APPROVED **[2024] IEHC 675**

THE HIGH COURT
JUDICIAL REVIEW

2024 1045 JR

BETWEEN

L.

APPLICANT

AND

CHIEF APPEALS OFFICER
SOCIAL WELFARE APPEALS OFFICE
MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 November 2024

INTRODUCTION

1. This judgment is delivered in respect of an *ex parte* application for leave to apply for judicial review. The principal issue addressed in the judgment is whether leave to apply should be refused by reason of the fact that there is an adequate alternative remedy available to the Applicant. More specifically, it is necessary to consider whether the statutory right to seek a "*revision*" of the appeals officer's decision, pursuant to section 317 of the Social Welfare Consolidation Act 2005, represents an adequate alternative remedy.

LEGISLATIVE FRAMEWORK

2. These judicial review proceedings concern a claim for a form of social welfare benefit known as "*domiciliary care allowance*". This benefit takes the form of a monthly payment to the carer of a child with a severe disability. The eligibility criteria are prescribed under Chapter 8A of the Social Welfare Consolidation Act 2005. The principal criteria are prescribed as follows under section 186C of the Act:

   (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.

3. The Supreme Court has held, in *Little v. Chief Appeals Officer* [2023] IESC 25, that eligibility must be assessed as of the date of the making of the application for domiciliary care allowance. This is so even in the case of an appeal or a revision of an appeals officer's decision. In each instance, the index date is the date of the making of the application for domiciliary care allowance (not the later date of the appeal or revision). The Supreme Court held (at paragraph 56) that a change in circumstances must now trigger a *new* claim for benefit rather than the revision of an earlier claim.

4. The practical consequence of this is that, in cases where the child has been diagnosed with a severe disability on the basis of an assessment carried out *subsequent* to the date of the application, the claimant should submit a *fresh*

application rather than seek to pursue an appeal or revision or judicial review proceedings.

5. The Social Welfare Consolidation Act 2005 provides for the preparation of a written opinion by a medical assessor appointed by the Department of Social Protection. A medical assessor is required (a) to assess all information provided to him or her in respect of an application for domiciliary care allowance, and (b) to provide an opinion as to whether the child satisfies the principal eligibility criteria. It is expressly provided that a deciding officer shall "*have regard to*" the opinion of the medical assessor.

6. The decision-making procedures are prescribed under Part 10 of the Social Welfare Consolidation Act 2005. The legislation provides for two tiers of decision-making. The first-instance decision is made by a deciding officer. Thereafter, there is a right of appeal. Appeals are generally determined by appeals officers, but there is also a formal right to refer any particular appeal decision to the Chief Appeals Officer (section 318). The legislation also provides a right of appeal on a question of law to the High Court (section 327).

7. The striking feature of the legislation is that provision is made for the "*revision*" of both the first-instance decision and the decision of the appeals officer. In effect, a claimant who is dissatisfied with the decision can request same to be revisited. This has the practical consequence that a decision by an appeals officer is not necessarily an end of the matter. As discussed below, the Court of Appeal has held that a claimant may be required to exhaust their right to seek a revision before having recourse to the High Court. See paragraphs 24 and onwards.

8. It may be helpful to the reader to highlight two further aspects of the appeals process as follows. The Social Welfare (Appeals) Regulations 1998 (S.I. No. 108 of 1998) (as amended) make provision for certain information to be furnished to the appeals officer. This is provided for under article 10 (as substituted by the Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505 of 2011)):

> "In the case of an appeal against the decision of a deciding officer or the determination of a designated person under section 311, the Chief Appeals Officer shall cause notice of the appeal to be sent to the Minister who shall, as soon as may be, furnish to the Chief Appeals Officer—
>
> (a) a statement from the deciding officer or the designated person or on his or her behalf showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed, and
>
> (b) any information, document or item in the power or control of the deciding officer or the designated person, as the case may be, that is relevant to the appeal."

9. As explained below, one of the complaints made in the present proceedings is that neither the statement of the deciding officer nor the accompanying documentation had been circulated to the Applicant by the appeals officer.

10. The Regulations also make provision for the possibility of an oral hearing as follows. Article 13 provides that where the appeals officer is of the opinion that the case is of such a nature that it can properly be determined without a hearing, he or she may determine the appeal summarily. (This is subject to a proviso that the Minister can direct an oral hearing).

