THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2022/9 JR] / [2023] IEHC 99

BETWEEN:

M.B. (A.B. A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, M.B.)

APPLICANTS

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Ms. Justice Siobhán Phelan delivered on the 6th day of March, 2023.

INTRODUCTION

1. The assessment of need process enacted under the Disability Act, 2005 [hereinafter "the 2005 Act"] results in the preparation of two documents: an assessment report and a service statement.

2. It is common case that there is an ongoing obligation to review service statements pursuant to the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (SI No. 263/2007) [hereinafter "the 2007 Regulations"] promulgated pursuant to s. 21 of the 2005 Act. The Applicant argues, however, that there is also an ongoing duty of annual review of assessment of need under the 2005 Act. The HSE maintains, on the other hand, that while a first review has occurred in this case, there is no statutory obligation to review an assessment of need and more specifically, no obligation to review assessments on an ongoing basis in circumstances where an application may be made for a new assessment of need in the event of a change in circumstance or new information.

3. The issue which arises for determination in these proceedings is whether there is an entitlement, enforceable by order of mandamus or declaratory relief in judicial review proceedings, to compel the carrying out of more than one review of an assessment of need under the 2005 Act.

FACTUAL BACKGROUND AND CHRONOLOGY

4. The Applicant is a child (hereinafter "the Child") who has been diagnosed with Autism Spectrum Disorder. His mother and next friend applied for an assessment of need pursuant to s. 9 of the 2005 Act in March, 2018 when the Applicant was nine years old. The resulting Assessment Report was completed in August, 2019 (outside the mandated statutory time-frame).

5. The Assessment Report records on its final page (in accordance with s.8(7)(b)(iv)), that it is to be reviewed on the 30th August 2020 while noting in bold text that "*reviews do not take place automatically, parents can apply for a review through the AON process*."

6. The corresponding Service Statement issued in September, 2019.

7. The Applicant's solicitor wrote to the HSE by letter dated the 7th of October, 2019 to advise that the Service Statement was inadequate because it was inappropriate to simply state that the School Age Disability Team ("SADT") would provide for his needs and no review date had been stated. It was further asserted that it was "*wrong in law*" to treat the review of assessment as non-automatic.

8. Both the Assessment Report and the Service Statement were challenged by the Applicants under the statutory complaints and enforcement procedures, which led to the re-issuing of a Service Statement, dated the 30th of July, 2020 (but not received by Applicants until the 31st of August, 2020) following recommendation of the Disability Complaints Officer made in December 2019. The Disability Complaints Officer also recommended that a realistic timeframe no later than the date of the review of the reissued service statement would be fixed

for the commencement of interventions for the Child. The Disability Complaints Officer found with regard to the review of the Assessment Report that the requirement of s. 8(7)(b)(iv) was met by the inclusion of a review date. It was considered that the complaint that the statement that the review was not automatic was wrong in law fell outside the statutory complaints process.

9. The revised service statement which issued on foot of the Disability Officer's Recommendation nominated March, 2020 as a start date for psychology, speech and language therapy and occupational therapy and nominated a review date of September, 2020. The services outlined in the Service Statement were services already being delivered through SADT and no referral for outside support service was identified.

10. Thereafter, within the designated period, the assessment of need was subject to review and a document entitled "*Assessment Report*" but bearing the words "*Review*" issued on the 4th of September, 2020 [hereinafter "*Review Report*"]. This newly generated report referred to a "*review application*". If there was a review application, however, it has not been put in evidence before me and it seems from the papers that the review was initiated by correspondence dated the 28th of August, 2020 from the Assessment Officer who had completed the original Assessment Report. This letter stated:

> *"The Disability Act, 2005 requires the review of Assessment Reports issued under its provisions to applicants deemed to meet the definition of disability contained in the Act [Section 8(7)(b)(iv)].*
>
> *The time has come to review the Assessment Report for [Child]. The review of the Assessment Report is being undertaken within the same parameters as the original assessment of need under the Disability Act. The purpose of the review is to verify whether findings in the Assessment Report are still valid including the health and education needs of the applicant and the services required to address those needs. A review does not, in itself, necessitate a formal reassessment of any, or all, of the child's needs as originally identified and will only result in additional assessments where it is*

found that the original findings contained in the Assessment Report are no longer appropriate.

As [Child] is receiving a service from the School Aged Disability Team, they have been asked to participate in the review. You will receive a reviewed final assessment report and service statement shortly."

11. The terms of the said letter broadly reflect the position as stated in the HSE's Assessment of Need Standard Operating Procedure where it is stated that what is required by a "review" is a review of the Assessment Report and not a re-assessment. The Standard Operating Procedures states that changes that may be identified at the review time include:

- The child/young person no longer meets the definition of disability under the Act;
- A service not identified in the original Assessment Report is now required;
- A service identified in the original Assessment Report is no longer required;
- There is a requirement for an additional assessment to identify health needs;
- There is a requirement for an assessment of educational needs.

12. The Review Report which issued shortly thereafter in September, 2020 provides an update in respect of the Child referring to the previous assessments carried out and identifying a named individual with the SADT as conducting an assessment for the review. The Review Report, unlike the original Assessment Report, does not nominate a further review date.

