THE HIGH COURT

[2023] IEHC 537

[Record No. 2022 188 JR]

BETWEEN

I.B. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.B.)

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Ms Justice Bolger delivered on the 2nd day of October 2023

1. This is an application for Judicial review seeking an Order of Certiorari quashing the decision of the Disability Complaints officer (DCO) of 22 February 2022 on the grounds that it failed to process the applicants' complaint properly and did not make appropriate recommendations in respect of service provision, and related declaratory reliefs. For the reasons set out below I am granting Certiorari.

Background

2. IB is a 7 year old child for whom an application for an Assessment of Need pursuant to the provisions of the Disability Act 2005 ("the 2005 Act") was made in October 2018. A meeting took place on 22 July 2019 and an Assessment Report issued on 19 November 2019, which determined that this child has a disability as defined by the 2005 Act and identified various interventions and services required. A Service Statement pursuant to the 2005 Act issued on 19 November 2019 ("the first Service Statement), detailing the services

to be provided by Enable Ireland in Sandymount, all but one of which were to start on 22 July 2019. A Review Service Statement was issued on 16 April 2021 ("the second Service Statement") which listed the services to be provided, including Occupational Therapy, Psychology, Speech and Language Therapy, with a start date of July 2019.

3. By letter dated 3 March 2021, Enable Ireland wrote to the applicants in respect of the national reconfiguration of disability services and this child's transfer to a Children's Disability Network Team 4, in Leopardstown with effect from 28 June 2021. In May 2021, the initial team interview was held which resulted in an Individual Family Service Plan Report, dated 20 May 2021 which explained how services to children with a disability was due to change in June, 2021, and that this child would be moving to the Ballyogan Centre in Leopardstown.

4. By letter sent to the respondent's Disability Complaints Officer dated 22 December 2021, solicitors on behalf of the applicants instituted a complaint under s.14(1)(e) of the Disability Act, 2005, in respect of the failure to provide or to fully provide a service specified in the Service Statement. The letter enclosed a copy of the second Service Statement dated 16 April 2021.

5. A revised Service Statement ("the third Service Statement") issued on 14 January 2022 which was not referred to in the application for leave and which was first identified by the HSE in responding to the within application.

6. By decision dated the 22 February 2022, the DCO did not uphold the applicant's complaint. The decision made no mention of the third Service Statement. The applicants challenge that decision. Leave was granted to bring this application on 21 March 2022. An Individual Family Service Plan (IFSP) meeting was held on 31 March 2022 by the CDNT in Leopardstown.

Relevant Statutory Provisions

7. Section 9 of the Disability Act provides for an Assessment of needs:-

"9.—(1) Where—

(a) a person ("the person") is of opinion that he or she may have a disability, or

(b) a specified person ("the person") is of that opinion in relation to another person and the person considers that by reason of the nature of that other person's disability or age he or she is or is likely to be unable to form such an opinion,

the person may apply to the Executive for an assessment or for an assessment in relation to a specific need or particular service identified by him or her"

8. Section 8(7) of the 2005 Act provides that an assessment report shall set out the following;

"(a) whether the applicant has a disability,

(b) in case the determination is that the applicant has a disability—

(i) a statement of the nature and extent of the disability,

(ii) a statement of the health and education needs (if any) occasioned to the person by the disability,

(iii) a statement of the services considered appropriate by the person or persons referred to in subsection (2) to meet the needs of the applicant and the period of time ideally required by the person or persons for the provision of those services and the order of such provision,

(iv) a statement of the period within which a review of the assessment should be carried out."

9. Section 11(2) of the 2005 act provides that:-

"*(2) Where an assessment report is furnished to the Executive and the report includes a determination that the provision of health services or education services or both is or are appropriate for the applicant concerned, he or she shall arrange for the preparation by a liaison officer of a statement (in this Act referred to as "a service statement") specifying the health services or education services or both which will be provided to the applicant by or on behalf of the Executive or an education service provider, as appropriate, and the period of time within which such services will be provided*."

10. Section 11(7) of the 2005 Act provides:-

"*(7) Without prejudice to the generality of subsection (2), in preparing a service statement the liaison officer concerned shall have regard to the following—*

(a) the assessment report concerned,

(b) the eligibility of the applicant for services under the Health Acts 1947 to 2004,

(c) approved standards and codes of practice (if any) in place in the State in relation to the services identified in the assessment report,

(d) the practicability of providing the services identified in the assessment report,

(e) in the case of a service to be provided by or on behalf of the Executive, the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive for the relevant financial year,

(f) the advice of the Council, in the case of a service provided by an education service provider, in relation to the capacity of the provider to provide the

service within the financial resources allocated to it for the relevant financial year."

