APPROVED **[2024] IEHC 676**

THE HIGH COURT
JUDICIAL REVIEW

2024 1090 JR

BETWEEN

H.

APPLICANT

AND

CHIEF APPEALS OFFICER
SOCIAL WELFARE APPEALS OFFICE
MINISTER FOR SOCIAL PROTECTION
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

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

INTRODUCTION

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

officer's decision, pursuant to section 317 of the Social Welfare Consolidation Act 2005, represents an adequate alternative remedy.

LEGISLATIVE FRAMEWORK

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

   (a) the child has a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age, and

   (b) the level of disability caused by that severe disability is such that the child is likely to require full-time care and attention for at least 12 consecutive months.

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

4. The practical consequence of this is that, in cases where the child has been diagnosed with a severe disability on the basis of an assessment carried out *subsequent* to the date of the application, the claimant should submit a *fresh* application rather than seek to pursue an appeal or revision or judicial review proceedings.

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

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

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

revision before having recourse to the High Court. See paragraphs 26 and onwards.

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

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

9. As explained below, one of the complaints made in the present proceedings is that neither the statement of the deciding officer nor the accompanying documentation had been circulated to the Applicant by the appeals officer. The Applicant advances, in the alternative, a challenge to the validity of article 10. This is considered at paragraphs 40 *et seq*. below.

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

PROCEDURAL HISTORY

11. The Applicant submitted a claim for domiciliary care allowance in relation to her daughter (hereinafter "*the child*" to preserve privacy). The application is recorded as having been received on 8 May 2023. As of that date, the child had been ten years of age and had been diagnosed with ADHD (Combined Subtype) and Dyslexia.

12. The *pro forma* application form for domiciliary care allowance contains a section (described as Parts 6 and 7) which is to be completed by a medical practitioner. Part 7 consists of a table which lists out a series of "*abilities*" and requests the medical practitioner to indicate the child's "*ability level*" under each category, ranging from "*normal*" through to "*profound*".

13. In this case, Parts 6 and 7 of the form had been completed by the child's general medical practitioner. The child's GP had assessed the child's ability level as "*moderate*" in the case of learning, sensory issues, and feeding/diet; "*mild*" in the case of behaviour; and "*normal*" in the case of all other listed abilities. The box "*N/A*" is also ticked in relation to continence and mobility. This assessment is at variance with the Applicant's own assessment of her daughter's abilities.

14. The first-instance decision was made on 31 May 2023. The deciding officer summarised the decision as follows:

> "While I recognise that [name redacted] needs some additional care, it has not been possible, based on the evidence submitted, to establish that [name redacted] requires a level of care and attention substantially in excess of that normally required by a child of the same age and that the level of that disability is such that they are likely to require full-time care and attention for at least 12 consecutive months.
>
> This decision does not mean that I don't consider that your child has a disability or that they don't need additional care.

> The nature of your child's condition is not disputed and it is clear from your application that your child does require additional care and attention. However, the evidence submitted does not demonstrate that the level of additional support required is substantially in excess of that required by a child of the same age without their condition and that, that level of care is likely to be required for at least 12 consecutive months, as provided for in the qualifying conditions for the scheme."

15. It is relevant to note, having regard to the submissions now made, that the deciding officer indicated that she had regard to the opinion of the Department's medical assessor and that a copy of this opinion had been attached to the decision-letter for information. The medical assessor's opinion dated 23 May 2023 has been exhibited. The opinion, in relevant part, reads as follows:

