Bulletin 162 7
alteration rules of def claimants

SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/1534/2000 restrictive definition

Starred Decision No: 30/01

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so as to arrive by 4th June 2001

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

1. With the consent of both parties, this application for leave to appeal is treated as the appeal. I grant leave to appeal, and the appeal succeeds. The decision of the Disability Appeal Tribunal on 8 10 99 was erroneous in point of law, for the reasons given below, and I set it aside. However, I consider it expedient under s14(8)(a)(ii) of the Social Security Act 1998 to make such fresh or further findings of fact as will enable me to make my own decision. This is that the appellant is entitled to the care component of disability living allowance (DLA) at the lowest rate from 20 3 97, because he requires attention in connection with his bodily functions for a significant portion of the day. This is an open-ended award. He is not entitled to either rate of the mobility component: there has never been any evidence that he could qualify for the higher rate, and at the oral hearing his representative expressly disclaimed seeking the lower rate, which seemed wise in the light of CDLA/714/98 and related appeals. No argument was addressed to me on the highest rate care component, and I explain later in this decision why it would not have been applicable. It was also made clear that it was attention, not supervision, needs that motivated the claim to the middle rate.

2. I directed an oral hearing as I wanted to explore with the appellant the nature and extent of his attention needs and wishes; I found it most helpful to talk to him and obtain his responses through the two excellent signing interpreters, Ms Tina Little and Mr Van Holton, who attended the hearing. I appreciated the appellant's patience in answering my questions, and join with him in expressing thanks to the interpreters. He was represented byMr Victor Riddings of Stockport Welfare Rights, to whom I am grateful for his sensible and moderate submissions and his ready answers to my questions. The Secretary of State was not represented at the hearing, through the kind of mistake anyone could make: Miss Haywood, who is based in Leeds, had the hearing entered in her diary as not taking place until 2pm. She gave her consent over the telephone to the application being treated as the appeal, said she had nothing much to add to the Secretary of State's existing submission, and did not object (as the rest of those present did not) to the hearing going ahead without her, given the time it would take her to get to Manchester; and she faxed and wrote me a most courteous letter on the same dayapologising for her absence.

Procedural history

3. This was a second time round appeal. The appellant was initially refused benefit altogether. A tribunal decision on 30 4 98 awarding lower rate mobility and lowest rate care components was overturned because the Commissioner found both awards to be insufficiently explained. The second tribunal on 8 10 99 refused any rate of the mobility component (adequately explaining why), and again awarded the lowest rate care component only. It noted that the appellant had adjusted well to his disability, by learning to communicate partly by lipreading and partly by reading and writing messages. It accepted everything said in the claim pack about which needs the appellant had not been able to overcome, but found that most of the needs occurred infrequently and, even allowing for all of them, did not amount to attention frequently throughout the day. This immediately left the way open for complaints that it had not said which needs had been overcome. Its findings that communication with people who did not enunciate clearly so as to be lipreadable would be difficult, and that written communication would have to be in simple sentences both ways, led to a complaint that it had given inadequate weight to its own findings in denying that communication needs occurred frequently throughout the day. There is little substance in the first ground: the tribunal's findings show that it considered the difficulties of communicating at work to have been overcome. But the tribunal did not deal with the submission made to it about the need for physical action to initiate communication, and for that reason I set it aside.

The claimed needs

4. The appellant, born on 11 3 61, is quite profoundly deaf, and has little speech. He did not attempt to speak at all during the oral hearing. His hearing aids do no more than alert him, in a quiet environment, to the fact that someone is speaking, and provide a reassuring background noise without which he would feel confused and dizzy. He was the only non-hearing person in his family. He attended a special school where British Sign Language (BSL) was not taught (he did not learn it until after he left school) but he was encouraged to lipread. He says that his lipreading is not very good, and I note that the tribunal experimented with this and found that the appellant could understand short and simple questions put by the chairman,

but could not lipread the carer member at all. I can understand this, having tried the same thing myself and been told that I was almost impossible to lipread.

5. The appellant says he did not acquire much literacy either. Mr Holton the interpreter, from whom I was willing to receive evidence about why this should be, since it was difficult for the appellant to explain, said that teaching is done by showing children pictures with the names of the objects depicted beneath them, but they might as well be in Sanskrit. I took him to mean that each word would have to be separately learned and remembered, without fitting into any linguistic or grammatical context. I am willing to accept that the appellant's literacy is not very good, though he clearly has some ability, as he was able to obtain City and Guilds qualifications without having an amanuensis in the written exams, even though he had help from a support worker beforehand. He also manages to carry out his work as a foreman joiner, including allocating jobs to the workmen under his supervision by showing them plans and indicating what is written on them; and he is able to attend the weekly meeting, convey in writing what points he wants discussed, and receive replies in writing. Part of his argument, however, was that this is a slow and unsatisfactory method of communication, some people have less patience with him than others, and it takes him a while to understand what they are trying to convey to him. There are a lot of delays. He is able himself to work from plans, though these convey a good deal of information in graphic form, supplemented by writing the likely content of which has no doubt become familiar to him through use.

