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## SOCIAL SECURITY AND CHILD SUPPORT COMMISSIONERS

**Commissioner's File No.: CDLA/2037/2000**

# Starred Decision No: 54/01

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

*Mr Damien Abbott,*
*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 17th July 2001**

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

**Decision:**

1. My decision is that the decision of the Newcastle appeal tribunal held on 11th January 2000 is not erroneous in point of law.

**The appeal to the Commissioner**

2. This is an appeal to a Commissioner against the decisions of appeal tribunals brought by the claimant with my leave.

3. The Secretary of State did not support the appeal.

4. As this case raised the same issues under the Human Rights Act 1998 as CDLA/3594/2000, I directed a joint oral hearing. It was held before me in London on 28th March 2001. The claimants did not attend, but they were represented by Mr S McInally from the Welfare Rights Unit of their County Council. The Secretary of State was represented by Miss R Rayner of the Office of the Solicitor to the Departments of Health and Social Security. I am grateful to both representatives for their researches, for their helpful submissions and for their contributions to the discussion of the issues.

**The Human Rights Act 1998 issues**

5. I first deal with two issues under the Human Rights Act 1998 that were common to both appeals. They arose because the claimants had been observed and filmed in the course of investigations by the Department of Social Security into their entitlement to their disability living allowances. The first issue is whether the investigations interfered with the respect for the claimants' private lives under the Convention right in Article 8(1) of the European Convention on Human Rights and Fundamental Freedoms. The second issue is whether the use of the evidence obtained during the investigations violated the claimants' right to a fair hearing under the Convention right in Article 6(1) of the Convention.

*Respect for private life*

6. Article 8(1) of the European Convention on Human Rights and Fundamental Freedoms provides:

> 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

Article 8(2) provides that 'There shall be no interference with the exercise of this right except' in limited and defined circumstances.

7. Article 8(1) does not guarantee a right to a private life. It guarantees only 'respect' for private life. The reason for that limitation is obvious. It is a feature of everyday life that our private lives are continually impinged upon by others. Life in a community is only possible because measured interference with our private lives is tolerated. That interference is accepted by us as individuals (to a greater or lesser extent, depending on our temperament). It is recognised, and sometimes imposed, by domestic law.

8. These considerations are reflected in the interpretation and application of Article 8(1) in the Convention jurisprudence. The Commission and the Court have acknowledged that the scope of the protection given may depend on the extent to which a person has undertaken an activity that properly carries with it an element of interference with the person's private life. They have also recognised that Article 8(1) involves issues of degree.

9. The interference may be legitimate in view of the activity undertaken. In Brüggeman and Scheuten v Federal Republic of Germany (1977) 3 European Human Rights Reports 244, the Commission was concerned with abortion. The Commission decided:

> '56. However, there are limits to the personal sphere. ... In fact, as the earlier jurisprudence of the Commission has already shown, the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into contact with public life or into close connection with other protected interests.
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> '57. Thus, the Commission has ... found that the right to keep a dog did not pertain to the sphere of private life of the owner because "the keeping of dogs is by the very nature of that animal necessarily associated with certain interferences with the life of others and even with public life".'

10. The possibility of interference may also be inherent in the nature of the activity. In B C v Switzerland (27th February 1995, unreported), the Commission rejected an argument that there was a violation of Article 8 by listening to and recording a telephone conversation carried out on a wave-band that was accessible to other users. The Commission decided:

> 'The conversations were thus accessible to other users of telecommunication facilities and so can scarcely be classified as the "private" communications to which the European Court of Human Rights referred in the Malone case. By using such a telephone the applicant exposed himself to the risk of having the contents of the conversations revealed to others.'

11. The Court has commented on the balance to be struck between the interests of the individual and of the community. Issues of degree are inherent in that balance. The comments were made in the context of positive obligations, but the principle is consistent with the approach to the negative obligations contained in Article 8(1). In Rees v United Kingdom (1986) 9 European Human Rights Reports 56, the Court decided:

> '37. ... In deciding whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.'

There comments are repeated in Cossey v United Kingdom (1990) 13 European Human Rights Reports 622 (paragraph 37).