PROCEDURAL HISTORY

11. The Applicant submitted a claim for domiciliary care allowance in relation to his daughter. The claim is recorded as having been received on 10 July 2023. As of that date, his daughter had been diagnosed with development coordination disorder ("*DCD*"). The Applicant's daughter has since been diagnosed with autism spectrum disorder. This latter diagnosis was made on 17 August 2024, i.e. at a date subsequent to the making of the claim for domiciliary care allowance. Having regard to the principles in *Little v. Chief Appeals Officer* [2023] IESC 25, this diagnosis is not something which can be taken into account *ex post facto* for the purposes of the claim for domiciliary care allowance which had been made in 2023.

12. The first-instance decision was made on 22 August 2023. The deciding officer summarised the decision as follows:

> "While I recognise that [name redacted] needs some additional care, it has not been possible based on the evidence submitted, to establish that [name redacted] requires a level of care and attention substantially in excess of that normally required by a child of the same age and that the level of disability is such that they are likely to require full-time care and attention for at least 12 consecutive months.
>
> This decision does not mean that I don't consider that your child has a disability or that they don't need additional care. The nature of your child's condition is not disputed and it is clear from your application that your child does require additional care and attention. However, the evidence submitted does not demonstrate that the level of additional support required is substantially in excess of that required by a child of the same age without their condition and that, that level of care is likely to be required for at least 12 consecutive months, as provided for in the qualifying conditions for the scheme."

13. It is relevant to note, having regard to the submissions now made, that the deciding officer indicated that he had regard to the opinion of the Department's

medical assessor and that a copy of this opinion had been attached to the decision-letter for information. The medical assessor's opinion dated 15 August 2023 has been exhibited. It is apparent from the content of same that the medical assessor had not examined the child. Rather, the opinion is based on a review of the documentation which had been provided by the Applicant as part of the application.

14. The Applicant submitted an appeal under cover of letter dated 5 September 2023. The appeal is an admirably comprehensive document and addresses the day-to-day care needs of the Applicant's daughter. Relevantly, the appeal makes criticism of the medical assessor's opinion. It is apparent, therefore, that the Applicant had a copy of the opinion available to him and had been in a position to make detailed submissions on the content of same.

15. The Applicant stated as follows in his appeal:

> "I want to thank you in advance for the time that you will take to consider my appeal. I trust that it will be reviewed carefully, and I look forward to hearing from you soon. Please note that I would enthusiastically welcome the opportunity to speak with you in person to discuss our situation further."

16. The Applicant was notified of the appeals officer's decision under cover of letter dated 24 May 2024. The necessity, if any, for an oral hearing was addressed as follows:

> "The appellant refers to an opportunity to discuss the matter in person. The appeals officer is of the opinion, given the very detailed and extensive range of documents provided with the application and appeal, which include very detailed submissions from the appellant and detailed reports from the professionals that his child has attended, that an oral hearing is not required in this case."

17. In accordance with article 10 of the Social Welfare (Appeals) Regulations 1998 (as amended), the appeals officer sought a statement from the deciding officer,

and relevant documentation, from the Minister. This was done by letter dated 20 September 2023. The letter, in relevant part, reads as follows:

> "The above named has sent the attached notice of appeal of decision to this office.
>
> Please forward a statement, together with the signed decision and all relevant papers, so that this appeal may be processed. The Department's target for provision of the documents is 3 weeks from the date of this letter.
>
> Regulations provide that the Minister shall furnish a statement from the Deciding Officer or on his/her behalf, showing to what extent the facts and contentions advanced by the appellant are accepted or rejected. However, the decision under appeal may be revised by a deciding officer if it appears to be warranted in the light of new facts or evidence now provided. (Section 301(1) of the Social Welfare Consolidation Act, 2005).
>
> Where the decision has been revised, please notify this office so that the appeal may be recorded as closed."

18. This request was responded to on behalf of the Minister by the Department of Social Protection. For ease of exposition, the response will be referred to by the shorthand "*the Department's submission*".

19. The Department's submission was not furnished to the Applicant as part of the appeal process. However, the Applicant has since obtained a copy of the Department's submission by way of a request pursuant to the Freedom of Information Act 2014. The FOI request had been made on behalf of the Applicant by his solicitor. The response to the FOI request has been exhibited in these judicial review proceedings.

20. The Department's submission comprised a two page document. It appears that the submission had been accompanied by additional documentation collated under a number of tabs as follows:

TAB A Request for an appeal

TAB B Application form for Domiciliary Care Allowance

TAB C Decision letter of 22 August 2023

TAB D Evidence in respect of application

21. It should be explained that the format in which the documents have been presented in response to the FOI request is different. In particular, there are no individual tabs as such. The request for an appeal, the application form, and the decision-letter have been scheduled separately as part of the response to the FOI request. It appears that some of the documentation which had been included as part of the initial application for domiciliary care allowance may not have been furnished as part of the response to the FOI request. This documentation included, for example, a medical report from the child's general medical practitioner and a letter confirming a diagnosis of developmental coordination disorder.

