THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 763

RECORD NO: 2022/210 JR

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APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

Judgment of Mr. Justice Mark Heslin delivered on 21st December 2023

Introduction

1. In these proceedings, the applicant seeks an order of *certiorari* quashing a 4 February 2022 decision made by an Appeals Officer, refusing to award carer's allowance to the applicant ("the Decision").

2. This court has had the benefit of skilled oral submissions, made with clarity and sophistication, by Mr McDonagh SC and Mr Ó hOisín SC, for the applicant and respondent, respectively. Both counsel also provided detailed written submissions and I want to acknowledge the great assistance given to the court. I propose to refer to the principal submissions and authorities during the course of this judgment.

Leave

3. By order made on 21 March 2022, this Court (Meenan J.) granted the applicant leave to apply for judicial review as set out at para. D of the applicant's 11 March 2022 statement of grounds (i.e. *certiorari* and costs) on the grounds set out at para. E of the said statement, namely:-

> *"1. The impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense or a* (sic) *has resulted from a manifest error of law and fact and should be quashed for lack of proportionality.*
>
> *2. The impugned decision was 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.*
>
> *3. The respondent's decision–making process was flawed as a matter of law in that the respondent took an erroneous view of the test it was required to apply.*

4. The respondent has failed to take into account and/or give adequate weight to the medical evidence and facts outlined in the applicant's application.

5. The respondent failed to resolve any conflict of fact. If the applicant's medical evidence was not accepted, for whatever reason, there was an onus on the Respondent to set out how this conflict in evidence was resolved.

6. The respondent has failed to explain why the evidence submitted supporting his application was not accepted, in particular, when the report from a medical consultant in pain management, dated 21 September 2021, asserted that the applicant met the statutory requirements for carer's allowance.

7. The impugned decision fails to disclose any adequate reasons so that it is not possible to fully determine if the said decision is vitiated by an error."

Pleaded case

4. On behalf of the respondent it is submitted that the foregoing grounds are 'thin' on detail and a similar suggestion is made in relation to the grounding affidavit sworn by the applicant. Whilst it is clear that the applicant's case became far more focused, by means of a second affidavit sworn by the applicant on 14 November 2022, it does not seem to me that the claim articulated by the applicant at the hearing before me on 30 November 2023 falls outside the pleaded case. As Mr McDonagh submitted, consideration had been given as to whether any amendment to the pleadings was necessary. The applicant's decision not to seek to amend the case seems to me to reflect the reality that no amendment was necessary. In short, the case as originally pleaded encompasses the claim pursued. Having carefully considered the pleadings, affidavits and exhibits, the following 'timeline' emerges.

Chronology of events

5. By means of an application, dated **27 April 2018**, which was received by the respondent on **3 May 2018**, the applicant applied for carer's allowance in relation to the care he provides to his now partner, Ms. X (also, the "relevant person" or "care recipient").

Carer / relevant person

6. Carer's allowance is one of a wide range of social protection payments which are provided for in the Social Welfare (Consolidation) Act 2005 ("the 2005 Act"). Chapter 8 of the 2005 Act deals with Carer's Allowance and s. 179 provides the following definitions:-

""carer" means—

(a) a person who resides with and provides full-time care and attention to a relevant person, or

(b) a person who, subject to the conditions and in the circumstances that may be prescribed, does not reside with but who provides full-time care and attention to a relevant person". (s. 179 (1) of the 2005 Act);

….

(4) For the purposes of the definition of 'relevant person' in this Chapter a relevant person shall not be regarded as requiring full-time care and attention unless the person has such a disability that he or she -

(a) requires from another person—

(i) continual supervision and frequent assistance throughout the day in connection with normal bodily functions, or

(ii) continual supervision in order to avoid danger to himself or herself, and

(b) is likely to require full-time care and attention for at least 12 consecutive months".(s. 179 (4) of the 2005 Act)

7. The initial application was refused by letter dated **23 January 2019** which was sent to the applicant by a deciding officer in the Carer's Allowance Section of the respondent. That letter stated inter alia that the deciding officer had examined the claim and had assessed means of "*€0.00 per week from 19/01/2019"* and went on to inform the applicant that the requirements of s. 179 (4) of the 2005 Act were not met.

8. The letter concluded by informing the applicant that if he was unhappy with the decision and wanted another deciding officer to review the claim, he should write to the respondent. The letter also indicated that:-

"it would help to forward any further evidence relevant to the reason for refusal of your claim e.g., a detailed report on the care needs of [named], *a care diary, recent consultant reports, most recent set of accounts etc".*

9. Whilst it is not a criticism, it is certainly a fact that the aforementioned invitation to provide "*any further evidence*" did not make clear that the respondent would attach no weight to any evidence which concerned the relevant person's *current* care needs, as opposed to her care needs at the time of the original application. For ease of reference, I propose to refer to the latter as the "2018 position" or the "2018 care needs". Whilst this first refusal invited the applicant to forward inter alia *"a detailed report on the care needs"* of the relevant person it certainly did not state or suggest that it should be confined to the 2018 position.

10. The applicant called for a review of the initial refusal. By letter dated **14 March 2019** a second deciding officer informed the applicant that he did not qualify because the provisions of s. 179 (4) of the 2005 Act had not been met. The letter went on to make clear that the outcome of the review of the 23 January 2019 decision did not affect the applicant's right to appeal and gave notice that the time limit for such an appeal was 21 days (with the Chief Appeals Officer having discretion to accept late appeals for valid reasons).

Appeals officer

11. Chapter 2 of the 2005 Act concerns "*Appeals Officers, Chief Appeals Officer and Decisions by Appeals Officers"*. Section 304 concerns the appointment of appeals officers and provides:-

> "*304. —The Minister may appoint such and so many persons as he or she thinks proper to be appeals officers for the purposes of any provision or provisions of this Act, and every person so appointed shall hold office as an appeals officer during the pleasure of the Minister"*.

Chief appeals officer

12. Section 305 of the 2005 Act concerns the Chief Appeals Officer and states:-

> "*305. (1) The Minister shall designate—*
>
> *(a) one of the appeals officers who is an officer of the Minister to be the Chief Appeals Officer, and*
>
> *(b) one or more of the other appeals officers (not being an officer designated under paragraph (a)) who are officers of the Minister to act as the deputies for the Chief Appeals Officer when the Chief Appeals Officer is not available".*

Notice of appeal to the Chief Appeals Officer

13. Section 311 concerns appeals and references to appeals officers and provides:-

> "*Subject to subsection (4), 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 to 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".* (emphasis added)

Where it appears…the decision was erroneous…

14. Section 317 deals with the revision by an appeals officer of a decision of an appeals officer and states, in relevant part:-

> *"317. — (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 of new facts brought to his or her notice since the date on which it was given…."* (emphasis added)

Regulations

15. S.I. No. 108/1998 contains *inter alia* the following regulations in relation to social welfare appeals:

"9(1) Any person (in these Regulations referred to as the appellant) who is dissatisfied with the decision of a deciding officer or the determination of a designated officer and who wishes to appeal against such decision or determination, as the case may be, shall give notice in that behalf, in writing to -

(a) in the case of an appeal against a decision of a deciding officer, the Chief Appeals Officer …"

The Regulations go on to specify a 21 day time limit; require that the notice of appeal contain a statement of the facts and contentions relied upon by the appellant (subsection 3); and that the notice of appeal and documentary evidence must be sent to the Chief Appeals Officer (subsection 4). It is clear from the foregoing that it is the Chief Appeals Officer who assigns an appeals officer, the notice of appeal having been directed *to* the former. In the manner presently explained, is also clear that there is a statutory entitlement to reasons.