11. Section 14 of the 2005 Act provides for a complaints procedure in respect of assessments, Service Statements, or the Executive's failure to provide the services specified in a Service Statement of various grounds. Relevant to the underlying complaint in this case is the ground set out in s. 14(1)(e), which provides:-

"*(e) the fact, if it be the case, that the Executive or the education service provider, as the case may be, failed to provide or to fully provide a service specified in the service statement*."

12. Section 15(6) of the Act states:-

"*Where a complaints officer is of opinion that a complaint is not suitable for such resolution as aforesaid, he or she shall investigate the complaint and shall give the applicant concerned and, if appropriate, the assessment officer concerned, the liaison officer concerned, the education service provider concerned and any other person having an interest in the matter, an opportunity to be heard by him or her and to present to him or her any evidence relating to the complaint and shall prepare a report in writing in relation to it setting out his or her findings and recommendations and shall furnish a copy of the report to the applicant, the Executive and, if appropriate, the assessment officer concerned, the liaison officer concerned and the head of the education service provider concerned*."

13. Section 15(7) of the 2005 Act provides:

"*In addition to any other matter to which a complaints officer may, as he or she considers appropriate, have regard to in the performance of his or her functions, he or she shall have regard to the matters referred to in section 11(7).*"

14. Section 15(8)(f) provides:-

"*(8) A report of a complaints officer may contain one or more of the following: …*

(f) if the report contains a finding that the Executive or an education service provider failed to provide or to fully provide a service specified in the service statement, a recommendation that the service be provided in full by the Executive or the education service provider or both as may be appropriate within the period specified in the recommendation."

15. Section 22 of the 2005 Act provides an enforcement mechanism for recommendations issued by the Complaints Officer and determinations of the Appeals Officer if these are not complied with which are binding on the service provider, usually the HSE, and are enforceable in the Circuit Court after a period of three months has elapsed.

The Applicants' Challenge

16. The applicants challenge the decision of the Disability Complaints Officer of the 22nd of February 2022 for wrongly addressing the first service statement and s.11(2) even though their complaint was about the second service statement and s.14(1)(e). Their written submissions summarise their challenge as follows: -

"*i. The Complaints Officer fundamentally misconstrued the complaint made, the legal and factual issues arising, and erred in law and in fact by failing to consider or determine the actual complaint before him, or make recommendations as required;*

ii. The Complaints Officer failed to consider matters, which he was statutorily obliged to have regard to;

iii. The Complaints Officer considered matters, which he ought not to have considered;

iv. The Complaints Officer's decision was irrational, unreasonable, and unambiguously flies in the face of fundamental reason and common sense;

v. The Complaints Officer's decision was contrary to fair procedures, natural and constitutional justice and the Complaints Officer fettered his discretion and failed to correctly exercise his powers." (para. 8, applicant's submissions)

The HSE's response

17. The HSE places heavy emphasis on the existence of a third Service Statement of 14 January 2022 which they say supersedes the second Service Statement and renders the applicant's proceedings futile as there is no useful purpose to be served from quashing the impugned report; *Barry v. Fitzpatrick* [1996] 1 I.L.R.M. 512 and *The Estate (Abengelen Properties) v. Corporation of Dublin* [1984] I.R. 381. The application is moot as the services to be provided are specified in the third service statement under the heading of "Actual Intervention" by way of a scheduled review of the applicant's Family Service Plan by June 2021 which was sent to the applicant under cover letter dated 20th May 2021 and was moot even before leave was sought. The applicant's failure to refer to the third service statement in the ex parte application for leave evidences a lack of candour. The applicants should have proceeded via the statutory complaints procedure rather than by bringing these judicial review proceedings.

18. The HSE informed this court that they would not stand over the lawfulness of the disability complaint officer's decision and that their opposition to the reliefs sought was focused on grounds of the mootness and/or futility of the application and the applicant's lack of candour. However, in subsequent submissions on the recently delivered decision of the Supreme Court in *JN v Harraghy* [2023] IESC 9, there was some engagement with the merits of the applicants' complaint and the lawfulness of the Disability Complaints Officer's decision and so for the avoidance of any doubt, I have addressed the validity of decision below, as well as the HSE's arguments on mootness, futility and lack of candour.

The Service Statements

19. The first Service Statement dated 19 November 2019 identifies five separate service types to be provided: occupational therapy, preschool support, speech and language therapy, psychology and social work. The service provider and location for each of the services is identified as Enable Ireland, Sandymount, Dublin 4. The second Service Statement, which was the subject of the applicants' complaint, dated 16 April 2021 is headed up "Review Service Statement". That identifies the same service provider and location as the first Service Statement and four service types: occupational therapy, psychology, speech and language therapy and social work. The Actual Interventions in relation to occupational therapy, psychology, speech and language therapy all refer to the Initial Family Service Plan which was held on 8 November 2019. The minutes of that meeting were sent to the applicants by the service provider, Enable Ireland, under cover letter dated 20 May 2021 and set out the goals and plans from 18 June 2020.

