Neutral Citation: [2014] IEHC 485

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 107 J.R.]

BETWEEN

C.O'B.

APPLICANT

AND

CHIEF APPEALS OFFICER, SOCIAL WELFARE APPEALS OFFICER, MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 21st day of October, 2014

1. The applicant is the mother of a young boy who suffers from an autistic condition and whom she claims has significant care needs. In that context the applicant applied for a domiciliary care allowance to assist in her care of her son. Her application for the allowance was refused by a decision of the deciding officer on 24th June, 2013, and the applicant availed of the two statutory remedies: she sought a review of the decision under the statutory scheme and the decision at first instance upheld by decision of the second respondent communicated to the applicant by letter of 14th October, 2013.

2. The applicant also appealed and her request for an oral hearing of the appeal was accepted. In that context the applicant also formally requested that the deciding officer and the three medical assessors whose desktop reports were available to the deciding body at first instance be available at the oral hearing. It is the refusal of the respondent to agree to this request that gives rise to this judicial review.

3. Moriarty J. made an order on 24th February, 2014, giving the applicant leave to apply for judicial review in the form of an order of *certiorari* quashing the decision of the Chief Appeals Officer, made on 12th February, 2014, refusing the request that the deciding officer and the three medical assessors be available for cross examination, for a declaration that the respondent was obligated to require the presence of the deciding officer and the medical assessors at the oral hearing, and for an order of *mandamus* compelling the first named respondent to ensure that those persons were present at the oral hearing and available to be cross examined. The scheduled oral hearing was adjourned on consent following the grant of leave

4. The grounds on which leave was granted in summary are that fair procedures require that the applicant be permitted to cross examine the deciding officer and/or the medical assessors, if the medical evidence intended to be called at appeal by the applicant controverts the medical evidence available to the decision maker at first instance. It is argued that the absence of the deciding officer and medical assessors would amount to a denial to the applicant of a hearing in compliance with the legislation, the Regulations, the European Convention on Human Rights Act 2003, fair procedures and natural and constitutional justice.

5. The respondents say that application is either moot or premature because it has been formally confirmed to the applicant by letter of 28th March, 2014, that the appeals officer did not propose to have regard to the reports of the three medical assessors which were before the deciding officer at first instance, and that the appeal file would not have these reports. With regard to the request to procure the attendance of the deciding officer it is argued that as the appeal is not a review of the decision at first instance, there is no basis at law for requiring the original decision maker to be present to defend his or her decision or for permitting or requiring cross examination of him or her. Finally, it is argued that it is a matter for the appeals officer to determine in his or her discretion how an appeal should proceed, and he or she is entitled to a presumption that he or she will act fairly m accordance with the requirements of natural and/or constitutional justice.

The legislative provisions

6. The decision making scheme in the Social Welfare Consolidation Act 2005, (the Act of 2005) provides for an initial decision by a deciding officer, which decision may be the subject of an appeal or a review. A review is carried out under s. 301 of the Act, as amended, and is carried out by a different deciding officer. An appeal on the other hand is carried out under s. 311 of the Act and is carried out by an appeals officer, an independent authority headed by the first named respondent. The decision impugned in this judicial review is a decision of an appeal officer made under the jurisdiction created by s. 311 of the Act.

7. Section 311 of the Act of2005 (as amended) provides as follows:-

> *"(1) Where any person is dissatisfied with the decision given by a deciding officer or the determination of a designated person in relation to a claim under section 196, 197 or 198, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer.*
>
> *(2) Regulations may provide for the procedure to be followed on appeals and references under this Part.*
>
> *(3) An appeals officer, when deciding a question referred under subsection (1), shall not be confined to the grounds on which the decision of the deciding officer or the determination of the designated person, as the case requires, was based, but may decide the question as if it were being decided for the first time."*

8. The process and procedures on appeal are governed by the Social Welfare (Appeals) Regulation 1998 (S.I. No. 108/1998), as amended by the Social Welfare (Appeals) (Amendment) Regulations 2011 (S.I. No. 505/2011).