Reasons

16. Regulation 19 provides:

"19(1) The decision of the appeals officer shall be in writing signed by him or her and shall be sent, as soon as may be, to the Chief Appeals Officer.

(2) In any case where the decision of the appeals officer is not in favour of the appellant, the appeals officer shall attach to his or her decision a note of the reasons for the said decision.

(3) The Chief Appeals Officer shall, as soon as may be after the receipt of the decision of the appeals officer, cause a memorandum of -

(a) the decision, and

(b) where in accordance with sub-article (2) of this article the decision is not in favour of the appellant, the reasons therefore, to be sent to -

(i) the appellant and to any other person concerned,

(ii) the Minister, in the case of an appeal against the decision of a deciding officer, and

(iii) the Health Board, in the case of an appeal against a determination by a designated officer." (emphasis added)

Little v. The Chief Appeals Officer

17. On 8 December 2022, this Court (Owens J.) delivered an *ex tempore* decision in respect of a challenge, by way of judicial review, in respect of a 2021 decision of an appeals officer concerning domiciliary care allowance ("DCA"). The appellant in the case before Owens J. contended that nothing in the 2005 Act prevented the appeals officer from making a decision on eligibility in favour of a claimant by reference to a date *after* the date of the claim. In the Supreme Court's decision delivered on 14 November 2023 in *Deirdre Little v. The Chief Appeals Officer & Ors* [2023] IESC 25, Woulfe J. said the following of this Court's decision:-

"*11. Owens J. felt that the main issue canvassed before him in this judicial review was in fact an issue which he had previously dealt with in L.L. v. Chief Appeals Officer [2021]*

IEHC 101 ("L.L"). In L.L. he held that the 2005 Act requires that a claimant be entitled to the benefit sought at the time when the claim was submitted…."

18. Later in the same judgment, Woulfe J. stated:-

"*Decision*

41. It seems to me that this appeal raises a relatively net question of statutory interpretation as regards s. 317(1)(a) of the 2005 Act, i.e., whether an appeals officer may only revise an earlier decision of an appeals officer as to eligibility where it appears to him or her that the earlier decision "was erroneous" as of the date on which it was given? Alternatively, may he or she do so where it appears that the claimant has subsequently become eligible for the benefit claimed, in the light of new evidence or new facts, as of some later date such as the date of the application for revision? In other words, when seeking a revised decision in 2021, did the appellant in this case have to establish eligibility for DCA as of the time of the original application for DCA in 2018, or did it suffice to show entitlement as to the date of the revision application in 2021?" (emphasis added)

Past tense

19. The Supreme Court decided that the former, not the latter, was the correct position and explained matters as follows:-

"*53. As regards an application for revision of an appeals officer's decision pursuant to s. 317(1)(a) of the 2005 Act, an appeals officer may revise where it appears to him or her that "the decision was erroneous" in the light of new evidence and new facts which had been brought to his or her notice since the date on which it was given. The language used in this provision suggests as follows, in my opinion.*

54. Firstly, the "decision" sought to be revised is the decision of the appeals officer as to the question referred on appeal. As set out para. 52 above, this is the same question which was before the deciding officer, i.e., whether the claimant was entitled to the benefit claimed at the date the claim was made.

55. Secondly, the appeals officer may revise where it appears that the decision "was" erroneous in light of new evidence or new facts. One can note the word "was" framed in the past tense, as opposed to language such as "is" or "has become" erroneous. It seems to me that the new evidence or new facts must relate back to the original decision as to eligibility. I agree with the trial judge that the decision not to award a benefit was not erroneous if a person was established not to be eligible for a benefit on the basis of the evidence initially presented, and it is shown by evidence tendered later on a review application that a person claiming benefit has since become entitled to that benefit by subsequently fulfilling the relevant qualification criteria". (emphasis added)

20. Returning to the 'timeline, by letter dated **3 April 2019**, an executive officer within the Social Welfare Appeals Office wrote to the applicant to acknowledge receipt of his notice of appeal.

21. By letter dated **9 September 2019**, a higher executive officer within the Social Welfare Appeals Office referred to the applicant's appeal and confirmed that the appeals officer would hold an oral hearing on **24 September 2019**.

22. At para. 9 of an affidavit sworn on 4 November 2022 Mr. S, appeals officer, made inter alia, the following averments:-

> *"I presided at the oral hearing and determined the appeal. By letter of 27th September 2019, my decision to disallow the appeal together with my reasons was communicated by the Social Welfare Appeals Office to the applicant".*

23. The said letter dated **27 September 2019** begins in the following terms:-

> *"The Chief Appeals Officer has asked me to write to you about your Carer's Allowance appeal and to tell you that the appeals officer's decision is as follows:*
> *Decision of the Appeals Officer*
> *The appeal is disallowed".*

24. The letter went on to quote verbatim s. 179 (4) of the 2005 Act, following which the letter set out the background. This was followed by an evaluation of evidence; conclusion; and reasons for decision. This section, which comprises some two pages of the four–page letter referred inter alia to the relevant person's diagnoses and went on to state inter alia the following:-

> "*The Deciding Officer appreciates that the care recipient has medical issues which require monitoring and extra assistance and that the conditions may limit the completion of certain activities of daily living but the medical evidence does not establish the necessity for full time care and attention for twelve months".*

25. The letter proceeded to detail the information outlined by the applicant in his letter of appeal with respect to "*the care duties that he regularly carries out"*. The letter went on to state inter alia:-

> *"There is a second medical report dated 28 January 2019. It diagnoses chronic pain disorder and neuropathy SPD and states that she has had spinal cord stimulator treatment. The ability/disability profile is broadly similar to the earlier report".*

26. The letter went on to refer to the "*further medical evidence"*. This included inter alia the following:-

> *"There is a letter from a consultant gastroenterologist dated 1 February 2019 which confirms that the care recipient has a diagnosis of pernicious anaemia and states that going forward she will need b12 and possibly iron infusions.*
>
> *There is a letter from a GP dated 5 February 2019. It details the other medical issues the care recipient has along with pernicious anaemia. It states that she suffers from iron deficiency anaemia, depression and anxiety. The letter states the care recipient is*

attending maternity hospital with uterine prolapse and severe stress incontinence and is awaiting surgery for this. She suffers from back pain, leg pain and significant pelvic pain for which she receives analgesia that is not working. She also suffers from eczema, allergic skin reactions and chronic sinusitis.