20. The third Service Statement is dated 14 January 2022, some three weeks after the applicant's complaint and over five weeks prior to the impugned disability complaint officer's report. The service provider has changed to CH 06 Child Disability Network Team (CDNT) no. 4 located at Unit 10, 11 Leopardstown Shopping Centre, Ballyogan Road, Dublin 18. A single service type is identified as "Individual Family Service Plan" with a start date of 30 April 2022, some three months after the date of the service statement, with a review date of 14 January 2023. The two earlier service statements also referred to an Individual Family Service Plan but as an intervention rather than a service type. Under "Identified Need" the third Service Statement confirms that the applicant: -

> *"require a range of interdisciplinary supports including psychology, speech and language therapy, occupational therapy and social work as outlined in I's Assessment of Needs Report from February 2nd, 2021".*

"Actual Interventions" are identified as the child's key worker "*will contact the family and offer Individual Family Support Plan (IFSP) meeting by April 2022 to identify the strengths and needs and set the goals for [the child] and his*

family". Under the heading "4. Other Relevant Information" it states again that "*a member of the team will be in contact by April 2022 to commence service* ***and*** *to develop Individualised Family Service Plan which will outline the key areas for intervention*". (my emphasis).

21. The third Service Statement seems to distinguish between the commencement of services in April 2022 and the development of the Individualised Family Service Plan (IFSP). Needs similar to those previously identified in the first and second Service Statements are identified, namely, psychology, speech and language therapy, occupational therapy and social work. The third Service Statement does not say when those services are to commence but says that a member of the team will be in contact by April 2022 "*to commence service….."*. An Individual Family Service Plan meeting was held on 31st March 2022 by the service provider identified in the third Service Statement.

The Disability Complaint Officer's Report 22 February 2022

22. The applicants' complaint by letter from their solicitor dated 22 December 2021 states "*the purpose of this correspondence is to institute a complaint under Section 14(1)(a) in respect of the failure to provide or fully provide a service specified in the Service Statement*." The letter enclosed the Second Service Statement of April 2021. The Disability Complaints Officer could not have been left in any doubt that the complaint pertained to that service statement or that that service statement specified services that the applicants asserted the HSE had "*failed to provide or to fully provide*" (as per s.14(1)(e)). The applicants were doing exactly what Dunne J. said in *JN v Harraghy* the Act enabled them to do:-

> "*It is clear from the scheme of the Act that it is designed to enable assessments to be made of the health and educational needs of persons with disability, and to enable those persons to have a process to enable them to challenge either the assessment itself or the provision or non-provision made in relation to their needs through the process created by the Act. Quite elaborate and detailed procedures have thus been*

put in place to allow those who seek access to the relevant services to obtain what is appropriate for them and available from the resources allocated by the government. The objective of the legislation is, as the Long Title makes clear, to "facilitate generally access ... to certain such services and employment and to promote equality and social inclusion ...". One can safely say that the purpose of the 2005 Act is to provide assistance to persons with disabilities and to allow those with an issue as to the provision being made for them to challenge the decisions made concerning them with a complaint process, including an appeal, (together with a further appeal to the High Court on a point of law), and enforcement measures where appropriate." (para. 34)

23. Section 15(6) (at para. 13 above) sets out what the Disability Complaints Officer was supposed to do in investigating a complaint, including giving certain persons an opportunity to be heard and present evidence.

24. The Grounds of Opposition claim at para. 14(2) that the Disability Complaints Officer had regard to s.11, although non compliance with s.11 was never part of the applicants' complaint. The verifying affidavit sworn by Ms Dwyer, the Assessment of Need Liaison Officer in the applicant's case, does not address what the Disability Complaints Officer did or did not do. The Disability Complaints Officer did not swear an affidavit. The letter from the Disability Complaints Officer to the applicants enclosing the report says that she examined the applicants' complaint. Her report refers to the applicants' complaints file which is in turn refers to a final assessment report of 19 November 2019 and to the first Service Statement. The Disability Complaints Officer found "*the initial team interview was conducted on 22 July 2019 which included input from services identified in the Service Statement including speech and language therapy (SLT), physiotherapy (PT), occupational therapy (OT), social work (SW) and psychology. Such provision of service indicates the HSE compliance with the legislative timeframes as identified in the I's Service Statement".* That first Service Statement was not the subject of the applicants' complaint and the interview of 22 July 2019 referred to in the report took place before the Assessment of Needs or the first service statement were even finalised. The Disability Complaints Officer went on to cite s.11(2), a

statutory provision that had not been referred to in the applicants' complaint. She then concluded