6. The claim pack, completed by a welfare rights worker through the intermediacy of a signing interpreter, stated that BSL was the appellant's first language, in the sense of being the language in which he felt most comfortable. The claim pack stated problems with using public transport and asking for directions in unfamiliar places. He had a vibrating cooking timer, but would have to stand and wait for water to come to the boil or for oil to heat as he would not be able to hear bubbling or sizzling. As to this, it is customary for hearing people to wait for water to come to the boil, if only to start timing how long things need to cook, rather than hoping to hear bubbling begin from another room; and anyone, hearing or not, who leaves a pan of heating oil or fat unattended is irresponsible. Supervision needs were

then mentioned, in terms of smoke alarms, noises in the street which might suggest something was happening, and someone to warn him if his daughter fell or the washing machine overflowed. However, Mr Riddings made it clear that middle rate care was sought on attention, not supervision, grounds. It is also worth noting that the appellant's employers apparently consider that he can work on building sites without risking a breach of health and safety regulations, or their insurance cover.

7. It is true that in the event of an intruder at night, or a fire where the noise might alert a hearing person to its existence before the smell of smoke did, or an emergency requiring the calling of a doctor, a deaf person with little intelligible speech is at a distinct disadvantage. But these contingencies are relatively remote, and would in any case require no more than the presence of a hearing person asleep on the premises who could be alerted, and in turn alert a claimant, to what was happening, or who could be woken to call a doctor. There would therefore be no need for supervision (someone being awake to watch over a claimant) in terms of s72(1)(c)(ii)) of the Social Security Contributions and Benefits Act 1992, and since such emergencies are not common, any attention needs generated, however repeated or prolonged on a particular occasion, would not be needed with the regularity (roughly speaking, more nights than not) required by s72(1)(c)(i). Apart from pointing out the difficulties, the present appellant makes no claim to night-time needs for supervision, nor for attention.

8. In the additional section of the claim pack, a number of needs or wishes for a number of hours a day were asserted, including that the appellant would like to attend evening classes to learn a foreign language and would need a note-taker for this purpose. Naturally I wondered, as no doubt the earlier tribunals had, how his literacy in English could be as bad as he claimed if he could contemplate learning another language. But he told me that this item in the claim pack was a misrepresentation of what he had said. He had said he would like to attend evening classes to do business studies, and would need a support worker to help him understand what was said. This is a different matter, and I must urge on those who complete claim packs on behalf of other people the necessity of *thinking* about what they are writing down, how it fits in with the rest of the case they are trying to make, and the impression that what they say will give. There is no point

talking about learning a foreign language if the case is going to be that a claimant can only with difficulty get on in English.

9. The items in the additional section relating to the needs of the appellant's present lifestyle were help with attending meetings, with correspondence, with reading newspapers and magazines and with watching non-subtitled TV or videos.

10. As is encouraged by the questions in the additional section, the appellant had also set out what he would like to do, or at least to try, if he had the help he needed. In his "wish-list" he said he would like to go to the theatre/cinema, to the pub where it is dark and lipreading is not easy, to a social club, to church, to travel without risking missing announcements about train delays or bomb scares, to read books, to attend a business studies course, to get to know his neighbours, and to be able to go out in the garden without missing someone at the door such as the milkman with the bill. He also mentioned answering telephone calls from hearing people. I include this in the wish-list because as both the appellant and his wife are deaf, it seems improbable that hearing people would telephone them, except in emergencies. He has a minicom with which he can manage telephone calls with other deaf people, but told the earlier tribunal that if hearing people try to use this, they go too quickly for him to understand. I should have thought this could be cured by asking anyone who might have cause to ring him to go slowly and keep checking that he has understood.