A letter from a consultant perinatal psychiatrist dated 12 February 2019 that outlines a history of her health issues and states that on her most recent pregnancy she had no major further complications and did not need any additional mental health backup.

While the care recipient has several medical issues most of those are issues, even when combined, that would not require the full – time care and attention of a caregiver.

The significant medical problem that could require the care recipient to be cared for full-time is her back pain. In her own statement she refers to her back problem as lower spinal cord damage and such a condition is one that could require full – time care and attention. However, there is insufficient medical evidence to support a diagnosis of spinal cord damage or any other damage to the spine. There are no x–ray reports or MRI reports that can confirm damage that would give rise significant back pain.

The appellant requested an oral hearing for this appeal. At the hearing, which was attended by the appellant and the care recipient, they both reiterated some of what they had already stated in their written submissions. Since submitting the original application for Carer's Allowance the appellant and the care recipient are living together and the care recipient has given birth to a third child.

No further medical evidence was submitted at the oral hearing.

Having examined all of the evidence submitted in association with this appeal I am not satisfied that there is sufficient medical evidence for the care recipient to be regarded as requiring full–time care and attention.

For that reason, this appeal is disallowed" (emphasis added)

27. Whilst emphasising that the foregoing decision has not been challenged, an objective reading of its terms is that it is a decision concerning the relevant person's care needs as of the date of the decision, namely 27 September 2019.

28. Again, whilst this decision makes reference to 2019 evidence (specifically medical evidence dated 1 February; 5 February; and 12 February 2019) it does not state or suggest that it was entirely irrelevant unless it concerned the relevant person's 2018 care needs. On the contrary, an objective reading of the letter suggests that the decision maker engaged with current evidence in respect of the relevant person's current needs. Nothing turns on the foregoing observations but

they do seem appropriate insofar as understanding the context in which the claim ultimately arose. I now continue with the chronology.

29. By letter dated **25 October 2019** an executive officer within the Social Welfare Appeals Office replied to correspondence from the applicant, received on 11 October 2019, and confirmed that:-

> *"Your file has been recalled from the Department of Employment Affairs and Social Protection. On receipt of same, your file together with this correspondence will be brought to the attention of the Appeals Officer dealing with your case".*

30. At para. 10 of his 4 November 2022 affidavit, Mr. S makes inter alia the following averments:-

> *"10. By way of undated letter which was received by the Social Welfare Appeals Office on 10 October 2019, the applicant wrote in connection with his unsuccessful appeal in relation to his Carer's Allowance claim. There was no new medical evidence included with the applicant's letter. Following receipt of that letter, I conducted a review of my decision, dated 24 September 2019, and determined, by way of a decision dated 30 October 2019, that the original decision that was communicated to the applicant on 27 September 2019 stood and that the appeal remained disallowed. My decision of 30 October 2019 was communicated to the applicant by way of letter, dated 12 November 2019, from the Social Welfare Appeals Office".*

31. The aforesaid letter dated **12 November 2019** made reference to s. 317 of the 2005 Act and confirmed that the applicant's request for a review of his appeal had been given to the appeals officer who made the decision on the applicant's appeal and confirmed that he had reviewed the decision. Having referred to the oral hearing, during which the appeals officer noted that the applicant stated he was living with the relevant person, the letter went on to state inter alia:-

> "*The Appeals Officer acknowledges your admission that you are bankrupt. However, this is not something that the Appeals Officer takes into consideration when assessing the* (sic) *X's medical conditions to establish if she meets the full–time care and attention requirements of the Carer's Allowance legislation. If bankruptcy adds to X's stress then this should be reflected in the doctor's medical report".* (emphasis added)

32. I pause to suggest that if this decision (which, again, is not under challenge in these proceedings) was exclusively concerned with the 2018 position, there would seem to be little point in the Social Welfare Appeals Office suggesting that a fresh medical report might be provided "*if bankruptcy adds to X's stress"*.

33. Returning to the letter of 12 November 2019, it went on to state inter alia:-

> *"The Appeals Officer has noted your claim that* [named] *receives blood infusions, vitamin B injections, undergoes scope investigations, is constantly exhausted, suffers from concentration problems, takes extensive medications and receives nerve injections at the Dublin Neurological Institute. The Appeals Officer also notes that* [named] *attends Beaumont Hospital for a suspected aortic aneurysm".* (emphasis added)

34. An objective reading of the foregoing seems to me to suggest that the appeals officer took into account evidence which spoke to the relevant person's *current* circumstances in the manner set out. There was certainly nothing in the letter to suggest that the foregoing was irrelevant or that it could not be "*noted"* by the appeals officer insofar as it did not concern the 2018 position. These observations seem entirely consistent with the decision which was put in the following terms:-

> *"Having reviewed your appeal, the Appeals Officer has decided that, while <u>you are</u> spending significant time assisting* [named] *with some of her activities of daily living, the medical evidence <u>is not</u> sufficient to determine that <u>she requires</u> frequent assistance throughout the day with normal bodily functions. Consequently* [named] *does not qualify as a relevant person in respect of whom Carer's Allowance can be paid.*
> *The original decision that was communicated to you on 27 September 2019 stands and your appeal remains disallowed".* (emphasis added)

35. By letter dated **5 December 2019**, an executive officer within the Social Welfare Appeals Office referred to correspondence from the applicant, which had been received on 20 November 2019 and stated inter alia:-

> *"The Appeals Officer has reviewed your appeal in accordance with s. 317 of the Social Welfare Consolidation Act, 2005. Section 317 provides that an appeals officer may revise an appeal decision where new facts or evidence have been provided which were not before the Appeals Officer when she/he made her/his decision, which had they been before her/him, would have rendered that decision erroneous.*
>
> *…*
>
> *You have now requested a second review of the decision.*
> *The Appeals Officer has noted and considered the contents of your letter that was received in the Social Welfare Appeals Office on 20 November 2019 and he is satisfied that a revision of his decision is not warranted".*

36. At para. 12 of Mr. S's 4 November 2022 affidavit, he made inter alia the following averments:-

> *"12. The applicant, by undated letter that was received in the Social Welfare Appeals Office on 13 January 2020, asked for a full detailed report of why his appeal was disallowed. My decision, dated 3 February 2020, elaborated on why the applicant's appeal was disallowed….".*

37. The said decision was communicated to the applicant by means of a letter from the Social Welfare Appeals Office dated **6 March 2020** and stated inter alia the following:-