> *"based upon the above stated legislation (Disability Act 2005, Section 11(2), I find that the Executive has adhered to same and in accordance with my statutory functions under the Disability Act 2005 and the Disability (Assessment of Needs, Service Statement and Redress Regulation) Regulations 2007 (Section 9, Statutory Instrument No. 263 of 2007) I am therefore not upholding this complaint."*

However, the complaint was not brought pursuant to s.11(2). The applicants' complaint was not about the preparation of the Service Statement or the period of time within the services were to be provided but was and was clearly stated in the complaint letter of 22 December 2021 to be "*a complaint under s.14(1)(e) in respect of the failure to provide or fully provide a service specified in the Service Statement"*. The applicants could hardly have been any clearer in what their complaint was. Nevertheless, the Disability Complaints Officer seems to have entirely misunderstood it and her approach to the complaint bears little resemblance to the investigation that s.15(6) required her to conduct. There is no evidence in her impugned report of any input having been sought or obtained from the HSE or from the assessment officer. All she found was that the interview of July 2019 included input from services that had been identified in the first Service Statement and concluded that this indicated "HSE compliance" with a different statutory provision and with timeframes which were not part of the applicants' complaint.

25. I cannot and do not make any finding as to whether the services specified in the second Service Statement were provided or fully provided, as that is a matter for the Disability Complaints Officer. But I can and do find that the Disability Complaints Officer

failed to investigate the complaint that the applicants made, as she was required to do by s.15(6). Instead, she focused on the first service statement and issues of timeframe over which no complaint was made. She did not investigate whether the services specified in the second Service Statement were provided or provided in full, and it is difficult to see how she could have done so without looking to establish what services were provided. She found that an interview took place on 22 July 2019 including input from various services but that cannot equate to a finding that the services the subject of the complaint were provided or fully provided. The approach she adopted seems to represent the sort of narrow view of the powers conferred by the Act that was condemned by the Supreme Court in *Harraghy* at para. 71:-

> *"It does have to be said that there was some acceptance in the course of argument on behalf of the Appeals Officer that circumstances could arise which might result in the view being taken that the dates provided for in a service statement were inaccurate or incorrect. Thus, it was not disputed that in circumstances where, for example, more resources became available to the HSE which would enable the services at issue to be provided at an earlier date that the timeline provided for in a service statement could no longer be regarded as accurate or correct. It is undoubtedly the case that the Appeals Officer took a narrow view of the powers of an Appeals Officer in relation to the service statement when dealing with the complaint. Such a narrow view seems to me to be inappropriate having regard to the nature of the legislation and the remedies provided for someone to make a complaint in relation to the provision or lack of provision of services to an individual. As has been set out above, an elaborate process has been set up to allow persons in the position of the mother of the child in this case to make a complaint where services are not being provided, or perhaps not being provided in as timely a manner as might be appropriate. It should be borne in mind that the process is not an adversarial process and is one which has been designed to give an appeals officer considerable powers to enquire into the issues arising in any given case, as I have described above. There is no doubt in my mind that an appeals officer is entitled to*

interrogate issues such as the date when a particular service could be provided and, equally, is entitled to interrogate the question as to whether or not those services could be provided elsewhere in the relevant functional area of the HSE. That did not happen here."

26. Dunne J.'s dicta related to the more extensive statutory powers of an appeals officer, but a similar criticism can be made of this Disability Complaints Officer's approach to her statutory powers in this case. This Disability Complaints Officer failed to take account of what she should have taken account of and improperly took account of irrelevant matters, an approach that has been heavily condemned in law. Clarke J. (as he then was) stated in *Sweetman v. an Bord Pleanála* [2007] IEHC 153, [2008] 1 I.R. 277 at p. 298:-

"*A court is also entitled (and indeed is duty bound) to consider matters such as whether the decision maker had regard to factors which ought not properly have been included in the consideration or failed to have regard to factors which should properly have been considered. O'Keeffe v. An Bord Pleanála irrationality only arises in circumstances where the decision maker properly considered all of the matters required to be taken into account and did not take into account any matters which should not."*

27. It is also clear that this Disability Complaints Officer failed in her obligation "*to have regard to"* s.11(7) matters, as she was required to by s.15(7). In my decision in *Harraghy,* I criticised a similar failure both by the Disability Complaints Officer and the disability appeals office to comply with their obligations in holding as follows at paras. 56 and 57:-

