THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 200 J.R.]

BETWEEN

M.D.

APPLICANT

AND

MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 9th day of February, 2016

1. The applicant applied for domiciliary care allowance under the scheme created pursuant to chapter 8A of the Social Welfare Consolidation Act 2005 ("the Act of 2005"), as amended, in June, 2014 in respect of her son who suffers from a developmental disability, and of whom the applicant is the primary carer.

2. By a decision made on 8th September, 2014 the application was refused the allowance on the grounds that her son was not considered to be a "qualified child" within the meaning of the legislative provisions.

3. The applicant sought a review of the decision under the statutory scheme and submitted further documentation for that purpose. The deciding officer, in a letter of the 16th December, 2014 determined to make no revision of the original decision.

4. The applicant lodged an appeal of the decision to the Social Welfare Appeals Office, and for the purposes of that appeal separately sought that the respondent should carry out an independent physical assessment of the young boy.

5. On 13th March, 2015 the respondent refused the request for the carrying out of a physical examination. By that letter the respondent notified the applicant as follows:-

> *"In relation to the undertaking of a physical examination, it is not considered either necessary or beneficial to have a physical examination carried out as there is no dispute as to the diagnosis of [X] or to the fact that he needs extra care and attention. What is disputed is whether his condition is such as to require continuous or continual care and attention substantially in excess of that required by a child of his age without the condition."*

6. The applicant, after taking legal advice, and because she says she was unhappy at the pace of the process, by a letter of 17th April, 2015, withdrew her appeal.

7. Noonan J. on 25th April, 2015 gave the applicant leave to apply by way of judicial review for the following reliefs:-

a. an order of *certiorari* quashing the decisions of the respondent made on 8th September, 2014, the 16th December, 2014 and 13th March, 2015;

b. a declaration that the respondent is obliged by statute and/or by reasons of fair procedure, and natural and constitutional justice, to carry out a medical examination of the son of the applicant when there is a conflict of medical evidence;

c. a declaration that the decisions were made as a result of an error of law and/or as a breach of statutory duty and/or of the natural and constitutional justice required to be afforded to the applicant;

d. a declaration that the decisions were unlawful, invalid and vitiated for want of proper reasons, and/or that they were irrational, unreasonable and disproportionate;

e. a declaration that the respondent erred in law in making the said decisions in failing to properly consider all of the evidence.

8. The facts are not significantly in dispute. The applicant lodged a large body of supportive medical reports in support of the application, including reports from a physiotherapist, speech therapist, occupational therapist, and a psychologist. She asserts that this documentation offers such a degree and level of support for her application that the respondent's refusal of the allowance is irrational.

9. At the time of the statutory review the applicant had furnished further reports, including the report of a report from Professor Michael Fitzgerald, a consultant child and adult psychiatrist, from an occupational therapist, a psychotherapist, a speech and language therapist and a psychologist as well as a general report of an assessment carried out by the HSE on 9th October, 2014 which had used a wide range of assessment tools by experts in five discreet areas and which came to the determination that the young boy did have a disability "as defined by the Disability Act 2005". This is a lengthy report which inter alia recommended that the young boy's parents "should attend a structured parenting programme to support him in acquiring age-appropriate self-help skills, social skills and encouraging appropriate behaviour". There was also a suggestion that the family might be "offered further support… if deemed appropriate", and that his parents would be "given advice on how to support his development of social skills in context". In the case of the seven interventions or services which were recommended, six of them were recommended to be put in place "as soon as possible". Each of the reports supported an assessment that the young boy was below average in a number of fundamental social skills.

10. At the time of the review there were two separate reports available from the family GP who described the young boy's inability as "severe" in 12 identified skill areas.

11. Mrs. D. also supplied extracts from personal diaries from February, 2013 to September, 2014, showing more than 50 hospital and related appointments with her son.

