THE COURT OF APPEAL

Record No. 2014 1245

[Article 64 transfer]

Irvine J.
Hogan J.
McDermott J.

BETWEEN/

C.S.B.

APPLICANT/

RESPONDENT

- AND -

THE MINISTER FOR SOCIAL PROTECTIO N

RESPONDENT/

APPELLANT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 20th day of April 2016

1. This is an appeal brought by the Minister for Social Protection against the decision of Barrett J. in the High Court delivered on 1st April 2014 which quashed two separate decisions of the relevant deciding officer delivered on 21st May 2013 and 1st July 2013 which refused to grant a domiciliary care allowance to the applicant: see *B. v. Minister for Social Protection* [2014] IEHC 186.

2. The applicant, Ms. B., is the mother and primary carer of R., who is now a seven year old boy. He was diagnosed with high functioning autism on 14th February 2013 on foot of a Health Service Executive Multi Disciplinary Team assessment. Although the team acknowledged in this assessment that R. was "a very capable boy", the assessment further suggested that R. met the criteria for an allowance known as the domiciliary care allowance. This is an allowance payable in respect of children with disabilities whose care and attention is substantially in excess of that required of a child of the same age.

3. While the diagnosis is one which, perhaps, speaks for itself, it should perhaps also be stated that while the diagnostic team expressed the view that R. met the criteria for the allowance, no precise reason for their conclusions that he required care and attention substantially in excess of that required by a child of the same age was, as such, given. It might also be observed that the clinicians also recognised that R. was a "healthy young boy who appears to be bright" and that he has "good self care skills."

4. In the course of her application Ms. B. set out the difficulties which she encountered in respect of the care of her son. These included the fact that he was a messy eater and rubbed food into himself; that he had difficulties with zips and buttons; that he needed to be supervised with toilet facilities; that he sometimes got up at night and stayed awake for hours at a time; that completion of work sheets required a parent to sit with him; that he frequently experienced tantrums and rages and that his play outside needed to be supervised.

5. The applicant's application for the allowance was, however, refused by decision dated 16th May 2013 on the basis that the statutory criteria were not met. The applicant then sought a statutory review which was treated as an appeal. A later review - which had been requested by the applicant's legal advisers - was also unsuccessful.

6. The reason given by the deciding officer, Ms. Mahon, for the decision of 16th May 2003 was that the medical evidence provided did not indicate that the extra care and attention required by him was 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, acknowledged that R. had high functioning autism, but added:

> "While [R.] has additional care needs, especially delayed social and communication skills, the medical evidence submitted to date does not indicate a disability so severe requiring substantially extra care."

7. By letter dated 22nd May, 2013, Ms. B. sought a statutory revision of this decision pursuant to s. 301 of the 2005 Act. By decision dated 1st July, 2013, another deciding officer of the Minister for Social Protection (namely, Mr. Baldrick himself) undertook a revision of the decision and, following receipt of another medical assessor's opinion, nonetheless affirmed the decision of 16th May, 2013. The second medical assessor had stated that:

> "I appreciate that [R.] requires extra attention secondary to high functioning autism. However, the overall need for continuous care and attention, based on medical reports submitted, is not substantially in excess of that [required by] a four year old child."

8. It is clear that both sides agreed that R. had a disability (high functioning autism) and that he required extra care and attention. In effect, therefore, the difference between the parties centred on whether this additional care and attention was "substantially" in excess of that required by a child of his age.

9. The essential issue before the High Court and, again, on appeal to this Court, is Ms. B.'s contention that the Department of Social Protection in effect operates a policy whereby the opinions of its medical assessors are dutifully followed by departmental deciding officers, irrespective of the medical evidence actually submitted by claimants such as Ms. B. In support of this contention, the solicitors for Ms. B. have utilised the Freedom of Information Act 1997 (as amended) to obtain further information regarding the decision-making process that obtains within the Department for Social Protection. The solicitor for Ms.B., Mr. Gareth Noble, averred in an affidavit dated 21st November 2013 that the Freedom of Information request showed that:

> "…it was stated that Officer A, who I believe to be [the initial deciding officer in Ms. B.'s application]...made 2,224 positive decisions and 1,582 negative decisions. A total of 3,806 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 further letter dated 23rd December, 2013, from the Department to Mr. Noble stated:

> "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. An affidavit of 5thFebruary, 2014, sworn by Mr. Roy Baldrick, an assistant principal, of the Department of Social Protection set out the Minister's position:

> "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 [Ms. B.'s son]...required care and attention substantially in excess of what is required by a 4 year old child There is, in fact, no conflict of medical evidence - rather there is a difference between the opinion formed by the applicant's doctors who understandably are advocating on behalf of the applicant and her son and the opinion of the medical assessor whose function is to provide to the deciding officer an independent medical opinion having assessed the information and facts provided.
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> 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 the criteria had not been fulfilled but 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 [information technology] system it is not possible to quantify the frequency or volume of such clarifications/referrals, however from my personal experience I am aware that such exchanges do take place between deciding officers and medical assessors ..."