The interpretation of the legislation in decided cases

11. DLA claims by people who are profoundly and prelingually deaf are among the most difficult to adjudicate. Parliament has not chosen to provide in the Contributions and Benefits Act that they should receive any particular level of benefit, as it has in relation to the mobility component for those who are both blind and deaf (s73(2)) and those who are severely mentally impaired (s73(3)), or in relation to the care component for those who are terminally ill s72((5)). No doubt many claimants, representatives and adjudicating authorities wish it had. But as things stand, it is necessary for these claimants to convince adjudicating authorities that their need for attention in connection with their bodily functions is such as to entitle them to the care component either at the lowest rate, on the ground that they

require attention for a significant portion of the day (whether during a single period or a number of periods) under s72(1)(a)(i), or at the middle rate on the ground that they require frequent attention throughout the day under s72(1)(b)(i).

12. But against this background of no specific provision, the superior courts have made a series of necessarily (this being a point of law jurisdiction) vague pronouncements which encourage claimants and their representatives to argue, in effect, that all profoundly and prelingually deaf claimants must be entitled to the middle rate of the care component. The leading case is *Fairey/Halliday,* CA/780/91 before Mr Commissioner Sanders, 15 6 95 before the Court of Appeal and [1997] 1 WLR 799 before the House of Lords. Miss Fairey, like the appellant in the present case, was not happy with confining her social life only to the company of other deaf people, and wanted to improve her interaction with her colleagues at work and to widen her social horizons. Mr Commissioner Sanders held that it was right to include in the aggregate of attention that was reasonably required for a profoundly and prelingually deaf claimant such attention as might enable her to carry out a reasonable level of social activity. He warned, however, that various social activities that would be open to hearing people would not become more accessible to a deaf person whatever additional attention was given, and that probably no amount of attention would put a profoundly deaf person in the same position as one with good hearing, even if an interpreter were always to accompany the claimant, "which I would hardly imagine would be desirable". He stressed that it was for the fact-finding adjudicating authorities to determine both what amount of attention was reasonably required and whether it fulfilled the condition of "frequency".

13. The majority in the Court of Appeal agreed with Mr Commissioner Sanders. Glidewell LJ held that attention in connection with hearing to enable a claimant to "live, as nearly as possible, a normal social life" was "reasonably required". As to frequency, this was a matter for the fact-finding authorities. Swinton Thomas LJ agreed, and added

> This Court must not lay down the minutiae of what can and cannot be included in the aggregate which goes together to make up the attention which is reasonably required. That is matter for the Adjudication officer.

14. Hobhouse LJ, the dissenting member of the Court of Appeal, deplored the absence of detailed findings of fact, forcing the court to consider "unspecific hypotheses". He pointed out the difficulties for fact-finders in deciding which of the activities a deaf person might wish to pursue was "reasonable" and which was not; in his view none of the activities Miss Fairey said she wished to pursue, and for which she might need help "in connection with" her lack of hearing and speech, could be characterised as "unreasonable" for her to aspire to, so the suggestion that the criterion of "reasonableness" would take care of everything was simply unworkable.

15. Lord Slynn gave the lead speech in the House of Lords. He considered the authorities. He cited, but did not comment on, the observation of Lord Bridge of Harwich (with whose speech the rest of their lordships agreed) in *Woodling* [1984] 1 WLR 348 that

> ... it seems a reasonable inference that the policy of the enactment was to provide a financial incentive to encourage families or friends to undertake the difficult and sometimes distasteful task of caring within the home for those who are so severely disabled that they must otherwise become a charge on some public institution.

Happily neither Miss Fairey, nor the present appellant, nor a very large number of the blind or deaf claimants who appear before tribunals runs any risk of being institutionalised if not awarded middle rate DLA.

16. Lord Slynn then considered *Mallinson* [1994] 1 WLR 630 in which, by accepting seeing as the bodily function impaired, the majority opened up the field of possible forms of attention. Lord Woolf foresaw no problem of the test being applied too broadly: the need for attention had to be frequent throughout the day, and it had to be in connection with bodily functions. He excluded "extreme situations" where the attention would not result from the severity of the disability or would not be reasonably required, but did not offer any concrete examples for the guidance of fact-finders. Lord Slynn concluded that the provision of a signing interpreter was capable of constituting "attention", and the test was whether this attention was reasonably required to enable the severely disabled person as far as reasonably possible to "live a normal life". She was not to be confined to doing only those things which totally deaf people could do and provided with

only such attention as was necessary to keep her alive in that community. It was not in any way unreasonable for Miss Fairey to wish to be involved in mixing and taking part in activities with others and undertaking recreation and cultural activities.

> What is reasonable will depend on the age, sex, interests of the appellant and other circumstances.

Attention given to a profoundly deaf person to enable that person, so far as possible in the circumstances, to carry on "an ordinary life" was properly to be included in the aggregate of attention required. How much attention is reasonably required and how frequently it is required were questions of fact for the adjudication officer.