12. The medical assessor first employed by the respondent stated in an opinion of the 7th July, 2014 that the medical evidence did not indicate that the young boy needed substantially more care and attention than that required by a child of his age without the disability. The applicant submitted further reports for the purpose of the renewal, including all of which it is argued are supportive of the application and indicate that the young boy does need extra support and assistance in his activities.

13. Without prejudice to those preliminary objections, the respondent argues that s. 186G of the Act of 2005, as amended, does not create a power to conduct a physical medical assessment in respect of a child who is not a qualified child within the meaning of chapter 8A of that Act, and that while a medical certification process is available and frequently engaged in connection with applications for other forms of benefits under the social welfare code, no power exists under the relevant legislation relating to applications for domiciliary care allowance for the carrying out of a physical medical assessment.

14. It is also denied that there was any conflict in the evidence before the deciding body, as that body accepted that the young boy did suffer from a condition which required additional care, albeit not at a level required to satisfy the statutory criteria.

15. It is denied further that there was a failure to give reasons, and/or that the decision was irrational or vitiated for want of proper intelligible and adequate reasons. It is asserted in that context that, while the respondent does have a general duty to give reasons for its decision, it does not have a duty to explain the details of each such decision. It is also asserted that the decisions by the deciding officers, who were persons with relevant experience and expertise, were neither unreasonable nor ambiguous.

The decisions of the 8th September, 2014 and 16th December, 2014
16. The first decision in respect of which relief is claimed issued on 8th September, 2014. The refusal letter enclosed the assessment report of the Department's medical assessor and it is clear it was prepared on a standard form and was a desktop assessment. The assessor considered that the applicant was ineligible for the reason explained as follows:-

> *"While I acknowledge that X has some special needs, the ME's provided to-date do not indicate the need for substantially more care and attention. The condition may improve/stabilise with specialist therapies."*

17. Mrs. D. sought a review and a further medical opinion was obtained from a medical assessor by the respondents which again was a desktop evaluation, and which gave as the reason why the applicant was considered not to be eligible as…

> *"The ME provided does not indicate the need for substantially more care and attention"*

The third decision: refusal of physical assessment
18. In a letter of 5th March, 2015 the solicitor for the applicant asked for confirmation that an "independent physical assessment" would be conducted in order to resolve the "conflict of medical evidence". The reply of 13th March, 2015 asserted that the deciding officers had "considered fully all the evidence submitted and the opinion of the medical professionals", and that the decision was considered fair and rational, based on the evidence submitted. It was suggested that the correct approach was that Mrs. D. should appeal. It was also said that a physical examination would not assist the decision maker in that it might "only provide a limited indication of the child's care needs at that point in time and not the complete picture", and that the daily and ongoing care needs would more properly be looked at in the context of the details provided by his parents and other care professionals.

The first ground of opposition: delay
19. The respondent makes a preliminary objection that the applicant is time barred in respect of the application relating to the decision of the 8th of September, 2014 and the 16th of December, 2014. I consider that as the two decisions are challenged on the same basis, and as the applicant was engaged in correspondence with the respondent she did not fail to made application promptly, and I adopt the *dicta* of Dunne J. in *Solovastru v Minister for social Protection* 2011 IEHC 532 (Unreported, High Court, 9th June, 2011) and conclude that she was *"attempting to deal with the matter otherwise than by recourse to legal proceedings"* and that there is good reason to extend time, and I so order.

The second ground of opposition: failure to exhaust remedies
20. Section 311 of the Act of 2005 provides for an appeal to an independent appeals officer, the decision of whom is subject to a further revision either by another appeals officer pursuant to s. 317, or by the Chief Appeals Officer pursuant to s. 318. The applicant did appeal, but on the 17th April, 2015 withdrew that appeal. It is argued that these proceedings constitute an impermissible attempt to circumvent the statutory appeals process.