> *"The decision of the Appeals Officer that was communicated to you on 27 September 2019 concludes that the Appeals Officer <u>is not satisfied</u> that there <u>is sufficient medical evidence</u> for the care recipient to be regarded <u>as requiring</u> full – time care and attention. That means that the Appeals Officer is not satisfied that there is sufficient medical evidence for the care recipient to be regarded <u>as requiring</u> continual supervision and frequent assistance throughout the day in connection with normal bodily functions".* (emphasis added)

38. Once again, this decision is not the subject of challenge. However, at face value it seems to suggest that the decision related to the *current* circumstances of the relevant person. As with previous correspondence, the present tense was used but without stating or suggesting that the use of the present tense was intended to refer only to the 2018 position, not the present position of the relevant person. With reference to the earlier letter of 12 November 2019 from the Social Welfare Appeals Office, the 6 March 2020 letter stated:-

> "*The letter repeated that the medical evidence was not sufficient to determine that the care recipient requires frequent assistance throughout the day with normal bodily functions".* (emphasis added)

39. By letter dated **6 January 2022** the Social Welfare Appeals Office wrote to the applicant in relation to a 24 November 2021 email received from him. The said letter went on to state inter alia:-

> "*Your email was given to the Appeals Officer who made the decision on your appeal and your appeal has been reviewed under s. 317 of the Social Welfare Consolidation Act.*
> *The Appeals Officer noted that you requested an explanation of the statement '….does not qualify as a relevant person in respect of whom Carer's Allowance can be paid'.".*

40. The letter proceeded to refer to s. 179 of the 2005 Act, in particular subsections (1) and (4) and went on to state inter alia the following:-

> "*The Appeals Officer's decision in your appeal is that the care recipient does not require full – time care and attention and consequently she is not a 'relevant person' for the purpose of the payment of Carer's Allowance.*
> *Having reviewed your appeal the Appeals Officer is satisfied that there is nothing in your email of 24 November 2021 that would make the decision in your appeal erroneous….".*
> (emphasis added)

41. Once more, this decision suggests that it referred to the *current* situation, namely, that the relevant person "*does not require"* (present tense) "*full–time care and attention*" to meet the s. 179 definition. Again, this is not the impugned decision. However, it is fair to say that there is no suggestion that the decision maker has confined themselves to looking at the 2018 situation alone. There is nothing in this letter or, for that matter, in any previous correspondence sent by or on behalf of the respondent, to suggest that the decision maker could not, or would not, consider evidence which spoke to the position *after* the 2018 application.

42. By letter dated **21 January 2022**, the Social Welfare Appeals Office wrote to the applicant in respect of correspondence received from him and stated inter alia:-

> "*Following receipt of this correspondence, your file has been recalled from the Carer's Allowance section of the Department of Social Protection. On receipt of same your file, together with the correspondence, will be brought to the attention of the Appeals Officer dealing with this case".*

The Decision

43. It was the aforesaid correspondence from the applicant which precipitated the review which gave rise to the Decision impugned in these proceedings. I now turn to the Decision.

44. The Decision under review is set out in a "*Report of Appeal Decision*", which is dated **4 February 2022**, signed by Mr. S (*qua* Appeals Officer). It begins in the following terms:

> "*Question under appeal*
> *Should the decision of the Appeals Officer in the appellant's appeal, which was issued to the appellant by the Social Welfare Appeals Office on 27 September 2019, be revised under s. 317 of the Social Welfare Consolidation Act?*
> *Decision of the Appeals Officer.*
> *The appeal remains* ***disallowed*** *for the reasons outlined below…"*

45. It will, of course, be recalled that the decision of the appeals officer to which Mr. S refers is *his* earlier decision which issued to the applicant on 27 September 2019 (see again, para. 9 of Mr. S's 4 November 2022 affidavit). The Decision proceeded to quote, *verbatim*, sections 179(4) and 317(1) of the 2005 Act. This was followed by a setting out of "*Background"* followed by "*Evaluation of evidence, conclusions and reasons for decision*:". Having referred to s. 317 and stated that carer's allowance can be awarded to a person who meets the requirements in s. 179, the aforementioned evaluation of evidence was as follows:

> "*In the appeal decision that issued to the appellant on 27 September 2019 the Appeals Officer concluded that there was insufficient medical evidence for the care recipient to be regarded as requiring full-time care and attention. The evidence that was available to the Appeals Officer consisted of the information available on the appellant's application form for carer's allowance, including the medical report dated 27 April, 2018 completed by the care recipient's GP in association with the application, and a statement from the care recipient. There was additional medical evidence in the appeal documentation including:*
>
> - *a medical report dated 28 January 2019*
> - *a letter from a GP dated 13 August 2013*
> - *a letter from a pain specialist to a consultant spinal/orthopaedic surgeon dated 24 February 2015*
> - *a letter from a consultant gastroenterologist dated 1 February 2019*
> - *a letter from a GP dated 5 February 2019*
> - *a letter from a consultant peri-natal psychiatrist dated 12 February 2019*
> - *several letters from St. Vincent's hospital, the Mater hospital, St. Michael's hospital, the National Maternity hospital and the HSE, confirming medical appointments."* (emphasis added)

46. It will be recalled that when the appeal decision issued to the applicant on 27 September 2019 it did not suggest that no evidence concerning the position in 2019 could be considered or that the 2019 evidence was only given weight insofar as it related to the 2018 position. The evaluation of evidence in the Decision continued as follows:

"*Since the decision on the appeal was issued to the appellant on 27 September 2019 the Social Welfare Appeals Office has received additional medical evidence in support of the appeal. The additional evidence includes:*

- *a letter from a GP dated 30 September 2021*
- *a letter from consultant in pain medicine dated 21 September 2021 in respect of a pain clinic that took place on 21 September 2021*
- *a letter from a consultant in pain medicine dated 21 September 2021 in respect of a pain clinic that took place on 11 January 2022.*

It seems likely that the date on the letter is incorrect given that it refers to a clinic that took place four months after the date of the letter.
In the letter that refers to the pain clinic that took place on 11 January 2022 the pain consultant states that the care recipient has lower limb dysesthesia/paraesthesia as well as significant mobility issues and suffers from urinary incontinence. It is the consultant's opinion that the care recipient requires continual supervision and frequent assistance throughout the day in connection with normal bodily functions. The GP letter dated 30 September 2021 outlines the care recipient's medical history and her current diagnoses. It states that the care recipient requires assistance with the normal activities of daily living such as cooking, cleaning, shopping, laundry and caring for her children." (emphasis added)

47. As is clear from the foregoing, the applicant furnished additional evidence which related to the then position. In other words this additional evidence was certainly not confined to the relevant person's 2018 care needs. The final three paragraphs of the Decision are as follows:

"Following receipt of the most recent medical evidence I undertook a review of the decision in this appeal in accordance with s. 317 of the Social Welfare Consolidation Act. I re-examined all of the medical evidence as well as the more recent evidence." (emphasis added)

48. I pause at this juncture to say that the plain meaning of the foregoing is that the decision maker examined all medical evidence, old and new. There is no suggestion in the Decision that the appeals officer excluded from his consideration any of the evidence ("*more recent*", or otherwise). The Decision does not state or suggest that no weight was given to evidence which concerned the post-2018 care needs of the relevant person. There is not the least suggestion that *"the more recent evidence"* or any of it, was given no weight whatsoever. The aforesaid statements in the Decision appear under the heading which begins with the words *"Evaluation of Evidence"*. Thus, if it was the case that the decision maker regarded *"the more recent evidence"*, or any of it, as having no value whatsoever or as being evidence which could not be examined or, for that matter, as being evidence which, once examined, could be accorded no value or weight, one might reasonably expect the Decision to say so. It does not.

