Neutral Citation: [2014] IEHC 186

THE HIGH COURT

[2013 No. 509 JR]

BETWEEN

B.

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Mr. Justice Barrett delivered on the 1st day of April, 2014

1. This case is concerned with the issue of whether a person who repeatedly exercises a discretion in the same way can be said to be properly exercising that discretion.

Facts

2. The applicant, B., is a home-maker and primary carer of a son who has been diagnosed with autism. In all respects and in every way the evidence before the court suggests B. and her husband to be caring and concerned parents seeking to do the best for their son.

3. On 4th March, 2013, B. applied to the Minister for Social Protection for domiciliary care allowance, a statutory payment made pursuant to Chapter 8A of the Social Welfare Consolidation Act 2005 (as inserted by s. 15 of the Social Welfare and Pensions Act 2008 and amended by s. 26 of the Social Welfare (Miscellaneous Provisions) Act 2010). Section 186C(1) of the Act of 2005 as amended provides that a person is deemed to be a qualified child where, *inter alia*, (a) the child has a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age, and (b) the level of disability caused by that severe disability is such that the child is likely to require full-time care and attention for at least 12 consecutive months. Section 186C(2) provides that a Department of Social Protection medical assessor shall (a) assess all information provided to him or her in respect of an application for domiciliary care allowance, and (b) provide an opinion as to whether the child satisfies paragraphs (a) and (b) of subs. (1). Section 186C(3) provides that:

> *"In determining whether a child satisfies paragraphs (a) and (b) of subsection (1), a deciding officer shall have regard to the opinion, referred to in subsection (2)(b), of the medical assessor."* [Emphasis added].

4. In her application form, B. set out the difficulties which she encounters in the care of her son. In addition, her son's general practitioner stated that B.'s son has been diagnosed with autism and that the diagnosis is permanent. Attached to the form were B.'s own reports and a further form which was filled out by a general practitioner indicating that the social interaction anxieties of B.'s son are severe, as is his capacity to keep well and stay safe. Further medical reports from other medical professionals were also attached setting out *inter alia* the level of services that B.'s son will require and indicating that he requires continual or continuous care and attention substantially in excess of that required by a child of the same age.

5. Though not a factor in the decision of this Court, it is nonetheless informative to mention briefly the problems that B.'s son was considered to present by the various medical professionals who met with him, if only to provide some background context to the process that is in issue in these proceedings. The report of those professionals is too long to be quoted in its entirety. However, even a brief extract gives a flavour of the issues which affect B.'s son. Thus, per the Health Services Executive Multi Disciplinary Team Assessment Report of 14th February, 2013:

> *"X [B.'s son] came into the room without any difficulty. He was very object-focused upon entry into the room. He was jumping repetitively and his eye contact was inconsistent. He was very aware of the lights and he switched these on and off at one point. He used four or five word sentences and sometimes came out with random statements ....He seemed to have some difficulties with understanding but this was hard to gauge. He spoke with a high pitched voice and was on his own agenda for much of the assessment. He babbled when excited. He lashed out at both therapists during the assessment and also threw a large ball at his mother with no awareness of the impact on her. He was quite impulsive during the assessment and had difficulty with listening. He walked on the bean bags with no awareness and he used a few gestures. There was no referencing during the assessment with his mother, and when he entered the room he burst into it."*

At a later stage, the report continues:

> *"It is the Team's recommendation that X...would benefit from placement within an Autism Unit within a mainstream school. It is likely that he will find school very difficult, particularly due to his difficulty in following direction, social isolation and his potentially aggressive behaviour towards others. In the absence of a place being available for X...he will then need a supported mainstream placement and it will be imperative that he has an SNA access due to his Autism and safety issues (particularly safety to self and others) ....Parents are also recommended to apply for the Domiciliary Care Allowance as X ...requires care supervision attention that is in excess of that usually provided to children of his age."*

6. Notably, B. is not in these proceedings seeking a review of the outcome of the decision that issued pursuant to her application for domiciliary care allowance; she is challenging only the process whereby that decision was formulated. Consequently, the above-quoted extracts from the H.S.E. report, while of assistance in setting the factual matrix within which the instant application is made, are not relevant to, and have not been relied upon by this Court in, the determination of these proceedings.

