Neutral Citation: [2014] IEHC 641

THE HIGH COURT

Record Number: 2014 No. 125 JR

Between:

LD

Applicant

And

Chief Appeals Officer Social Welfare Appeals Office Minister for Social Protection

Respondents

Judgment of Mr Justice Michael Peart delivered on the 19th day of December 2014:

1. The applicant is a single parent, being the mother, sole provider and primary carer of her son ("J") who was born on 11th December 2001, and who was diagnosed with Asperger's Syndrome on the 17th October 2012.

2. On the 23rd April 2013 she applied to the third named respondent ("the Minister") for Domiciliary Care Allowance, attaching to her application form a report from the Mater Misericordiae University Hospital dated 17th October 2012, and a letter from her general practitioner. The application form which she completed has been exhibited in a replying affidavit on behalf of the first named respondent. Part 4 thereof is headed: "**If the child needs care and/or attention during the day or at night that is over and above what is needed by a child of the same age, please state which of the following they need help with and give details in the box provided. Note: a separate sheet of paper can be used for more details needed**". Clearly this information is important since eligibility for Domiciliary Care Allowance is dependent on the decision-maker being satisfied that J requires ongoing care and attention, substantially over and above the care and attention usually required by a child of the same age as him who does not have Asperger's Syndrome. This part of the form requires the applicant to tick either the 'yes' box or the 'no' box beside seven different categories, namely, Communication, Feeding, Manual Dexterity, Learning, Mobility, Toileting, and Managing Treatment. The only box beside which the applicant ticked the 'yes' box was that relating to 'Mobility'. If an applicant ticks a 'yes' box she is invited to insert details. In the box provided beside the heading 'mobility' the applicant stated "*occupational therapy needed to help with awkwardness. Doesn't run or climb. Walking tires him out very quickly*". Apart from those particular boxes, there is provision in the form for an applicant to set out details of any other care and attention needed by the child. The applicant in that box stated as follows:

> *"[J] has been recommended to engage in academic activities to keep him stimulated and to prevent him becoming reclusive. Spends a lot of time alone as finds social situations extremely hard and doesn't engage in any physical activities. Has become low and depressed in recent times due to lack of social activities."*

3. Her application was refused by decision dated 25th June 2013 on the basis that the evidence provided by her did not indicate that the extra care and attention required for J as a result of his diagnosis was substantially in excess of that required for a child of the same age who does not suffer from Asperger's Syndrome.

4. The applicant appealed that decision to the first named respondent ("the CAO") by letter received on 18th July 2013. As part of that appeal she furnished a new letter from the Mater Hospital dated 3rd July 2013, as well as her own 7 page memorandum which set out in a very detailed way her own experience of J at home and the difficulties which she encounters on a daily basis resulting from his diagnosis.

5. The letter from the Mater Hospital stated that the signatories of that letter (a Consultant Child and Adolescent Psychiatrist and a Senior Speech and Language Therapist) were writing the letter "*to strongly support Lisa's Domiciliary Care Allowance appeal in order to support [J]'s significant needs*".

6. The letter also stated that J had attended for ongoing assessment, intervention and monitoring over the past number of years, and that he and the applicant had attended approximately 80 clinical contacts with the clinic and that the outcome of the assessment confirmed a diagnosis of Asperger's Syndrome. It went on to state:

> *"Given a diagnosis of Asperger's Syndrome, he will require multiple and intensive supports in order to meet his current needs and future potential. Aside from multiple school-based support and ongoing clinical interventions, [J] is highly likely to benefit from a highly supportive home environment. Asperger's Syndrome is a pervasive development disorder characterised by pervasive difficulties in the areas of socialisation, interaction, communication, and restrictive, repetitive patterns of behaviours, activities and interests. Knowing the nature of [J]'s difficulties, he will require ongoing support in the completion of his activities of daily living, and is likely to require this level of support, as well as attendance at clinical appointments well into the future, as [J] will face the increased social demands associated with secondary school and teenage years".*

7. Her own 7 page memorandum gives a very detailed account of the difficulties which the applicant encounters on a daily basis in dealing with aspects of J's behaviour which result from his diagnosis, particularly in relation to his dependence upon a rigid routine, his emotional outbursts when that routine is disturbed or not adhered to, his difficulties with noise, concentration, hearing, making friends and his need for constant mental stimulation. He has no learning difficulties as such, but he can get bored and distracted easily in class and elsewhere, and the applicant has found that he has a need for intellectual stimulation in order to avoid behavioural difficulties resulting from boredom and lack of stimulation. This memorandum also says that due to lack of exercise, he has gained weight. This problem is complicated by the fact that he suffers from asthma, and has some mobility difficulties for which occupational therapy has been recommended but not yet accessed. Many other problems of daily living are set forth in this memorandum, including the fact that because of her financial situation she is unable to permit J to join certain clubs which could assist him in the area of intellectual stimulation. In that regard her memorandum stated the following:

> *"[J] excels academically when focused. The only outlet [J] will participate in is Art/Science and similar. I have found that most of these clubs are located on the south side of the city and of course involves fees and travel expenses which I can't afford. At present "Summer Holidays" I have [J] enrolled in Centre for Talented Youths in D.C.U. This college is beside our home but courses cost €170 per week. He scored very high in assessment and he has just completed 2 weeks there doing Computer Gaming & Engineering and Mythology and Creative Writing. There was other courses he was interested in which ran for 6 weeks but I could not afford to book any more than 2 weeks. The difference in his mood and personality while doing these courses was amazing. There is a program that runs throughout the year also but without support I wouldn't be able to put him in. These are the only type of activities that will keep [J] motivated and give him a chance to get out of the house and a chance to 'mix' in some kind of way with kids of similar interests and abilities. If he is focused on something it prevents meltdowns and keeps him stimulated. I have noticed the older [J] is getting without constant stimulation he is growing more reclusive, showing lack of interest, becoming more anxious and depressive. The summer months are extremely difficult and mentally exhausting for both him and me. He will not stay with anybody other than myself."*

9. Nevertheless, despite the additional information provided as part of her appeal, the CAO determined her appeal by dismissing it, and did so on a summary basis (i.e. without an oral hearing). The letter to the applicant dated 5th February 2014 which communicated the decision explains the reasons as follows:

> *"having examined the evidence available to me in this case, I have concluded that while [J] with his condition, Asperger's, does require extra support [it] has not been established with the evidence provided that he requires substantially more care on a continuous basis, as provided for in Domiciliary Care Legislation. In the circumstances, I regret that the appeal cannot succeed".*

That must be taken as meaning that the appeals officer was satisfied that even though J required extra support because of his diagnosed condition, it was not of a level substantially above the level of care and attention usually required by a child of the same age who does not have that diagnosis.

10. The applicant now submits that she was entitled to an oral hearing prior to the determination of her appeal and that to have decided the case on a summary basis is unlawful. She goes on to say in her affidavit that in an oral hearing she would have had a significantly better chance of being successful, and in support of that averment, she has exhibited an extract from the Social Welfare Appeals Office Annual Report 2012, which she says indicates that 53% of appeals in oral hearings were allowed as compared to 30% in appeals decided on a summary basis. I should say at this stage that in a replying affidavit the appeals officer rejects that these statistics indicate a better chance of success where an oral hearing takes place. In that regard she states at paragraph 17:

> *"The appeals officer who makes the decision as to whether an appeal should be dealt with summarily on its papers or whether an oral hearing should be held are the same persons who decide the substantive outcome of the appeal. It is manifest that cases which do not warrant an oral appeal are ones where the grounds for upsetting the initial refusal are, generally, weaker and/or more straightforward than cases where an oral appeal is warranted."*

11. I can understand why an applicant who has been denied an oral hearing might on a superficial consideration of those statistics consider that her chances of success would be greater had she been offered an oral hearing. However I think there is much to be said for the averment contained in paragraph 17 above, and that the conclusion which the applicant has reached and which is asserted on this application is not necessarily correct. However, one way or another, I do not consider that the statistics set forth have a bearing on the issues for determination in this application. Ultimately it is a matter of statutory interpretation.

12. In her grounding affidavit at paragraph 8 the applicant states:

> *"I am strongly of the view that [J] is a qualified child the purpose of the statute and that there is a body of medical and other evidence which would permit an Appeals Officer to find in my favour. I say and believe that the medical and other reports I submitted give rise to an unresolved conflict of documentary evidence and that in those circumstances, I was entitled to an oral hearing. I say that in the light of the significant evidence submitted I expected that I would be given an oral hearing."*

13. Despite these averments however, and her belief that without an oral hearing the determination of her appeal is unlawful, she never sought an oral hearing either when lodging her appeal, or at any time between that date and the determination of the appeal.

14. In passing I note that the letter from the Minister's office to the applicant dated 25th June 2013 notifying her of the refusal of her application, and of her entitlement to seek a review of that decision, or to appeal to the Chief Appeals Officer, does not inform the applicant of any entitlement to an oral hearing for the purpose of any such appeal. That must dilute the significance if any of the fact that the applicant never sought to have an oral hearing. I do not consider that she should be seen as having acquiesced in a summary decision by not having requested an oral hearing. I can understand that from an administrative point of view, there would be problems arising from a great number of applicants seeking an oral hearing as it would undoubtedly delay the process of deciding appeals if oral hearings had to take place in every case where an oral hearing was requested. However, administrative and logistical difficulties of that kind could not justify a positive decision not to notify refused applicants of an entitlement to at least request an oral hearing. I am not for a moment suggesting, as there is no evidence in this regard, that a positive decision was taken that refused applicants ought not to be told of an entitlement to seek an oral hearing for their appeal. But I am suggesting that it would be helpful to refused applicants, and it might avoid unnecessary judicial review proceedings, if the letter informing refused applicants of the decision to refuse their application went on not only to notify them of their entitlement to a review of that decision, and/or an appeal to the Chief Appeals Officer, but to ask them to state whether or not they wish to request an oral hearing, and in the event that they do, then to go further and state why they consider that an oral hearing should be held, and what additional evidence or material they wish to submit at such a hearing. It seems to me that if a person does not know that there is the possibility of an oral hearing, as opposed to a paper appeal, his/her mind will not be addressed to whether an oral appeal might assist. It cannot be presumed that in all or indeed many cases such refused applicants will consult solicitors who might then advise them of the possibility of requesting an oral hearing. In making these remarks, I am of course mindful of the fact that neither the Act of 2005 nor the Social Welfare Regulations 1998 and 2011 ("the Regulations") contain any provision requiring that an appellant be made aware of the possibility of an oral hearing, and that they simply provide at Article 14 of the Regulations that a date and place for a hearing shall be notified to, inter alios, an appellant "*where, in the opinion of the appeals officer, a hearing is required*".