21. Counsel for the respondent argues that the decision of Hanna J. in A.M. v. Minister for Social Protection [2013] IEHC 524 (Unreported, High Court, 25th October, 2013) is directly in point. At p. 10 of his judgment, Hanna J. said the following:-

> *"I have no doubt in my mind that Mr. and Mrs. M. are excellent parents, very concerned about G. and that G. has considerable challenges. However, the legislative framework provides for a comprehensive mechanism for a claimant to challenge the refusal of the DCA. The statutory appeals mechanism is the appropriate route for the applicant to take. The statutory appeals process still remains open to the applicant. It provides an efficacious procedure whereby the applicant can ventilate and, perhaps, remedy her complaints and concerns…This is the proper and appropriate route to follow."*

22. Hanna J. also considered that further protection was afforded by the fact that the Appeal Board could enlist the aid of the High Court on any question of law which arose on appeal.

23. The starting point on the role of the court in granting judicial review where an applicant has not exhausted other remedies is *State (Abenglen Properties Ltd.) v. Corporation of Dublin* [1984] I.R. 381, where the Supreme Court refused to grant an order for certiorari of a decision of the local authority on the grounds that the applicants had a right of appeal to the Planning Board which would engage a de novo hearing on such appeals. The dicta from the judgment of O'Higgins C.J. At p. 393 is often quoted:-

> *"The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the*

exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

24. Further, certiorari is a discretionary remedy as explained by Denham J. in *O'Donnell v. Tipperary (South Riding) Co. Council* [2005] 2 I.R. 483 where she adopted the reasoning in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 as follows:-

"Once it is determined that an order of certiorari may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of certiorari should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of certiorari is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether certiorari is the appropriate remedy to attain a just result."

25. As Hedigan J. said in *B.N.N. v. Minister for Justice* [2009] 1 I.R. 719 (at p. 732 of his judgment) the court should be slow to quash a decision when an alternative remedy in the form of an appeal is available to an applicant.

26. I consider that that general approach is correct. Judicial review is available when it is clear on the arguments or evidence before the High Court that an available statutory appeal cannot remedy the identified defect or error.

27. The decision of Hanna J. in *A.M. v. Minister for Social Protection* was appealed to the Court of Appeal, and judgment was given by Irvine J. on behalf of the Court in *Malone v. Minister for Social Protection* [2014] IECA 4 (Unreported, High Court, 10th December, 2014). By that stage, the applicant had exercised its statutory right of appeal and the appeal was allowed with retrospective effect. The question for the Court of Appeal then was whether it would engage in the appeal, as it was arguably moot. In the course of her judgment, Irvine J. dismissed the appeal on the grounds that the issues raised were indeed moot, but counsel for the applicant seeks to distinguish the decision of Hanna J. in reliance on the statement at para. 30 of the judgment of Irvine J.:

"The findings appealed against are facts specific to the application made by Ms. Malone for the DCA... the finding was one made entirely by reference to the specific facts concerning the initial application made for the DCA and the wording of the decisions made referable to those facts by the relevant deciding officer."

28. Later at para. 34 she said the following:-

"In the present case the learned trial judge did not make any declaration as to the meaning of any statutory provision such as would determine the manner in which the respondent would be obliged to carry out its statutory obligations when dealing with the applicant or indeed anyone else on any future occasion."

29. I reject the argument of counsel for the applicant that the decision of Hanna J. in *A.M. v. Minister for Social Protection* is not binding on me or can readily be distinguished because the decision of Hanna J. was specific to its facts. I can find no distinguishing fact or factor in the present case that would allow me to depart from the reasoning of Hanna J. and which is consistent with established jurisprudence. Any difference is one of the nature and quality of the evidence and I do not interpret the judgment of Irvine J. as pointing me to any requirement or entitlement to examine the facts before the deciding officer. The "fact specific" findings referred to by Irvine J. in her judgment are the findings with regard to the giving of reasons, the availability of an appeal and the argument that a medical assessment was mandated. Each of those arguments is made also in the present case.