12. Pausing at this point, I agree with the argument advanced by counsel for the applicant, Mr. Shortall, that it would have been better if the deciding officer herself had sworn an affidavit, specifically in relation to the question of whether she regarded herself as bound by the decision of the medical assessor: see*, e.g.,* in this regard by analogy with the comments of Carroll J. in *Gavin v. Criminal Injuries Compensation Tribunal* [1997] 1 I.R. 132, 142. I nonetheless regard Mr. Baldrick's affidavit as admissible for the purpose of recording general departmental practice.

13. It might also be noted that no application was made during the course of the trial to have parts of Mr. Baldrick's evidence excluded on the grounds that it contained hearsay. In these circumstances, the statement by Mr. Baldrick that the Department does not, in fact, operate a fixed policy is entitled to evidential weight.

Section 186C of the Social Welfare (Consolidation) Act 2005

14. Before proceeding further it may be useful first to set out the relevant statutory provisions governing the entitlement to domiciliary care allowance. Section 186C(1) of the Social Welfare (Consolidation) Act 2005 ("the 2005 Act") (as amended) provides that a person is deemed to be a qualified child for this purpose where:

> "(a) the child has 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,
>
> (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."

15. Section 186C(2) of the 2005 Act 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 subsection (1)."

16. The provisions of s. 186C(3) of the 2005 Act are also of critical importance in that they provide 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."

The decision of the High Court

17. In his judgment Barrett J. pointed to the uncontradicted evidence regarding the policy and practices of the Department and concluded that the policy effectively meant that the deciding officers had unlawfully deferred in an uncritical fashion to the views of the medical assessor:

> "….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."

18. In arriving at this conclusion Barrett J. referred to a series of seminal decisions regarding the adoption of fixed policy positions and he was correct to observe that such fixed policies are unlawful because they necessarily involve a negation of the statutory discretion conferred by the Oireachtas. It might be convenient at this juncture to consider some of the leading case-law on fixed policy positions.

The case-law on fixed policy positions

19. As Barrett J. noted, the seminal decision on this point is that of *McLoughlin v. Minister for Social Welfare* [1958] I.R. 1. In *McLaughlin* the question was whether a solicitor working in the Chief State Solicitor's Office was employed in the civil service of the Government within the meaning of the Social Welfare Act 1952 for the purposes of compulsory insurance. A majority of the Supreme Court held that this question must be answered in the negative and two members of the majority, Kingsmill Moore and O'Daly JJ. also commented adversely on the role taken by the Appeals Office who had found against the claimant based on a document received from the Minister for Finance which the claimant was not even allowed to see. Kingsmill Moore J. thought ([1958] I.R. 1, 20) that the appeals officer had not acted judicially and that the Minister's document "could not be conclusive" and was not even "relevant."

20. O'Daly J. took a similar view ([1958] I.R. 1, 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."

21. It is clear, therefore, that *McLaughlin* involved a case where the appeals officer considered that he was bound to follow a direction from the Minister for Finance. This was, as the Supreme Court found, both an unlawful fixed policy position and an abdication of his statutory functions. In his judgment, Barrett J. observed that he thought it:

> "….. difficult to reconcile the views of [the Supreme Court] 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 [the Supreme Court in *McLaughlin*] but also to suggest that the true decision-maker in these applications is in fact the medical assessor."

22. For my part, I consider that Barrett J. was both partly right and partly wrong in relation to these observations. He was right inasmuch as he correctly stressed the necessity for the deciding officer to make an independent judgment on this issue and not to act under the dictation of a third party. That, after all, is what the Supreme Court had condemned in McLaughlin. He was, however, wrong insofar as he suggested that the Department's letter of 23rd December 2013 had indicated that the deciding officer would or should just simply follow the opinion of the medical assessor: I see these words are simply highlighting a statement of fact, namely, that the deciding officer would normally follow such an opinion.

23. That in itself would scarcely be unusual given that the issue of eligibility for the allowance is normally dictated completely by a medical assessment of need. It must be borne in mind that the deciding officer is not medically qualified and it is only to be expected that he or she will be guided by the views of the medical assessor who is so qualified. It must be stressed once again, however, that the views of the medical assessor are not – and cannot be – dispositive in relation to any given case.