15. A significant feature of the present application is that the respondents became aware of the applicant's complaint that her decision had been decided in a summary way only, and that she felt she was entitled to an oral hearing, only when they were served with the present proceedings after leave had been granted on the 4th March 2014. At no earlier stage of the process had her desire

for an oral hearing been communicated to any of the respondents.

16. Accordingly, upon receipt of the papers, the Chief State Solicitor wrote to the applicant's solicitors by letter dated 18th March 2014 offering to hold an oral hearing now that the CAO was aware of her wish in that regard. As far as relevant, this letter stated as follows:

> *"Prior to the initiation of the within judicial review there was nothing on file to indicate that the applicant wanted an oral hearing as part of her appeal. This has now become manifest.*
>
> *Please note that the Appeals Officer proposes to reschedule an oral hearing before a different Appeals Officer. The purpose of the hearing is to hear the additional evidence which the appellant wishes to adduce and to consider whether this additional evidence would render the substantive decision of the first Appeals Officer erroneous for the purpose of potentially revising that decision pursuant to section 317 of the Social Welfare (Consolidation) Act 2005.*
>
> *You will be aware that in the majority of cases where the appellant requests an oral hearing it is granted, save where such a hearing is unnecessary and unwarranted. This was communicated to the High Court during the case of C. P. v. Chief Appeals Officer and others 2013 607 JR which you acted for the applicant. It was also clarified to the Joint Oireachtas Committee on Education and Social Protection as recorded in the attached transcript of 21st March 2012 and 20th February 2013.*
>
> *In the circumstances, we consider the within judicial review to have been wholly unnecessary and in any case is now moot. We propose that the proceedings be struck out and there be no order as to costs."*

17. Any thoughts that this offer might bring an end to these proceedings were dashed by a response the following day from the applicant's solicitors which stated as follows:

> *"There is no statutory basis for your proposal, as the appeals office is now functus officio but for the power to revise (see inter alia C.P. v. Chief Appeals Officer). Consequently, the only legal basis upon which that decision can be set aside and an oral hearing granted is if the original decision is quashed. This can be done before the President this morning or on a later occasion, if the respondent is agreeable. Further, the applicant will be seeking her costs to date. Otherwise, the applicant wishes to proceed with the judicial review proceedings and awaits the respondents' statement of opposition in due course."*

18. It would appear from the fact that at paragraph D 4 of the Statement of Grounds the applicant has included in the reliefs being sought that her solicitors (no doubt because of previous cases where this had occurred) were perhaps anticipating that subsequent to the commencement of judicial review proceedings the applicant might be offered an oral hearing, and consider that the question of whether there was any lawful basis for such an offer post the determination of the appeal is something which needs to be the subject of a judicial determination not just for this applicant's case but for future cases. That relief at paragraph D4 seeks a declaration in the following terms:

> *"A Declaration that the first named respondent, although having reached a decision which was contrary to statute, regulation and fair procedures, is now functus officio and cannot re-open the matter by way of an oral hearing in the absence of an order from this Honourable Court, in the premises that, inter alia, section 320 of the Social Welfare Consolidation Act 2005 provides that the decision is final and conclusive but for a power to revise".*

19. In so far as it is pleaded at paragraph E(i)3 of the applicant's Statement of Grounds that the discretion vested in the appeals officer to hold a hearing when he/she is of opinion that a hearing is required is one which must be exercised with due regard to fair procedures, natural and constitutional justice and which mandates an oral hearing where there are unresolved conflicts in the documentary evidence before the appeals officer, the respondents in their Statement of Opposition deny that there was any clear conflict of evidence which should have been addressed in an oral hearing, and deny therefore that an oral hearing was required. In support of that plea, an affidavit has been filed by the appeals officer who was appointed to act in this appeal and who disallowed the appeal. Ms Gallagher states in her affidavit that in fact she "*did not review or have any regard to the reports provided to the Deciding Officer herein by the Medical Assessor*". In other words, in so far as there may have been any evidential conflict between the evidence adduced by the applicant and the opinion provided by the Medical Assessor, the appeals officer had regard only to the evidence and materials adduced by the applicant, thereby confining her consideration of the appeal to that evidence and material alone, and not any competing opinion or materials.

