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

Commissioner's File No.: CDLA/770/2000

Starred Decision No: 39/01

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so as to arrive by 4th June 2001

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1. This appeal (in fact there are two under the same tribunal and Commissioner's file numbers, one arising from a Benefits Integrity Project termination of a running award, one arising from the reclaim), brought with leave of the tribunal chairman, succeeds. The decision of the Appeal Tribunal on 29 10 99 was erroneous in point of law, as explained below. I therefore set it aside and remit the appeal to a completely differently-constituted tribunal for rehearing. I would like to have been able to give the decision myself, but have concluded that there are still matters of evidence needing some further inquiry, which will be better conducted by a tribunal.

2. I held an oral hearing because there seemed to be two strands of opinion among Commissioners as to the effect of the "cooking test" in s72(1)(a)(ii) of the Social Security Contributions and Benefits Act 1992: one that it is a simply a test of certain functional activities (R(DLA)2/95) and one that it has some relationship to claimants' abilities to keep themselves fed (CDLA/2267/95, CDLA/17329/96). I was not convinced that the statutory language was ambiguous, but I asked to see the Parliamentary materials, and was provided with extracts from the House of Lords debate in *Hansard* and a letter from the then Minister of State for Social Security and the Disabled in response to an inquiry from an MP. At the hearing the appellant was represented by Mr Tony Benson of Southwark Benefits and Health Project and the Secretary of State by Mr Jeremy Chang of the DSS Solicitor's Office. I am very grateful to both of them for their helpful submissions. Immediately after the oral hearing a decision on the cooking test by the Chief Commissioner for Northern Ireland (C41/98(DLA)) was circulated, and I thought it right to invite any further submissions this might prompt, which I have now received. I have also had the benefit of reading the recently-issued decision of Mr Commissioner Rowland in CDLA/5686/99.

3. The present appellant, who was born on 24 3 56 and is an otherwise fit man, suffers from a painful and unstable left knee following a road traffic accident in 1992. The nature of the injuries, and subsequent history, is conveniently set out by his consultant at pages 158 and 166. The appellant uses a brace and a stick (according to the consultant, but the appellant told the tribunal a crutch) when walking. He broke his right ankle on 24 9 98, but according to the consultant was recovering in November 1998 and had more or less recovered by July 1999. The knee has considerably improved,

but there will always be an instability. His consultant says he cannot run, climb ladders or even stairs with any confidence (it seems he has a stairlift), that his walking is limited, and that he cannot lift heavy weights and should preferably drive an automatic car.

4. The appellant had awards of both components of DLA for several years. The latest was of higher rate mobility and middle rate care running from 9 11 96 to 8 11 98. Following his completion of a Benefits Integrity Project questionnaire on 9 1 98 (pages 54-86), and also a renewal claim pack on 27 5 98 (pages 87-129), it was apparent that his needs had diminished, compared with the 1995 claim pack at pages 2-49. His GP completed a report on 4 9 98, and following a review request by the Secretary of State, benefit was terminated for the period 9 1 98 to 8 11 98. The renewal claim was also refused.

5. The tribunal took extensive evidence from the appellant and his wife, and also had the benefit of the two consultant's reports and a submission from the representative. In a careful decision, it held that he was not entitled to either component of DLA (under either decision). On the cooking test, it observed that he could either use his microwave or sit down while cooking.

6. The appeal complained only of the decision on the cooking test. I take it from this that no fault was found with the rest of it. I was a little concerned about whether adequate consideration had been given to what must have been a greatly increased disability following the broken ankle (of the good leg) in September 1998. It may be that the need for that increased level of disability to have persisted for 3 months before qualifying and thereafter to be likely to persist for a further 6 months (ss72(2) and 73(9)) would have precluded this being taken into account. But the rehearing tribunal can go into this if evidence or submissions are put before it.

7. The appeal asserted both that the use of a microwave was not warranted by R(DLA)2/95 and that sitting while cooking would not solve all the problems; the unstable knee would make using an oven difficult, and getting up and down to see to things would increase rather than diminish the difficulties. The Secretary of State supported the appeal on these grounds, and has maintained his support throughout.