13. As part of the review cycle, the Child's Service Statement was reviewed, and a reviewed service statement was issued, dated the 28th of October 2020. The Reviewed Service Statement (in contradistinction to the Reviewed Report) contained a further date for service review dated the 2nd of September, 2021. It detailed services provided by SADT on an ongoing basis based on a report obtained from the SADT detailing interventions provided and to be provided.

14. Proceedings were brought in the Circuit Court in March, 2021 in respect of a failure to provide services in line with the Disability Complaint's Officer's recommendations (made in December 2019). These proceedings were compromised.

15. The subsequent reviewed service statement dated 6th of September, 2021 in turn contained a service review date of 2nd of September, 2022. This reviewed service statement was informed by a report from SADT dated the 3rd September, 2021 detailing the interventions since the previous report in September, 2020 with transition to secondary school support identified as a goal for intervention.

16. The Applicant's solicitors wrote to the assessment officer on 24th of September, 2021, enclosing the Review Report dating to the 4th of September, 2020, indicating that the Child's assessment of need was due to be reviewed on 4th of September, 2021 and requiring a further review of the assessment to be carried out, threatening litigation if this was not done. Confirmation was sought that, as part of the review of assessment, new assessments would be carried out for dysgraphia and dyspraxia.

17. An assessment of needs review request form was subsequently completed by the Second Applicant in October, 2021 at the request of the HSE. This form recited that the review process "*refers to a review of your child's previous Assessment Report – it does not provide for reassessment unless clinically indicated*." A Handwriting Clinic Report completed by an occupational therapist dating to June, 2021 which accompanied this application showed that following assessment, the Child was performing in the average and above average range, with some relative difficulties with handwriting for which assistive technology was recommended. This report referred to earlier assessments dating to 2016 which record that the Child presented with a varied cognitive profile with high scores ranging from the high average to the very superior range, achieving a score equal to or better than 99% of his same age peers in perceptual reasoning. No specific reference was made to dysgraphia and dyspraxia or why further assessment for same might be indicated on the form.

18. There followed an exchange of correspondence between the Child's mother and various officers of the HSE in the assessment of need process, setting out the HSE position that there had already been an assessment review. Correspondence rested with a letter dated the 11th of November, 2021 from the relevant Liaison Officer confirming the HSE's position that the Applicant was not entitled to a further review of the assessment, and that in the case of new health concerns a new application for assessment of need would be appropriate. The point was made in this correspondence that the assessment of need under the 2005 Act is required to identify if the individual meets the criteria for a disability under the 2005 Act and the health services required to meet the health needs adding "*so I am not sure that this will benefit [A.B.]*".

19. The Child's mother then instructed the institution of these judicial review proceedings in January, 2022 seeking both *mandamus* and declaratory reliefs as to the nature and extent of the obligation on the HSE to review assessments of need.

STATUTORY FRAMEWORK

20. As is clear from the long title to the 2005 Act, one of the central purposes of the Act is to make provision for "*the assessment of the health and education needs occasioned to persons with disabilities by their disabilities*." An assessment under the 2005 Act requires the HSE to determine whether an applicant has a disability within the meaning of that Act, and if so, to identify the health and education needs occasioned by the disability, and (in the case of children) the health services required to meet those needs. To this end, Part 2 of the 2005 Act makes provision for the assessment of need (s. 8), service statements (s. 11) and redress (s. 14) for persons whose disability comes within the definition under the Act. The machinery of Part 2 of the 2005 Act is only available to qualifying persons.

21. The 2005 Act is prescriptive in terms of what should be comprised in the assessment under s. 8 and the service statement under s. 11. It is quite clear that the two documents have a different function.

22. An "*assessment*" as defined under s. 7 of the 2005 Act, means an assessment undertaken or arranged by the HSE to determine, in respect of a person with a disability, the health and

education needs (if any) occasioned by the disability and the health services or education services (if any) required to meet those needs. Accordingly, an entitlement to an assessment under Part 2 of the 2005 Act vests in a person who has a qualifying disability. Those who are not determined to have a disability within the meaning of the Act are not entitled to an assessment report or a service statement.

23. Section 8 of the 2005 Act provides for the preparation of "*assessment reports*" on what the Court of Appeal has described as a "*utopian*" basis, setting out independently the assessed health needs of children with disabilities and the services which they require to meet those needs, together with the timeframe for delivery of those services. An assessment report is described in s. 8(6) as "*a report in writing of the results of the assessment*". Section 8(7) prescribes the detailed content of the assessment report, which includes in relation to reviews that it shall set out the period within which a review should be carried out:

> *"A report ... shall set out the findings of the assessment officer concerned together with determinations in relation to the following— ....*
>
> *(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."*

24. The "*utopian*" aspect of this report comes from the statutory requirement that the report be prepared "*without regard to the cost of, or the capacity to provide*" those services. (s.8(5), see generally *ELG v HSE* [2022] IESC 14).

25. The services which will be provided are then recorded in a service statement prepared by a liaison officer employed by the HSE in accordance with the requirements of s. 11 of the 2005 Act. Section 11(2) of the 2005 Act provides for the preparation of service statements as follows:

> *"(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."*

26. Section 11(7) further provides for matters to be considered in the preparation of the service statement as follows:

> *"(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."