> "[The child] is 10 years of age. She has a current diagnosis of ADHD (combined type) and a specific learning difficulty with literacy–dyslexia. She is attending a Paediatrician. She has also been reviewed by Psychology. Paediatric and Psychology reports attached – 18/01/23, 11/07/21 and 28/11/22 have been reviewed. She has now been prescribed a stimulant medication for the management of her symptoms of ADHD. From the reports attached, [the child] can struggle with concentration, attention, distractibility and emotional outbursts. She is attending a mainstream school. She is due to start in a Specialist Reading School in September 2023. She currently avails of resource hours and learning support. She does not currently have SNA access, but I note this has been recommended. In terms of [the child's] intellectual and learning abilities, she is functioning in the average range of ability. She is reasonably independent with personal care and toileting with some supervision of certain tasks noted. She suffers intermittently with constipation. Her dietary intake is monitored. No allergies documented. She can have difficulties getting to sleep but sleep generally well. No overt communicative issues. There are no recent dated hospital admissions documented. I acknowledge that she can struggle in certain settings or with changes in routine with the noted episodes of frustration and emotional outbursts. I am aware of the concerns around [the child's] social, sensory and behavioural challenges and how these have also impacted on the family's functioning. While I acknowledge there are specific difficulties and [the child] does require additional supports, with the current medical reports to date, it is my opinion that she does not require substantially extra

> care and attention in excess of that required by a child of the same age. With the current Specialist input and Educational Supports input now in place as above improvements would be anticipated."

16. In accordance with article 10 of the Social Welfare (Appeals) Regulations 1998 (as amended), the Appeals Office sought a statement from the deciding officer, and relevant documentation, from the Minister. This was done by letter dated 27 September 2023. The letter, in relevant part, reads as follows:

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

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

18. The Department's submission was not furnished to the Applicant as part of the appeal process. However, the Applicant has since obtained a copy of the Department's submission by way of a request pursuant to the Freedom of Information Act 2014. The FOI request had been made on behalf of the Applicant by her solicitor. The response to the FOI request (dated 6 July 2024) has been exhibited in these judicial review proceedings.

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

    TAB B Application form for Domiciliary Care Allowance

    TAB C Decision letter of 31 May 2023

    TAB D Evidence in respect of application

20. It should be explained that the format in which the documents have been presented in response to the FOI request is different. In particular, there are no individual tabs as such. The request for an appeal, the application form, and the decision-letter have been scheduled separately as part of the response to the FOI request.

21. The manner in which the material has been presented in the FOI response has given rise to a concern on the part of the Applicant that there may have been additional materials before the appeals officer of which the Applicant is unaware. However, the Applicant did not exercise her right of appeal under the Freedom of Information Act 2014 notwithstanding that her solicitor had been notified of same as part of the response to the FOI request. I will return to this issue of the documents at paragraphs 34 to 37 below.

22. The Department's submission, in large part, merely recites the procedural history. It also indicates that, in response to the appeal, the deciding officer considered whether a revision of the original decision might be warranted. It is stated that the deciding officer, having examined all the information together with the opinion of the medical assessor, had decided that her decision "*remains unchanged*".

23. The Applicant submitted an appeal against the first-instance decision by way of email on 23 June 2023. It is apparent that the appeals officer identified an inconsistency between the mother's assessment of the child's abilities under the various categories and that of the general medical practitioner. Accordingly, the appeals officer afforded the Applicant an opportunity to confirm that the information available to them was correct by issuing what is described as a "*natural justice letter*" on 18 April 2024. The Applicant made a number of submissions in response to same.

24. The Applicant was notified of the outcome of the appeal by decision-letter dated 28 May 2024. The key findings of the appeals officer are stated as follows:

> "In the medical report which accompanied the application, the child's GP assessed her medical conditions as affecting her in a moderate manner in terms of Learning, Sensory Issues, Feeding/Diet and in a mild manner in terms of Behaviour. In her application the appellant has described difficulties that the child had with balance and coordination, dental hygiene, toileting and continence, feeding, learning, sensory issues, changes to her routine, and emotional regulation. She stated that the child was awaiting Occupational Therapy and attending Psychology and Paediatrics. A letter from a Paediatrician was provided. In addition a report of an Educational Psychologist was provided.
>
> There was a clear inconsistency in the evidence between that provided by the child's GP and that provided by the appellant, as to how the child's medical condition affected her abilities and her activities of daily living, on the date on which the application was made. I was not satisfied that the inconsistency was resolved by the clinical information provided in either of the documents from the Paediatrician or from the Educational Psychologist. All of this information has been put to the appellant in the natural justice letter and she has responded by providing additional evidence from herself and additional evidence from the child's GP. Additional evidence was provided from this child's current teacher, but the child had changed schools since the date on which the application was made, and this information effectively relates to her presentation and circumstances after the date on which the application was made. As the child had