''56. I was not satisfied by the attempts of the Appeals Officer or the HSE to demonstrate how the Appeals Officer determination (or to the extent that the argument was made, the Complaints Officer decision) considered (or in relation to the Complaints Officer had regard to) the matters set out in s. 11(7) and, in particular, subs. (e). The Appeals Officer's consideration does not have to be

done by way of a detailed narrative, but it has to be done in a way that complies with the Appeals Officer's statutory duty pursuant to s. 18(20) and given what was required by the High Court in McEvoy v. Meath County Council and the Supreme Court in Glencar Explorations v. Mayo County Council to satisfy the court that consideration had been given to the necessary matters. The Appeals Officer simply stating that he has considered all the documentation (implicitly including the HSE's service plan of 2020) cannot evidence a consideration of the matter set out in s. 11(7)(e) when there was no evidence put before the Appeals Officer of how the provision of services to the appellant by the date specified in the service statement ensured expenditure within the amount allocated to implement the approved service plan of executive for the relevant financial year, or the converse, i.e. that the provision of the service on an earlier date would result in such expenditure. To the extent that the Appeals Officer says he did consider the matter set out in s.11(7)(e), it can only have been speculative in the absence of that evidence or anything akin to it.

57. I see no basis in either the Appeals Officer's determination or in the limited information and documentation on which the Appeals Officer based his findings, that satisfies me either that he had sufficient information to allow him to consider the matters set out in s.11(7) or that he complied with his statutory duty to do so. The low bar identified by the High Court in McEvoy v. Meath County Council and by the Supreme Court in Glencar Explorations v. Mayo County Council was not passed here, such that this court could be satisfied that

the Appeals Officer did give the consideration to the s.11(7) matters as he was required to do."

28. For all of those reasons, this report cannot, in principle, be permitted to stand.

The Effect of a Review

29. The HSE contend that the existence of a third Service Statement, issued after the applicants' complaint and before the Disability Complaints Officer's report, renders this application moot and futile.

30. The second Service Statement, the subject matter of the applicants' complaint was a review of the original Service Statement. Provision is made for a Service Statement to be reviewed annually in Regulation 2 of the Disability (Assessment of Need Service Statement and Redress) Regulations 2007, S.I. no 263 of 2007 as follows: -

"The service statement shall be reviewed no later than 12 months after the statement was drawn up or no later than 12 months from when the statement was either last reviewed or amended".

There is a different provision for the amendment of a service statement at s. 11 (9) of the Act, set out above, the purpose of which was described by Phelan J. in *MB v HSE* [2023] IEHC 99 as being for "*where there is a change in circumstances, acknowledging that needs may change post the conclusion of an assessment report*". The applicant's Service Statement was never amended but was reviewed on a number of occasions. A reviewed Service Statement is not a new Service Statement. It is a review of the Service Statement that was previously issued in accordance with s. 11(2). The HSE's submissions on

mootness and futility are premised on their assertion that once a Service Statement is reviewed, the reviewed version supersedes the previous Service Statement. I do not think that analysis is supported by the wording of the legislation. It is only where a Service Statement is amended in accordance with s.11(9) that a brand new service statement is put in place, whereas a review is (as Regulation 22 says) of "*the"* Service Statement. Therefore, the Second Service statement was a review of the original Service Statement dated 19 November 2019 and the third Service Statement was a further review of that same original Service Statement. Similar services are identified in each review and each reflects the service needs that were identified in the Assessment of Needs.

31. The applicants' stated intention in bringing these proceedings is to seek to enforce the second Service Statement before the Circuit Court pursuant to s.22. The HSE says this is premised on a reality which no longer exists on the ground as they are no longer configured to deliver the services identified in the second Service Statement. As a result, they assert that the proceedings are moot and/or futile as the second Service Statement could not in any case be enforced. However, the actual reality on the ground is that this child has a recognised need for services that have been identified as including psychology, speech and language therapy, occupational therapy and social work. Those needs are set out in the Assessment of Needs and in all three Service Statements to date including in the third service statement that the HSE seem to view as providing for a different way of delivering those services. The change in the service provider between the second and third Service Statements from a single service provider to unified multidisciplinary teams did not and could not alter this child's needs that were first identified in their Assessment of Need of 19 November 2019. The third Service Statement of January 2022 did not supersede the second Service Statement or render it or the services it specified, irrelevant. Otherwise, the HSE's obligation under Regulation 22 to review the service statement every twelve months could

allow the HSE to avoid having to deal with a Disability Complaints Officer's recommendation pursuant to s.15 that a service specified in a service statement be provided.

32. Section 15(6) requires the Disability Complaints Officer to prepare a written report including their findings and recommendations and s.15(8)(f) provides that the report may *inter alia* contain *"a recommendation that the service be provided in full"*. None of the statutory provisions empowering the Disability Complaints Officer to make those recommendations or empowering the Circuit Court to direct the HSE to implement the determination or recommendation of the Appeals Officer in accordance with its terms or to give effect to the resolution, as the case may be (s.22(1)(a)), refers to whether a Service Statement has been reviewed or provides for any such review to impact on those statutory powers.