20. The documents exhibited in this case indicate that the opinion of the Medical Assessor was sought on two occasions; firstly, after the applicant lodged her initial application for Domiciliary Care Allowance; and secondly, after she lodged her appeal. The first opinion is dated 13th May 2013 which was to the effect that she was not eligible because there was no medical evidence that "*child needs substantially more care and attention*". Under a heading "not eligible description" this opinion states "*[J] clearly needs additional care. However based on all medical reports and evidence available to me at this time, I am of the opinion that the need for Continuous Care and Attention needed in this case is not substantially in excess of C & A normally required by a child of similar age*". Having seen what was contained in the applicant's application as already set forth above, and the documentary evidence which accompanied it in the form of the letter from the General Practitioner, and the Report from the Mater Misericordiae Hospital, it is easy to appreciate how the Medical Assessor might arrive at the opinion given. There was in fact very little in that application form and accompanying material to justify a view that J met the statutory criteria for Domiciliary Care Allowance. The application form had noted some difficulties with mobility only , and the Report from the Mater Misericordiae Hospital identified a requirement for a Special Needs Assistant and maximum resource hours in a mainstream classroom, as well as occupational therapy and/or physiotherapy to assist with his motor skills. The second Medical Assessor's opinion obtained for the purpose of the appeal (albeit that it was not apparently considered or had regarded to by the appeals officer) is dated 13th September 2013. That opinion also states that the applicant is not eligible for DCA because there is "*no ME [medical evidence] that child needs substantially more care and attention*", and went on to state "*ME does not indicate a severe disability*". It is not clear from that opinion whether the Medical Assessor considered only the medical evidence, namely the letter dated 3rd July 2013 from the Mater Hospital which accompanied the appeal, and perhaps the earlier report from Mater Hospital which had accompanied the original application, or whether he had been provided also with the applicant's own seven-page memorandum to which I have referred and which set out in a very detailed way her daily experience of living with J, and the difficulties associated with his condition, and his needs. However, as I have said, the appeals officer has stated in her affidavit that in deciding the appeal she did not review or even have any regard to the reports provided by the Medical Assessor. The only evidence considered by her therefore for the purpose of the appeal will have been the original application, the report of the Mater Hospital and its later letter dated 3rd July 2014, as well as the applicant's own extensive memorandum to which I have referred. Indeed, based on these documents, one can easily appreciate that there was no conflict of

evidence to be resolved at an oral hearing since the hospital was clearly supportive of the applicant's application for Domiciliary Care Allowance, and her own memorandum set out a financial need in the sense that she identified certain activities which she would like to access for J in order to assist in his intellectual stimulation and avoidance of boredom, and which she stated she could not afford. It is not suggested by the applicant that there was any conflict contained within the applicant's own materials furnished. Given that there was therefore no conflict, since no contrary evidence was considered for the purpose of the appeal, it is no doubt incomprehensible to the applicant how she was deemed ineligible for DCA, and impossible to accept the written submission made in the present proceedings that "*the evidence submitted by the applicant did not establish that her son had a severe disability requiring continual care and attention significantly in excess of that required by a child without that disability*". However, this is not a merits appeal. It matters not whether this court on the same material considered by the appeals officer would come to a different view, namely that J's needs for care and attention are greater than those of a child of the same age who does not have a diagnosis of Asperger's Syndrome. This Court has no function with regard to the merits of the applicant's application/appeal.

21. I should add that under section 186 (3) of the Act of 2005 (as substituted by section 26 of the Social Welfare (Miscellaneous Provisions) Act, 2010) a deciding officer, when determining whether a child is or is not a qualified child for the purpose of an application for DCA, "*shall have regard to the opinion … of the medical assessor*" [emphasis added]. There is no similar mandatory requirement upon an appeals officer/Chief Appeals Officer, which explains why Ms. Gallagher can aver, as she has, that in determining this appeal she did not have regard to the opinion of the medical assessor.

21. I have set out as much of the background to this case as I consider necessary before dealing with the legal submissions which have been made, and the issues of statutory interpretation that arise.

22. Having now offered the applicant an oral hearing, albeit after the determination of the appeal, the respondents consider that the present proceedings are moot. They submit that within section 317 of the Act of 2005 there is an implied power to hold an oral hearing after the decision on the appeal has been made because that section enables an appeals officer to revise any decision of an appeals officer in certain circumstances.

23. The applicant on the other hand submits that once the appeal is determined, the appeals officer is *functus officio*, except, as provided in section 317 (1) (a) "*where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it [the decision on the appeal] was given*". The applicant says that there are no new facts or new evidence since the decision, and that it must follow from the plain and ordinary words in the section that the appeals officer has no jurisdiction to re-open the appeal, and for that purpose to provide an oral hearing, even if the applicant was to acquiesce or agree to such an oral hearing.