> a diagnosis of Attention Deficit Hyperactivity Disorder, and as a formal diagnosis is usually the reserve of an Occupational Therapist, I have noted that no assessment report from (*sic*) has been made available by the appellant in support of her application. The letter from the child's GP which was provided in response to the natural justice letter provided information as to her presentation 12 months after the date on which the application was made, and indicated that her condition had worsened since the date on the which (*sic*) the application was made. The appellant's own response to the natural justice letter also provided information as to the development of the child's condition since the date on which the application was made. I have considered the information provided by the child's GP aren't (*sic*) the appellant in response to the natural justice letter in the context of the changes in the child's circumstances since the date on which the application was made. In the absence of any clinical information to the contrary, on or before the date on which the application was made, I must give more significant weighting to the GP's assessment of how the child's medical condition affected her abilities [as] set out in the initial medical report."

25. Counsel contends that having identified a "*clear inconsistency in the evidence*", the appeals officer should have convened an oral hearing to resolve same.

ADEQUATE ALTERNATIVE REMEDY

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

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

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

> "The breadth of the revision provisions is, possibly, unique in the field of the administration of public law. The Act provides extensive rights to seek to revise the decisions of both the deciding officers and the appeals officers. It is noted that s. 301 provides the deciding officer with not only the jurisdiction to, *inter alia*, revise on new facts or new evidence, but also to revise by reason of some mistake having been made in relation to the law or the facts. Section 317 only provides jurisdiction to the appeals officers to revise where new facts or new evidence are put before him or her. Lest it be thought that there was no power to revise an appeal decision for a mistake of law or facts, s. 318 provides that the Chief Appeals Officer has that jurisdiction. The respondents also pleaded the availability of the s. 318 mechanism in their statement of opposition but, in the High Court as in the appeal, they focused on s. 317. It also bears repetition that the power of revision includes the power to hold an oral hearing and the right to review a decision not to grant an oral hearing.
>
> The extent of the powers of revision and the remedial intent behind those powers distinguish these social welfare appeals from those concerning immigration, criminal procedures, and other areas of law. What is envisaged in the 2005 Act is as broad a scheme of review as possible of assessments and the entitlement to allowances/benefits. […]"

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

> "[…] The reasons for imposing a requirement to exhaust alternative (adequate) remedies include that a statutory system of appeals will be more effective and convenient than an application for certiorari, that the Oireachtas has provided specialist bodies with specialist expertise and that issues of judicial resources may arise. For these reasons, it would not usually be appropriate for the court to engage in deciding the substantive issue as a precursor to deciding an alternative remedy exists.
>
> That said however, a court must have some regard to the underlying grounds upon which the substantive claim for relief is made. That may be the only way the court can assess whether the issue is one which would bring it within the exception to the rule of exhausting alternative remedies. For

> example, the court would have to assess whether the claim amounted to a fundamental denial of fair procedures or is one that is based on a lack of jurisdiction. If that were the case, then the discretion to refuse jurisdiction may not be exercised by the court hearing the application. As stated above however, the exercise of the court's discretion must be dependent on a wide range of factors. In the present case, the decision was made by the appeals officer on the basis that he was fully satisfied that he could properly determine and make a fair decision in the appeal summarily based upon the available evidence. The appellant had the opportunity, both before the appeal decision itself and after the decision by way of application for a revision, to put forward any further evidence that would support her contention that an appeal [*recte*, oral hearing] was required. The fact that she possessed the opportunity to request a revision so that she could have an oral hearing was, on the facts of this case and in the context of the scheme of the 2005 Act, an alternative remedy to which she ought to have had recourse."

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

30. The principal ground of challenge advanced in the present proceedings is that the failure of the appeals officer to convene an oral hearing was unfair. It is submitted that the appeals officer—having identified a "*clear inconsistency*" as between the general medical practitioner's assessment of, and the Applicant's assessment of, the child's abilities in each of the named areas—should have convened an oral hearing.