49. Having looked at the '*Evaluation'* section, it is appropriate to quote verbatim, the "*conclusion and reasons*" sections:

> *"Notwithstanding the opinion of the pain consultant following the clinic that took place on 11 January 2022, which is nearly four years after the appellant's application for Carer's Allowance was received in the Department of Social Protection, I have concluded, based on the entirety of the medical evidence, that the care recipient does not require continual supervision and frequent assistance throughout the day in connection with normal bodily functions, even though she may require some assistance with daily activities such as cooking, cleaning, shopping, laundry and caring for her children.*
>
> *For that reason the decision that issued to the appellant on 27 September 2019 stands and the appeal remains disallowed."* (emphasis added)

The Decision makes explicit that it was *"based on the entirety of the medical evidence"*. That can only mean that it was based on *all* the medical evidence, including what the decision maker described as *"the more recent evidence"*, which concerned the *current* care needs of the relevant person.

50. The fact that the *entirety* (including *current*) medical evidence formed the basis for the Decision is borne out by the findings, which are plainly expressed in the *present tense*, about what the relevant person *"does not require"* and *"may require",* as regards assistance and supervision (i.e. currently).

51. If the foregoing left any room for doubt, it is removed by the explicit reference to the then-current opinion of the pain consultant following a clinic which took place on 11 January 2022 (i.e. less than a month before the Decision of 4 February 2022). It is, of course, true that the decision maker points out that this opinion *"is nearly four years after the appellant's application for Carer's Allowance was received"*, but, despite this, (i.e.*"Notwithstanding"*) the entirety of the medical evidence (obviously including current evidence) has formed the basis for the Appeals Officer's conclusion, which is clearly expressed in the present tense, (speaking to the current situation, not the relevant person's 2018 care needs).

52. As the last sentence of the Decision makes clear, the *"reason"* why *"the appeal remains disallowed"* is because, the Appeals Officer has *"concluded, based on the entirety of the medical evidence, that the care recipient does not"* meet the s. 179(4) definition. In short, evidence relating to the current needs of the relevant person formed the basis for the Decision. It is also plain that evidence with respect to current needs form the basis for findings with respect to the current needs of the relevant person. This can be clearly illustrated by comparing the following two sentences from the Decision.

53. With reference to *"The GP letter dated 30 September 2021"* which outlines *inter alia "her current diagnoses"* the Decision states the following:

> *"It states that the care recipient requires assistance with the normal activities of daily living such as cooking, cleaning, shopping, laundry and caring for her children"*.

54. Whilst the decision maker, based on the entirety of the medical evidence, concludes that the relevant person *"does not require"* the level of supervision and assistance to meet the s. 179 requirements, he goes on to state that the care recipient *"may require"* some:

> "assistance with daily activities *such as cooking, cleaning, shopping, laundry and caring for her children."*

55. The conclusion that the relevant person *"may require"* the foregoing assistance is not only expressed in the present tense, it was very obviously based on the GP letter dated 30 September 2021. Indeed, the decision maker uses *identical* language when setting out (i) the views expressed in his conclusion; and (ii) describing the 30 September 2021 evidence upon which those views were based.

56. It is perfectly clear from the decision maker's description of the GP letter dated 30 September 2021 that it provided information in relation to the care recipient's *"current diagnoses"* as well as the GP's views on her *current* needs. It is a statement of the obvious that this GP letter is medical evidence. It is perfectly clear from the Decision that it was considered and relied upon and formed part of what the decision maker describes as *"the entirety of the medical evidence"* upon which his conclusion was based.

57. As the Supreme Court confirmed in *Little,* and as this court previously made clear in *L.L.,* the decision maker is required to make decisions with respect to the relevant person's care needs at the time the application was made. Nowhere in the Decision does the appeals officer address the relevant person's care needs as of 2018.

Ermakov

58. In submissions on behalf of the applicant, Mr McDonagh SC referred to the judgment in the neighbouring jurisdiction in *R. v. Westminster City Council ex parte Ermakov* [1996] 2 All ER (*"Ermakov"*). The background concerned a decision by the relevant Council to refuse a housing application to a national from the Republic of Uzbekistan who had come to the United Kingdom from Greece. The decision (under s. 64 of the Housing Act, 1985) and the reasons for it (namely, that the Council was not satisfied that the applicant had experienced harassment in Greece and that it was therefore reasonable that he and his family should continue to live there) were communicated to him. The applicant applied for judicial review of the decision and, for the purposes of the proceedings, a representative of the Council swore an affidavit explaining that the true reasons for the decision were not those expressed in the decision letter.

59. The first instance court permitted the Council to rely on the said affidavit evidence to justify the legality of their decision and dismissed the application. In the Court of Appeal's judgment, Hutchinson L.J. stated the following (from p. 315):

> *"(1) It is unrealistic to seek to draw any significant distinction in the context of s. 64, between the decision and the communication of the decision with reasons, or to treat the giving of reasons as purely procedural. In reaching this conclusion I am influenced by the*

fact that the section in terms requires reasons to be given at the same time as the decision is communicated; by Schiemann J.'s observations in Ex p Shield; and by the many cases in which such decisions have been quashed for inadequacy of reasons."

60. I pause to note that, as seen earlier, Regulation 19(2) of the Social Welfare (Appeals) Regulations (S.I. No. 108/1998) stated in relevant part that "*the appeals officer shall attach to his or her decision a note of the reasons for the said decision."* (emphasis added).

Elucidation and Confirmation, not Alteration or Contradiction

61. Lord Justice Hutchinson's decision in *Ermakov* continued:

> *"(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn L.J.'s observations in Ex p Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction …*" (emphasis added).

62. Later in the same decision, Hutchinson L.J. stated (p. 316, para. (4)):

> *"… it should only be in very exceptional cases that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings*."

There and then

63. *Ermakov* has been adopted in this jurisdiction. In *City of Waterford VEC v. Department of Education and Science* [2011] IEHC 278 Mr. Justice Charleton stated (para. 12):

> *"Reasons are to be stated there and then, not added later upon challenge. Where reasons stated within a written decision are shown to be manifestly flawed, these cannot be supplemented by better reasons, or correct reasons, at any stage after the decision is made. Sometimes evidence can be admitted to elucidate a reason which is laconically expressed or, exceptionally, where a mistake occurs, to correct a mistake. Elucidation may, in guarded circumstances, be accepted but not alteration; R. v. Westminster City Council, Ex parte Ermakov [1996] 2 All ER 302*". (emphasis added).