8. The evidence in the 1995 claim pack (page 28) was that the appellant could do all the activities mentioned in connection with cooking a main meal, on the basis that he had a small kitchen and could steady himself with one hand while picking things up with the other, but that he would not cook because if he lost his balance and forgot about his unstable leg, he would burn himself. He would not risk this, and his wife would not let him. The 1998 questionnaire (page 72) said he could do all the activities but did not cook meals, though he could make himself snacks and use a microwave. The reclaim pack (page 108) said there would be no problems, and that if the appellant cooked at all he could sit and do all of the preparation work and then put the food in or on the cooker, but usually his wife did all the cooking. His GP at page 131 was unable to comment on cooking; at page 141 his consultant said there was no disability which would prevent the appellant from planning and preparing a main meal for himself. The representative's submission at page 157 was that the appellant could not stand to cook because of pain, and that bending, and lifting full pans, would make him unstable. A later submission at page 168 referred to difficulties with standing and with carrying full pots and pans. The oral evidence at the hearing was that the appellant had arranged his kitchen so that most things (except spices) were readily to hand without any need for reaching, and he could support himself on the furniture, but he could not bend down and would have problems with pots and pans because of unsteadiness. He could sit down to do the preparations, but not to do all of the cooking. He and his wife shared the cooking of any particular meal half-and-half, but his wife would worry if he tried to do the whole operation himself.

The law

9. The cooking test in s72(1)(a)(ii) gives a right to benefit where a claimant is so severely disabled physically or mentally that

> he cannot prepare a cooked main meal for himself if he has the ingredients.

(The reference to having the ingredients is, I take it, meant to exclude shopping for those ingredients. It is settled by authority that the congeries of bodily functions involved in shopping are not relevant bodily functions attention in connection with which is otherwise one of the two tests for DLA (*Packer* [1981]1 WLR 1017: that case also excluded housework and

cooking as occasions for relevant attention for attendance allowance, the forerunner of DLA. The ingredients are assumed to have been shopped for, if necessary, by someone else, whether at the claimant's direction or on that person's own initiative.)

10. The statutory formulation seems apt to cover people who are, because of their disability, unable to cater for themselves, and therefore need meals on wheels, or someone else to cook for them.. An early decision, CDLA/46/94, held that if a claimant's idea of a main meal was beans on toast, eggs or pot noodles, which he could prepare for himself, that was adequate. (I take this to mean that decision makers are not meant to offer nutritional advice.) The Divisional Court in *R v Secretary of State, ex parte Armstrong*, 4 4 96, settled that people are expected to be willing to learn to cook for themselves and do not pass the cooking test simply because their partners have always done the cooking. A test of keeping yourself fed makes eminent sense, and allows the individual circumstances of a claimant, and any adaptations they may already have made to enable them to cook, to be taken into account - as with the other DLA qualifying tests, where sensible and practicable alternatives to attention from another person may either have been adopted by claimants or be proposed by adjudicating authorities. Unenlightened by authority, this is the interpretation I would have placed on the subsection.

11. But matters are not so simple. In R(DLA)2/95 Mrs Commissioner Heggs stated her view that the cooking test was "a hypothetical test to be determined objectively". Factors such as the type of equipment or facilities available to a particular claimant were irrelevant. "Normal reasonable facilities" were to be postulated, though these "might include certain devices to assist". The cooked main meal was a labour-intensive reasonable main meal for one (not a celebration meal or a snack), cooked on a "traditional cooker". The meal would have to be cooked on a daily basis: bulk cooking and freezing on days when help is available, with each meal being defrosted and heated in a microwave on other days, would not fulfil the test. The word "prepare" further indicated that the test contemplated the peeling and chopping of fresh vegetables, since frozen vegetables require no real preparation. But a chop, a piece of fish or meat ready minced would not fall in the category of convenience foods and could properly be regarded as basic ingredients. The test includes "all activities auxiliary to the cooking such as reaching for a saucepan, putting water in it and lifting it on

and off the cooker". All cooking utensils would have to be placed in a reasonable position - the Commissioner does not say by whom, but she may have meant that some attempt could properly be expected to store utensils in reasonably accessible places. The test was designed as a measure of a claimant's ability to perform specific daily tasks, not of a need for help. The fact that a claimant might never wish to, or be able to afford to, cook such a meal would be irrelevant.