31. It is further contended that the unfairness was compounded by the following considerations. It is said that the appeals officer did not provide the Applicant with a copy of the submission made by the Department of Social Protection as

part of the appeal process. It is further said that even now the Applicant has not been provided with a complete version of the Department's submission in that—or so it is alleged—the documentation described as "*Tab D*" has not been furnished. Put otherwise, it is contended that the appeals officer, having received the Department's submission, should have circulated same to the Applicant and afforded her an opportunity to respond to same.

32. The nature of the Department's submission has already been described at paragraphs 19 to 22 above. In effect, it consisted of little more than a narrative of the procedural history, together with confirmation that the deciding officer had considered—and decided against—a revision of the original decision. It is difficult to conceive that any of this can have taken the Applicant by surprise nor that there is anything new which would have required to be responded to.

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

34. The Applicant's concern that certain of the documentation, which had been appended to the Department's submission on the appeal, has still not been furnished to her appears to be misplaced. The concern centres on the reference, in the Department's submission, to "*Tab D*". Presumably, this is a reference to the evidence which the Applicant herself had submitted to the deciding officer as part of her claim for domiciliary care allowance. This evidence included, for example, a report from a chartered educational psychologist. The "*available evidence*" which had been considered by the deciding officer is expressly enumerated in the decision-letter of 31 May 2023.

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

36. Had the Applicant any concerns in this regard, it had been open to her to request a review pursuant to the FOI Act 2014. This could have clarified any residual doubt as to what had been contained at Tab D. The existence of a right of review had been expressly notified in the letter of 6 July 2024.

37. At all events, the complaints which the Applicant seeks to pursue in these judicial review proceedings are ones which are capable of being fully addressed by way of revision pursuant to section 317 of the Social Welfare Consolidation Act 2005. The Applicant now has a copy of the Department's submission and had been provided with a copy of the medical assessor's opinion in advance of the appeal. The Applicant is entitled to confirmation that there had been no additional material before the appeals officer, over and above that of which the Applicant has previously been informed. If there had been any additional material, same should be provided to the Applicant. The Applicant can then request that the appeals officer's decision not to convene an oral hearing be revised. In support of this request, the Applicant can articulate all of the points made in her statement of grounds as to why it is that she contends that an oral hearing and cross-examination of the general medical practitioner and the medical assessor are necessary. In particular, the Applicant has made the point that the appeals officer themselves had expressly identified the existence of a "*clear inconsistency*". These points will have to be considered by the appeals officer.

APPEAL TO HIGH COURT ON A QUESTION OF LAW

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

39. Having regard to the finding (under the previous heading) that leave to apply for judicial review should be refused in the present case because the existence of a right to request a revision of the appeals officer's decision represents an adequate alternative remedy to judicial review, it is unnecessary to consider the separate issue of whether leave should be refused by reference to the right of appeal to the High Court. It is sufficient simply to note that there is a respectable argument that the circumstances in which it will be appropriate to invoke the High Court's general supervisory jurisdiction by way of judicial review, in preference to the appeal to the High Court on a question of law, will be limited if not ousted entirely.

CHALLENGE TO SOCIAL WELFARE (APPEALS) REGULATIONS

Overview

40. The Applicant advances, in the alternative, a challenge to the validity of article 10 of the Social Welfare (Appeals) Regulations 1998 (as amended in 2011). The relevant part of article 10 has been set out at paragraph 8 above. In

brief, the article obliges the Minister/Department to furnish the appeals officer with (i) a statement from or on behalf of the deciding officer showing the extent to which the facts and contentions advanced by the appellant are admitted or disputed; and (ii) all relevant information and documentation.

41. The challenge to the Regulations is put forward on two bases as follows. First, it is pleaded that this aspect of the Regulations is *ultra vires* the parent legislation. Secondly, it is pleaded that this aspect of the Regulations is incompatible with, and repugnant to, Article 40.3 of the Constitution of Ireland. Crucially, in each instance, the principal point made by the Applicant is that article 10 should not be *operated* so as to allow an appeals officer to receive, consider or rely upon evidence which has not been shared with a claimant/appellant. The Applicant submits that such an outcome can be avoided by giving the Regulations a compatible interpretation.