23. In answer to that submission, the respondents have firstly referred to the general policy whereby, if an appellant requests an oral hearing for an appeal, it will normally be facilitated save where manifestly it can serve no useful purpose; and secondly, have submitted that if the applicant considers that she ought to have been offered an oral hearing for the purpose of her appeal, they are entitled to presume therefore that she would have wished to adduce orally some evidence which was not otherwise before the appeals officer in written form. In that regard, they submit that the applicant has not stated what additional evidence she would have wished to adduce orally had she been offered an oral appeal prior to the decision being made.

24. It is submitted also by the respondents that it must be deemed to be within the powers conferred by the Act of 2005 and the scheme of the Act generally, that the appeals officer can decide to hold an oral hearing, even if only to decide whether or not there is any new evidence, or are any new facts or materials available now that were not available when the appeal decision was decided summarily - in other words, that such a power must exist within the scheme of the Act so that the appeals officer can determine "at any time" under section 317 if the decision made is erroneous in the light of new evidence or new facts. It is submitted that it is implicit in the general scheme of the Act and the Regulations that an appeals officer/Chief Appeals Officer may hold an oral hearing even if its only purpose is to determine whether there are any new facts or new evidence such that a revision of an appeals officer's decision might be justified.

25. The first question for decision is whether the appeals officer is now *functus officio*, and cannot re-open the matter by offering an oral hearing after the appeal decision has been made in the absence of new facts or new evidence which has been brought to attention since the date on which the appeal decision was made. In that regard, Mr Shortall has accepted that there are no such new facts or evidence. He submits that section 317 is clear and unambiguous in its terms, as is section 320 of the Act of 2005. Those sections provide as follows:

> *"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 new facts which have been brought to his or her notice since the date on which it was given, or*
>
> *(b) where –*
>
> > *(i) the effect of the decision was to entitle a person to any benefit within the meaning of section 240, and*
> >
> > *(ii) it appears to the appeals officer that there has been any relevant change of circumstances which has come to notice since that decision was given.*
>
> *320. -- The decision of an appeals officer on any question shall, subject to sections 301 (1) (b), 317, 318, 324 (1) (c), and 3 to 7, be final and conclusive." [emphasis added]*

26. As to appeals themselves (i.e. from a decision of a deciding officer on an application for DCA), they are provided for in section 311 as follows:

> *"311. – (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."

27. Apart from the power to make Regulations under section 311(2) above, a similar power exists under section 330 which provides:

"330.- The Minister may make regulations specifying the procedures to be followed by – –

(a) a deciding officer, when deciding questions under sections 300 and 301,

(b) and appeals officer, when deciding questions under section 303 and 311, and

(c) a designated person, when making determinations in relation to supplementary welfare allowance."

28. The Minister made Social Welfare (Appeals) (Amendment) Regulations 2011 (S. I. No. 505 of 2011) pursuant to, inter alia, section 311 and 330 of the Act 2005. These regulations effected certain amendments to the Social Welfare (Appeals) Regulations 1998 (S.I. 108 of 1998) including, by substitution, Article 14 thereof which now provides:

"Hearings.

14. 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."

29. Relevant also for the purpose of deciding whether a power to hold an oral hearing for the purpose of deciding under section 317 whether there are any new facts or new evidence which have been brought to attention since the making of the appeal decision can be implied to exist is section 313 which provides:

"313. - An appeals officer shall, on the hearing of any matter referred to him or her under this Part have power to take evidence on oath and for that purpose may administer oaths to persons at ending as witnesses at that hearing." [emphasis added]

30. Mr Shortall has emphasised the difference between an appeal under section 311, and a revision of an appeal decision under section 317. He submits that it is clear from section 311 that an appeal from the decision of a deciding officer is a de novo decision upon the application for DCA, and for that purpose it is clear that an oral hearing is within the gift of the appeals officer, and that this is the clear meaning of section 311(3) of the Act of 2005 and Article 14 of the 1998 Regulation as amended. He submits also that section 320 of the Act makes it equally clear that the appeal decision is final and conclusive, save for any revision of it that might be undertaken under section 317.

31. He says that this is to be contrasted with the revision procedure under section 317 which is intended, in his submission, to be a desk-based or paper-based exercise only where new facts or new evidence have come to light since the decision has been made.

32. I would comment in passing that the new facts or new evidence referred to in section 317 (1) (a) of the Act of 2005 are not confined to matters that may have happened or been generated since the decision, but may consist of material or evidence which, though it existed before the appeal decision was made, was not before the appeals officer at the time the appeal decision was made. This seems to be quite a broad power conferred upon an appeals officer should anything come to his or her attention later, or indeed any appeals officer at any later stage, which may mean that the appeal decision already made is erroneous.