12. This decision, which has been reported and therefore presumably indicated a consensus among Commissioners, certainly reflected the questions asked in the claim pack about planning a cooked main meal, peeling and chopping vegetables, using cooking utensils, taps and a cooker and coping with hot pans, for which there is no obvious statutory warrant. It seemed, with all respect to Mrs Commissioner Heggs, a somewhat improbable test for the 1990s and one which required claimants to imagine a state of affairs often quite outside their daily experience of cooking for themselves. It was also, as the Commissioner acknowledged, entirely out of line with the other DLA tests.

13. However, I have now seen the Parliamentary and other materials which Mrs Commissioner Heggs, from the wording of her decision, must I think also have seen. It is clear from *Hansard* that what the then government had in mind when "inventing" (sic) the cooking test was to cover disabled people who had no identifiable needs for help with their bodily functions but nonetheless had difficulty in performing certain mundane tasks of everyday life that pose little or no problem for the non-disabled population. It was a "deliberately difficult abstract test", which would involve no assessment of a claimant's actual cooking abilities. The Minister of State went further: he said that the aim was to bring into benefit people who need help with "household tasks". The cooking test had been chosen as a simple and effective indicator of "a wide range of functions both physical and mental - awareness, memory, vision, balance, dexterity, and so on". People would not be disqualified if they could prepare food to a limited extent or could cook food which someone else had prepared, for example using a microwave.

14. The test therefore seems to have been intended to bring in by a side wind the kind of help with household tasks that had formerly been ruled out by *Packer,* as well as including cooking. And it seems to have been

analogous to the All Work Test for incapacity benefit later adopted by the same government, under which the objective inability to do various activities to some extent or another scores points, which if they add up to 15 mean the test is passed, and if they do not, mean it is failed.

15. Nothing of this necessarily follows from the statutory wording adopted in s72(1)(a)(ii). However, R(DLA)2/95, being a reported decision, must be followed unless it can be distinguished. In some respects, it raises more questions than it answers. What, for example, is a "traditional cooker"? Does it have to have a low-level oven, despite the fact that by 1991, when the test was invented, many ovens were at waist level or above, and quite separate from the hob? Is the grill to be at waist-level or eye-level? What is a "device to assist"? Mrs Commissioner Heggs herself, in CDLA/1469/95, with an appellant who could not bend, observed that it is not essential to use an oven or grill to cook a main reasonable daily meal for one. I could not agree more, but this surely cuts out bending, and lifting from a low level, from the "specific daily tasks" which the test was designed to assess. Further, in CDLA/2267/95, in which she specifically referred to R(DLA)2/95, she stressed that there was no need to use heavy pans or dishes, or the oven, to cook a main meal for one, and that such a meal could be prepared and cooked while sitting on a high stool or chair if necessary. It was all a question of what was reasonable in the circumstances of the case.

16. Others appear to have gone farther: Mr Commissioner Rowland in CDLA/17329/96 said at paragraph 14 that "there is no reason why, if a claimant *does* have his or her kitchen adapted so that he or she *is* able to prepare a cooked main meal, that claimant should continue to receive disability living allowance" (his italics), and that one must look at the individual claimant in his or her actual circumstances and consider what he or she can reasonably be expected to achieve in the way of preparing a cooked main meal. This runs counter to Mrs Commissioner Heggs's injunction to disregard factors such as the type of facilities or equipment available (save for "devices to assist"), and also to CDLA/2293/95, in which a wheelchair user who was able to, and constantly did, cook because her kitchen had been adapted to accommodate the wheelchair nonetheless qualified under the cooking test.