33. The Supreme Court has recognised the importance of those statutory powers as recently as *JN v Harraghy*, decision of Dunne J. 27 April 2023 where, at para. 34, Dunne J. described the purpose and power of the Act in stating as follows:

> *"It is clear from the scheme of the Act that it is designed to enable assessments to be made of the health and educational needs of persons with disability, and to enable those persons to have a process to enable them to challenge either the assessment itself or the provision or non-provision made in relation to their needs through the process created by the Act. Quite elaborate and detailed procedures have thus been put in place to allow those who seek access to the relevant services to obtain what is appropriate for them and available from the resources allocated by the government. The objective of the legislation is, as the Long Title makes clear, to "facilitate generally access … to certain such services and employment and to promote equality and social inclusion …". One can safely say that the purpose of the 2005 Act is to provide assistance to*

persons with disabilities and to allow those with an issue as to the provision being made for them to challenge the decisions made concerning them with a complaint process, including an appeal, (together with a further appeal to the High Court on a point of law), and enforcement measures where appropriate."

At para. 41 Dunne J. confirms the need to engage in a purposive interpretation given that it is a remedial Act:-

> *"It is clear from the above account of the case law that a purposive interpretation should be given to a remedial statute, where appropriate and necessary. That does not mean that the legislative limits in a remedial statute can be ignored, or as Clarke C.J. put it in J.G.H., referred to above, "Courts should not be narrow or technical in interpreting those bounds but they should not be ignored either" In addition to the point, as was stated by Baker J., in the case of E.L.G., referred to above, "a purposive approach…cannot mean drawing a conclusion that is plainly contrary to the legislation." Those comments are of assistance and in interpreting legislation such as that which is at issue in these proceedings, I shall bear in mind those comments in considering the issues in this case."*

34. An example of that purposive approach endorsed by the Supreme Court in *JN* can be seen in the decision of the Circuit Court in the case of *L O'B v. HSE* [2023] [2021] IECC 1, written judgment delivered on 8 November 2021, where Judge Cormac Quinn found at p.11 of his judgment, that:

> "*The service of further "service statements" in this case which are required by the legislation to be served annually, do not trump the determination of the "complaints officer i.e. the service of further service statements in this case does not mean that the determination of the complaints officer is of no effect or to use the words of Mr Jefferies 'out of date.'…*

> *I am satisfied that the services recommended by the complaints officer are still required by the applicant and have not been provided. I make these findings based on the literal interpretation of the act together with the "purposive" interpretation and also interpreting the legislation in accordance with the Constitution and the EU Convention on Human Rights.*

It would be inconsistent with the purposive approach that Dunne J. said must be applied, to seek to limit the Disability Complaints Officer's important powers and ultimately the equally important powers of the Circuit Court, because the Service Statement has been reviewed as required by Regulation 22.

Mootness / Futility

35. For an issue to be moot, the legal dispute must be at an end, such as occurred in *Goold v. Collins and ors* [2004] IESC 38 where Hardiman J. found that the case did "*not feature a live, concrete dispute between the parties: a decision on the outstanding issues would have no direct impact on the parties"* (at page 27). The rationale behind the mootness doctrine was described by O'Donnell J. (as he was then) in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 I.R. 751, when he endorsed the the observation of Murray CJ in *Irwin v Deasy* [2010] IESC 35:

> *"The mootness doctrine is applied by the courts to restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable".*

In the case before me, the applicants challenge the Disability Complaints Officer's report of their complaint about the second Service Statement. The Service Statement was reviewed and a third Service Statement produced after the complaint was made and before the impugned decision of the Disability Complaints Officer. The scheduled review of the applicant's Initial Family Service Plan (IFSP) took place by letter to the applicants dated 20 May 2021. None of these events and facts renders the issues raised by the applicants and

their concern at what they say is the continued failure to provide all or any of the services in the second Service Statement hypothetical, academic or anything other than a live dispute between them and the HSE, such that these proceedings could be viewed as moot or futile.

36. The applicants' complaint, which they say was never lawfully investigated by the Disability Complaints Officer, was that the HSE had failed to provide or fully provide a service specified in the second Service Statement. Even if the review of the applicants' IFSP was a service as defined at s.2 of the Act, it could not be interpreted as the full, partial or sufficient provision of the four separate service types set out in the second Service Statement, the same services that are repeated in the third Service Statement as the service types to be provided to the applicant in respect of the child's assessed needs. The extent to which what took place, either in May 2021 or subsequently, constituted the full, partial or sufficient provision of the services specified in the second service Statement is something that should have been assessed by the Disability Complaints Officer in their investigation of the applicants' complaint. No such assessment was made by the complaints disability officer and the applicants are and remain entitled to expect that this failure to respect their statutory right to made a complaint under the Act will be remedied by allowing them the opportunity to have their complaint properly considered and investigated as may be appropriate. As found by Clarke J. (as he was then) in *Tristor Ltd v Minister for the Environment and ors* [2010] IEHC 454 :- "*the court should do its best to ensure that parties do not inappropriately suffer or, indeed gain, by reason of invalid decision making and that, insofar as it may be possible so to do both on the facts and within the relevant statutory framework, the situation should be returned to where it would have been had the invalid decision not taken place."* That dicta was cited with approval by the Supreme Court in *Kelly v. Minister for Agriculture* [2021] IESC 62 where the "*just conclusion"* was found by O'Donnell J. (as he was then) to be an order of certiorari quashing the decision to dismiss the appellant but not allowing the orders he had sought for payment of salary and pension from when he had been dismissed.