22. The manner in which the material has been presented in the FOI response has given rise to a concern on the part of the Applicant that there may have been additional materials before the appeals officer of which the Applicant is unaware. However, the Applicant did not exercise his right of appeal under the Freedom of Information Act 2014 notwithstanding that his solicitor had been notified of same as part of the response to the FOI request. I will return to this issue of the documents at paragraphs 28 to 34 below.

23. The Department's submission, in large part, merely recites the procedural history. It also indicates that, in response to the appeal, the deciding officer considered whether a revision of the original decision might be warranted. It is stated that the deciding officer, having considered the application in full together

with the opinion of the medical assessor, had decided that their decision "*remains unchanged*", i.e. a revision of the original decision was not warranted.

ADEQUATE ALTERNATIVE REMEDY

24. Section 317 of the Social Welfare Consolidation Act 2005 (as amended by the Social Welfare and Pensions (No. 2) Act 2013) provides, in relevant part, as follows:

> "(1) An appeals officer may at any time revise any decision of an appeals officer—
>
> (a) where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given, […]"

25. The nature of the statutory power of revision has been explained by the Court of Appeal in *F.D. v. Chief Appeals Officer* [2023] IECA 123 as follows (at paragraphs 42 and 43):

> "The breadth of the revision provisions is, possibly, unique in the field of the administration of public law. The Act provides extensive rights to seek to revise the decisions of both the deciding officers and the appeals officers. It is noted that s. 301 provides the deciding officer with not only the jurisdiction to, *inter alia*, revise on new facts or new evidence, but also to revise by reason of some mistake having been made in relation to the law or the facts. Section 317 only provides jurisdiction to the appeals officers to revise where new facts or new evidence are put before him or her. Lest it be thought that there was no power to revise an appeal decision for a mistake of law or facts, s. 318 provides that the Chief Appeals Officer has that jurisdiction. The respondents also pleaded the availability of the s. 318 mechanism in their statement of opposition but, in the High Court as in the appeal, they focused on s. 317. It also bears repetition that the power of revision includes the power to hold an oral hearing and the right to review a decision not to grant an oral hearing.
>
> The extent of the powers of revision and the remedial intent behind those powers distinguish these social welfare appeals

> from those concerning immigration, criminal procedures, and other areas of law. What is envisaged in the 2005 Act is as broad a scheme of review as possible of assessments and the entitlement to allowances/benefits. […]"

26. The Court of Appeal rejected an argument on behalf of the claimant in that case that the right to seek the revision of an appeals officer's decision did not represent an adequate alternative remedy to judicial review (at paragraphs 49 and 50):

> "[…] The reasons for imposing a requirement to exhaust alternative (adequate) remedies include that a statutory system of appeals will be more effective and convenient than an application for certiorari, that the Oireachtas has provided specialist bodies with specialist expertise and that issues of judicial resources may arise. For these reasons, it would not usually be appropriate for the court to engage in deciding the substantive issue as a precursor to deciding an alternative remedy exists.
>
> That said however, a court must have some regard to the underlying grounds upon which the substantive claim for relief is made. That may be the only way the court can assess whether the issue is one which would bring it within the exception to the rule of exhausting alternative remedies. For example, the court would have to assess whether the claim amounted to a fundamental denial of fair procedures or is one that is based on a lack of jurisdiction. If that were the case, then the discretion to refuse jurisdiction may not be exercised by the court hearing the application. As stated above however, the exercise of the court's discretion must be dependent on a wide range of factors. In the present case, the decision was made by the appeals officer on the basis that he was fully satisfied that he could properly determine and make a fair decision in the appeal summarily based upon the available evidence. The appellant had the opportunity, both before the appeal decision itself and after the decision by way of application for a revision, to put forward any further evidence that would support her contention that an appeal [*recte*, oral hearing] was required. The fact that she possessed the opportunity to request a revision so that she could have an oral hearing was, on the facts of this case and in the context of the scheme of the 2005 Act, an alternative remedy to which she ought to have had recourse."

27. As appears, in assessing whether the right to seek a revision would represent an adequate alternative remedy, it is necessary, to an extent, to have regard to the grounds upon which judicial review is sought. The purpose of this exercise is not to attempt to determine the underlying merits but rather to assess whether, on the assumption that the grounds were well founded, same could be adequately addressed by way of the revision of the (initial) decision of the appeals officer.