27. Manifestly, the service statement is directed to the practical realities of service provision, resource and budgetary constraints and competing priorities. Unlike the assessment report which identifies the services which ideally should be provided in view of an identified need, the service statement reflects a service commitment to provide identifiable services. Unfortunately, all too often, the service commitment recorded in the service statement falls far short of the ideal scenario described in the assessment report. Section 11(11) provides for a review of the service statement in the following terms:

"(11) A liaison officer shall invite the applicant or a person referred to in section 9 (2) to meet with him or her for the purpose of reviewing the provision of services specified in the applicant's service statement."

28. Unlike s. 8(7) which expressly provides that a date for review of an assessment shall be fixed, s. 11 is silent with regard to the timing of reviews of service statements.

29. While the 2005 Act does not provide details as to how service statements are to be reviewed, it creates a regulatory power vesting in the Minister to do so pursuant to the terms of s. 21 of the 2005 Act which provides:

"21.—The Minister may make regulations for the purpose of enabling this Part to have full effect and, in particular, but without prejudice to the

generality of the foregoing, regulations under this section may make provision in relation to any or all of the following:

(a) applications for assessments and the procedure for and in relation to such assessments including—

(i) different periods within which an assessment is to be carried out or subsequently reviewed,

(ii) different such periods in respect of—

(I) different categories of disability, or

(II) persons of different ages,

(iii) the categories of skills and expertise required to carry out an assessment,

(iv) matters relating to the determination and approval of standards to be applied in relation to the carrying out of an assessment,

(v) matters relating to the nomination by the Council of a person or persons with appropriate expertise to assist in carrying out an assessment in relation to educational services,

(b) in relation to a service statement—

(i) the form of the statement and any matter to be contained in it,

(ii) matters relating to the determination of eligibility under the Health Acts 1947 to 2004,

(iii) any other matters referred to in section 11 (7),

(iv) matters relating to the amendment of a service statement,

(v) the procedures for and in relation to the review with the applicant or a person referred to in section 9 (2) by liaison officers of the provision of services specified in service statements, including the intervals at which such reviews shall be undertaken either generally or with reference to—

(I) a particular category or categories of disability, or

(II) categories of persons of a particular age,

…….”

30. It is clear that s. 21 permits the exercise of a regulatory power both with regard to the conduct of a review of assessments and of service statements. In exercise of this regulatory power, the Minister introduced the 2007 Regulations. As regards the review of assessments, the Regulations repeat the terms of s. 8(7) but adding that the review date shall be no later than 12 months from the date on which the assessment report is issued as follows (Regulation 11):

> *“11. Each assessment report shall specify a date for the review of the assessment and that review date shall be no later than 12 months from the date on which the assessment report is issued.”*

31. As regards the review of service statements, however, the Disability Regulations record both that a review date must be provided, and that there is an ongoing, annual obligation to review in the following terms:

> *“18. The service statement shall be written in a clear and easily understood manner and it shall specify:*
>
> > *(e) the date for review of the provision of services specified in the service statement; …*
>
> *22. 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.”*

32. Section 9(8) of the 2005 Act provides for the making of a further application for an assessment of need as follows:

"(8) A person who has previously made an application under subsection (1) may make a further application if he or she is of opinion that since the date of the assessment—

(a) there has been a material change of circumstances,

(b) further information has become available which either relates to the personal circumstances of the applicant or to the services available to meet the needs of the applicant, or

(c) a material mistake of fact is identified in the assessment report."

33. Section 9(7) provides for a power to refuse an application for a fresh assessment if an assessment has already been carried out and the period specified in the assessment report in respect of the carrying out of a review of the assessment has not expired or, in the case of a child, the assessment has been carried out within the period of 12 months before the date of the application.

34. Regulation 12 confirms that the obligation to provide a review date on the further assessment report applies equally in the case of subsequent assessments carried out on foot of further applications (i.e. the s.9(8) procedure) as follows:

"12. Where a person makes a further application for assessment in accordance with section 9(8) of the Act of 2005, the review date shall be no later than 12 months from when the report on the further assessment is issued."

35. The Regulations are otherwise silent on the question of reviews of assessment reports.

36. The 2005 Act further imposes a recording and reporting function on the HSE under the terms of s. 13 of the Act as follows:

"13.—(1) The Executive shall keep and maintain records for the purpose of—

(a) identifying persons to whom assessments or services are being provided pursuant to this Part or the Act of 2004,

(b) identifying those services and the persons providing the services pursuant to this Part,

(c) specifying the aggregate needs identified in assessment reports which have not been included in the service statements,

(d) specifying the number of applications for assessments made under section 9 and the number of assessments completed under that section,

(e) specifying the number of persons to whom services identified in assessment reports have not been provided, including the ages and the categories of disabilities of such persons,

(f) planning the provision of those assessments and services to persons with disabilities.

(2) The Executive shall, within 6 months after the end of each year, submit a report in writing to the Minister in relation to the aggregate needs identified in assessment reports prepared including an indication of the periods of time ideally required for the provision of the services, the sequence of such provision and an estimate of the cost of such provision.

(3) A report under this section shall include such other information in such form and regarding such matters as the Minister may direct and shall be published by the Executive within one month of the date of its submission to the Minister….."

37. As made clear from the terms of s. 13, a purpose of the two separate reports is to appraise the relevant Minister, by means of annual "*aggregate*" reports provided by the HSE, of the gap between how needs should be met and how they are, in fact, being met.