7. By decision dated 16th May, 2013, a deciding officer for the Minister for Social Protection decided that B.'s son is not a qualified child on the basis that the medical evidence provided did not indicate that the extra care and attention required by him is

substantially in excess of that required for a child of the same age who does not suffer from the same condition. The medical assessor, by opinion dated 3rd May, 2013, had stated that the medical evidence submitted to date did not indicate a disability so severe as to require substantial extra care. By letter dated 22nd May, 2013, B. sought a statutory revision of this decision pursuant to s.301 of the Act of 2005. By decision dated 1st July, 2013, another deciding officer of the Minister for Social Protection undertook consideration of a revision of the decision and, following receipt of another medical assessor's opinion, refused to revise the decision of 16th May, 2013.

8. The crux of the issue now before the court is that B. contends that the Department of Social Protection in effect operates a policy whereby the opinions of its medical assessors are followed slavishly by departmental deciding officers, irrespective of the evidence submitted by claimants such as B. In terms of relief, the primary relief contended for by B. is a declaration that the minister's alleged policy of deferring only to, and following, the departmental medical assessor's opinion means that in this case there has been an abdication of the deciding officer's statutory duty. It is contended by B. that the application of such a policy, if applied, unlawfully vitiates and/or voids the decision-making process operated in respect of her application in that the statutorily appointed decision-maker did not in reality make the decision and did so only in name, contrary to s. 300 of the Act of2005 and to fair procedures and natural and constitutional justice. Section 300 of the Act of 2005 provides that:

> *"Subject to this Act, every question to which this section refers [which would include the application made by B.] shall, save where the context otherwise requires, be decided by a deciding officer."*

9. The solicitors for B. have utilised the freedom of information legislation to undertake some research into the decision-making process that pertains within the Department for Social Protection. This has yielded some statistical evidence that is of relevance to this application. Thus in an affidavit of 21st November, 2013, Mr. Gareth Noble, solicitor for B. avers as follows:

> *"I say that ...the Freedom of Information request was complied with and that it was stated that Officer A, who I believe to be [the initial deciding officer in B.'s application}...made 2224 positive decisions and 1582 negative decisions. A total of 3806 in total. I say that ...[the said deciding officer} did not depart from the Medical Assessor's opinion in any of the decisions nor did any of the other Deciding officers referred to in that Freedom of Information request."*

10. A later freedom of information request made by Mr Noble of the Department of Social Protection yielded the following further information in a letter of 23rd December, 2013, from the department to Mr. Noble:

> *"Notwithstanding that accurate statistics on this issue are not readily available; the Department considers that it would be highly unusual for a deciding officer to decide against a medical assessor's opinion on the question of medical eligibility".*

11. How are decisions as to eligibility for domiciliary care allowance taken within the Department of Social Protection? How can it be that, as in B.'s case, a desk-top review by a department-paid medical assessor yields such a different conclusion as to the needs of B.'s child from that presented by the medics who dealt directly with B.'s son? An affidavit of 5th February, 2014, sworn by an assistant principal of the Department of Social Protection offers, *inter alia*, the following helpful information:

> *"8. While the Medical Assessor provides his/her opinion to the Deciding Officer it is the Deciding Officer who must and does make the final decision.*
>
> *9. In the present case that is precisely what happened when the Deciding Officer made her decision. The Deciding Officer ...took into account all of the information and material provided and had regard to the opinion of the Medical Assessor when coming to her decision that the Applicant's Son ...did not require care and attention which another [such] ...child without that disability would require ....*
>
> *10. It is suggested by and on behalf of the Applicant that there was a conflict of medical evidence in this case and that the Deciding Officer simply ignored medical evidence which supported the view that [B. 's son]...required care and attention substantially in excess of what is required by a 4'h year old child There is in fact no conflict o(medical evidence - rather there is a difference between the opinion formed by the Applicant's doctors who understandably are advocating on behal(o[the Applicant and her son and the opinion o[the Medical Assessor whose (unction is to provide to the Deciding Officer an independent medical opinion having assessed the information and (acts provided" [Emphasis added].*

12. The court pauses at this point to note just how remarkable the underlined averment is. B.'s application included documentation provided by a general practitioner and a specialist H.S.E. team that comprised a senior clinical psychologist, a senior occupational therapist, a public health nurse and a physiotherapist, all of whom had met with B.'s son and all of whom were offering what the court has no reason to doubt were *bona fide*, properly reasoned professional opinions. Yet to this evidence the Department apparently adopts a disdainful mind-set and prefers instead the desk-top reviews of its own medical assessors who have no personal knowledge of the individual case at hand.