17. Lord Hope simply agreed with Lord Slynn. Lord Mustill said it would not have crossed his mind that helping Miss Fairey with social activities could be relevant attention, but found himself constrained by the authorities. Lord Goff shared these reservations. Lord Clyde said he was not prepared to hold that the services of an interpreter to enable the claimant to extend her social life beyond the limits of those with whom she could communicate without an intermediary could never be reasonably required, but pointed out that whether these were required and to what extent were matters yet to be explored.

Guidance for fact-finders?

18. The imprecision of the tests to be applied leaves fact-finders floundering, as prophesied by Lord Hobhouse in the Court of Appeal. I take it that a "normal" or "ordinary" life is to be considered by reference to what hearing people can do without assistance. What their lordships had in mind by a "reasonable level of social activity" they have not disclosed. For fact-finders to have to decide what *they* think is reasonable for a particular claimant to want to do having regard to his or her interests, let alone by reference to age, sex or other circumstances seems both invidious and presumptuous. However, I propose in this decision to try and give some guidance on how fact-finders should go about their task and what criteria they might apply in reaching their conclusions.

19. Mr Commissioner Levenson in paragraph 34 of CDLA/3433/99 has conveniently listed the relevant legal considerations, but of necessity his formulations are little clearer than those of the higher courts. Mrs Commissioner Heggs in CDLA/16668/96 very properly warns that it may not be enough (as the earlier tribunals in this appeal did) to say that a person has adapted well to his disability, if this is only because other people have to make a lot of extra effort to help him do so. Mr Commissioner Howell in CDLA/8167/95 gave some shape to the questions by suggesting that blind people, however understandable it may be for them to wish to try mountaineering, windsurfing or parachute jumping, would thereby be placing themselves in the "extreme situations" postulated by LordWoolf and could not expect to have attention in connection with these situations taken into account. The Commissioner considered that the inquiry on which fact-finders embark should be concerned with the "relatively mundane everyday aspects of functioning as a human being in ordinary life", by reference toMr Mallinson's needs for help by guidance when walking in unfamiliar places and with reading, at least until he learned to read Braille.

20. I take it (but perhaps I am wrong) that it is still necessary to have regard to Parliament's omission to legislate specifically for deaf claimants. As Mr Commissioner Howell also observed in CDLA/8167/95 in relation to blind claimants

> The House of Lords has not said, and cannot have meant, that all the help a blind person reasonably needs in the course of trying to lead as "normal" a life as possible counts as attention and therefore towards getting the benefit. Were that the case all blind people would qualify for the middle rate care component at least. In a more generous system that might be desirable but under the law as it is the help that can count as "attention" is, for blind people as for all the disabled, far more restricted.

He discounted some help (choosing matching clothes, telling blind people that the housework had not been done properly or that they had gravy on their chins) as not reasonably required because it was too remote: it lacked the requisite degree of contact and intimacy. The problem with deaf claimants, however, is that it is well-settled that the services of a signing interpreter are not too remote in this sense.

21. Very many of the instances where deaf claimants would reasonably require help (doctors, dentists or hospitals where symptoms need to be described and advice understood, banking or other financial services on the relatively rare occasions where a loan or overdraft is sought or a new account is to be opened, renewing insurances, consultations with children's teachers or parent/teachers meetings, benefit queries, consulting solicitors, public meetings on matters of interest, going on holiday, shopping on the again relatively infrequent occasions where information is needed, such as buying electrical goods) do not occur often enough in a single day to count even as attention for a significant portion of that day, though adjudicating authorities are entitled to aggregate them to form some estimate of overall attention needs over time. Even help in dealing with official letters (both understanding them and formulating replies), though attention reasonably required, does not happen every day. (Junk mail is readily recognisable, even to those with literacy difficulties, and is put in the bin, as I understand it, by the overwhelming majority of recipients.)