38. Separately, the 2005 Act establishes a redress mechanism by providing for complaints as follows:

"14.—(1) An applicant may, either by himself or herself or through a person referred to in section 9 (2), make a complaint to the Executive in relation to one or more of the following:

(a) a determination by the assessment officer concerned that he or she does not have a disability;

(b) the fact, if it be the case, that the assessment under section 9 was not commenced within the time specified in section 9 (5) or was not completed without undue delay;

(c) the fact, if it be the case, that the assessment under section 9 was not conducted in a manner that conforms to the standards determined by a body referred to in section 10;

(d) the contents of the service statement provided to the applicant;

(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.

(2) A complaint under subsection (1) shall be made by the applicant concerned or a person referred to in section 9 (2) as soon as reasonably may be after the cause of the complaint has arisen and in any case within such time (if any) as may be prescribed under section 21."

39. To interpret the HSE's distinct reporting and review obligations a close reading of the relevant statutory provisions is required. A comparison of the separate provisions governing assessments and service statements is instructive.

Provision	Assessment Reports	Service Statements
Content (general)	S. 8(7). A report under subsection (6) (referred to in this Act as "an assessment report") shall set out the findings of the assessment officer concerned together with determinations in relation to 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.	Reg. 18. The service statement shall be written in a clear and easily understood manner and it shall specify: (a) the health services which will be provided to the applicant; (b) the location(s) where the health service will be provided; (c) the timeframe for the provision of the health service; (d) the date from which the statement will take effect;
	Reg. 11. Each assessment report shall specify a date for the review of the assessment and that review date shall be no later than 12 months from the date on which the assessment report is issued.	(e) the date for review of the provision of services specified in the service statement;
Review obligations	Section 8(7)(b)(iv) requires a period to be specified within which a review of the Assessment Report "should" occur.	Section 11(11) provides that the liaison officer shall invite the applicant or a person referred to in section 9 (2) to meet with him or her for the purpose of reviewing the provision of services specified in the applicant's service statement. Reg. 22. 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.
Review of new assessment report.	Reg. 12. Where a person makes a further application for assessment in accordance with section 9(8) of the Act of 2005, the review date shall be no later than 12 months from when the report on the further assessment is issued.	n/a

40. What is readily apparent from the comparative table is that the requirement to specify a period within which a review of an assessment should be done is contained in the 2005 Act itself whereas the requirement to periodically review service statements derives not from the 2005 Act but from the 2007 Regulations, albeit that a review of a service statement is at least envisaged by the provision in s. 11(11) for a meeting for the purpose of reviewing the provision of services provided for in the service statement. The 2007 Regulations give real flesh to the review of service statement by mandating that the review occur annually. While the requirements regarding service statements are fixed in this way by the Minister in exercise of a delegated regulatory function under s. 21 of the 2005 Act, the Minister has not elected to materially expand on the statutory provision (in s. 8(7)(b)(iv)) for review of an assessment other than to require that the period specified under s. 8(7)(b)(iv) should not exceed twelve months. In consequence, the position in respect of the review of service statements is clear: a date for review must be provided and that document must be reviewed ("*shall be reviewed*") within 12 months of its production, or its last review (Regulations 18 and 22). It is undeniable, however, that the regulatory position in respect of the review of service statements is also quite different to the position governing the review of assessments.

DISCUSSION AND DECISION

41. In this case, the Applicant was provided with an assessment report and the assessment carried out under Part 2 was reviewed once. He has been provided with several service statements. The service statement has been reviewed on an ongoing basis. Although he could apply for a new assessment under s. 9(8) of the 2005, instead a further review of the original assessment was sought on his behalf on the basis that there has been a change in his circumstances.

42. There is a lack of certainty as to the extent of the duty to review assessments as apparent not only from the issue which arises in these proceedings (and I am told is arising in other cases also) but also from the terms of the Standard Operating Procedure and the fact that the HSE accepts that there have been occasions where, contrary to the position contended for in these proceedings as to the legal obligations on the HSE, more than one review of an assessment has been carried out. Inconsistent practices do not detract from the fact that the question of

entitlement as framed in these proceedings is one which falls to be determined as a matter of statutory interpretation.

43. Much of the focus in submissions before me was on the difference in the statutory language pertaining to the review of assessment of need when compared with review of service statements. There is no doubt that the language of the 2005 Act and the 2007 Regulations is different where the review of assessment reports and service statements are concerned. As already noted, the position in respect of service statements is clear: a date for review must be provided, and that document must be reviewed ("*shall be reviewed*") within 12 months of its production, or its last review. While an express obligation for a review of the service statement arises pursuant to the 2007 Regulations, no corresponding clearly expressed obligation of ongoing review has been prescribed in respect of assessment reports.

44. It is suggested that there is no logical basis for providing for an ongoing review of service statements without also providing for ongoing review of assessments of needs. It is submitted this must be what was intended by the Oireachtas when requiring that a date for review of an assessment of need be specified under s. 8(7)(b)(iv) of the 2005 Act. It seems to me that these submissions are not supported by the language of the legislation nor a proper understanding of the different statutory function of the assessment and the service statement.