32. It is submitted by the applicant that where an oral hearing is clearly provided for in the Act for an appeal under section 311 and the Regulations made thereunder, and there has been no explicit provision made for an oral hearing for any purpose within the revision procedure in section 317 of the Act, that omission should be taken as an indication by the Oireachtas that an oral hearing is permitted to be held only for an appeal.

33. Mr Shortall has placed considerable reliance upon the judgment of Geoghegan J in *Castleisland Cattle Breeding Society v. Minister for Social and Family Affairs* [2004] IESC 40 for his emphasis upon the distinct difference between an appeal decision and a revision of an appeal decision. In that case, Geoghegan J. was considering the precursor to section 318 of the Act of 2005 which, as noted by Hogan J. in *C. P. v. Chief Appeals Officer* [2013] IESC 512 is "*the corresponding (yet very similar) section to s.317.* During the course of his judgment in *Castleisland*, Geoghegan J. stated:

"Under the provisions of s. 263 of that Act [Social Welfare (Consolidation) Act, 1993] 'the Chief Appeals Officer' may, at any time, revise any decision of an appeals officer, if it appears to him that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts. I would comment in passing that s. 263 does not appear by its terms to be conferring a double appeal. What seems to be envisaged is that the Chief Appeals Officer may go through the materials which were before the appeals officer and check whether there was any error in law or on the facts. If he were to find that the appeals officer did not have enough facts or the facts which were before him or her were ambiguous there may be circumstances in which the Chief Appeals Officer would require additional evidence, but essentially it is a revising rather than an appellate procedure." [emphasis added]

34. Mr Shortall relies on these obiter remarks that the revision procedure under s. 263 of the Act of 1993 was not a double appeal procedure. He submits that they are equally applicable to a revision under section 317 of the Act of 2005, and support his submission that an oral hearing is intended for an appeal only, and not to a revision.

35. Nuala Butler SC for the respondents counters that submission by firstly referring to the 'obiter' nature of those comments in *Castleisland*, but, more substantially, referring also to the difference between section 263 of the Act of 1993 between section 317. Section 263 limited the extent of a revision exercise by the Chief Appeals Officer to seeing whether the decision was erroneous "*by some mistake having been made as to the law or the facts*" – in other words a backward looking exercise only, in contrast to section 317 which allows the appeals officer on a revision exercise to consider whether there are any new facts or new evidence that have been brought to attention since the appeal decision was made, and which were not before the appeals officer when the decision was made. Section 318 of the Act of 2005 is identical to s. 263 of the Act of 1993, but section 317 is relevantly and significantly different by permitting an appeals officer to consider new facts and new evidence not before the appeals officer previously.

36. I agree with Ms. Butler's submission in this regard. The two provisions are different in the way she has submitted. The comments of Geoghegan J. must be read in the context of s. 263, and cannot speak to section 317 of the Act of 2005 which is a differently worded, albeit similar, provision.

37. I am satisfied that Mr Shortall is correct when he says that under the scheme of the Act, there is no possibility of a second appeal as such, and that once an appeal has been determined by an appeals officer, the appeal decision is final and conclusive and the appeals officer is *functus officio*, subject only to, inter alia, any revision of the appeal decision under section 317 of the Act of 2005. I can accept also the distinctions between an appeal and a revision which have been helpfully set out in a schedule within his written submissions. There is no need to go through the various distinctions which he makes between those two provisions. I accept that they are different procedures, or at least that they are two stages of an appeals procedure – i.e. the appeal and the revision of the appeal. I can accept also that an applicant for DCA whose appeal against a refusal has been dealt with summarily, and who either wished at that time or, as in this case subsequently, to have an oral hearing as part of an appeal against that refusal, and who did not have an oral appeal, may feel that the power of revision under section 317 of the Act is not an adequate substitute for an appeal by way of oral hearing. But there is no absolute entitlement to an oral hearing at the appeal. One can be requested, but it does not follow that it must be permitted. The appeals officer has a clear discretion to decide whether an oral hearing is necessary in the light of the materials which formed the basis of the appeal. Nevertheless, if it is permissible within the Act of 2005 to have an oral hearing as part of the re-examination of the appeal by way of the revision procedure permitted under section 317, in the light of any new facts or new evidence which the applicant may wish to adduce at such a hearing, there is in reality very little distinction between an oral hearing for the appeal itself and the oral hearing the purpose of any possible revision of that appeal decision since the latter gives the applicant an opportunity to have the appeal re-examined in the light of those new facts and new evidence which he/she adduces at such an oral hearing.