9. Regulation 14, as amended by the amending Regulations of2011, provides as follows:-

"Where, in the opinion of the appeals officer, a hearing is required he or she shall, as soon as may be, fix a date and place for the hearing, and give reasonable notice of the said hearing to the appellant, the deciding officer or designated person, as the case may be, and any other person appearing to the appeals officer to be concerned in the appeal. "

10. Regulation 15, as amended provides that the appellant shall ordinarily appear at the hearing in person and may be accompanied by a member of his or her family, or, with the consent of the appeals officer, by any other person, or may be legally represented. Equally, the deciding officer may appear at the hearing in person and he or she may be represented by another officer of the Minister.

11. Regulation 18(1) provides that the procedures at the hearing shall be such as the appeals officer may determine. It has been determined that this appeal will be conducted by oral hearing and that the three desktop reports of the medical assessors will not form part of the material to be considered on appeal.

The role of the Chief Appeals Officer
12. The first respondent is the Chief Appeals Officer appointed pursuant to the provisions of s. 305 of the Act of 2005. The Chief Appeals Officer is designated by the Minister, and by virtue of s. 305 of the Act, the Chief Appeals Officer is an officer of the Minister.

13. The procedure set out in the Act and Regulations for the prosecution of appeals from decisions at first instance involves the service by an appellant by a notice of appeal on the Chief Appeals Officer within the prescribed time as provided in s. 311 of the Act of 2005.

14. The Chief Appeals Officer has other powers found in Part II of the earlier Regulations S.I. 108 of 1998, the Social Welfare (Appeals) Regulations 1998. Regulation 7 provides that the Chief Appeals Officer may convene meetings of appeals officers to discuss matters relating to the discharge of the functions of appeals officers including consistency in the application of the statutory provisions. Counsel for the respondent asked the court to take particular note of this function of the Chief Appeals Officer which she argues is a function consistent with the ongoing education and support of appeals officers and as a desirable means by which consistency can be sought to be achieved in the appeals process itself The exercise of this power in the instant case is noted below.

The Role of an appeals officer
15. An appeals officer is the individual officer appointed by the Chief Appeals Officer to determine an appeal on an individual case. Section 311(3) makes it clear that the appeals officer in deciding an appeal, called by the section "a question", regarding a decision by a deciding officer at first instance, shall not be confined to the grounds to which the decision at first instance was based but may decide the question "as if it was being decided for the first time." It is clear that the appeal may be a *de novo* appeal but need not always be conducted as such.

16. In *Kiely v. Minister for Social Welfare* [1977] 1 I.R. 267, Henchy J. held that the effect of s.44 of the Social Welfare Act 1952, the now amended, s. 311(3), meant that the appeals officer may go outside the grounds on which a deciding officer made his decision and decide the question as if it were being decided for the first time. Such a decision making process involves the appeals officer deciding the matter de novo. Henchy J. importantly said at p. 277 the following:-

"The statutory intention, therefore, was that the appeals officer would be armed with the necessary jurisdiction to conduct a foil and effective oral hearing de novo."

The reports of the medical assesson
17. In the case of an application for domiciliary care allowance, s. 186C(3) of the Act of 2005 requires a deciding officer, the deciding body at first instance, to have regard to the opinion of the medical assessor. There is no requirement that an appeals officer must have regard to this opinion on an appeal, and it is the deciding officer only who is mandated to have regard to the medical opinion.

18. In this case the decision of the deciding officer refusing the allowance to the applicant was made following the furnishing of reports from three medical assessors. Each of these reports expressed the view that the evidence did not indicate that the applicant's son required care and attention substantially in excess of that required for a child of the same age who did not suffer from the same condition. The reports were prepared by three medical assessors, none of whom had examined the young boy, and the reports were prepared on a template form to which each of them added a short narrative.

19. A particular difficulty with the reports of medical assessors was highlighted in the judgment of Barrett J. in *B. v. Minister for Social Protection* [2014] IEHC 186, when the court took the view that the policy by which deciding officers generally deferred to the opinions of the medical assessors in the manner and circumstances which he held operated in the decision making process was one which amounted to an abdication of statutory duty by the deciding officer. Barrett J. held that the evidence before him suggested that undue deference was, as a matter of policy or practice, being given by deciding officers to the opinions of the medical assessors, and that this tainted the decision making process in the case before him. It would appear from evidence and submissions to this Court that the Chief Appeals Officer in the light of that decision by Barrett J. took the view that desktop opinions furnished by medical assessors who have not personally examined a child on whose behalf domiciliary care allowance application was made, should as a matter of good practice be excluded from the file on appeal.