45. Given that the requirements in relation to the conduct of a review of assessments are couched in s. 8(7)(b)(iv) in terms of a requirement to specify a period within which a review will take place in the Assessment Report prepared under that section, it is my view that the only way an ongoing review obligation may be inferred is if one construes s. 8(7) of the 2005 as giving rise both to an obligation to create a new assessment report upon review and to carry out a review. If there were an obligation to generate a new assessment report following review of the original report, then it might be said that this new assessment report was itself captured by s. 8(7)(b)(iv) triggering a requirement to specify a new review date which would then become a continuing cycle of review, new report and fresh review date. This interpretation of the statutory regime rests on s. 8(7)(b)(iv) being construed as requiring the conduct of the review in the first place as opposed to the specification of a time period within which the review would take place, which is not necessarily the same thing.

46. Looking first at the question of whether s. 8(7), properly construed, requires the issue of a new assessment report post review in which a further period for review is specified, what is immediately striking is that the 2005 Act goes into considerable detail in prescribing what should be recorded in an assessment report following an assessment of need under Part 2 of the 2005 Act but is entirely silent regarding any requirement to provide a further report following review.

47. Separately, the 2005 Act provides that an application for a new assessment can be made. A change in circumstance, such as that advocated on behalf of the Applicant, is expressly provided for in the Act as a reason to apply for a new assessment. Where an application for a new assessment is made, the HSE is under a statutory obligation to complete that assessment in a like manner to the initial assessment (i.e. within seven months of his application). The point was made on behalf of the HSE in opposing the within proceedings that had such an application been made then a new assessment process would already have concluded having regard to time-frames specified under the 2005 Act before ever these proceedings could be listed for hearing. It is noteworthy, however, that such a subsequent application (for a new assessment) cannot be made within the period for carrying out a review of the old assessment (s. 9(7)). This begs the question as to why it would be necessary to provide separately for a new or fresh application if the Oireachtas had already provided for a duty to review assessments on an ongoing basis.

48. In *ELG v HSE* [2022] IESC 14, Baker J. found at (at para. 72) that "*assessment*" is "a *specific term of art for the purposes of the statutory scheme*" and further that the definition of "*assessment*" in s.7 "*does not have a plain meaning but in this context rather bears the more narrow technical meaning applicable to Part 2* [of the 2005 Act]…" (at para.103). Approaching the question of whether there might be a duty to prepare a fresh assessment report following a review of the original assessment report in a like manner to the obligation following the initial assessment on the basis that the "*assessment report*" and "*assessment*" are terms of art with a specific meaning in the context of the 2005 Act, it is clear that the definition of assessment report has not been crafted to encompass a revised report post review of an original assessment report. The clear duty under s. 8 is to provide an assessment report meeting set statutory criteria as part of the assessment of need process and to specify in that assessment

report a period within which a review should be carried out. No statutory requirement to generate a fresh assessment report following review has been prescribed.

49. In considering whether an obligation to create a new assessment report arises upon conclusion of a review, I attach some significance to the fact, noted above, that a mechanism exists under the 2005 Act whereby an applicant may seek a further assessment resulting in a further assessment report via s. 9(8) of the 2005 Act. The HSE is permitted to refuse applications under s. 9(8) only in narrow circumstances as set out in s. 9(7) including where an assessment report is within its review period. This provision makes little sense, on the interpretation contended for by the Applicants: under the system of ongoing reviews which they contend for, the "*period for carrying out a review*" would never expire. Even accepting that the purpose of the review is to identify whether any changes have occurred which might impact on service need or give rise to a requirement for further assessment rather than a whole new assessment of need, s. 9(8) would be largely redundant if there were simultaneously an ongoing duty to review the assessment and a requirement to generate an annual assessment report. As an annual assessment report would in turn trigger a fresh obligation to specify a further review date, the requirement for annual review would never end for so long as the disability persisted even in circumstances where the needs arising from a disability are static and unchanging for long periods of time.

50. Further, in enacting the 2005 Act, the Oireachtas enacted a detailed statutory redress mechanism under s. 14 of the Act covering e.g. delay, challenges to findings of no disability, quality of assessment, contents of service statements and provision of services. Complaints as to failure to carry out reviews of assessment reports or provide new assessment reports following review were not among the statutory grounds enacted. The HSE pleaded in the Opposition papers filed that in enacting such a detailed statutory redress procedure for the enforcement of the obligations created under the 2005 Act, the Oireachtas intended that the mechanism provided would be available in respect of any failure to give effect to a disabled person's rights. I find the HSE's position in this regard to be compelling. In *J.F. v. HSE* [2018] IEHC 294, Faherty J. states (at para. 16):

"…the Oireachtas, having enacted the system of assessments of need with associated timeframes, has also enacted an integral statutory system of redress for complaints about breaches of those timelines, together with an inbuilt mechanism for judicial enforcement."

51. It seems to me that in enacting an integral and extensive statutory system of redress (including a right of appeal to an appeals officer and to seek enforcement under s. 18 in respect of the recommendations of the Disability Complaints Officer and a further right under s. 22 to seek enforcement of determinations of the Appeals Officer by the Circuit Court or to appeal to the High Court on a point of law under s. 20), the Oireachtas created what it intended would be the means of enforcing rights created under the 2005 Act. The omission of redress in respect of a failure to carry out of the review of an assessment report is telling as it would appear to reflect a deliberate choice by the Oireachtas not to enact an enforceable obligation either to an assessment report follow review or to a review itself, let alone an ongoing periodic review.