17. Faced wth these apparent contradictions, the Secretary of State's officer submitted that any authorities which did not follow R(DLA)2/95

should be disregarded by decision makers. I asked Mr Chang at the oral hearing why, if decision makers were going astray, the DSS had not appealed their decisions. It was probably an unfair question, and he admitted that he was unable to answer it.

18. The way out chosen by the DSS, and urged by Mr Benson, was to explain any apparent deviations from the pure doctrine (which my unwholesome curiosity had uncovered) by reference to Mrs Commissioner Heggs's "devices to assist". CDLA/17329/96 could, they said, be interpreted as really not going much farther than to have regard to ordinary, readily-obtainable devices such as slotted spoons to serve vegetables from the saucepan or steamer and thus avoid the need to lift pans of hot water. Mr Chang referred me to paragraph 13 of the decision, where the Commissioner speaks of a flat potato peeler, a jar-opening device, an old-fashioned can opener, a cooker with large control knobs, ugly saucepans with flat handles rather than more attractive ones, and special knives. Mr Benson was a little more conservative, submitting that the "devices" should be limited to fairly basic common manual implements which might be found in an ordinary kitchen, and excluding anything designed specially for the disabled. He felt that jar-openers and wall can-openers (even though the latter are used by many non-disabled people) were pretty near the limit. He submitted that the Commissioner's remarks in paragraph 14 about kitchen adaptations, given the fairly modest implements used by the claimant in that case, appeared more radical than they were (or, I suppose, were *obiter*).

19. Mr Benson's broad submission was that people can be expected to go some little way to help themselves, for example by using more easily-handled pans, but decision makers should be wary of being too dictatorial. I asked him whether a person who lacked the wrist movement to chop a vegetable but would be able to cut it up by sawing or slicing it should get the benefit, and his response was that people should not be too picky. He urged me also to take into consideration a person's overall ability to get a plate of edible food in front of him (food that was not imperfectly cooked, or no longer hot), without unreasonable pain or risk. Too detailed concentration on the individual activities to which the claim pack is directed, without this overall consideration, could be misleading.

20. Mr Chang was not entirely convinced that this approach was right, and submitted that if a claimant could find a way round a particular problem

highlighted by the claim pack questions by using permissible devices, this was a legitimate consideration.

21. The narrower submission of both parties was, of course, that in the circumstances of this particular appeal I need not fuss about the wider aspects of the cooking test: what mattered was the appellant's claimed lack of stability in relation to using a cooker, and the impropriety of taking into account his ability to use a microwave. Mr Commissioner Henty in CDLA/20/94 expressly ruled out consideration of a microwave, whether for fast foods, frozen meals or ordinarily prepared meals.

22. The Chief Commissioner for Northern Ireland, in C41/98(DLA), which is persuasive but not binding on me, reviewed the authorities and held, in a case involving a person who could not bend, used crutches and had a limited ability to stand, that the authorities did not require the use of a low-level oven to cook a main meal (though each case would have to be considered on its own circumstances), and that the statutory word "cannot" in the Northern Ireland equivalent of s72(1)(a)(ii), meant that a reasonable person would have to consider it unreasonable for the particular claimant to cook himself a main meal.

23. Both parties in their additional submissions argued that this case was in line with what they had already said. Mr Benson accepted the Chief Commissioner's test of reasonableness, but submitted that not only pain, discomfort and safety should be taken into account, but also efficiency, in the sense of producing edible food. He further submitted that the Chief Commissioner was right to decide that the inability to bend to use a low-level oven would not of itself lead to entitlement, but that it was a factor that should be considered according to the circumstances of each case. For example, in the context of providing oneself with a meal which is still hot, it may be necessary to keep food warm in the oven, but there might be an alternative, such as using the hob for this purpose. Only if there was not would the use of the oven contribute to establishing entitlement. It could be argued that what Parliament had in mind was the overall ability to cook a main meal as an overall test of functions, and that inability to perform eg bending alone would not necessarily be fatal.

24. I must express my admiration for Mr Benson's submissions, which I have throughout found most sensible, moderate and ingenious.