37. Undoubtedly there are situations where a relief sought is or has become futile because "*no benefit will or could obtain to the applicant*" (Donnelly J. in *H.A. v Minister for Justice* [2022] IECA 166 at para. 39) such as where the decision maker could never properly

grant the relief claimed. At para. 42 of her decision Donnelly J. identified the principles that may be helpful in determining issues of futility:-

> *". It is worthwhile making reference to some of the principles set out by McKechnie J. in Harrisrange Ltd v. Duncan [2002] IEHC 14 concerning the issue of when a defendant ought to be given leave to defend in a summary judgment procedure. These can be adapted to the situation where a court is being asked to refuse to make an order by way of judicial review, despite having found that the order actually made was vitiated by legal error. From such a perusal and adaptation, the following principles may be helpful in determining these issues:*
>
> > *(i) The discretion to refuse relief by way of judicial review should be exercised with discernible caution;*
> >
> > *(ii) Having already determined that a decision is vitiated by error of law, relief ought not to be refused on the ground of futility unless it is very clear that the granting of relief is futile in the sense of being incapable of benefitting the applicant for judicial review;*
> >
> > *(iii) The onus of establishing that it is very clear that the granting of relief is futile remains on the party who makes that assertion;*
> >
> > *(iv) In deciding upon this issue, the Court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
> >
> > *(v) The Court must be mindful that it is decision-making bodies who have been charged by statute with the particular decision-making function;*
> >
> > *(vi) The issue is whether the applicant for relief by way of judicial review has a case to make on remittal of the issue to the statutory decision-maker is to be judged by whether it is arguable that they may achieve a benefit in that procedure;*

(vii) If it appears arguable that the moving party on the judicial review application may achieve a benefit for any reconsideration of their case by a decision, the low threshold for the grant of relief will have been reached;

(viii) Where truly there is no basis upon which the decision-maker could reach a different conclusion than the decision already reached but impugned in the proceedings, then it may be appropriate to exercise discretion to refuse relief;

(ix) Where, however, there are issues of fact upon which adjudication is required and which in themselves are material to success or failure, then their resolution must be left to the statutory decision-maker;

(x) Where there are issues of law which may be resolved by the Court, it may be appropriate to exercise the discretion to refuse to grant judicial review, but only if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(xi) The overriding determinative factor, bearing in mind the constitutional basis of the parties' right to fair procedures and the legal basis of the claim for relief being made by an applicant, is the achievement of a just result whether that is to grant or refuse certiorari."

38. I pay particular attention to (ii), (v), (vii), (viii) and (ix) in finding that it is not appropriate in this case to refuse the relief sought on grounds of futility, including the relief that the matter be remitted to a Disability Complaints Officer. I have had regard to the averment of the applicant father at paragraph 10 of his Affidavit that this child "*has not received any or all of the services specified in the service statement"*. The HSE in its replying Affidavit referred to the reconfiguration of their system of delivery of services by a new service provider which the HSE's deponent says (at paragraph 21 of their Affidavit) means the second service statement "*is out of date and was drafted for a system of delivering*

services which is defunct". That does not pass the high threshold identified by Donnelly J. in *HA*.

39. The HSE's analysis of the second service statement as having been drafted for a particular system of delivering services, is inconsistent with how the courts have determined what a service statement is. For example, the service statement was described by Phelan J. in *MB v HSE* as "*the product of a resource management exercise (presumably largely desktop and administrative or managerial) which does not draw in the same way on the capacity of the HSE to deliver front-line services"* (at para. 59). Donnelly J. in *C.M. v. Health Service Executive* [2021] IECA 283, [2022] 1 I.L.R.M. 40 described the assessment of need as being carried out *"without regard to the cost of or the capacity to provide, any service identified in the assessment as being appropriate to meet the needs of the applicant concerned. It thus will indicate the 'gold standard' of service requirements*" (para. 23)

40. The existence of a third Service Statement did not supersede the second Service Statement and/or rendered the proceedings moot or futile.