30. Accordingly I consider that the decision of Hanna J. in *A.M. v. Minister for Social Protection* is so close to the facts in this case that his judgment does bind me with regard to the approach he adopted to the availability of alternative remedies.

31. The appeal process available under the statutory scheme is robust and independent, and does, I consider, address what counsel describes as "procedural infirmities". It allows for an oral hearing and the opinions of the medical assessors are now taken off the file. Indeed Mrs. M did successfully appeal the refusals and the result of the appeal was retrospective such that she suffered no prejudice.

32. The appeal, to an appeals officer, is a de novo appeal as is clear from my judgment in *O.B. v. Chief Appeals Office* [2014] IEHC 485 (Unreported, High Court, 21st October, 2014). I am advised that it is current practice that the opinion of the medical assessor is removed from the file sent to the Appeals Officer and this follows from a number of decisions in the High Court including *L.D. v. Chief Appeals Officer* [2014] IEHC 641 (Unreported, High Court, 19th December, 2014) and *Smith v. Chief Appeals Officer* [2014] IEHC 633 (Unreported, High Court, 19th December, 2014).

33. It is not for me to say whether the appeal of the applicant in the present case is lightly to be successful, but the arguments that she makes before me with regard to the weight of evidence supportive of her application may properly to be made before the appeals officer. She may seek an oral hearing and seek to cross-examine or challenge any evidence tendered by the respondent. She herself can give evidence of the considerable amount of care and attention that she clearly does give to her son on a daily basis and which she says is significantly in excess of that which he would need absent his disability.

34. I consider the application for certiorari to be premature and refuse to grant a decree of certitiori in those circumstances.

35. However, the applicant makes a number of other claims to which I now turn.

Requirement to carry out of a physical assessment

36. I do not consider that counsel for the applicant is correct that the only means by which the deciding officer could resolve what he describes as a "conflict of evidence" was to require a physical examination of the young boy, and how a decision maker is to resolve to his or her satisfaction a factual matter, and the means by which a decision maker is to come to a determination, is not one that can be preordained by any declaration of this Court, or indeed by any preordained formula. Furthermore, I consider that counsel for the respondent is correct that there is no statutory basis on which the medical assessment can be carried out in the manner

alleged by the applicant. Section 186G of the Act of 2005, as amended, is called in aid by the applicant in his argument that the medical assessment must be conducted. That section states:-

> *"(1) a qualified child in respect of whom domiciliary care allowance is in payment shall attend for or submit to such medical or other examination as are required in accordance with Regulations."*

37. The applicant is not in receipt of the care allowance, and therefore s. 186G has no application to her case. There is no power contained in the statutory regime to enable the deciding officer to call for a medical assessment to be conducted. I accept that on an interpretation of s. 186G, the power does not arise unless the allowance is in payment and there is no freestanding power under sub. (2). The respondent cannot be compelled to require the conduction of an independent medical assessment, as no obligation arises under statute, and the statutory power arises only in respect of a later stage in the process.

38. Having regard to the fact that the process engaged in the application for the allowance was entirely a creature of statute, I do not consider that the court may intervene in the manner in which that process is engaged by the respondent for the purposes of directing a particular approach to evidence or to any perceived or even admitted conflict of evidence.

39. Hanna J., having regard to s.186G, held that "medical exams are only required in rare situations". Because it does not seem to me that the definition of "relevant person" contained in s. 179 of the Act was opened to Hanna J., and because his comment was obiter, I am not bound by it. I consider that on a true interpretation of s. 186 G, there is no power in the deciding officer to require or order that a medical assessment be carried out, save in regard to a person on whose behalf a payment is already being made.

40. I consider that the decision is justiciable, it is one relating to the application and interpretation of statutory powers in the context of an application for a statutory entitlement, and therefore amenable to review by this court. I consider that no error of interpretation was made by the deciding body.