25. As I have said, I have also seen the recent decision of Mr Commissioner Rowland in CDLA/5686/99, also made following an oral hearing. I have not invited further submissions on it, because it seems to me also to reflect what the parties to the present appeal have been saying. That was a case where the claimant used two walking sticks, and the Commissioner remitted it to another tribunal to consider whether, given the claimant's evidence that he could not even make a cup of tea, the test was fulfilled. But the main point was a submission by both parties that the tribunal had erred in deciding that the claimant could avoid lifting hot pans by removing their contents with a perforated spoon. The Commissioner characterised this as an "astonishing proposition". He confirmed that R(DLA)2/95, in holding that convenience foods should not be taken into account, did make the test more stringent than whether a claimant could "cope" with keeping himself or herself fed. But he said that the reference to "certain devices to assist" showed that unconventional, as well as strictly conventional, methods of cooking with basic ingredients might be taken into account as stratagems for coping, if they helped to avoid substantial danger to a claimant eg in dealing with hot pans. Nor did the cooking test necessarily involve an ability to bend, if it was considered reasonable in a particular case for alternatives to bending to be used. The statutory language was not ambiguous so as to allow recourse to Parliamentary materials; but in any event those materials did not support what was being argued. The test being "abstract" meant merely that people were not to be excluded simply because they might never wish to cook for themselves. Nothing was said about deeming them unable to prepare a main meal when they could in fact do so by using special devices or stratagems.

My conclusions

26. Although I now know what Parliament (as enlightened by government spokesmen) intended when enacting the cooking test, I have concluded that it failed fully to reflect this intention in the statutory language it adopted. I agree with Mr Commissioner Rowland that that language is not sufficiently ambiguous to warrant the adoption of Parliament's intention in preference to the consensus interpretation arrived

at by my colleagues, which does derogate to some extent from that intention. I am influenced not least by the later decisions of Mrs Commissioner Heggs with regard to use of an oven, lifting of hot or heavy pans, and using a high stool as an aid to cooking (subject always to the circumstances of the particular case).

27. I therefore conclude that the cooking test does require envisaging the peeling and chopping (or sawing or slicing) of fresh vegetables, and that pre-prepared or frozen foods which only need reheating are to be disregarded. I am somewhat confused as to the use of tins: tinned foods are as obvious and labour-saving an alternative to fresh ones as are frozen foods, yet I notice that my colleagues have considered tin-openers (or jar-openers) among permissible "devices to assist". Perhaps again it is a matter of looking at the individual circumstances of each case.

28. By analogy with an attendance allowance case, CA/137/84, in which a child's inability to feed himself with his right hand did not "count" even though his religion required him to do so, it might have been supposed that religious or cultural practices entailing special diets which are more labour-intensive do not "count" either. But R(DLA)2/95 at paragraph 8 does say that a "reasonable" main daily meal is to be judged having regard to what is reasonable for the community to which the claimant belongs, eg a vegetarian meal. Such meals, like for example curries or Chinese food, which involve a good deal of peeling, chopping and, perhaps, rolling out of dough for nan bread, are more labour-intensive than preparing a chop or a piece of fish. People with allergies may have to be careful what they eat. Vegans may be prepared to eat ready-shelled nuts, or may insist on nutcrackers, which are difficult to manipulate.

29. It seems to me that Mr Benson got it right when he suggested that people should be prepared to compromise to a reasonable degree and not be too picky. If tins or jars are permissible, and can be opened with reasonable devices to assist, then it seems to me that a reasonable bystander (as in the view of the Northern Ireland Chief Commissioner) could properly take the view that it would not be unreasonable for a claimant following some special diet to use tinned foods, or ready-shelled nuts. Any assertion that a particular claimant cannot use such foods would need to be backed by strong evidence of medical or cultural *necessity*. The broader principle is that people can reasonably be expected, in accommodating their disability,

not to cook foods which are particularly labour-intensive, or particularly dangerous. A chip-pan is a wildly unreasonable utensil for a disabled person to use; it is dangerous enough for the fully-abled and alert, and "oven" chips, which can be grilled as well as cooked in the oven, are a reasonable alternative, if people must eat chips. Slotted spoons are an obvious way of avoiding ever lifting hot pans and so risking burns or scalds, and of lifting vegetables out a few at a time if lifting any kind of weight is a problem. Other devices to assist, which are either actually used or can easily and cheaply be obtained may be taken into account, even if they are not as attractive as might be wished (like the saucepans in CDLA/17329/96). But I am inclined to agree with Mr Benson that devices specially designed for disabled people would not be within the spirit of R(DLA)2/95.