22. As to how the aggregation exercise is to be performed, Lord Woolf in *Mallinson* is cited as authority for aggregating various instances of attention so as to produce "frequent" attention needs. But it seems to me that this was not a matter of adding up but of slotting in. The tribunal had found that Mr Mallinson needed help with getting in and out of the bath and cutting up food. Lord Woolf suggested that if guiding outdoors in unfamiliar surroundings and reading letters were counted in, the criterion of frequency might be satisfied. So it might; but it would still be necessary to consider, in relation to the particular claimant, on how many days this would apply. If he dealt with letters or went for walks in unfamiliar places only once or twice a week, it is hard to see how the attention could be required frequently throughout the majority of days; and indeed Lord Woolf expressed some doubt as to whether Mr Mallinson would succeed on the facts. The lowest rate care component test of attention being required for a significant portion of the day (whether during a single period or a number of periods) lends itself better to aggregation. In CDLA/16240/96 the tribunal said there was a requirement for attention from other persons "for a sufficient period to constitute frequent attention for the purposes of the regulations". This, though upheld by the Commissioner, seems to me an abuse of language. On the facts of that particular case, where the appellant was a trainee deaf instructor in a school including both hearing and deaf children and therefore

particularly reliant on understanding and communicating with hearing colleagues, a finding of a need for frequent attention could well have been justified without aggregating. In other particular cases, it would not.

23. Given the difficulties with attention needs which are only sporadic, other types of attention have been invoked, such as attracting the claimant's attention where necessary, together with any additional effort involved in communication.

The extra effort involved in initiating communication

24. This type of attention was mentioned in CA/780/91, where Mr Commissioner Sanders "entirely agreed" with CA/249/92. In that case, the deputy Commissioner, while accepting that help from an interpreter could count as relevant attention, rejected the contention that help withlipreading could, and expressed considerable doubt as to whether the other party to a two-way conversation could 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. It was not correct as a matter of law that a person with hearing difficulties that make communication slow or difficult must automatically satisfy the day attention condition just because a normal person likes and expects to communicate with others on frequent occasions throughout a day. It was all a matter of fact and degree. Mr Commissioner Sanders derived from this decision his finding that when the claimant was with a reasonably skilled signer she would not be receiving relevant attention, though a child needing attention in order to develop communication skills might.

25. On appeal, there was a counter-notice seeking a ruling on whether some of the actions associated with communication - physical contact to attract attention, deliberately articulating lip movements - could constitute relevant attention, even though conversation with a fluent signer or by lipreading could not. Glidewell LJ accepted that the effort required of another person to initiate two-way conversation with a deaf person could constitute attention, though whether or not it actually did so was a question of fact. Swinton Thomas LJ held that if the person giving attention to the deaf person has to do extra work, or take extra time away from ordinary

duties, this may be capable of being relevant attention; but again it was a question of fact and degree "to be resolved at the initial hearing".

26. In the House of Lords, Lord Slynn referred to the counter-notice but said that the point was rejected by all the members of the Court of Appeal and was expressly abandoned before their lordships. It is impossible to tell what it was that Lord Slynn believed to have been rejected. His observation can hardly be read as an endorsement of what the Court of Appeal said. Nonetheless, we are bound by what the Court of Appeal did say, as set out in the preceding paragraph.

27. As a result of this decision, claimants and their representatives have sought to emphasise the extra effort involved in initiating communication, such as tapping a deaf person on the shoulder, flashing a light, stamping on the floor so as to produce vibration, or throwing a paper ball.

28. There have been several Commissioners' decisions dealing with the point. I have read CDLA/15884/96, CDLA/16211/96, CDLA/16240/96, CDLA/16668/96, CDLA/17202/96 and CDLA/3433/99. All were "facts and reasons" cases, and therefore specific to their own circumstances. I must, however, dissent to some extent from the conclusion in paragraph 34 of CDLA/3433/99 that "unusual" efforts to attract the attention of a deaf person simply means steps that would not be required to attract the attention of a hearing person in the same environment. I agree that any comparison must be made in the same environment, but I am not satisfied that *any* extra effort must axiomatically give rise to a relevant attention need. I do not consider that what was said by either Glidewell LJ or Swinton Thomas LJ requires this conclusion *as a matter of law*. Both were at pains to stress that these were matters of fact.

29. In my view, it is possible in many cases to treat the need to attract attention, including the instances mentioned in paragraph 27 above, as *de minimis*. They occur, but they involve negligible extra work or extra time away from the would-be communicator's ordinary duties, to quote Swinton Thomas LJ's test. I stress that fact-finders must properly investigate allegations of such needs, and not write them all off as *de minimis*. But something more than reaching out to tap a shoulder, stamping, switching a light momentarily off and on or throwing a paper ball (or some rather more

reliable missile) would be required to constitute any significant amount of attention. Where (as in the present case) husband and wife are both deaf and with little speech, such expedients are in any event going to be a matter of course. It should also be remembered that even hearing people may not hear a call from another room if the TV is on or music playing or water running, and that people wanting to attract the attention (other than momentary) of someone who is eg working or engaged in DIY or preparing a meal will usually go to where that person is rather than expect the person to come to them.