12. The twin themes of degree and undertaking an activity that legitimately involves an element of interference were brought together in Costello-Roberts v United Kingdom (1993) 19 European Human Rights Reports 112, also a positive obligation case. The Court decided:

> '36. The Court agrees with the Government that the notion of "private life" is a broad one, which ... is not susceptible to exhaustive definition. ... Having regard, however, to the purpose and aim of the Convention taken as a whole, and bearing in mind that the sending of a child to school necessarily involves some degree of interference with his or her private life, the Court considers that the treatment complained of by the applicant [slippering as a disciplinary measure] did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition contained in Article 8.'

13. Mr McInally argued that the undertaking of covert investigations had been in violation of Article 8 regardless of whether or not the claimants were filmed. He accepted that anyone could have seen what the investigators saw, but argued that the claimants were only there because they had been called for interview. He also argued that motivation of the investigators was relevant. He summarised his argument in these terms: covert means should be limited to serious cases in which no other means of investigation were available and were not appropriate where there was no suspicion of wrongdoing.

14. I accept that motivation is relevant under Article 8(1), but find the motivation of investigating entitlement to benefit unobjectionable. I do not accept that covert means can only be justified in the most serious cases or when no other means are available. The issue is one of degree and is not susceptible to blanket statements. The same applies to whether suspicion of wrongdoing is necessary.

15. Miss Rayner was reluctant to accept that Article 8(1) involved an issue of degree. She argued that this was only relevant under Article 8(2). However, when pushed she argued that the degree of intervention into the claimant's lives was insufficient to bring the cases within Article 8(1). She mentioned that the investigations were one off, for short periods, in the vicinity of Government buildings, and involved the claimants performing normal activities. She also mentioned that the claimants should have been aware of the possibility of investigations.

16. I apply the principles set out in the Convention jurisprudence to this case like this. I accept Miss Rayner's points on the issue of degree, although with some elaboration.

17. The claimant had applied for and been awarded disability living allowance. The award were paid from the public purse. It was a condition of the award that the claimant satisfied, and continued to satisfy, specified criteria. By applying for an allowance, the claimant inevitably accepted a degree of interference with her private life. That interference was necessary at the outset in order to show that she satisfied the conditions of entitlement. Once the award was made, there was a legitimate interest in the Secretary of State checking whether the claimant continued to satisfy those conditions.

18. The checks involved observing and making videos of the claimant. At the time, there was no code of practice governing investigations, but section 30(7A) of the Social Security Administration Act 1992 contained general authority for the Secretary of State to undertake investigations to obtain information and evidence on which an application for a review could be based. There is nothing to suggest that the officers were investigating for any other purpose.

19. The claimant was observed and filmed without her knowledge. But she was only filmed for two short periods, amounting to no more than a couple of minutes in total. She was filmed in a public place and the film merely showed her walking ability at that time and place. The film showed no more than would have been apparent to any member of the public who happened to be passing or, for that matter, to a tourist who happened to be filming in the street at the time. The video has only been used in support of the written statements of the investigators. It has only been used for the purposes of the reviews and appeal.

20. The claimant was also observed without her knowledge on other occasions and the observations were recorded in writing without her being filmed. She was observed only when she was in public places or places to which the public had access. The periods of observation were relatively short and no longer than necessary to show her mobility. The investigators saw no more than could be seen and reported by any member of the public. The recorded observations have only been used for the purposes of the reviews and the appeal.

21. My conclusion is that there has been no breach of Article 8(1). The decision to investigate, the extent to which the claimant was investigated, the manner in which the investigations were carried out, the use that was made of the material collected, and the retention of that material for adjudication purposes were all consistent with showing respect for the claimant's private life.

*Right to a fair hearing*

22. Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms provides:

> 'In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

23. I do not need to refer to the jurisprudence of the Commission and the Court, because the relevant law appears from the decision of the House of Lords in R v P, which was published in [2001] 2 All England Law Reports 58 on the day of the oral hearing.

24. That case is authority for these propositions. As a general rule, Article 6(1) is not concerned with the admissibility of evidence, which is a matter for domestic law. So, the manner in which evidence was obtained does not of itself involve a violation of Article 6(1). That provision is concerned with whether the proceedings as a whole were fair. The key considerations are whether the claimant had the chance to challenge the authenticity and use of the evidence.