Was the decision irrational?
41. The respondent accepts that, had it not been accepted at all by the decision makers that the young boy did suffer a disability, the decision to refuse the allowance would arguably have been irrational. However, the decision was not based on such an approach, and it was accepted, and this is clear in the evidence on affidavit, that the young boy does have a disability. The finding of a decision that an administrative body is irrational is one that the court will not likely make as is clear from the case law. Decisions of particular note are the decisions of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39; *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 and in what remains the leading case, *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] 1 I.R. 462, where the Supreme Court said that a decision would be considered irrational only if it flew in the face of common sense and fundamental reason or that it was a conclusion "so unreasonable that no reasonable authority could ever have come to it".

42. I accept that the applicant has pointed to a weighty portfolio of documents and reports furnished in support of her application, and she points to the paucity of documentation which supports the contra view. However, I do not believe that I can come to a conclusion that the decision of the deciding officer, an expert body with particular knowledge of the questions that arise in the context of an application for domiciliary care allowance, is irrational and fundamentally at variance with common sense or good reason. That is not to say that I consider the decision to be correct and that is not a matter for me to determine at this hearing, but rather I conclude that I cannot determine that the decision is incapable of being supported on any rational basis.

43. Therefore, I reject the argument that the decision is irrational.

Failure to give reasons
44. My approach must be governed by the decision in an almost identical set of facts delivered by Hanna J. in *A.M. v. Minister for Social Protection*. That was also an application for judicial review of a refusal on the part of the respondent to award domiciliary care allowance to the applicant in respect of the care of her child. Hanna J. refused judicial review on a number of grounds. With regard to the argument that the decision lacked proper or adequate reasons, he concluded at p. 8 of his judgment that the decision *"reflects the language of the governing statutory criteria for qualifications"* and that it appeared to him to be *"sufficiently detailed and adequate"* to explain the decision. He went on at p. 11 of his judgment to say as follows:-

> *"In this case I find the reason of the 10th May, 2012 for refusal to grant the DCA is clear and unambiguous. The threshold simply has not been reached in light of the evidence submitted…. Furthermore the reasons given were sufficient to enable the applicant to request a revision of the decision (s.301 of the 2005 Act), to appeal the decision under s. 311 et seq of the 2005 Act and/or to seek relief by way of judicial review. This language was reflected in the decision on the 22nd and 26th October, 2012 and I am satisfied that adequate and identifiable reasons were given. There is not an obligation on the Department to explain its decisions in detail but rather to inform applicants of the grounds for the decision so that the appeal is not impaired. Decision makers should not have to provide reasons that are extremely detailed explaining every step of the decision as this would render the process unworkable."*

45. Hanna J. was dealing with precisely the statutory regime as is engaged in the present case, and almost identical grounds of review were advanced. Counsel for the applicant argues that the strength of the evidence in *A.M. v. Minister for Social Protection* was considerably less than that now advanced by this applicant, and while that may be so, it seems to me that his argument is misplaced in that it suggests I have a jurisdiction, which I do not have, to engage with the facts of the case, or to assess the weight of the evidence. I cannot distinguish the judgment of Hanna J. in *A.M. v. Minister for Social Protection* merely on account of the fact that the evidence in the present case has a greater weight nor has a different quality or value than that proffered to the decision maker in the case before Hanna J.

46. It is well established in the authorities that the primary reason a deciding body must give reasons is to enable the person receiving the decision to be in a position to make a coherent decision whether to appeal that decision, or, in the case of an application such as the present one, to be in a position to understand whether further or different evidence might be needed on a fresh application.

47. The applicant has already lodged an appeal, so clearly she had sufficient information and reasoning available for her to make an assessment as to the issues on appeal, and she knew in particular that the issue was not whether her son suffers from the identified disability, but the effect and degree of effect of that disability on his ordinary life and his care needs.