30. As to any extra effort involved in signing, or speaking more loudly, or in articulating to facilitate lipreading, I agree (as did Mr Commissioner Sanders) with the deputy Commissioner in CDLA/249/92, whose views do not appear to me to have been affected by the pronouncements of the higher courts, that such efforts must not automatically be treated as relevant attention. However, writing notes, and reading those written by a claimant, does take more time, especially if handwriting on one side or the other or both is bad; though no doubt such communications are made as short and simple as possible. Here, I think, much would depend on the complexity of the information to be communicated.

31. It must also be borne in mind that extra effort by other people is involved even when a signing interpreter is used. In a two-way conversation through an interpreter, it is probably necessary for the other person to speak rather more slowly, and preferably more simply and connectedly, than might otherwise be done (in the same way as with interpretation into another spoken language), and the temptation to chip in and amplify or rephrase what has been said, as might be done in ordinary conversation, must be resisted while the interpreter is signing. I noticed this at the oral hearing. When the interpreter is repeating what the deaf person has signed, it is again necessary to keep quiet until this has finished. More self-restraint is required of the parties to a multiway conversation, if the deaf person is to play any meaningful part, rather than simply receiving a commentary on what is being said and perhaps missing the chance to make a contribution. This extra effort cannot be double-counted (taken into account if an interpreter has already been accepted as reasonably required on such occasions), so it is right to make some kind of global trade-off between this extra effort and the

effort, spared in this context, of attracting attention, or enunciating more clearly, or writing and reading notes.

32. As these, like all other questions of reasonable requirements and frequency, are by consensus of all the higher courts questions of fact, it follows that Commissioners should not be too quick to overturn a decision simply because on the evidence they might have made a different one..

My approach to the present appeal

33. The bodily functions of hearing and speaking (I prefer this formulation, set out in CSDLA/867/97, to "communication", but I am not sure that it makes any difference) are those involved in the present case. The appellant is entitled to have taken into account such attention as will enable him to live, so far as possible in the light of his disability, a "normal" or an "ordinary" life and to pursue "a reasonable level of social activity", having regard, however, to his age, sex and interests and other (undefined) circumstances. The extra effort involved in initiating communication with him is capable of constituting attention. The attention the appellant needs is the presence of a signing interpreter or, as Mr Riddings suggested, a communication support worker, who might be less skilled, and therefore less expensive. The appellant told me that the support worker he had for his City and Guilds course also translated words into signs, but it is probably easier (because the pressures are less) to translate from the written than from the spoken word. Because what we must look at is what is reasonably required, not what is actually available, it is not possible to take into account the drastically limited amount of an interpreter's time that £35.80, the current middle rate of the care component, would in reality buy. Lord Mustill in *Fairey* spoke of the claimant being "reimbursed" for the cost of service provision; but of course that is not what happens.

34. It seems to me that the correct way to approach this and similarcases is first of all to ascertain, by detailed questioning if necessary, what the daily life *of this particular claimant* currently involves, in addition to the various matters mentioned in paragraph 21 above, most of which will be common to everyone with this disability. Mr Commissioner Sanders in paragraph 11 of CA/780/91 stressed the importance of considering the needs of each individual claimant rather than the needs of deaf people in general. He

remitted the case because he did not have enough evidence to decide it himself. What is the claimant's work, what communication does it involve? What is his or her present recreational and social life? Would communication *in these existing circumstances* be made "significantly more efficient or effective" (CDLA/3433/99) by use of an interpreter? Would it be practicable or desirable to use an interpreter in such circumstances?

35 I suggest the last question because although financial considerations cannot be taken into account, I see nothing in the authorities to preclude fact-finders from considering either the practicability or the desirability of using an interpreter in any particular circumstances. Mr Commissioner Sanders thought it hardly desirable for an interpreter to accompany a claimant at all times. The normal wish for privacy, both of the claimant and of his or her family, and for confidentiality, will militate against the presence of another, or a third, person for much of the time. Deaf people may have to accept help in many circumstances, such as medical, financial or legal consultations or meetings with teachers, and some official correspondence, where they would much rather not have to disclose their private business to anyone else, and this is a not inconsiderable part of their disability. They no doubt wish to maintain what privacy they can. As to practicability, there may be circumstances where either an interpreter would not help very much (too dark, too noisy) or at all, or where it would be difficult for one to be in attendance without inconvenience or undue risk to him or her.