Afterthoughts

64. Later in the same decision the learned judge stated (at para. 16):

> "*It is clear that the law on administrative and judicial tribunals does not encompass the addition of reasons beyond the document wherein the decision is officially set out. Were such a procedure to be allowed, afterthoughts would replace the reliability which the parties to a tribunal are entitled to expect that the decisions of any judicial or administrative tribunal will encompass*." (emphasis added)

65. Returning to the Decision, it was communicated to the applicant by means of a letter from the Social Welfare Appeals Office dated **15 February 2022**. The contents of that letter comprise the text of the 4 February, 2022 report prepared by the appeals officer.

66. In his affidavit sworn on 4 November, 2022, precisely nine months *after* making the Decision, Mr. S makes *inter alia* the following averments concerning it:

> *"[22] I say and believe that I did not take an erroneous view of the statutory test as asserted by the applicant.*
>
> …
>
> *[25] … I had to consider whether Ms. [named] met the statutory test, as set out by s.179(4) of the 2005 Act, on the date that the application for carer's allowance was made in May 2018 and not whether she met the statutory test subsequent to that date.*
>
> *[26] I say and believe that my decision expressly refers to the reports of Dr. Murphy and states that "notwithstanding the opinion of the pain consultant following the clinic that took place on 11 January, 2022, which is merely four years after the appellant's application for carer's allowance". I say and believe that my decision enabled the Applicant to understand that I had regard to the reports of Dr. Murphy/Dr. Levins, the weight I had given to these reports and the reasons such weight had been accorded to these reports*".

67. The applicant has never suggested that these averments were not made *bona fide* and I accept entirely that the appeals officer has, at all material times, been performing a difficult role in a diligent, professional and *bona fide* manner. However, the foregoing comments seem to me to engage the *Ermakov* principles. The appeals officer's averments seem to me to go beyond elucidation or confirmation. They do not confirm what has been decided but contradict the very terms of the decision. Regardless of what the decision maker *intended,* it seems to me that it would offend the principle articulated by Charelton J. in *City of Waterford VEC* if this court were to admit the aforesaid averments for the purposes of interpreting the Decision. To do so, in my view, would be to permit an alteration, *post facto*, of the decision.

Notwithstanding

68. In so far as the respondent appears to rely on the word *"notwithstanding"*, two observations seem fair to make. First, only part of the sentence which began with that word is quoted in para. 26 (whereas, earlier I quoted the full sentence verbatim). Second, the ordinary meaning of "notwithstanding" is "in spite of" or "despite". In other words, the Decision conveyed to the recipient that, in spite of taking account of the entire medical evidence including current medical evidence, the decision maker found that her current care needs did not satisfy s. 179 of the 2005 Act. This was the wrong test. In my view, the applicant has met the burden of proof of demonstrating an error of law with respect to the Decision.

69. At para. 5 of Mr. S's second affidavit, sworn on 17 February 2023, he quotes, verbatim, the passage of the Decision which begins: *"Notwithstanding the opinion of the pain consultant …"* and,

at para. 6 he makes *inter alia* the following averment: *"I say and believe that it is clear from the foregoing passage of my decision that I applied the correct statutory test"*. With respect, that is not at all clear. At para 7 of the same affidavit, Mr S avers *inter alia*:

> *"[7]…The applicant appears to believe that I applied the incorrect statutory test in respect of all my previous reviews/decisions and alleges that this is clear from the "language used" in those decisions. This belief is incorrect. As with my review of 4 February 2022, I considered whether Ms. [named] met the statutory test as of May 2018 and not as of the date of the review. I say and believe that this is clear from the language of those decisions*."

70. Again, and with the greatest of respect, this is not clear from the language in the 4 February 2022 Decision or, for that matter, in similar language which is found in those earlier decisions.

Weight

71. Nor can I accept the proposition that the Decision enabled the applicant to understand: *"the weight I had given to these reports and the reasons such weight had been accorded to these reports"* (i.e. the reports of Dr. Murphy/Dr. Levins). In oral submissions on behalf of the applicant, Mr McDonagh SC described the aforementioned averments (at para. 26 of the first affidavit sworn by Mr S) as somewhat "gnomic" and, without intending any disrespect whatsoever, it is difficult to disagree.

72. I say this in circumstances where the case made by the respondent in submissions to this court is that *no* weight was given to any medical evidence which concerned the post-2018 position. That is not at all apparent to the reader of the decision. In fact, a contrary meaning is clear, given the decision maker's conclusion that the relevant person *"may require some assistance with daily activities* ***such as cooking, cleaning, shopping, laundry and caring for her children****",* a conclusion based on the 30 September 2021 GP letter which outlined *"her current diagnoses",* which letter (according to the Decision) *"states that the care recipient requires assistance with the normal activities of daily living* ***such as cooking, cleaning, shopping, laundry and caring for her children****"*. (emphasis added)

73. A central theme of the respondent's submissions is that, having regard to the functions of the decision maker under s. 317 and the legislative context in which the Decision fell to be made, it must be interpreted on the basis that the correct test was applied. Regardless of the consummate skill with which this and similar submissions were made, at their 'heart' is the 'circular' proposition that, because a decision maker was required to apply a particular statutory test they must have applied that test, irrespective of what the Decision says.

74. In my view it would be to strain the meaning of words far beyond breaking point and would involve a clear breach of the *Ermakov* principles to interpret the Decision in the manner contended for by the respondent. To come at matters from a different angle, it is *only* if this court accepts averments made by the maker many months *after* the Decision (in particular at para. [22] of his 4

November 2022 affidavit) that an interpretation compliant with the relevant test is possible. Put another way, the plain and objective meaning of the Decision, considered as a whole, is that it speaks to the current position, not to the relevant person's 2018 care needs.

75. In light of the examination of the sequence of prior decisions, I accept the submission made by Mr McDonagh that they, and *the* Decision, are all 'of a piece'. That is, perhaps, unsurprising given that all of them were made by the same person. This is not to criticise the decision maker in any way. It is simply to note that the relevant backdrop, which culminated in the Decision, involved multiple reviews by a single, rather than a range of persons. As the applicant avers at para. 5 of his 14 November 2022 affidavit, the decision maker: *"… appears to have one way or another reviewed his own decision of September 2019 on six or seven or even more occasions"*. Nor was this in any way impermissible under the legislation. My point is that the Decision was not an 'outlier' as opposed to being the latest in a series of decisions none of which could have given the applicant to understand that the decision maker was exclusively concerned with the 2018 position.

