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SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

Commissioner's File No.: CDLA/15884/1996

Starred Decision No: 31/01

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Any **comments** by interested organisations or individuals on the suitability of this decision for reporting should be sent to:

Mr P Cichosz,
Office of the Social Security and Child Support Commissioners,
5th Floor, Newspaper House, 8-16 Great New Street, London EC4A 3BN.

so as to arrive by 4th June 2001

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

31/01

RAS/SH/11

Commissioner's File: CDLA/15884/1996

SOCIAL SECURITY ADMINISTRATION ACT 1992

SOCIAL SECURITY CONTRIBUTIONS AND BENEFITS ACT 1992

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

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Name: [REDACTED] (Ms)

Disability Appeal Tribunal: Central London

Case No: D/21/21/96/0154

1. This is an appeal by the claimant against the decision of the Central London disability appeal tribunal given on 22 March 1996. The tribunal decided that the claimant was not entitled to disability living allowance.

2. The tribunal's findings of fact were -

"1. The appellant was born deaf and has never heard the spoken word.

2. She is able to communicate by signing, writing and she uses a minicom.

3. She cannot hear the ambulance, police sirens or cars, but she is fully mentally competent, aware of all dangers and it would be reasonable to expect her to take care of on coming cars on the road and the speeds and distance of vehicular traffic.

4. She drives her car and it would be reasonable to expect as a prudent driver to use her mirror.

5. In the event of a bomb alert, the appellant would be physically removed in the UK. The risk of a bomb alert while on holiday may well be remote.

6. She has been lip reading and learning to do so from age 8. She worked for British Rail and used lip reading at work when she began at age 17.

7. Her children's school send faxes which she can read, when they require her presence at school to deal with children's needs.

8. She has osteoarthritis of the back and shoulders but she is able to perform all bodily functions of washing, toileting, dressing, undressing, rising from a chair, eating. Hearing is a bodily function.

9. She completed her claim form with the help of someone. Pages 51 and 52 of the submission is evidence of her writing.

10. She has a flashing smoke alarm, alarm clock and telephone in her home.

11. She walks to the shop without speaking to people. She does not need to be guided or supervised to take advantage of the walking faculty."

The reasons the tribunal gave for their decision were -

"The appellant's representatives today explained in great detail how the appellant is affected by her lack of hearing. But from the totality of the evidence we did not find the appellant reasonably required attention throughout the day or for a significant portion of the day. The appellant has many skills available to her and while she may have to concentrate to lip read, it would be reasonable to expect her to do so when communicating with her doctor, her children's school and other official bodies.

We were told she can be frustrated as words on a page mean little to her and she needs to rely on her father in law to help with letters. But having seen her written answers and writing and the abilities and aids at her disposal we did not agree with the contentions urged upon us that the appellant reasonably required attention in connection with her hearing, even to amount to a significant portion of the day. Sections 72 and 73 of the Social Security Contributions & Benefits Act 1992 applied."

It is common ground between the parties and I agree that those findings and reasons are insufficient both with regard to the mobility component and the care component. I accordingly allow this appeal, set aside the tribunal's decision and remit the case for rehearing by a differently constituted tribunal.

3. The issues have been thoroughly canvassed in the papers, particularly in the submissions on behalf of the claimant and there is little or nothing that needs my comment. I must however make one point and that is with regard to the question whether extra effort involved in the use of sign language or in lip reading can constitute relevant attention.

4. My decision in the Fairey case included this sentence -

"But where the person with whom the claimant is in communication is reasonably skilled in the use of sign language, I would not think it right to conclude that any extra effort involved in that method of communication would necessarily go towards satisfying the attention condition."

That sentence was the subject of a cross appeal on behalf of Miss Fairey. Her Counsel apparently argued (see the judgment of Glidewell LJ at pages 19-20 that while fluent communication between Miss Fairey and for example her mother by sign language and/or lip reading is not relevant attention some of the actions associated with such communication - physical contact to attract the claimant's attention, deliberately articulating lip movements - could properly be held to be attention. As to that, Glidewell L J said (page 20) -

"I agree with the Commissioner on this issue. It may be that, in a particular case, the effort required of another person to initiate two-way conversation with a deaf person could constitute 'attention' within section 72(1). Whether it did so or not, however, would be a question of fact. In this paragraph of his decision, the Commissioner has not ruled out the possibility of such a finding of fact. It follows that I can find no error of law in the Commissioner's conclusion on this issue."

The claimant's representative may be aware that his quotation of that same passage is significantly incomplete. Hobhouse LJ simply dismissed the cross appeal. Swinton Thomas LJ (page 40) while accepting that "a two-way communication between members of the family or others and the applicant, either in language which the applicant can lip read or by sign language, could not form a part of the composite package" agreed that "if the person giving the attention to the deaf person has to do extra work, or take extra time, away from the attendant's ordinary duties to help the disabled person that may be capable of being included in the attention which is being provided. The question is very much one of fact and degree ..." In the House of Lords, Lord Slynn merely said (page 15) that -

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

So where does that leave the point?

5. The best guidance I can give is that where the persons concerned are reasonably fluent in the use of sign language or at lip reading the fact that such may be a more laborious method of communication does not mean that, on that account alone, relevant attention is given. But if extra effort is required for example to initiate two-way conversation that could constitute relevant attention. Whether any such extra effort is involved is a question of fact.

(Signed) R A Sanders
Commissioner

(Date) 10 November 1997