36 Having decided by reference to the above questions what help with a claimant's existing way of life is reasonably required, a fact-finder can then go on to consider the "wish-list" part of the case – what the claimant might like to do if the necessary help was available. This presents more problems. Claimants are often saying only what they think they might like to *try* (eg reading books); they do not know whether, if they did get the chance, they would enjoy it. They might not, and would they then be expected to notify the Secretary of State? I asked the Secretary of State's officer if she could give me some guidance on this; she responded that it was for the tribunal to decide whether the wish was reasonable and that the kind of help required and the length of time involved was reasonably required. Mr Riddings' submission at the hearing was that wish-list activities should be regarded as reasonably required if they were not unreasonable sorts of things for a claimant to want to do. This is fine, but I am not convinced that it goes far

enough. I am not sure whether the Secretary of State's officer meant that not only the type of activity but also the kind of help involved and the length of time it would take would have to be figured in to the consideration of reasonableness; but if she did, I agree with her. The claim pack in the present appeal said that large amounts of time would be occupied daily by, for example, reading with the aid of a support worker. This would leave no time for other activities. Some account needs to be taken of the feasibility of a wished-for activity.

37. It is particularly important here to distinguish between what a claimant would like to do if only he were not deaf, and what he might enjoyably be able to do, in the course of relatively mundane everyday existence and having regard to the amount of time that could be spared from existing or desirable activities, if he could have a signing interpreter with him. The former (despite its endorsement by the Commissioner in CDLA/16668/96) strays too close to an account of the disability of being deaf. Only the latter, it seems to me, can properly be taken into account. Practicability and desirability play their part here too.

38. I tentatively suggest therefore that what is "reasonable" should be equated with what is realistic for a particular claimant. It should also be remembered that what may initially require signing help to be understood may in a relatively short time be learned, so that help is no longer required. I have in mind something like a religious ritual, which remains substantially the same on each occasion.

39. Bearing all this in mind, I accept, and find as fact, the evidence the appellant and his interpreter gave me about his abilities as set out in paragraphs 4 and 5 above. I further find that he reasonably requires signing help from time to time with all the matters mentioned in paragraph 21 (whether it is he or his daughter who needs medical attention). But as I have said, these are all sporadic happenings. I am satisfied that he reasonably requires signing help at the weekly meetings at work, as this would be a significantly more efficient and effective means of conducting business, and would save the appellant from the embarrassment of people losing patience with him and from his own impatience and frustration at delays. He is limited in his ability to read newspapers and magazines, and would welcome someone who could summarise the news for him, but it does not seem to me

to be feasible for more than a very short summary to be given; there would not be enough time in the day for more to be fitted in.

40. The appellant told me that it would be practicable to have someone signing to supplement non-subtitled TV programmes, because he would be able, so to speak, to give half an eye to the picture and half to the signer; but I am not convinced that he would welcome a stranger being present during evenings of family relaxation.

41 He told me that attracting his attention at work is often a problem and it can take up to 30 seconds on each occasion, sometimes through a chain of other people. But he also told me that his work environment (building sites) is often noisy, with a lot of machinery operating, and it seems to me that in those circumstances even hearing people will have problems attracting the attention of others by voice alone and will have to resort to other means. Further, I hardly think it would be practicable, or even permitted by his employers, to have an interpreter in attendance. Building sites can be dangerous for the uninitiated, and the interpreter could be put at risk. The appellant told me that in a quiet environment his hearing aids enable him at least to know that someone has spoken, and he looks up of his own accord. Because much of his supervisory work involves plans and drawings, he is able to indicate what is to be done and who is to do it by reference to them, without the need for much extra writing and receiving of notes.

42. Taking all these facts into account, I am not satisfied that a need for attention for more than a significant portion of each day, performing an aggregation exercise, is made out.

43. Turning to the wish-list (set out in paragraph 10), does adding in the extra activities the appellant would realistically enjoy doing with the aid of an interpreter make a difference to the overall calculation? I say at the outset that none of the things the appellant would like to do could conceivably be ruled out as too "extreme" by Lord Woolf's test. But some of them would not be feasible. For instance, the appellant told me that although he would like to be able to visit the cinema and theatre, having an interpreter would not make this possible because it would be too dark to see the signing. If a signer were provided by the establishment (as happens with many public occasions including, I have no doubt, meetings involving the problems of

deaf people), that would be different: but in my view it would not count as relevant attention. It would not be provided to the appellant individually, or at his expense, but to all comers. There is a parallel with discounting telephone help lines as supervision for mentally or emotionally disturbed people, because although the operators are available for the purpose of answering calls from anyone who may ring, and they no doubt hope to be saving callers from any substantial risk of danger to themselves or others, they are not supervising or watching over any particular caller.