52. As noted by the Clarke J. in *EMI Records v Data Protection Commissioner* [2013] 2 IR 669, 728:

"It is well established that the Oireachtas must be presumed to know the law and the Oireachtas is, of course, well aware of the existence and parameters of the High Court's judicial review jurisdiction. It follows, therefore, that the creation by legislation of a right of statutory appeal from an administrative decision which is not confined to an appeal on a point of law generally raises the inference – albeit a rebuttable inference – that the Oireachtas 'must have intended that the court would have powers in addition to those already enjoyed at common law' in respect of its judicial review jurisdiction: see Dunne v. Minister for Fisheries [1984] I.R. 230 at p. 237 per Costello J. That in turn suggests that the Oireachtas further intended that the statutory appeal would form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so: see, e.g., the comments in this regard of Laffoy J. in Teahan v.

Minister for Communications [2008] IEHC 194, (Unreported, High Court, Laffoy J., 18th June, 2008)."

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

53. The fact that the redress mechanism in s. 14 is delimited and does not provide for a means of enforcing an entitlement to reviews of assessment is consistent with the conclusion that the failure to expressly require periodic review of assessments represents a deliberate decision by the Oireachtas. Had the Oireachtas intended that there be a right to require the HSE to conduct periodic reviews of existing assessments, I would expect to see a remedy for non-performance of such an obligation in s. 14. The fact that a mechanism has not been provided to enforce the entitlement to a review of the service statement, even though it is accepted that there is a statutory obligation to perform the service review, is explicable by the creation of this right by statutory instrument under the terms of the 2007 Regulation which post-dated the enactment of s. 14.

54. In *ELG* the Supreme Court considered the law in relation to service statements on the basis of a close reading of the statute, rejecting the Applicants' attempt to stray from the statutory text in favour of what was asserted to be a purposive approach. In its judgment (Baker J.) the Court declined to depart from the literal text in the following terms:

"97. I will not deal here with the purpose of this legislation but merely comment that s.11(2) is found within Part 2 of the Act of 2005 which provides for the carrying out of assessments and the preparation of reports and service statements, and the correct approach to the interpretation of s.11(2) is to interpret the words in that section by reference to the use of

those words in other parts of the Act, or more particularly of Part 2 in which they are found, and also in the light of the definition section specifically referable to that Part in s. 7."

55. Baker J found no ambiguity in the provision under scrutiny, when read in light of those statutory definitions and in the context of the Act as a whole concluding:

"115. … This in my view is not an "overly rigorous, technical and narrow" interpretation, but rather in my view is one supported by the general purpose of the Act as recited in the Long Title and the general scheme of the Act…"

56. While I do not consider it necessary to have recourse to a purposive interpretation in this case either, the distinction drawn between the purpose of the two reports flowing from the separate statutory provisions in respect of each warrants mention having regard to the significance of legislative context in construing individual provisions of the 2005 Act. It is recognised that the assessment of need identifies idealised levels of service provision, whereas the service statement deals with the reality of the services available. Both documents must be compiled to record different statutory considerations and serve very different purposes: the ideal and utopian vs. the real, practicable and deliverable. The assessment report is directed to identifying the full range of appropriate services to meet assessed needs on a utopian or ideal and unenforceable basis, with the service statement addressing "*the practicability of providing the services identified in the assessment report*" and therefore subject to the variables of resource constraints and competing priorities but representing a real commitment to service provision. The absence of an ongoing review obligation of assessment of need but instead provision for a new application for an assessment, if necessary (e.g. in case of change of circumstances), is in line with the different functions served by the assessment report and the service statement.

57. It seems to me that the requirement for ongoing review of service statements which arises in clear terms under the legislative framework flows logically from the duty on the HSE to report to the Minister in respect of aggregate needs and the delivery of services under s. 13 of the Act tied to the State's duty under the Constitution to vindicate the personal rights of

disabled persons insofar as "*practicable*". The currency of reports on services being delivered is clearly linked to the effective discharge of the HSE's reporting obligation and its commitment to deliver services in a manner which is tangible, real and enforceable. A disabled person has a clear right to have his or her needs assessed under the 2005 Act but once they have been assessed, the focus shifts to securing the services identified.

58. While the State through the HSE strives to make better provision for unmet assessed need necessitating that the Excecutive arm of State is duly informed by accurate up to date information as to services being provided and identified gaps in services on a routine basis, there is no similar imperative for up to date assessment of needs. The difference flows both from the fact that needs may change but there is no inevitability of change but more fundamentally the distinct and separate purposes of the two documents. It bears note that provision is made under s. 11(9) for the amendment of the service statement where there is a change in circumstances, acknowledging that needs may change post the conclusion of an assessment report and there is a capacity for changes to be met by specific service provision even without undergoing a further full assessment of needs.