24. All of this is, in any event, underlined by the provisions of s. 186C(3) of the 2005 Act which requires that the deciding officer "shall have regard" to the opinion of the medical assessor in making this determination. These words – "shall have regard" – have almost acquired the status of a term of art at the hands of the parliamentary draftsman, as used in a variety of different statutory contexts. The recent case-law provides many examples of how these words have been interpreted in practice.

25. In *Glencar Explorations plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 the applicant 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 on the ground that the Council had acted in breach of its obligation under s. 7(1)(e) of the Local Government Act 1991 to have regard to the relevant policies and objectives of the Government.

26. Keane C.J. rejected the argument ([2002] 1 I.R. 84, 142) that the Council had breached its statutory obligations:

> "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 [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."

27. In *McEvoy v. Meath County Council* [2003] 1 I.R. 208, the applicants applied for a declaration that Meath County Council acted in contravention of s. 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 when making a development plan. Dismissing the application, Quirke J., said ([2003] 1 I.R. 208, 224):

> "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 relevant regional planning guidelines, they are not bound to comply with 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."

28. It is clear from cases such as *Glencar* and *McEvoy* that decision-makers who are statutorily required to have regard to some other matter are obliged to do just that. While they are not bound by those views, they are nonetheless required to inform themselves in respect of the matter to which they are obliged by statute to have regard and must give reasonable consideration as to whether this should inform or guide their decision-making.

Was there in fact a fixed policy position adopted by the Department?

29. All of this means that the deciding officers in the present case should inform themselves of the reasons given by the medical assessor and give consideration as to whether these views should be adopted by them. In the present case Barrett J., having noted the decisions in cases such as *Glencar* and *McEvoy*, went on to say:

> "....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 [in *Glencar*].
>
> 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*."

30. I find myself in respectful disagreement with this analysis. It comes back to the same point, namely, that the deciding officer inevitably follows the medical assessor's opinion, a matter to which he or she is statutorily required in any case to have regard. If it were indeed the case that the deciding officer regarded himself or herself as *bound* by the medical assessor's opinion, this would clearly amount to an unlawful fettering of discretion in the light of cases such as *McLaughlin*. While the deciding officer is required by statute to have regard to that opinion, he or she is nonetheless required to make his or her own independent decision. But short of that, the fact that the deciding officer invariably follows the views of the medical assessor is not in point.

31. It might be different if, for example, the statistical evidence had shown that a particular deciding officer had always (or almost always) decided in favour of the Minister. This, after all, was the backdrop to the application for judicial review in *Nyiembo v. Refugee Appeal Tribunal* [2007] IESC 25 where it was alleged that the statistical evidence showed that a particular Tribunal member had always ruled adversely to asylum claims. That, however, is not what has been alleged in the present case.

32. It is probably fair to say that in the present case Barrett J. was concerned lest the medical assessment provided by the applicant might have been immediately discounted within the Department and that, accordingly, the deciding officer simply unthinkingly endorsed the contrary views expressed by the medical assessor. It is, however, important to stress that if in any given case it were to transpire that the deciding officer had simply endorsed views of the medical assessor which were not reasonably sustainable on the evidence, then the claimant is not without a remedy. The claimant can always appeal that decision or seek a statutory review pursuant to s. 301 of the 2005 Act. In the event that the Department adheres to its original stated position, the reasonableness of that decision can always be challenged in judicial review proceedings. It must be recalled that the statutory opinion formed by the medical assessor must, when and if so challenged, be shown to be "factually sustainable and not unreasonable": see, *e.g., The State (Lynch) v. Cooney* [1982] I.R. 337, 380, per O'Higgins C.J. and *Kiberd v. Hamilton* [1992] 2 I.R. 257, 265, *per* Blayney J. As it happens, no challenge was made either in the High Court or in this Court to the reasonableness of the decision of either deciding officer.

Conclusions

33. It is against this background that I find myself obliged to conclude that Barrett J. was in error in concluding that the Department had effectively applied a fixed policy position whereby the medical assessor's opinion was unthinkingly and unquestioningly endorsed by the deciding officer. Statistics aside, there is no evidence that the deciding officer in question adopted this attitude. In this case, statistics alone do not, however, prove the existence of a fixed policy position.

34. While it is true that this deciding officer appears to have routinely followed the opinion of the medical assessor (an opinion to which she was statutorily required to have regard) in every (or, at least, almost every case), this does not *in itself* mean that she was adopting a fixed policy position. In these circumstances I feel that I must allow the appeal and reverse the decision of the High Court.