44. Pubs can indeed be dark and noisy, and both they and social clubs are prone to the difficulties mentioned above of multiway conversations. However, the appellant does sometimes go to the pub, and I accept that both this and social club activity are sufficiently realistic aspirations for him reasonably to require signing help.

45. He told me that he was brought up Church of England, but got very little out of the services because he could not hear. He would like to try church again. This too seems realistic and reasonable, subject to the point I made above about becoming familiar with the ritual. Sermons or homilies would still need to be interpreted each time.

46. I also accept that the appellant and his wife would go out and about by public transport more often if they felt more confident about not missing announcements. Bomb scares are fortunately rare and the main thing is to run where everyone else is running.

47. Attending evening classes is also a perfectly reasonable and realistic aspiration, and a support worker would be necessary, as the appellant had for his City and Guilds course.

48. Reading books with the help of a support worker would, however, not be a realistic aspiration for the appellant. It would take far too long in relation to his other commitments – 4-5 hours every day was what he said in his claim pack.

49. He told me that he has lived at his present address for about 15 years. He knows his immediate neighbours; one is not very nice, the other is very nice and supportive. But contact with neighbours, unless they become

friends, is again sporadic for most people. Neighbourhood meetings, for example about planning matters, would be included in the matters covered in paragraph 21; neighbourhood social clubs, if this is what the appellant has in mind, I have already accepted.

50. I cannot help thinking that difficulties with the milkman's bill could be sorted out by arranging (perhaps through the supportive neighbour) to pay more infrequently, so that it would only be necessary to watch out once a month rather than once a week. Being out in the garden and missing callers is a problem, but again I doubt that the appellant would welcome the perpetual presence of a stranger (who would not need to be a signer) there only to alert him should the bell ring.

51. Initiating and facilitating communication would not be a problem in any area where I have accepted that a signing interpreter would be reasonable. I have already dealt with communication at work. In the case of other contacts, I find the extra effort involved in successfully initiating communication (as opposed to ringing a doorbell and receiving no reply, which is unavoidable unless there is someone constantly present to alert the appellant) is *de minimis,* as is any extra effort involved in continuing communication, eg by the writing of short notes. The desire to communicate freely is perfectly understandable, but this is an area where, as Mr Commissioner Sanders said, no amount of assistance or attention will put a profoundly deaf person in the same position as one with good hearing.

52. Aggregating all the attention needs that I have accepted as realistic - the matters mentioned in paragraph 21, weekly meetings at work, visits to pubs and clubs, outings by public transport, evening classes, possibly church on Sundays, I am entirely satisfied that the appellant reasonably requires attention for a significant portion of each day, whether during one period or a number of periods. But am I further satisfied, by a process of slotting in different needs on different days, that the appellant reasonably requires attention frequently throughout the majority of days?

53. I have to say that I am not. It is not, I think, the case that attention required even in quite extensive blocks, if it occurs only once a day on average, can be said to occur frequently throughout the day. Supposing the appellant occupied most evenings going to pubs or clubs, or to evening

classes, or to meetings of interest, this would not be frequent attention throughout that day. If one of these days was also the day of the weekly meeting at work there would be two occasions of attention, which might amount to frequency, though it still I think does some violence to language. Similarly if he goes regularly to church on Sunday mornings and in the afternoon goes shopping for electrical goods, or to a meeting, or for an outing by public transport. But on most days the attention I have found to be reasonably required will not be needed frequently throughout the day. This may be a defect in the system for people in the appellant's position; it may reflect the fact that the framers of the legislation were not thinking of social or leisure activities as being relevant occasions for attention.

54. I regret the disappointment the appellant will suffer. I also regret the length of this decision, but hope that both tribunals and representatives may find it useful to have regard to the principles I have attempted to set out. Tribunals must not suppose that they are precluded, in appropriate circumstances, from continuing to award middle rate care. The particular nature of a person's work, for example, may give rise to more frequent attention needs (as in CDLA/16240/96), so that however well-adapted he is, he can manage only because other people have to make a lot of effort for him to do so. The decisions of colleagues who have upheld awards of middle rate care were made on different facts. There is no substitute for carefully investigating the facts of each case. This is of course a heavy burden both on busy representatives and on tribunals. It seems to me desirable that fewer cases of this kind should be listed for a tribunal day than is normal, particularly having regard to the extra time and effort involved in questioning through an interpreter and the need for both interpreters and claimants to have quite frequent rests.

(signed on original) Christine Fellner
Commissioner

23 February 2001