Approach to be taken on leave application

42. Before turning to the detail of the challenge, it is salutary to consider the proper approach to be taken, on a leave application, to a challenge to the validity of legislation. In particular, it is appropriate to consider the implications of the principle of judicial self-restraint for a leave application.

43. The principle of judicial self-restraint or the rule of avoidance indicates that a court will normally only entertain a claim challenging the validity of public general legislation where it is clearly necessary to do so in order to resolve the dispute between the parties. In the context of judicial review, this means that if the proceedings can be resolved on administrative law grounds, then a court will normally seek to dispose of the case on this narrower basis, rather than embark upon a determination of a challenge to the validity of the underlying legislation.

The principle of judicial self-restraint is subject to the overriding consideration of doing justice between the parties.

44. There are several strands to the rationale underpinning the principle of judicial self-restraint, and these are discussed in detail in *Kelly: The Irish Constitution* (Hogan, Whyte, Kenny and Walsh, 5th edition, Bloomsbury Professional, 2018) at §6.2.200 to §6.2.214. As the learned authors explain, the principle is informed by the presumption of constitutionality, and by the inherent limitations of the judicial process, i.e. the court only has jurisdiction to invalidate legislation; it cannot enact new legislation to fill the resultant gap in the law.

45. A challenge to the validity of primary or secondary legislation may be brought by way of plenary proceedings or by way of judicial review proceedings. A challenger who goes by way of judicial review undertakes the additional burden of having to apply for leave to pursue the proceedings. The normal approach adopted on such a leave application is for the court to assess *all* of the grounds pleaded and determine which, if any, of same satisfy the arguability threshold. The court will thus consider whether to grant leave both in respect of the grounds which seek to challenge the impugned decision and the grounds which seek to challenge the validity of the *underlying legislation* pursuant to which the impugned decision was made. This is so notwithstanding that, at the substantive hearing, the challenge to the validity of the legislation will not be reached unless it is unavoidably necessary to do so in order to resolve the proceedings.

46. This approach is entirely consistent with the principle of judicial self-restraint. The principle does not operate to inhibit a court from even *considering* whether there might be arguable grounds for contending that legislation might be invalid. An interim finding that an applicant has merely met the low threshold for leave

to apply for judicial review does not create the difficulties inherent in an actual finding of invalidity. (cf. *Hynes v. An Bord Pleanála* [1997] IEHC 182).

47. It follows, therefore, that had this court been minded to grant leave in respect of the administrative law grounds of challenge, it would still have been necessary to assess whether the alternative grounds, which challenge the validity of the underlying legislation, meet the low threshold for leave to apply for judicial review.

48. The distinguishing feature of the present proceedings is that leave to apply for judicial review is being refused on the basis that there is an adequate alternative remedy available to the Applicant. There is a principled distinction between (i) cases where the dispute between the parties is to be determined by the High Court following a substantive application for judicial review, and (ii) cases where the dispute is capable of being resolved by an appeal or review procedure before an administrative tribunal, without recourse to the High Court at all. In cases of the first type, the court will grant leave in respect of a challenge to the validity of the underlying legislation where the arguability threshold is met, notwithstanding that the court will, generally, endeavour to dispose of the proceedings on the narrower, administrative law grounds if possible. In cases of the second type, by contrast, judicial review is unnecessary.

49. Counsel for the Applicant has made the superficially attractive argument that the statutory right of revision under section 317 of the Social Welfare Consolidation Act 2005 is not an adequate alternative remedy because the appeals officer does not have jurisdiction to entertain a challenge to the Regulations. Counsel cites *Petecel v. Minister for Social Protection* [2020] IESC 25. This argument tends to miss the point that there is no freestanding entitlement to challenge primary

or secondary legislation by way of judicial review. Rather, an applicant must have a "*sufficient interest*". Here, the Applicant would only have a sufficient interest to challenge the Regulations where such a challenge is in aid of her claim for the relevant social welfare payment. The challenge is unnecessary in circumstances where there is an alternative avenue open to the Applicant, whereby she is entitled to seek a revision of the appeals officer's initial decision and to seek an oral hearing.