76. At para. 6 of the same affidavit, the applicant goes on to aver: *"… it is apparent that the decision of September 2019 and indeed all the reviews thereafter, including the review conducted in 2022 by Mr. S, dealt with and made a decision in respect of the then current difficulties from which Ms.*[named] *was suffering"* (emphasis added). The evidence before this court is supportive of the foregoing.

77. On the basis that the Decision must 'stand or fall' on its own terms, I am satisfied that it was based on an error of law. Furthermore, it seems to me that the applicant has made out its claim that inadequate reasons were given.

78. In *M.D. v Minister for Social Protection & Ors.* [2023] IEHC 88, Ms. Justice Phelan examined the jurisprudence on adequacy of reasons with respect to a decision by the respondent's Social Welfare Appeals Office concerning Domiciliary Care Allowance (or "DCA"). At para. 73 the learned judge stated:

> "*The duty to give reasons in the social welfare context has been considered in a number of cases. In A.M. v Minister for Social Protection [2013] IEHC 524, Hanna J. considered a complaint that the decision of the Deciding Officer was inadequately reasoned. The learned judge reviewed the case-law culminating with the then recent decision of the Supreme Court in Rawson v The Minister for Defence [2012] IESC before finding (para. 21):*
>
> > *'In this case I find the reason of the 10th May, 2012 for a refusal to grant the DCA is clear and unambiguous. The threshold simply has not been reached in light of the evidence submitted. It has not been established that the extra care and attention required by the applicant's son, G., was [not] substantially in excess of that required by a child of the same age who does not suffer from G.'s condition. 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. The*

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'." (emphasis added)

79. The principle highlighted above seems to me to have been breached in relation to the Decision impugned. At the 'core' of the respondent's opposition to the relief claimed by the applicant is that no weight was given, or could have been given, to medical evidence concerning the post-2018 position. The Decision discloses the contrary.

80. Focusing on the GP letter, dated 30 September 2021, if it was *not* accepted by the decision maker, there are inadequate reasons to explain this in the Decision, particularly given that, in terms, the decision maker accepted and relied upon it. Looking at the matter though the lens of reasons, I am not satisfied that the reader could *"know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider"* [see Kelly J. (as he then was) in *Mulholland v An Bord Pleanála (No. 2)* [2006] 1 I.R. 453 at para. 34(4)].

Alternative remedies

81. Counsel for the respondent, Mr Ó hOisín SC, also submits that the applicant has failed to exhaust alternative remedies [see the Supreme Court's decision in *Tomlinson v Criminal Injuries Compensation Tribunal* [2006] 4 I.R. 321 ("*Tomlinson*")]

82. In *Tomlinson* Denham J. (as she then was) referred to the decision in *The State (Abengelen Properties) v Corporation of Dublin* [1984] I.R. 381 wherein O'Higgins CJ stated (at p. 393):

"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." (emphasis added)

83. The foregoing is the approach this court has taken, also conscious that in the same decision the then Chief Justice went on to state:

"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." (emphasis added)

s. 318 of the 2005 Act

84. There are two aspects to the respondent's 'alternative remedies' argument. First, the respondent contends that the applicant should have availed of s. 318 which, it will be recalled, provides:

"***Revision by Chief Appeals Officer of decision of appeals officer***
318. The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation the law or the facts."

s. 327 of the 2005 Act

85. Second, the respondent points to s. 327 of the 2005 Act which provides:

"Appeals to High Court
327. Any person who is dissatisfied with -
(a) the decision of an appeals officer, or
(b) the revised decision of the Chief Appeals Officer,
may appeal that decision or revised decision, as the case may be, to the High Court on any question of law."

86. Returning to the facts in the present case, in the respondent's 'first instance' decision, dated 23 January 2019, the applicant was informed that if he was not satisfied with the Deciding Officer's decision, he was entitled to appeal it within 21 days by writing to the Chief Appeals Officer. That was, of course, reflective of a person's entitlements pursuant to Regulation 9 of the Social Welfare (Appeals) Regulations (S.I. No. 108/1998); and s. 311 of the 2005 Act.

87. Furthermore, the respondent's 6 March 2020 letter stated *inter alia* that:

"As stated in the letter of 5 December 2019 to you an appeal can be reviewed under s. 317 of the Social Welfare Consolidation Act. An Appeals Officer can revise a decision under s. 317, where new facts or evidence have emerged, which were not before the Appeals Officer when she/he made the decision." (emphasis added)

88. The Decision comprised a s. 317 review. However, when the Decision was communicated to the applicant by letter dated 15 February 2022, the applicant was not informed that there was any *further* right of appeal, be that pursuant to s. 318, or otherwise. This is wholly unlike previous decisions which, in their turn, informed the applicant of his entitlement to invoke, successively, s. 311 and s. 317.

89. Whilst the foregoing is not determinative of whether, properly interpreted, s. 318 might be employed by a dissatisfied applicant, it does seem instructive. The evidence before this court certainly suggests that the decision maker did not regard s. 318 as a 'route' available to the applicant. If they did, they plainly did not inform the applicant of this.

90. The foregoing is not at all a criticism of the decision maker. Rather, it seems to me to reflect what s. 318 is directed to. In this regards, I agree with Mr McDonagh's submission that s. 318 confers upon the Chief Appeals Officer an *additional* jurisdiction to that enjoyed by them under s. 317, namely, not one dependent on *"new evidence or new facts"* coming to light.

91. S. 318 gives rise to a very wide discretion, enjoyed by the Chief Appeals Officer, at any time, to revise any decision of an appeals officer. As drafted, s. 318 would certainly appear to confer on the Chief Appeals Officer an 'own motion' power to revise any decision. In other words, the exercise of the Chief Appeals Officer's s. 318 power does *not* depend on a dissatisfied person seeking to have that power invoked.

92. It will be recalled that the '*Revision*' power, pursuant to s. 317, arises in the light of "*new evidence or new facts*" which have been "*brought to*" the "*notice"* of an appeals officer. It seems uncontroversial to suggest that it will typically be a dissatisfied person who brings new evidence of new facts to an appeals officer's attention. That being so, there would appear to be a material difference between the jurisdictions created by sections 317 and 318, respectively.

93. In short, someone in the applicant's position plays a *central* role in respect of s. 317, but does not necessarily play *any* role for the Chief Appeals Officer's s. 318 power to be invoked.

94. Before leaving the argument made with respect to s. 318, it is appropriate to refer to the decision of Mr. Justice Owens delivered on 10 March 2021 in *LL v The Chief Appeals Officer & Ors.* [2021] IEHC 191 wherein, at para. 37 he stated:

> *"37. I have decided not to accede to the preliminary objection by the Chief Appeals Officer that these judicial review applications should not be entertained because of a failure by the applicants to exhaust remedies under the 2005 Act by requesting a revision by the Chief Appeals Officer under s. 318."*

95. Recalling that, in the present case, the applicant had received over half a dozen adverse decisions (all of which reflected a certain view of the relevant test) the applicant could hardly be criticised for believing that a similar view would be taken on a s. 318 review (even if the s. 318 route was available to him).