The procedure on appeal
20. The role of the medical assessors in the appeal process has been the subject of judicial scrutiny and in *Kiely v. Minister for Social Welfare* the Supreme Court was asked to decide whether the conduct of the appeal was in accordance with natural and constitutional justice where the evidence of the medical assessor was before the court in the form of a written report and the applicant was given no opportunity to test his evidence by cross examination. The appeal in that matter had been conducted by way of an oral hearing and oral testimony was given by various medical experts on behalf of the applicant, Mrs. Kylie. Henchy J. noted that a plenary hearing as was envisaged by the legislation was not what he described as "*a partially oral hearing*", but rather a hearing where both parties gave evidence and where both parties had been afforded in accordance with natural and constitutional justice, an opportunity to test the evidence of the other. An oral hearing would be directed frequently in cases where there was a conflict of evidence that could only be resolved by such testing of evidence by the means by which our law recognises that evidence as tested, namely by cross examination, and the testing of such evidence was required where there were "unresolved conflicts on the documentary evidence as to any matter which is essential to the ruling of the claim". It is clear from the judgment of Henchy J. in *Kiely v. Minister for Social Welfare* that the legislation did not require an oral hearing to be held in every case but only where the documentary evidence disclosed unresolved conflicts of fact. However, once an oral hearing was embarked upon, the hearing had to comply with the rules of natural and constitutional justice.

The current appeal

21. After leave was granted by Moriarty J. on 24th February, 2014, the Chief Appeals Officer determined that it was not the "current practice" on an appeal from a decision refusing claims for domiciliary care allowance to consider the reports of the medical assessors or to afford any weight to them. It was accepted in a letter written by the Chief State Solicitor to the solicitors acting for the applicant dated 28th March, 2014, that heretofore there was a "widespread", although not invariable, practice that an appeals officer did have regard to the reports of the medical assessors, but the general practice had now changed. That letter, correctly, said that the Act of2005 did not require the appeals officer to have regard to the report from the medical assessor, although the legislation quite clearly required the deciding officer at first instance to have regard to these reports.

22. The Chief State Solicitor was writing to describe and explain the practice of the Department of Social Welfare in the transmission pursuant to the statutory scheme of the various documentation and the reports to be submitted by that department to the appeals officer. It seems to me that Regulation 10 of the Regulations of 2011 permits, and indeed requires, that the Minister shall furnish to the Chief Appeals Officer all documentation and information relevant to the appeal. There is implicit in the language of the Regulation a power on the part of the Minister to assess and determine what information is so relevant, and the Minister is not merely to act as a conduit to the Chief Appeals Officer of all documentation on file. The Minister had a power to consider the relevance of individual documentation on the file and decide which documentation ought to be included in the file for appeal.

23. There is no suggestion in this case that information relevant to the appeal was omitted by the Minister, but it is argued that the decision by the Chief Appeals Officer that in all cases the medical assessor's reports would be removed from a file was *ultra vires* the Chief Appeals Officer. The respondent asserts it is a decision made within the powers contained in Regulation 7 that enable the Chief Appeals Officer to ensure consistency in the appeals process.

24. It seems to me the applicant have misunderstood the letter of the Chief State Solicitor of 28th March, 2014. The Minister decided and confirmed by this letter that the medical assessors' reports would be removed from the file before it was transferred to the appeals officer. There is a certain ambiguity in the language used by the Chief State Solicitor in her letter, but it is clear that the letter was written on behalf of the Minister and not on behalf of the Chief Appeals Officer, and that the Minister had decided following recommendation from the Chief Appeals Officer to remove the medical assessors reports from the appeal file. This recommendation was presumably made following the decision of Barrett J. in *B. v. Minister for Social Protection*, and at a meeting of the type expressly envisaged by the legislation. The decision as to what is to be contained in the appeal file is within the competence of the Minister under the statutory scheme, and it is not challenged in these proceedings. Accordingly, I make no decision as to whether the Chief Appeals Officer did have a jurisdiction to prepare a revised brief or file for an appeals officer ultimately appointed to this case or where the power to prepare a brief or revised file was one which must be exercised by the Minister. The effect of the decision, by whomsoever it was made, is that the evidence contained in the desktop reports from the three medical assessors will not form a basis for the decision making process yet to be commenced by an appeals officer. This is a decision which benefits the applicant and the reports which were removed were not supportive of her application for domiciliary care benefit. This review is centred on the request of the applicant that the persons who prepared these reports be available for cross examination at the oral hearing.