50. For completeness, it should be recorded that there is a vital distinction between the circumstances of the present case and those at issue in *Zalewski v. Adjudication Officer & Workplace Relations Commission* [2019] IESC 17, [2019] 2 ILRM 153. The distinction is this. Here, the Applicant maintains the position that, on their proper interpretation, the Social Welfare (Appeals) Regulations 1998 allow for the very result for which she contends. The argument that the Regulations are invalid is a fallback argument, made to address the possible contingency of the Applicant's contended for interpretation of the legislation being held to be incorrect. Crucially, the Applicant regards the Regulations, properly interpreted, as *intra vires* the parent legislation and compliant with the Constitution of Ireland. This is not a case, therefore, where a party is expected to engage in a statutory process, which he or she maintains is fatally flawed, prior to pursuing judicial review proceedings. The type of mischief which is identified by the Supreme Court in *Zalewski* does not arise.

No arguable grounds for challenge to legislation

51. The finding, under the previous heading, that the right to seek a revision represents an adequate alternative remedy is enough to dispose of this application for leave to apply for judicial review. For completeness, however, it

is appropriate to record that the challenge to article 10 of the Social Welfare (Appeals) Regulations 1998 does not, in any event, meet the low threshold of arguability.

52. The Applicant appears to contend that an appeals officer is under an automatic obligation to furnish a copy of the Department's submission to a claimant/appellant. This posits a very high standard: the general case law in relation to fair procedures suggests that a decision-maker is only obliged to circulate a submission to the other side where same contains "*new*" or "*significant*" material. As appears from the summary of the content of same at paragraphs 19 to 22 above, the Department's submission does not contain anything new.

53. Even taking the Applicant's case at its height, however, and assuming that there might be an automatic obligation to circulate the Department's submission in all instances (and not only where the submission contains new or significant material), the challenge to article 10 of the Social Welfare (Appeals) Regulations 1998 does not meet the leave threshold of arguability. The wording of the Regulations is sufficiently broad and open-ended to accommodate an interpretation which is compliant with what the Applicant contends are the requisite fair procedures. Notwithstanding that article 10 does not expressly state that the Department's submission must in all cases be furnished to the claimant/appellant, the power under article 12 to request further particulars can be *interpreted* as allowing for such an outcome. The flexibility of the Regulations is illustrated by the facts of the present case: the Applicant was offered, and availed of, an opportunity in April 2024 to provide additional information in support of her appeal.

54. It follows, therefore, that there is no reality to the Applicant's challenge to article 10 of the Regulations resulting in an order setting aside any aspect of same. Even if the Applicant's arguments were to be successful, the most that would eventuate would be a declaration that the Regulations are to be *interpreted* in a particular way.

55. All of this is a consequence of the presumption of constitutionality as explained by the Supreme Court in *East Donegal Co-operative Livestock Mart Ltd v. Attorney General* [1970] IR 317. The presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the courts.

56. There is an analogous, albeit possibly lesser, presumption that a delegate promulgating secondary legislation intends that the procedures under such legislation are to be conducted in accordance with the principles of constitutional justice.

CONCLUSION AND FORM OF ORDER

57. For the reasons explained, the *ex parte* application for leave to apply for judicial review is refused. Having regard to the grounds of challenge, the existence of a right to request a revision of the appeals officer's decision, pursuant to

section 317 of the Social Welfare Consolidation Act 2005, represents an adequate alternative remedy to judicial review.

58. Having regard to the principle of judicial self-restraint, leave to apply is also refused in respect of the challenge to the validity of article 10 of the Social Welfare (Appeals) Regulations 1998. It is unnecessary for the High Court to embark upon a consideration of the challenge to the Regulations in circumstances where there is an alternative avenue open to the Applicant, whereby she is entitled to seek a revision of the appeals officer's initial decision and to seek an oral hearing. Moreover, the challenge to the secondary legislation does not meet the threshold of arguability.

Appearances

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