13. The assistant principal continues:

> *"11.It is the case ...that it would be unusual for a Deciding Officer to make a decision that was at odds with the opinion of the Medical Assessor. This is for a number of reasons. Firstly Medical Assessors, unlike the Deciding Officers are all qualified doctors registered with the Medical Council who have had at least 6 years in practice and are qualified to give their medical opinion on whether a given disability of the severity suffered by a particular child means, on the basis of all the information provided, that that child requires continual care and attention substantially in excess of the care and attention required by a child of the same age without that disability. Secondly the Deciding Officers are required by statute to have regard to their opinions and thirdly Deciding Officers in any given case have the option of discussing the matter with the Medical Assessor involved before any individual decision is made. Therefore if a Deciding Officer has any issue with the Medical Assessor's opinion (for example if the Deciding Officer's view was that they had) the Deciding Officer can discuss and clarify the basis for their opinion with the Medical Assessor. This may and can lead to the Medical Assessor revising their opinion or satisfying the Deciding Officer with regard to his/her concerns. Alternatively a Deciding Officer can refer the case to another medical assessor for a second opinion if desired. Due to the format in which the data is held on the IT system it is not possible to quantify the frequency or volume of such clarifications/referrals, however from my personal experience I aware that such exchanges do take place between Deciding Officers and Medical Assessors ..."*

14. To the extent that such consultations take place it may offer some explanation why deciding officers would accept the views of

the medical assessors in that it would suggest that those views are tested behind closed doors. However, it might perhaps be queried how competent non-medically qualified deciding officers are to assess and/or test the views of medically qualified assessors. It might also perhaps be contended that even in a system such as that described by the department, one would expect to see some disparity of views between deciding officers and medical assessors. When lawyers discuss a point of law they seldom agree on every aspect of their discussion.

When doctors discuss a patient's case it seems reasonable to assume that they may not agree with every aspect of the diagnosis that each offers in respect of that patient. Yet when deciding officers within the Department of Social Protection deal with medical assessors in the context of applications for domiciliary care allowance it appears that it is, at best, 'highly unusual' for a deciding officer to decide against a medical assessor's opinion. Testament perhaps to the unusualness of such an occurrence is the fact that in this case it appears that the initial deciding officer who considered B.'s application agreed with the relevant medical assessor's opinion in 3,806 out of3,806 cases. The question that arises for this Court is whether that represents a proper exercise of her decision-making powers or whether it involves an abdication of her duties as a statutorily appointed deciding officer.

Alternative remedies
15. Before proceeding to consider the legal principles applicable to the issue just raised, the court briefly considers an argument made on behalf of the minister that there is in the present case an alternative avenue of appeal open to B. within the context of the social welfare code and that she ought to have pursued this avenue of appeal, rather than bringing the present application for judicial review. Mention was made in this regard of such decisions as that of the Supreme Court in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381, and those of the High Court in *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483 and *A.M v. Minister for Social Protection* [2013] IEHC 524. The court considers this line of argument to be misfounded for the following reason: B. is not in these proceedings seeking a review of the outcome of a decision that issued; she is challenging only the process whereby that decision was formulated and there is no provision in the social welfare code whereby she can challenge the process, as opposed to the outcome, of decision-making. Hence it is necessary for her to make application for judicial review.