30. Utensils should be stored where reasonably accessible, as was I think indicated in R(DLA)2/95. As to bending to a low-level oven, I adopt what has been said by my colleagues.

31. Peeling and chopping may be done sitting down, provided there is adequate manual dexterity to perform these activities at all.

32. Reasonableness does, it seems to me, play some part in considering (as in the present appeal) whether sitting down is a fully adequate way of cooking a main meal, or whether the getting up and down which probably is essential from time to time brings its own problems. A high stool may not be a complete answer. These are not altogether easy to perch on, as anyone who has used a bar stool will know.

33. An addition to the claim pack examples of difficulties that might be encountered is "telling when food is cooked". This obviously has relevance to people with impaired vision, who cannot necessarily see, by sticking a fork into a piece of chicken, whether or not it is cooked - or possibly to people who lack the strength to stick the fork in at all.

34. If there are serious considerations of pain, discomfort or safety in cooking a main meal, I would agree with Mr Benson that these need to be taken into account, subject to the use of any reasonable stratagems.

35. It should not be forgotten that the cooking test is a test of mental as well as physical ability to cook a main meal. If, for example because of severe depression, a person is simply unable to plan a meal and execute the cooking of it in a reasonably expeditious fashion, then his or her physical ability to do so will not conclude the matter. Mr Benson's argument about overall ability to produce an edible meal is particularly relevant here, though I have doubts about it in relation to those who are only physically disabled. Cooking a main meal, even a main meal for one, so as to have everything ready at the same time, may well be difficult at first for those unaccustomed to doing so; but practice will soon improve performance, subject to what I have already said about pain, discomfort and overall safety.

Microwaves

36. Microwaves did not figure in either C41/98(DLA) or CDLA/5686/99. I agree that they are to be disregarded if they are used only for heating up pre-prepared or frozen foods. But I respectfully dissent from Mr Commissioner Henty's view in CDLA/20/94 that they cannot be used even for cooking a meal which the claimant himself or herself has "ordinarily prepared". Even the Minister of State outlawed microwaves only for cooking food someone else had prepared. There can be no question of telling someone they ought to buy a microwave. But if they already have one, then if using it to heat fresh vegetables or other foods is practicable culinarily, and is a safer or quicker alternative to the "traditional cooker" (whatever that may be), then I see no reason why it should not be taken into account that a claimant uses one. The authorities have departed to a not inconsiderable extent from Parliament's pure doctrine, but that is the fault of Parliament in not enacting what it meant.

Directions on the present appeal

37. The rehearing tribunal will explore with the appellant, who seems to be a most honest and candid witness and one prepared to make the best he can of his disability, what are the actual difficulties he is likely to encounter in preparing a main meal by peeling and chopping vegetables, trimming meat and so on, and then placing the results in his microwave (or partly in his microwave and partly in or on his cooker), overseeing its cooking,

removing it from the microwave or cooker, and dishing it up. It may be that using his microwave will not solve all his problems. I am lamentably ignorant about the use of microwaves, and there may be difficulties in co-ordination of which I know nothing. I leave that to the tribunal.

38. The tribunal will remember that there are two appeals involved, and that in the case of the Benefits Integrity Project termination of the existing award from 9 1 98 to 8 11 98, the burden of showing grounds to review under s30(2) of the Social Security Administration Act 1992 will have been on the adjudication officer, whereas with the renewal claim it will have been on the appellant. These considerations will still apply even though the new Decisions and Appeals Regulations are now in force. However, because the relevant decisions were all made after 21 5 98, the tribunal will be limited to looking at matters as at the date of the last review decision, 19 1 99.

(signed) Christine Fellner
Commissioner

8 March 2001