38. It is important also to keep in mind the scheme of the Act. Part 10 thereof is headed "Decisions, Appeals and Social Welfare Tribunal". There is no distinct heading called "Revisions". Revisions take place within the context of a decision by a deciding officer, or within the context of an appeal decision by the appeal officer (or under s. 318 by the Chief Appeals Officer). If a decision or an appeal is revised, it remains a decision or an appeal decision following that revision, albeit one that has been revised. Chapter 1 of Part 10 deals with deciding officers and decisions by deciding officers including any revision of such decisions. Chapter 2 deals with appeals officers, the Chief Appeals Officer and decisions by appeals officers. There is no separate chapter dealing with revisions. In my view it follows that when an appeals officer is dealing a revision of a decision of an appeals officer he/she is nevertheless dealing with the appeal that was lodged by the applicant by virtue of the revision power contained in section 317 of the Act. The revision is a matter arising in the context of such an appeal, and is a "matter" arising in relation to the appeal. It is a 'matter' arising in relation to something which was referred to the appeals officer under that Part (i.e. an appeal), and is in my view a "matter" therefore for the purpose of section 313 of the Act, and one therefore in respect of which an appeals officer has the power to take evidence on oath "at that hearing". It seems clear therefore that the Act contemplates that a hearing can take place in relation to a revision so that any new facts and new evidence can be adduced and considered. It is certainly arguable that a request for an oral hearing itself constitutes a new fact, even if it does not constitute new evidence, and that the appeals officer could *proprio moto* decide to hold an oral hearing once asked to do so, and to hold it for the purpose of a s. 317 revision. The Act should in my view be interpreted as widely as the words reasonably permit in order to reflect the permissive nature of the legislation, and the very detailed procedures laid down for decision-making, and the procedures provided for revision at any time of decisions. It seems to be the clear intention that applicants for DCA and other benefits are provided with different opportunities to reasonably put their case, and to do so in a fair manner and comprehensively.

39. It is worth noting also that section 317 is silent as to who may initiate a revision procedure under that section. It is therefore clear that an appeals officer himself/herself may be in receipt of new evidence or new facts from any source, and may, *proprio moto*, decide that the decision of the appeals officer should be revised in the light of that new evidence and/or new facts. On the other hand, it may be the unsuccessful applicant for DCA himself/herself who might wish to bring new evidence or new facts to the attention of the appeals officer so that the appeal decision already made might be revised under the procedure in section 317. The power to revise under section 317 is clearly a broad and flexible one which permits any particular decision of an appeals officer to be revised "at any time". It should also be borne in mind that revision of a decision under section 317 is not confined to a reversal of the original appeal decision. It may consist simply of an adjustment of some kind to the original decision. This is made clear by section 329 of the Act of 2005 which provides:

> *"329. – A reference in this Part to a revised decision given by a deciding officer or an appeals officer or a revised determination given by a designated person includes a reference to a revised decision or determination which reverses the original decision or determination."*

40. I consider that the provisions and procedures under scrutiny in this case should be given a purposive interpretation, yet one that is fully consistent with the clear words used by the Oireachtas. This is not a penal statute. It is one which provides for certain benefits which can be claimed by qualifying applicants, and provides for procedures and criteria in order to decide who qualifies for benefit and who does not. There are clear safeguards built into the scheme for decision-making such as the appeals procedure and revision procedure. These enable a fair opportunity to be provided to ensure as far as practicable that (a) a person who is entitled to a benefit receives that benefit, and (b) a person who is not entitled benefit does not. It stands to reason that somewhere within these procedures there is the possibility of an applicant being heard in person, not because there may be a better chance of succeeding in the application if one has the opportunity of putting one's case face to face with the decision-maker, but rather because there may be reasons identified and put forward either by the applicant or the decision-maker which make it desirable that an oral hearing should take place. An obvious example of where an oral hearing is considered essential from a fair procedures point of view where there are disputes of fact, or differing professional opinions, which bear upon the question of entitlement. There will be other examples of disputes, doubts or controversy which could benefit from an airing at an oral hearing. Such matters may arise at the appeal stage, in which case an oral hearing can be requested. Such a request may or may be granted by the appeals officer, who is clearly given discretion – a discretion which must of course be exercised fairly and in accordance with law. Alternatively the appeals officer can himself/herself decide that there should be an oral hearing even where one has not been requested. Specific provision is made in Regulation 14.

41. Equally possible is that an applicant may seek a revision of an appeal decision in the light of new evidence or new facts which were not before the appeals officer and which he/she wishes to bring to the attention of the appeals officer, and in respect of which there may be a conflict of views or controversy with existing facts and evidence, where the resolution of such conflict/controversy could be assisted by an oral hearing where the differing parties could be heard and a resolution arrived at more satisfactorily than if a paper review only was conducted.

42. Alternatively, the appeals officer might consider in the light of the new evidence given to him or her either by the applicant, or indeed from some other source, that a conflict or controversy exists which would benefit from hearing the contradictors, so that a

revision decision can properly be considered. If there is a clear statutory provision allowing the appeals officer to direct such an oral hearing, then there is no difficulty. Where on the other hand there is not such a clear provision, then consideration must be given to the overall scheme of the Act to see whether the Oireachtas has by some less explicit provision(s) evinced an intention that as part of the revision procedure an oral hearing can be directed.