Applicable principles
16. As mentioned above, s. 186C(3) of the Act of2005, as amended, provides that in determining whether a child is a qualified child for the purposes of that provision a deciding officer "*shall have regard to*" the opinion of the medical assessor. Case-law offers some insight as to what is meant by this phrase and the court considers a number of relevant cases below. However, it is worth making mention first of what is perhaps the seminal case in social welfare law, *viz*. the Supreme Court decision in *McLoughlin v. Minister for Social Welfare* [1958] I.R. 1. Commenting on the role of appeals officers and deciding officers under the Social Welfare Act, 1952, Kingsmill Moore J. stated at 27:

> *"I cannot accept it that the appeals officer was merely mistaken as to the evidential value of the direction of the Minister for Finance. He has not said so himself What he did say was that he was bound to adhere to a direction, purported to be have been given to him by the Minister for Finance, an observation which disclosed not a concern for the niceties of the probative value, but the belief that a public servant in his position had no option but to act on the direction of a Minister of State. Such a belief on his part was an abdication by him from his duty as an appeals officer. That duty is laid upon him by the Oireachtas and he is required to perform it as between the parties that appear before him freely and fairly as becomes anyone who is called upon to decide on matters of right or obligation ....[A]ppeals officers under the Social Welfare Act, 1952, and equally deciding officers, are, and are required to be, free and unrestricted in discharging their functions under the Act."*

17. It is difficult to reconcile the views of Kingsmill Moore J. as to the freedom with which appeals officers and deciding officers ought to act and the system currently operated within the Department of Social Protection with regard to applications for domiciliary care allowance and within which, to quote from the department's letter of 23rd December, 2013, to Mr. Noble "*it would be highly unusual for a deciding officer to decide against a medical assessor's opinion on the question of medical eligibility*". That seems to anchor the deciding officer's decision so firmly in what a medical assessor determines as not only to be inconsistent with the ideal propounded by Kingsmill Moore J. but also to suggest that the true decision-maker in these applications is in fact the medical assessor.

18. In *Glencar Explorations plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 the applicant mining and prospecting companies sought to set aside a decision of the respondent to ratify a draft development plan that contained a mining ban in respect of extensive tracts of land. During the course of his judgment, Keane C.J., at 142, made the following observation:

> *"I should add that I am also satisfied that counsel for the respondent was correct in submitting that it had not been established that the respondent had acted in breach of its statutory obligation pursuant to s. 7(I)(e) of the Local Government Act, 1991 to:-*
>
> *"have regard to ...*
>
> *(e) policies and objectives of the Government or any Minister of the Government in so far as they may affect or relate to its functions ... "*
>
> *... The fact that it [the respondent] is obliged to have regard to policies and objectives of the Government or a particular minister does not mean that, in every case, it is obliged to implement the policies and objectives in question. If the Oireachtas had intended such an obligation to rest on the planning authority in a case such as the present, it would have said so."*

19. The approach of the Department of Social Protection in the instant proceedings is somewhat difficult to square with the wording of Keane C.J. in *Glencar*. He writes that Mayo County Council in having regard to certain policies and objectives need not in every case implement the policies and objectives in question. Yet in the present case the department operates a system in which it acknowledges that it would be 'highly unusual' for a deciding officer to depart from the opinion of a medical assessor, a tethering of the deciding officer which suggests the system in operation within the department pursuant to the social welfare legislation to be not quite consistent with the liberty of action that Keane C.J. considered appropriate pursuant to s.7(1)(e) of the Local Government Act 1991.

20. In *McEvoy v. Meath County Council* [2003] I.R. 208, the applicants applied for a declaration that Meath County Council in making and adopting the development plan for County Meath acted in contravention of section 27(1) of the Planning and Development Act 2000 by failing to have due regard to the strategic planning guidelines for the greater Dublin area. Dismissing the application, Quirke J., at 224, made the following observation following a consideration of relevant Irish and English case-law:

> *"I am satisfied that the duty or obligation imposed by s.27(1) of the Act of 2000 upon a planning authority when making and adopting a development plan is to inform itself fully of and give reasonable consideration to any regional planning guidelines which are in force in the area which is the subject of the development plan with a view to accommodating the objectives and policies contained in such guidelines.*
>
> *Whilst reason and good sense would dictate that it is in the main desirable that planning authorities should, when making and adopting development plans, seek to accommodate the objectives and policies contained in the guidelines and may depart from them for bona fide reasons consistent with the proper planning and development of the areas for which they have planning responsibility."*

21. In the present case, deciding officers within the Department of Social Protection do not just inform themselves fully as to the views of the medical assessors but, at least in the case of the initial deciding officer in B.'s case, appear invariably to conform with same, or at least did so in 3,806 out of 3,806 cases. To borrow from the phraseology of Quirke J., whilst reason and good sense may dictate that it is in the main desirable that deciding-officers should, when arriving at their decisions, seek to accommodate the views of the medical assessors, a situation in which it is 'highly unusual' for them to depart from those views suggests there to be a fettering of their role in a way that does not sit well with the degree of discretion that Quirke J. ascribes to planning authorities in his decision in *McEvoy*.