59. It is appropriate to acknowledge also that the process to be followed in the conduct of an assessment and the preparation of a service statement is different. The assessment of need can involve assessment by a range of health care professionals. It is known to be very resource intensive as evident by the significant caselaw generated by delays in the assessment process or failures to fully assess the nature and extent of disabilities as required under s. 8 of the 2005 Act. In contrast, the service statement is 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 health services. Accordingly, I cannot accept the Applicant's contention that provision for an annual review of service statements without similar periodic review of assessments results in an absurdity. No absurdity arises such that I could be entitled to read into the legislation a requirement to conduct periodic reviews of assessment of need, which is the essence of what the Applicants seek.

60. Having regard to the clear language of the statutory provisions which provide separately and distinctly for the review of assessments and service statements, the fact that "*assessment*" and "*assessment report*" are terms of art, the different statutory functions served by each report

together with the absence of any reference to the periodic review of assessment reports in s. 14 of the 2005 Act, I am satisfied that the carrying out of a review of the original assessment does not result in a statutory obligation to generate a new assessment report with a consequential ongoing duty of periodic and automatic review of assessments of need. I cannot conclude that the difference in statutory treatment of the two instruments is a matter of legislative accident. Instead, I am satisfied that it reflects a deliberate legislative choice. Accordingly, I find that there is no statutory obligation on the HSE to carry out a second or further review of an assessment.

61. Relief by way of *mandamus* only lies where there has been an explicit and unambiguous duty imposed upon the body against whom the order is sought (for recent iteration see *Farrell v. Superintendent of Milford Garda Station* [2019] IECA 278). It follows from my finding that there is no statutory obligation on the HSE to create a further assessment report following assessment review that there can be no question of a further obligation arising to specify a period within which a further review should be concluded on an application of s. 8(7)(b)(iv). I am satisfied that the interpretation of s. 8(7) of the 2005 Act and Regulation 11 of the 2007 Regulations contended for by the Applicant could be justified only by reading into the Act wording beyond the words chosen by Parliament in terms of requiring ongoing review of assessment of needs. In view of my finding above, relief by way of *mandamus* cannot lie as the 2005 Act does not impose a duty on the HSE to conduct an annual review of assessment of needs (See *State (Sheehan) v. Government of Ireland* [1987] I.R. 550 and *Minister for Labour v. Grace* [1993] 2 I.R. 53). Similarly, as the declaratory relief sought is framed in terms of the existence of such a duty, it too must be refused. Where there is a change of circumstances which might warrant fresh assessment, the pathway created under the 2005 Act is through a new application for assessment of needs under s. 9.

62. Given my finding that there is no obligation to conduct a second or further review of the assessment disposes of these proceedings, the question of whether there is a statutory obligation on the HSE to conduct any review of an assessment at all arising from s.8(7)(b)(iv) of the 2005 Act does not require to be determined, because a review has occurred in this case. Had I not been clearly of the view that there is no ongoing automatic requirement to review an assessment of need, it might have been necessary to determine whether there was any requirement which is a question upon which the parties joined issue in this case. Suffice to say

that the fact that s. 8(7)(b)(iv) of the 2005 Act requires inclusion of a statement of the period within which a review of the assessment should be carried out without express provision then being made for an obligation to carry out the contemplated review within the time-frame indicated has been identified by the HSE as raising an issue as to whether there is an enforceable obligation to carry out a review of the original assessment. There is some force in the HSE submission that as the review function is couched in terms of a requirement to indicate a period within which a review "*should be*" conducted rather than in terms which require that the review itself be done, there is no duty to carry out the review itself. As explained by Denham J. in *Dundon v. Governor of Cloverhill Prison* [2006] 1 I.R. 518 (at p. 523) the difference in wording means that that which "*should be*" done is not mandated to be done, as it would be were the words "*shall be*" used. The words "*should be*" were described by Denham J. as words which "*urge such an approach*" and "*recommend strongly*" but without requiring compliance. Accepting that the 2005 Act is replete with examples of instances where the mandatory word "*shall*" is deployed (110 times per counsel for the HSE) and there is only one usage of the term "*should be*", the submission that some importance must attach to this isolated departure in language by the Oireachtas is not without persuasive effect.

63. It seems likely that the aspirational as opposed to mandatory value ascribed to "*should be*" in s. 8(7)(b)(iv) means that a mere failure to conduct a review within the time-frame indicated would not ground an order of mandamus. Where the aspirational element is understood as referring to delivery within the specified time-frame rather than the duty to carry out a review, however, it does not necessarily follow that a court would not vindicate the right to a review within a reasonable time through an appropriate order. In this regard, however, it must be borne in mind that in enacting the 2005 Act, the Oireachtas enacted a detailed statutory redress mechanism under s. 14 of the Act covering e.g. delay, challenges to findings of no disability, quality of assessment, contents of service statements and provision of services. Complaints arising from a failure to carry out a review of an assessment were not among the statutory grounds enacted. The HSE pleaded in the Opposition papers that in enacting such a detailed statutory redress procedure for the enforcement of the obligations created under the 2005 Act, the Oireachtas intended that the mechanism provided would be available in respect of any failure to give effect to a disabled person's rights.

64. If, as appears to be the case, in enacting an integral and extensive statutory system of redress (including a right of appeal to an appeals officer and to seek enforcement under s. 18 in respect of the recommendations of the Disability Complaints Officer and a further right under s. 22 to seek enforcement of determinations of the Appeals Officer by the Circuit Court or to appeal to the High Court on a point of law under s. 20) as recognised in *J.F. v. HSE* [2018] IEHC 294 (at para. 16 of the judgment of Faherty J.), the Oireachtas created what it intended would be the means of enforcing rights created under the 2005 Act, then the absence of a provision seeking to compel performance of a review function may be significant in a decision as to whether an enforceable duty of review has been prescribed or not.