Lack of Candour

41. The third Service Statement was not in existence when the applicants lodged their complaint. The Disability Complaints Officer did refer to it at all in their report and there is nothing in the impugned report suggesting that the HSE brought the existence of the third service statement to the Disability Complaints Officer's attention. If the third Service Statement superseded the second Service Statement, one would have expected the HSE to have informed the Disability Complaints Officer of that and/or for the Disability Complaints Officer to have made enquiries as to the review status of the second service statement which Regulation 22 required the Liaison Officer to review every twelve months. There is no evidence of any such enquiries having occurred.

42. It may have been prudent for the applicants to have advised the court of the existence of that third review Service Statement in its application for leave but their failure

to do so does not evidence a lack of candour such as would persuade me to exercise my discretion not to grant relief that I otherwise thought appropriate.

Were the applicants entitled to proceed by Judicial Review rather than an appeal?

43. The HSE say that the applicants should have appealed the impugned decision to the Disability Appeals Officer and that their failure to do so should persuade this court to refuse the relief that is sought. There is ample authority for the entitlement of a person protected by this Act to challenge what they say is an unlawful decision by judicial review rather than via the appeals process set out in the Act, for example in *C.T.M. v. The Assessment Officer & Anor* [2022] IEHC 131, Phelan J. upheld the applicant's right to proceed by way of judicial review rather than a statutory appeal. That is not to say that every decision of a Disability Complaints Officer that is believed to be incorrect and/or unlawful should or can be challenged by way of judicial review.

44. One of the situations that merit proceeding by way of judicial review rather than a statutory appeal was identified by Clarke J. (as he was then) in *EMI v Data Protection Commissioner* [2013] IESC 34, [2014] 1 I.L.R.M. 225 as where an aggrieved party alleges "*that they were deprived of the reality of a proper consideration of the issues such that confining them to an appeal would be in truth depriving them of their entitlement to two hearings"* (para. 4.9). I consider this to be such a case as the Act entitles a disabled person to a two tier complaints process on the merits of their complaint, the first before a Disability Complaints Officer and thereafter a full appeal to an appeals officer. The decision of the appeals officer can also be appealed to this court but only on a point of law. In this case, the applicants claim to have been deprived of the investigation of their complaint to which they are entitled pursuant to s.15(6) of the Act as the complaint that they made was never investigated by the appeals officer who, instead, examined a different Service Statement and different statutory provisions to those about which the applicants complained. That is different to a case where an applicant asserts that a complaints officer was incorrect in their analysis of their complaint. I have found that this applicants' complaint was simply not

investigated. They are, therefore, entitled to have the impugned process set aside and remitted for a lawful consideration of the complaint they made and to preserve their right to have any decision on their complaint with which they may not agree appealed to an appeals officer with a further appeal on a point of law should any such point of law exist.

Conclusions

45. The applicants made a complaint that the services specified in the second service statement were not or were not fully provided. The complaints officer did not investigate that complaint and instead focussed on the first service statement and on a meeting that had taken place before either the Assessment of Needs or the first service statement was prepared. Whilst the second service statement has been reviewed since that time and a third service statement furnished, the applicants are still entitled to have their complaint that the services have not been provided or fully provided investigated as their complaint remains a live and relevant issue for them and the issuing of a third Service Statement has not rendered it either futile nor moot. Whether the applicants are correct that the services specified in the second Service Statement have not been provided or fully provided at this stage is a matter for investigation by the Disability Complaints Officer in the discharge of their statutory powers and obligations pursuant to the Act. It will be a matter for the Disability Complaints Officer to determine what is relevant to their investigation of the applicants' complaint and to have regard to the matters specified in s.11 in making findings and recommendations, if any, as to what should be done. This could include the Individual Family Service Plan meeting that was held on 31 March 2022 by the service provider identified in the third Service Statement or anything else that has occurred in relation to the provision of services to this child, all of which are for the Disability Complaints Officer to investigate.

46. I therefore grant an order of Certiorari quashing the decision of the Disability Complaints Officer of 22 February 2022 and remit the matter to the HSE's Disability Complaints Officer to reconsider the applicants' complaint of 22 December 2021. For the avoidance of doubt, I confirm that the investigation of that complaint may take account of

anything that has occurred since then, including any review of the service statement and the provision of any of the services that have been identified as part of the child's needs.

Indicative view on costs

47. As the appellant has succeeded in their application, my indicative view on costs is that they are entitled to their costs in accordance with s. 169 of the Legal Services Regulatory Authority Act 2015. I will put the matter in before me at 10:30am on 24 October 2023 to allow make such further submissions as the parties may wish to make in relation to costs and/or final orders.

Counsel for the applicants: Derek Shortall SC, Maeve Cox BL

Counsel for the respondent: David Leahy SC, Cormac Hynes BL