22. Though not a case concerned with the meaning of the words "*shall have regard to*" or similar such wording, it is nonetheless useful to consider in passing the case of *McVeigh v. Minister for Justice, Equality and Law Reform* [2004] IEHC 405. This was a case in which the applicant sought an order quashing the minister's refusal to grant him an occasional import licence for a particular firearm. In the course of his judgment, Murphy J., at para. 6, echoing the judgment of Kelly J. in *Mishra v. Minister for Justice* [1996] 1 I.R. 189 at 205, noted that:

> *"Reference was also made to policy rules that may disable the Minister from exercising her or his discretion in individual cases. The use of a policy or set of fixed rules must not fetter the discretion which is conferred by the Act ..."*

23. In the present case, the fact that the initial deciding-officer agreed with a medical assessor's opinion in 3,806 cases out of 3,806 cases, consistent with a policy whereby it is 'highly unusual' for a deciding officer to depart from the opinion of a medical assessor, suggests that a situation may pertain within the Department of Social Protection, or at least in the case of this particular deciding officer, whereby the discretion that a deciding officer enjoys under law and which was amplified upon by Kingsmill Moore J. in *McLoughlin* was inappropriately fettered.

24. In *P.J. and others v. Minister for Justice, Equality and Law Reform* [2011] IEHC 433, the applicants sought leave pursuant to section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 to challenge the validity of a deportation order made by the Minister for Justice, Equality and Law Reform. In the course of his judgment, Hogan J., at paras. 44 and 45, makes the following reference to the Immigration Act 1999:

> *"Section 3(6)(h) of the 1999 Act provides that:-*
>
> *'In determining whether to make a deportation order in relation to a person, the Minister shall have regard to - ...*
>
> *(h) humanitarian considerations. '*
>
> *... This statutory requirement pre-supposes that all relevant considerations*
>
> *- including humanitarian considerations - will be fairly examined prior to the making of a deportation order."*

25. In the present case, it is not clear that all relevant considerations are taken into account by the departmental decision-maker. The almost disdainful reference in the affidavit of the assistant principal referred to above about the medical evidence supplied by applicants suggests that such evidence is not given the weight that ought to be given by any decision-maker to the honestly held and properly reasoned views of qualified professionals. The department's mind-set as regards such evidence, as evinced in the assistant principal's affidavit, appears to be that the views of those professionals are necessarily coloured in favour of applicants and hence the views of its own medical experts are invariably to be preferred. Again, per the department's own correspondence of 23rd December, 2013, it would be 'highly unusual' were the views of such experts departed from by deciding officers, and in the case of the initial deciding officer in B.'s case such views were not departed from once in 3,806 cases.

Conclusion

26. For the reasons stated above, the court considers that the policy whereby deciding officers generally defer to the opinions of department medical assessors in the manner and circumstances described has yielded a situation in the instant case in which there has been an abdication of statutory duty by the deciding officer who decided B.'s initial application. Indeed the manner of implementation of such policy in the case of the deciding officer who decided B.'s initial application is such that the court finds it has vitiated the decision-making process employed in relation to that application; this is because the deference manifested by this particular deciding officer to the opinion of medical assessors has been proven to be so great that the court concludes that the medical assessor's opinion volunteered in the course of the consideration of B.'s initial application was in fact determinative of that application, thus resulting in a contravention of s.300 of the Social Welfare Consolidation Act, 2005, thereby tainting the decision-making process. Given the foregoing conclusions, the court orders that the decision made in relation to B.'s initial application be remitted to the Department of Social Protection for fresh consideration.