65. Insofar as the omission of review of assessments from the redress provisions would appear to reflect a deliberate choice by the Oireachtas not to enact an enforceable obligation to a review of an assessment report under the 2005 Act, then this would weigh against a construction of the Act which requires the performance of the review function. It may be, however, that the absence of a redress and enforcement measure under the 2005 Act merely reflects that the Oireachtas did not intend to create a right to a review within the time-frame indicated rather than no right to review at all. It seems to me that this construction is open on the language used.

66. While s. 8 of the 2005 Act does not vest an express power to carry out a review it appears to be accepted by the HSE that a power to review an assessment of needs, as opposed to a duty enforceable by way of judicial review, exists. The HSE has not gone so far, at least in this case, as to argue that there is no power to conduct a review of an assessment of needs at all. Indeed, it seems to be a necessary implication in view of the terminology used in s.8(7)(b)(iv) that such a power exists. The proposition that the Oireachtas would require the HSE to indicate in an assessment report a time-period within which the assessment will be reviewed without also intending the HSE to have power to conduct the said review, is almost untenable. It is also clear that the HSE has in the past considered itself bound to conduct a review of an assessment of need. In *RC v. HSE* [2022] IEHC 652 Meenan J. quotes from a letter in which it was stated on behalf of the HSE that (at para. 9):

"the HSE accepts its statutory obligation to carry out a review of assessments of need in accordance with the terms of the Disability Act, 2005 and Regulations made thereunder".

67. In *RC v. HSE*, Meenan J. further notes that an attempt on the part of the HSE to amend its Statement of Opposition in that case to plead that there is no obligation enforceable by way of judicial review to compel the carrying out of an assessment report (para.11):

"presented a remarkable about turn for the Respondent from its earlier position. Indeed, the new position on whether or to there was an enforceable statutory duty to carry out a review was a radical departure from the position taken by the Respondent in many previous actions."

68. It seems to me that the HSE position that there is no duty to carry out a review of an assessment under s. 8(7)(b) within the time prescribed, bolstered by the absence of any provision in the redress procedures under the 2005 Act to enforce such a right, does not necessarily lead to the conclusion that there is therefore no enforceable duty to carry out a review, where it is established that a statutory power exists. This is because discretionary powers remain subject to the requirement that they be exercised in a reasonable manner (including in a manner which vindicates constitutional rights). It is well established that the existence of a discretionary power rather than an express or mandatory statutory duty does not mean there is no duty to exercise the power (see *Harrahill v. EC* [2008] IEHC 250 and the reliance in that judgment on the decision of Walsh J. in *Re Thomas J. Dunne* [1968] I.R. 105).

69. Where a period of time is indicated for the performance of a task in discharge of a statutory duty, as it is under s. 8(7)(b)(iv) of the 2005 Act, it must be strongly arguable that an unjustified or unreasonable departure from the indicated period for a review may be made amenable to a court ordered remedy. This is particularly so in this context where it is incontrovertible that the legislation creates rights which the language of the Act and supporting statutory instruments are designed, in the words of Hanna J. in *HSE v. Dykes* [2009] IEHC 540, "*to support and facilitate rather than stifle."*

70. The decision of Faherty J. in *J.F. v. HSE* [2018] IEHC 294 is a good example of circumstances where a failure perform a statutory function within a reasonable time was found to be unlawful notwithstanding that there was no statutorily mandated time-frame. It appears from the terms of Faherty J.'s judgment (para. 72) that the HSE agreed that the timeframe for a decision on a complaint must be a reasonable one, even though no time-period is specified. By analogy the fact that the Oireachtas requires the HSE to indicate a period during which the HSE is exhorted or strongly encouraged to conclude the review, rather than requiring the review be conducted within that time frame, does not mean that there is no requirement to conduct a review within a reasonable time.

71. Were a Court persuaded following full argument in a case in which the issue arises for determination that there was a duty to carry out a review of an assessment albeit not necessarily within the time period specified and that court were satisfied that the right to a review was violated by unreasonable delay in carrying out the review, then that Court might well consider granting declaratory relief to the effect that there was a duty to carry out a review of an assessment within a reasonable time which duty was breached by excessive delay in carrying out the review. In sufficiently egregious instances of a failure to perform a duty of review, if established, the Court might further be persuaded to grant an order of mandamus particularly if such failure occurred following the grant of declaratory relief. Indeed, if a duty of review is established, the absence of provision in the redress mechanism established under the 2005 Act to enforce a right to review would mean that it is more likely that a court would be prepared to exercise its jurisdiction in judicial review proceedings to enforce individual rights.

72. I express no concluded view on whether there is an enforceable obligation to conduct a first review arising under s. 8(7)(b)((iv) of the 2005 Act because it is not necessary for me to do so for the purpose of the within proceedings. Such ambiguity as exists must await clarification in a case in which it necessarily arises.

CONCLUSION

73. For the reasons set out above, I refuse the relief sought and dismiss the application. I will hear the parties in regard to any consequential matters.