Failure to consider the evidence
48. However, the requirement that an administrative body give reasons is founded on more than the proposition that the giving of

reasons is necessary to enable an applicant to make an informed decision on whether to appeal or seek to judicially review a decision. To consider that the sole or overreaching purpose of the giving of reasons is to assist in the making of a choice to appeal or review, is to ignore the place of Constitutional and natural justice in the decision making process. The particular imperative in the present case is that the decision be made after a consideration of the individual facts. This is a concrete realisation of the rule of *audi alteram partem.*

49. I consider that Kelly J. correctly identified the rationale for the giving of reasons in *Mulholland v An Bord Pleanala* (No. 2) 2006 1 I.R. 453 at para. 34:

> *"The obligation at (b) above to state the considerations on which a decision is based is, of course, new. I am of opinion that, in order for the statement of considerations to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must therefore be sufficient to:-*
>
> *(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;*
>
> *(2) arm himself for such hearing or review;*
>
> *(3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and*
>
> *(4) enable the courts to review the decision.*
>
> *Thus, the criteria which must be met for the statement of considerations are precisely the same as those which apply in respect of the statement of main reasons."*

50. The third requirement was not addressed by Hanna J. in *A.M. v. Minister for Social Protection* and I turn now to consider whether it offers the applicant a basis for review

51. In the letter dated 5th March, 2015, the solicitor for the applicant makes the argument that the deciding officer had totally failed *"to engage with the evidence actually presented".* It was suggested that the rejection was a *"standard rejection letter",* and that no "balancing exercise" had been engaged between the internal medical assessors and the substantial medical and other evidence furnished by the applicant in support of her application.

52. This reflects the complaint made by Barrett J. in *B. v. Minister for Social Protection* [2014] IEHC 186 (Unreported, High Court, 1st April, 2014), where he took the view that the respondent had failed to fully engage with the facts by engaging in a *"desk-top review"* through its medical assessors who have no personal knowledge of the individual case at hand. He considered that this did not represent *"a proper exercise of her decision making powers"* and that the practice of deference to the opinions of Departmental medical assessors was a derogation of statutory duty.

53. Two short and general reports from the medical assessors of the Department were available, each conducted after a desktop assessment, neither of which expressly deals with the details of the assessments proffered by the applicant, nor identifies the factors they found relevant, nor the elements of the evidence available from her which were considered as insufficient to support the application. The reports were in identical, or almost identical terms, and followed almost exactly the formula contained in the legislation, were devoid of factual content or analysis, and expressed a view that the legislative test was not met, using the precise language of the section.

54. I am of the view that the material before the deciding body did not make available a factual basis on which the deciding officer could engage the full decision making process, and compare or weigh the factors supportive of each position. The assessment being carried out by the deciding officer could not be conducted in the absence of a useful basis on which he or she could judge the factual question before her, and any determination on an application for the allowance to be decided by testing the evidence actually presented.

55. The reasons given by the deciding officer, and on the review, followed the language of the section, and show no analysis of the evidence and no consideration of the individual factors. While I accept that the decision was one for the deciding officer and not the medical assessor, the general reports from the medical assessor gave no useful analysis or comment on the evidence submitted by Mrs. D. in support of her application. I consider that they do not enable the decision maker to employ a coherent or objectively ascertainable engagement with the facts.

56. While an appeal is an appropriate remedy in the present case, and while I consider in those circumstances that in my discretion I should refuse to grant certiorari, in my judgment the decision making process as presented by the respondent, and the evidence which formed the basis of those decisions, do not show a decision making process that engaged with the evidence in a meaningful way. I consider in those circumstances that the applicant has made out an argument that the decision maker failed to properly consider all of the evidence furnished by the applicant.

57. Accordingly, I propose to make the declarations sought at para. 6 of the Statement of Grounds, that the Respondent in the decisions of 8th September, 2014 and 16th December, 2014 erred in law and breached fair procedures, natural and constitutional justice, by failing to properly consider all of the evidence furnished by the applicant.