96. For these reasons, I cannot regard a 'failure' to invoke s. 318 as preventing this court to grant relief. This is particularly so in circumstances where (i) not only was any s. 318 'right' *not* drawn to the applicant's attention; (ii) the Chief Appeals Officer plainly did *not* exercise their s. 318

jurisdiction (also bearing in mind the central role of the Chief Appeals Officer pursuant to the statutory framework *e.g.*, a notice of appeal must be given *to* the Chief Appeals Officer).

97. Turning to the respondent's argument with reference to s. 327 of the 2005 Act, the first observation to make is that s. 327 can be invoked by a person dissatisfied with the decision of an Appeals Officer, or the revised decision of the Chief Appeals Officer in respect of any question of law. The foregoing fortifies me in the view that there was no obligation on the applicant to invoke s. 318 before seeking relief from this court. If there were, s. 327 would surely be confined to the revised decision of the chief appeals officer.

98. In *EMI Records (Ireland) Limited v Data Protection Commissioner* [2013] 2 IR 669 ("*EMI Records*") Clarke J. (as he then was) considered the question of alternative remedies (from p. 725, para [34] of the reported decision). At para. [40] the learned judge referred to a summary of the law in the area, *per* the judgment of Hogan J. in *Koczan v Financial Services Ombudsman* [2010] IEHC 407 ("*Koczan*"). The former Chief Justice quoted paras. 19 and 20 of the judgment in *Koczan* wherein Mr. Justice Hogan stated *inter alia*:

> *"[20] … the Oireachtas is, of course, well aware of the existence and parameters of the High Court's judicial review jurisdiction. It follows, therefore, that the creation by legislation of a right of statutory appeal from an administrative decision which is not confined to an appeal on a point of law generally raises the inference - albeit a rebuttable inference - that the Oireachtas 'must have intended that the court would have powers in addition to those already enjoyed at common law' in respect of its judicial review decision: see Dunne v Minister for Fisheries [1984] I.R. 230 at p. 237 per Costello J. That in turn suggests that the Oireachtas further intended that the statutory appeal would form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so: see, e.g., the comments in this regard of Laffoy J. in Teahan v. Minister for Communications (No.1) [2008] IEHC 194, (Unreported, High Court, Laffoy J., 18th June, 2008)*." (emphasis added)

99. I pause to observe that the statutory appeal provided for in s. 327 of the 2005 Act *is* confined to an appeal on a point of law. This must be borne in mind when considering what Clarke J. (as he then was) went on to state, at para. [41] in *EMI Records*:

> "[*41] Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan v Financial Services Ombudsman [20102] IEHC 407 (Unreported, High Court, Hogan J., 1st November, 2010), that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned*."

100. In short, the foregoing comments were made in respect of a statutory appeal which was *not* confined to an appeal on a point of law (whereas s. 327 of the 2005 Act plainly *is*). Furthermore, the learned judge went on to state, at para. [42]:

> *"[42] However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed …"*

101. On this issue, Mr Ó hOisín drew also this court's attention, very appropriately, to the decision of Hanna J. in *A.M. v Minister for Social Protection* [2013] IEHC 524 ("*AM*"), wherein the learned judge found that adequate reasons had been given by the respondent for the refusal to grant Domiciliary Care Allowance, and went on, at para. 21, to state:

> "*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*." (emphasis added)

102. The foregoing is consistent with the applicant's entitlement to seek judicial review in these proceedings, *notwithstanding* the provisions of s. 327.

103. Indeed, had the applicant invoked s. 327 as opposed to seeking judicial review, the 'net' position for all parties would appear to be the same. By that I mean: (i) both routes involve the seeking of a public law remedy; (ii) both routes are to this court; and (iii) the evidence discloses no prejudice whatsoever by reason of judicial review being pursued.

104. It also seems appropriate to note that the respondent's statement of opposition engages with the applicant's claim, inter alia, as follows:

> *"it is denied that the decision … has resulted from a material error of the law…"* (para. 4);
> *"it is denied that the decision was made as a result of an error of law …"* (para. 5);
> *"it is denied that the respondent's decision making process was flawed as a matter of law in that the Respondent took an erroneous view of the test it was required to apply."* (para. 6)

105. For the foregoing reasons, I take the view that, in all the circumstances, judicial review was appropriately invoked by the applicant and relief should not be denied on the basis of any failure to invoke alternative remedies. This decision does not seem to be at all inconsistent with the analysis in *Koczan* and *EMI Records* and is entirely consistent with the approach taken in *AM.*

106. As the applicant acknowledges, an order of *certiorari* in respect of the Decision of February 2022 would not quash earlier determinations. Nevertheless, it is not suggested that such an order would be 'moot'. On this aspect, the applicant makes *inter alia* the following averments at para. 18 of his 14 November 2022 affidavit:

> *"… a determination by the High Court that it fell outside the competence of an Appeals Officer to decide that in February 2022 Ms. [named] did not satisfy the test as of February*

2022, will at least mean that in the context of any future application no adverse inference can be drawn from the earlier negative decisions of Mr. S. Indeed, should this Honourable Court grant the relief sought, I am advised that it would be appropriate, by way of ancillary relief, to ask the court to direct that any future application be dealt with other than by those who determined ultra vires that during the course of the period from 2018 to date Ms. [named] has not satisfied the statutory test as of the dates upon which those decisions were taken."

Conclusion

107. For the reasons set out in this judgment, the applicant is entitled to judicial review by way of an order of *certiorari* quashing the Decision.

Directions

108. The parties are invited to agree the terms of a draft order reflecting the findings of this court and to submit same within 14 days from the start of Hilary Term (i.e. by 5pm on 25 January 2024).

109. My preliminary view in relation to costs is that the 'normal' rule (which has been given statutory expression in s. 169 of the Legal Services Regulation Act, 2015 (the "2015 Act")) best meets the justice of the situation, namely, that an order for costs should be made in favour of the applicant (the "*entirely successful*" party *per.* s. 169(1) of the 2015 Act).

110. With respect to s. 169 (1) (a) to (g) of the 2015 Act, I have identified no factors which would merit departing from the 'normal' rule that 'costs' should 'follow the event'.

111. In default of agreement on any issue, including on the question of costs, short written submissions should be filed within a further 7 days (i.e. by 5pm on 1 February 2024).

112. Given the medical conditions which the relevant person is described as suffering from, and against the backdrop of s. 27 of the Civil Law (Miscellaneous Provisions) Act, 2008, I felt it appropriate to redact or anonymise certain names, to avoid identification of the care recipient.

113. The parties are invited to confirm their agreement with this approach or to identify either (i) an agreed alternative approach; or (ii) their respective positions, in the event of disagreement, in short written submissions by no later than 1 February 2024.

114. This judgment is being furnished to both sides in "unapproved" form, and shall not be published, pending responses to the foregoing.