The first question: the attendance of the medical assessors

25. The first ground on which leave to seek judicial review was granted was that the decision of the first named respondent made on 12th February, 2014, to refuse the request of the applicant to call the medical assessors to the oral hearing was made in breach of fair procedures. At the time leave was granted on 24th February, 2014, a decision had not yet been made that an oral hearing would proceed, nor had it been decided or communicated to the applicant that the reports of the three medical assessors would not be on the file and not form any part of the decision making. It goes without saying, and is quite clear from the decision of the Supreme Court in *Kiely v. Minister for Social Welfare*, that were the reports of the medical assessors to be, or to form any part of, the evidence before the person hearing the appeal, or to form any part of the basis of a decision on appeal, that the rules of natural and constitutional justice and fair procedures would entitle the applicant to cross examine that part of the evidence with which she disagreed.

26. It is clear in the events that have evolved since the commencement of these proceedings that these medical reports will not be before the appeals officer. Ms. Geraldine Gleeson the current Chief Appeals Officer has sworn two affidavits in these proceedings and has confirmed in her second affidavit sworn on 19th June, 2014 that the reports of the medical assessors "will not be included in the file sent to any newly appointed appeals officer". I have no reason to doubt the *bona fides* of that sworn assertion.

27. The applicant nonetheless seeks production of the medical assessors for cross examination. It seems to me that the applicant is incorrect. There is no procedure in our law where a person in an adversarial process can cross examine evidence which is not before a deciding body. No rule of natural justice requires or directs the cross examination of evidence if that evidence is not intended to be called by the other party. Such a requirement might well deny fairness to the other side and it is clear from the judgment of Henchy J in *Kiely v. Minister for Social Welfare* that the oral hearing envisages an adversarial process. Further, there is no purpose to be gained from cross examining this evidence and it has been made clear that the medical assessors' reports will not form any part of the appeal process. As a matter of law, it seems to me there can be no right derived from any of the principles of fair procedures which would entitle a person to test evidence which has not been adduced and which has already been excluded from a decision making process.

28. Insofar as the applicant asserts that the desktop reports of the medical assessors ought to be on the file of the appeals officer appointed to hear this case, she seeks to direct the Minister or the Chief Appeals Officer in the processing of the documentation, and in my view she cannot do this. Furthermore, what she seeks to do is counterintuitive; she seeks to have put on the file evidence which is not supportive of her position. The rules of fair procedure derive from the basic and fundamental principle that a person is entitled to have his or her case heard. There is in my view no principle which flows, whether directly or indirectly, from these principles of law which has the effect or meaning that a person is entitled not merely to have his or her case heard but to have the case or evidence which counters or does not support his or her case before the deciding tribunal or court. Such a principle would suggest a class of tripartite, as opposed to bilateral, adversarial structure where a deciding body was obliged to consider matters which neither party had sought to adduce in support of its case.

29. The applicant does not wish to adduce the evidence of the medical assessors in support of her case but rather she wishes to challenge their evidence. She can contest the evidence adduced by the respondents for the purposes of their argument or evidence on appeal, but not if the evidence is not adduced at all. However, the case law does not in my view go so far as to suggest in any adversarial system that if one party to an appeal, or indeed a party to litigation, calls or indicates an intention to call evidence of a particular type, that that person is entitled to have the relevant experts of the other party prepared for cross examination on that evidence. The applicant can test that evidence which is before the hearing but cannot require the respondent to call at the hearing evidence of a particular type on from an identified person. The respondent equally takes the risk that if contrary medical evidence is not adduced to challenge the medical evidence of experts caused by the applicant, that the weight of evidence will be such that the appeal may well be successful. But in my view what the applicant seeks to do is to direct the conduct by the respondent to the appeal of the appeal process and in my view she cannot do this. It may be and frequently is the case that following on the hearing of

an appeal, an appellant or respondent as the case may be seeks judicial review of the conduct of the appeal, but it is not appropriate for me to now, before the hearing, direct the evidence that must be adduced by either or both sides to the appeal or how the appeals officer must or can deal with that evidence.