43. In this regard, I am satisfied that section 313 of the Act of 2005, given the breadth of its terms, provides the necessary power to enable an appeals officer as part of the revision exercise to permit and/or direct an oral hearing for the purpose, inter alia, of a section 317 revision procedure, whether or not a hearing is requested by the applicant. Section 313 provides:

> *"313. – An appeals officer shall, on the hearing of any matter referred to him or her under this Part have power to take evidence on oath and for that purpose may administer oaths to persons attending as witnesses at that hearing" [emphasis added].*

44. I have emphasised above the words "this Part". The use of these words clearly indicates that the section is referable to any decision provided for in Part 10 of the Act of 2005. It would be different if for example that provision appeared only within section 311 and stated "this section" rather than "this Part".

45. The words "*any matter referred to him or her*" quite obviously include an appeal, since in section 311 (1) of the Act where an appeal is sought, "*the question shall … be referred to an appeals officer".* But it cannot be seen as being confined to the appeal alone otherwise section 313 would have said "*any appeal referred to him or her*". The section instead refers to "*any matter*". One of the matters that can be referred to an appeals officer under Part 10 is a request for a revision of the appeal decision on the basis of some new fact or new evidence. The revision is a matter which forms part of the procedures laid down in Part 10 in relation to an appeal referred to the appeals officer under section 311. It is part of the process, and not a separate process. Section 313 is part of that process as well, and enables oral evidence to be taken as part of the revision procedures as well as the appeal itself.

46. It must be deemed also to cover a situation where the appeals officer himself or herself decides, having been requested to revise a decision in the light of new facts or new evidence, that consideration should be given to whether the decision should or should not be revised. The point is made by the applicant in the present case that there are no new facts or new evidence being offered for the purpose of a revision, and therefore whatever the appeals officer has in mind by the offer of an oral hearing cannot be in the nature of a revision under section 317 of the Act of 2005. While it is a superficially attractive argument, it neglects the point that if the applicant is seeking a new appeal with an oral hearing, it can be assumed by the appeals officer that she wishes to put forward something at that hearing that was not put forward or offered in the materials which were considered on the summary disposal of the appeal. It is hard to see what the point of an oral hearing is if there is going to be nothing offered by way of some new facts or new evidence that has not already been considered. The Act contemplates one appeal only, either a summary appeal or an appeal with an oral hearing. The applicant got a summary appeal decision, and she sought nothing different. Now she seeks to have the existing appeal decision quashed on the basis that she was entitled to be offered an oral hearing even though she did not request one, and then a fresh appeal with an oral hearing. In my view her request for an oral hearing made in these proceedings was appropriately responded to by the appeals officer offering to hold an oral hearing in order to see whether, in the light of whatever it is that the applicant wishes to say, a revision of the appeal decision is warranted. Section 313 contemplates that there will be matters besides an appeal that may require evidence to be taken on oath, and it seems perfectly sensible to me, and within section 313 that an appeals officer who is being criticised by the applicant for not having held an oral appeal should consider that the matter has been referred back to her, and that in such circumstances she should hold a hearing in order to see what it is that the applicant wishes to say or what evidence she wishes to adduce, and to give her every chance to make her case if that is what she now wants to do. It is reasonable that section 313 should be seen as providing a jurisdiction for this to be done. There is certainly nothing absurd about permitting the applicant an opportunity to put her best foot forward in this way. She has the opportunity to have the refusal reversed in the light of what she wishes to say or in the light of what evidence or new facts she wishes to adduce. While that takes place within the revision jurisdiction, it must be borne in mind that it is a revision of the appeal, and not some free-standing procedure labelled 'revision'.

47. In view of these conclusions, I am not going on to decide the other issue raised in these proceedings, namely whether this applicant was entitled as of right to be offered an oral appeal (notwithstanding that she did not request one) in view of what the applicant now contends are conflicts of fact, the conflict as to entitlement, the difficulty in determining if the qualifying criteria for DCA are met, and the higher success rates for appeals where an oral hearing takes place. It was accepted by both sides that if I held for the respondent on the section 317 issue, that other issue did not arise. However, I would just say on that point that in so far as it has been asserted that there were clear conflicts arising on the materials put before the appeals officer which needed an oral hearing, I have struggled to identify what those conflicts are, even in the light of the contents of the Medical Assessor's opinions which the appeals officer has stated that she did not have any regard to. I accept that there is a divergence of views as between the applicant on the one hand, and the Assessor, the deciding officer and the appeals officer on the other as to whether her son qualifies for DCA. But that will arise in every case where a negative decision is arrived at by a deciding officer. That is not the sort of conflict or divergence of view that requires an oral hearing, otherwise any appeal which is being refused could not be refused without holding an oral hearing. That is not what is provided by the Act. While the letters from the Mater Hospital and the applicant's GP support the applicant's application, those do not amount to medical evidence as such. They are supportive but do not constitute medical evidence in the sense of stating that her son meets the criteria for DCA (and explaining why) under section 186C(1) of the Act of 2005 (as substituted by section 10 of the Social Welfare (Miscellaneous Provisions) Act 2010).

48. For the above reasons I refuse to grant the reliefs sought in these proceedings.