25. The cases under Article 6(1) involving the United Kingdom have emphasised that the judge in a criminal case has a discretion, now contained in section 78 of the Police and Criminal Evidence Act 1984, to exclude evidence that would adversely affect the fairness of a trial. Tribunals have to weigh evidence and may exclude it if it is of no probative value. But they do not have power to exclude evidence on the general ground of fairness. Miss Rayner argued that this was not relevant, because a lesser threshold was acceptable in civil cases. I accept that argument.

26. So, reliance on Article 6(1) cannot avail the claimant in the sense that it does not provide a basis for excluding the evidence used by the Secretary of State that goes beyond the scope of domestic law.

*Other issues*

27. I do not deal with three other issues under the Human Rights Act 1998, although they were discussed or referred to at the oral hearing.

28. I do not deal with the question whether a review initiated by the Secretary of State is a legal proceeding for the purposes of sections 7(1)(b) and 22(4) of the Human Rights Act 1998. Logically that question is prior to any issue under Article 8(1). However, the arguments were more fully developed on Article 8(1) than on sections 7 and 22. I prefer to leave the interpretation of those sections to another case.

29. And in view of my decision on Article 8(1), I did not have to decide: (a) whether an interference with the claimant's private life was justified under Article 8(2); and (b) whether there is any legislation that could be interpreted compatibly with the Convention right in Article 8 under section 3 of the Human Rights Act 1998.

**Domestic law**

30. Mr McInally suggested five possible errors under domestic law. Miss Rayner disagreed. I accept Miss Rayner's argument that the decision was not erroneous under domestic law.

31. First, Mr McInally argued that in view of the dispute over the distances that the claimant was observed to walk the tribunal should have adjourned for the witnesses to attend. I reject that argument. There were a number of statements of observations made on different days and in different circumstances. There was also substantial medical evidence. The dispute about distance in the context of the evidence as a whole was not significant. It is also significant that the claimant's representative (not Mr McInally or his organisation) did not ask for an adjournment or for the witnesses to attend, although he had sought other directions at an earlier hearing.

32. Second, Mr McInally argued that the tribunal's decision reads more like a decision on a claim than a decision on a review initiated by the Secretary of State. The significance of the difference is that in the former the burden is on the claimant while in the latter it is on the Secretary of State. There are isolated passages in the full statement of the tribunal's decision that support this view. However, reading the tribunal's reasoning as a whole I find nothing to suggest that it applied the wrong burden of proof or that the decision was so finally balanced that it turned on the burden of proof.

33. Third, Mr McInally argues that the tribunal did not deal with the evidence of the claimant's GP. The tribunal referred to the letter, but did not analyse its contents in detail. It is not necessary for a tribunal to deal with every piece of evidence. It is obvious that the tribunal considered the whole of the evidence and its conclusions are carefully reasoned by reference to the evidence.

34. Fourth, Mr McInally argues that the tribunal's reasons on the care component did not relate to the statutory criteria and amount to little more than an attack on the claimant's

character. As regards the statutory tests, the tribunal's findings were relevant to the cooked main meal test (which was the basis of the award that had been terminated on review). The findings were based on reasonable inferences from the evidence of grip and dexterity accepted by the tribunal. The rejection of that evidence made further reference to the statutory tests unnecessary. As regards attacking the claimant's character, the tribunal recorded that it found the claimant's evidence was 'self serving and inherently improbable'. That is a legitimate comment for a tribunal to make in order to explain why it has rejected evidence.

35. Finally, Mr McInally argued that the tribunal did not deal sufficiently with severe discomfort. I disagree. This is always a difficult issue for tribunals to deal with. It can only be determined by inference from the evidence as a whole. The tribunal gave a clear and detailed explanation of its conclusion on severe discomfort.

36. I agree with Miss Rayner's summary that the tribunal accepted that the claimant had some difficulties, but they were not sufficient to satisfy the conditions of entitlement to a disability living allowance.

**Summary**

37. I reject the claimant's arguments on the Human Rights Act 1998 issues and on domestic law. I accept the arguments of the Secretary of State on both aspects of the case. The appeal is dismissed.

**Signed on original**

**Edward Jacobs**
**Commissioner**
**30th March 2001**