30. I reject the suggestion that the proper conduct of the oral appeal requires that the medical assessors be present. It is a matter for the respondent to the appeal to determine what evidence he or she will adduce to counter the evidence of the medical experts which the applicant will call to the hearing. It is quite clear that it is not intended to rely on the evidence of the medical assessors and I accept the argument of the respondent that at this stage before the process has started the appeal body is entitled to the presumption that it will conduct its business in accordance with law.

31. I refuse to direct the attendance of the medical assessors at the appeal.

The second question: the attendance of the deciding officer
32. The order giving leave for judicial review also challenged the decision of the first named respondent to refuse to require the attendance of the deciding officer at the oral hearing of the appeal. The applicant asserts that she is entitled to cross examine the deciding officer at the appeal.

33. The decision of the deciding officer is under appeal, not under review, and the distinction between an appeal and review is one that is not without significance. There may be circumstances when, on the review of a decision by a tribunal or other decision making body, the person or persons making up that body would be open to cross examination on a challenge on a review. The circumstances are different if the process is one of appeal. Counsel for the applicant relies on the dictum of Henchy J. in *Kiely v. Minister for Social Welfare* where after making the comment that the relevant Regulations of 1952 envisaged a plenary hearing went on say the following:-

> *"Since an oral hearing presupposes a conflict, the article provides for adversary proceedings, and Article 11(2) allows the deciding officer to appear at the hearing in person or to be represented by another officer of the particular applicant and the deciding officer ...."*
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> *Counsel for the applicant also points to Article 15(3) of the Regulations of 1998, as amended, which provides that:-*
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> *"The deciding officer or designated person, as the case may be, may appear at the hearing in person or he or she may be represented by another officer of the Minister."*

34. It seems to me that the true construction of the decision of Henchy J. is that, once an oral hearing is embarked upon the process becomes adversarial and has the appearance of and forms a *lis* or action between an applicant and the deciding officer. The Regulations are clear that the deciding officer may appear at the hearing of the appeal. This is not in any sense a requirement that the deciding officer must appear at the appeal, or that the deciding officer can or must be called to give evidence. The deciding officer may prosecute the appeal himself or herself, or through another person. The deciding officer in other words sets up the case of the respondent to the appeal and is entitled to either himself or herself or through another person challenge the evidence and submissions made at the appeal by the appellant. There is nothing in the Regulations that requires the Chief Appeals Officer to compel the attendance of the deciding officer, although the Regulations do envisage an adversarial system with two opposing sides represented, in the case of the respondent either by the deciding officer or by somebody on his or her behalf.

35. Further, it does not seem to me that the entitlement of the deciding officer to appear at the appeal connotes an entitlement to give evidence at the appeal and the entitlement is one to conduct, argue or process the appeal, not one to give evidence on oath as to the reasons for the decision under appeal. For me to require the attendance of the deciding officer would be akin to a court on appeal requiring that the judge at first instance should make himself or herself available for cross examination on the reasoning that led to a decision. In my view there is nothing in the Regulations or procedures provided by the Act which requires or indeed permits such an approach. The word "appear" in the Regulation is used in a technical sense as understood in the procedures of courts and means "attend" not "give evidence".

36. Further, section 311(3), as amended, makes it clear that an appeals officer has various powers including the power under s. 313 to administer oaths and under s. 314(1) to require the presence of any person to give evidence or produce documents. The appeal in this case has not yet commenced and this process may well come to be challenged by the applicant in due course but the fact that an appeals officer has the power to require the attendance of any person for the purposes of hearing evidence or producing documents does not mean that I ought to compel the appeals officer to make a decision that the deciding office must attend and for me to interfere at this stage would be to deny the discretion and jurisdiction of the appeals officer to regulate his or her own procedures.

37. I refuse to direct the attendance of the deciding officer at the appeal

Decision
38. I refuse the reliefs sought in the judicial review for the reasons stated