28. The principal ground of challenge advanced in the present proceedings is that the failure of the appeals officer to convene an oral hearing was unfair. It is further contended that this unfairness was compounded by the following considerations. It is said that the appeals officer did not provide the Applicant with a copy of the submission made by the Department of Social Protection as part of the appeal process. It is further said that even now the Applicant has not been provided with a complete version of the Department's submission in that—or so it is alleged—the documentation described as "*Tab D*" has not been furnished. Put otherwise, it is contended that the appeals officer, having received the Department's submission, should have circulated same to the Applicant and afforded him an opportunity to respond to same.

29. The nature of the Department's submission has already been described at paragraphs 18 to 23 above. In effect, it consisted of little more than a narrative of the procedural history, together with confirmation that the deciding officer had considered—and decided against—a revision of the original decision. It is difficult to conceive that any of this can have taken the Applicant by surprise nor that there is anything new which would have required to be responded to.

30. At all events, the Court of Appeal in *F.D. v. Chief Appeals Officer* indicated (at paragraph 47) that a failure to circulate the deciding officer's submission is the type of thing which can be dealt with by way of a statutory revision.

31. The Applicant's concern that certain of the documentation, which had been appended to the Department's submission on the appeal, has still not been furnished to him appears to be misplaced. The concern centres on the reference, in the Department's submission, to "*Tab D*". Presumably, this is a reference to the evidence which the Applicant himself had submitted to the deciding officer as part of his claim for domiciliary care allowance. This evidence included, for example, a medical report from the child's general medical practitioner and a letter confirming a diagnosis of developmental coordination disorder. The "*available evidence*" which had been considered by the deciding officer is expressly enumerated in the decision-letter of 22 August 2023.

32. There is nothing in the wording of the Department's submission on the appeal which might suggest that Tab D contained any documentation other than that which the Applicant himself had provided to the deciding officer.

33. Had the Applicant any concerns in this regard, it had been open to him to request a review pursuant to the FOI Act 2014. This could have clarified any residual doubt as to what had been contained at Tab D. The existence of a right of review had been expressly notified in the letter of 6 June 2024. It is, perhaps, telling that the Applicant did not pursue this avenue.

34. At all events, the complaints which the Applicant seeks to pursue in these judicial review proceedings are ones which are capable of being fully addressed by way of revision pursuant to section 317 of the Social Welfare Consolidation Act 2005. The Applicant now has a copy of the Department's submission and

had been provided with a copy of the medical assessor's opinion in advance of the appeal. The Applicant is entitled to confirmation that there had been no additional material before the appeals officer, over and above that of which the Applicant has previously been informed. If there had been any additional material, same should be provided to the Applicant. The Applicant can then request that the appeals officer's decision not to convene an oral hearing be revised. In support of this request, the Applicant can articulate all of the points made in his statement of grounds as to why it is that he contends that an oral hearing and cross-examination is necessary. These points will have to be considered by the appeals officer.

APPEAL TO HIGH COURT ON A QUESTION OF LAW

35. Section 327 of the Social Welfare Consolidation Act 2005 provides, in relevant part, that any person who is dissatisfied with the decision of an appeals officer on any question may appeal that decision to the High Court on any question of law. Absent some unusual limitation arising from the terms of the statute conferring the right of appeal, the presumption is that an appeal of this kind is intended to both supplant and enlarge the remedies provided for by way of an application for judicial review: *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 91, [2022] 2 IR 686 (at paragraph 138).

36. Having regard to the finding (under the previous heading) that leave to apply for judicial review should be refused in the present case because the existence of a right to request a revision of the appeals officer's decision represents an adequate alternative remedy to judicial review, it is unnecessary to consider the separate issue of whether leave should be refused by reference to the right of appeal to

the High Court. It is sufficient simply to note that there is a respectable argument that the circumstances in which it will be appropriate to invoke the High Court's general supervisory jurisdiction by way of judicial review, in preference to the appeal to the High Court on a question of law, will be limited if not ousted entirely.

CONCLUSION AND FORM OF ORDER

37. For the reasons explained, the *ex parte* application for leave to apply for judicial review is refused. Having regard to the grounds of challenge, the existence of a right to request a revision of the appeals officer's decision, pursuant to section 317 of the Social Welfare Consolidation Act 2005, represents an adequate alternative remedy to judicial review.

38. Finally, it should be reiterated that the index date for determining eligibility for domiciliary care allowance is the date of the making of the application for the allowance. The practical consequence of this is that, in cases—such as the present—where the child has been diagnosed with a severe disability on the basis of an assessment carried out *subsequent* to the date of the application, the claimant should submit a *fresh* application rather than seek to pursue an appeal or revision or judicial review proceedings.

Appearances
Derek Shortall SC and Maeve Cox for the applicant instructed by KOD Lyons LLP