



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 285

Record No.: 2020/223

**Donnelly J.
Ní Raifeartaigh J.
Binchy J.**

BETWEEN/

**J O'S.S (A MINOR) SUING BY HIS MOTHER
AND NEXT FRIEND SM**

APPELLANT

-AND-

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 27th day of October, 2021

Introduction

1. This appeal, which was heard at the same time as the appeal in *C.M. (A Minor) v. The HSE*, raises the issue of the chronological/geographical order in which the Health Service Executive ("the respondent") must process applications for assessment of needs as provided for by s. 8 of the Disability Act, 2005 ("the Disability Act"). It also raises the meaning of the phrase "process applications for assessment" in the relevant regulations. These questions arise from the wording of regulation 5 of S.I. No. 263/2007 Disability (Assessment of Needs, Service Statements and Redress) Regulations, 2007 (hereinafter, "the 2007 Regulations") which were made under s. 21 of the said Disability Act. Regulation 5 provides that:

"The Executive shall process applications for assessment in order of the date on which they are received by the Executive. Where two or more applications are received on the same date then they shall be processed in alphabetical order of the surname of the applicant."

2. It is the appellant's case that regulation 5 plainly requires all statutory assessments of needs to be carried out chronologically on a national basis. The respondent submits that regulation 5 does not deal with the order of *carrying out* of assessments, but with the order of *processing of* applications for assessments. The respondent says that it carries out assessments of need on a regional basis within each of the nine Community Health Organisation ("CHO") regions that have been established by the respondent. The

respondent takes issue with the appellant's submission that there is no statutory basis for this proposition.

The Background

3. The appellant is now 10 years old and lives in an area of Cork, which together with Kerry, makes up the CHO4 region. His mother applied on his behalf for an assessment of needs in April 2016 when he was just under 5 years old. Over two and a half years later he was still waiting to be assessed. In the CHO4 region waiting times for assessments are considerably longer than other CHO regions.
4. The respondent's current practice and indeed, the practice it adopted in respect of the appellant, is that while *the applications* for an assessment of needs are *processed* chronologically, on a national basis, the assessments are then processed and carried out in chronological order, *within the CHO* in which an applicant resides, rather than being carried out chronologically on a national basis. The result of this is that an applicant who has applied months or even a year in advance of another applicant in a different CHO may be called for assessment long after the later applicant.
5. According to s. 9(5) of the Disability Act, assessments of need must be commenced within 3 months of the date of receipt of the application and completed without undue delay. According to regulation 10 they must be completed within 6 months. The respondent's figures show that 91% of assessments are not completed within 6 months and the appellant submits that many assessments take 3 years to complete.
6. In relation to this appellant, judicial review proceedings were conducted in two stages. The first arose in relation to delay in the assessment of needs process. Having been granted leave to apply for an order of *mandamus* compelling the respondent to complete his assessment of needs within 8 weeks, the respondent consented to such an order on the 19th December, 2018. The assessment report was issued on the 28th January, 2019. His assessment took 33 months to complete from the date the application was submitted; this timeframe was accelerated because he had secured an order of *mandamus* from the High Court.
7. Although the appellant had been assessed subsequent to the order of *mandamus* made on consent, he sought declarations as to the legality of the respondent's approach to assessments. His case was put forward, with the agreement of the respondent, as one of three test cases on this issue which were heard together. The High Court refused the reliefs sought. At this appeal stage, only this appellant and C.M. pursued their appeals. The appeals in these two cases were heard together.

The High Court Judgment

8. The rationale for refusing the reliefs sought by this appellant was set out in the High Court judgment delivered in the case of *C.M. (A Minor) v. The HSE*. The facts relating to this appellant, which were said to be indicative of the type of issues at stake in these applications for assessment of needs, were set out by the trial judge in the judgment *J.O'S.S (A Minor) v. HSE*. The High Court judgments in *C.M.* and *J.O'S.S* must be read together. The

references to the High Court judgment in this appeal are references to that in C.M. (A Minor) v. The HSE save where otherwise expressly stated.

9. In his judgment, the trial judge dealt with this issue under the heading "*The "Geographical Lottery" Issue*". That title (terminology with which the respondent disagreed) is said by the appellant to reflect the position that the order in which applicants for assessments of needs are assessed is dependent upon their geographical location.
10. The trial judge relied upon the evidence from Dr. Morgan who is the Head of Operations, Disability Services with the respondent. He is not a medical doctor and objection was taken in this appeal by the appellant to reliance on his evidence. At para. 68, the trial judge noted Dr. Morgan's evidence as follows:-

"The duration of an ASD [Autism Spectrum Disorder] assessment can vary significantly from area to area, but a time of up to ninety hours is indicated by certain professionals. He stated that these assessments are subtle and complex and often require observation of a child across a number of different settings, including in the clinic, at school and at home. In such circumstances it is not viable to propose conducting such assessments 'out of area'."

11. The trial judge went on to say:-

"The court can readily understand that where a child either has, or is suspected of having, ASD, they will require a multidisciplinary assessment, which will involve observing the child both at home and in his school setting".

The trial judge then said at para. 69:-

"While the applicant put forward the simple proposition that each assessment should be undertaken in strict chronological order on a national basis, they did not elaborate as to how that would take place in practice. There were averments by the next friends of the applicants, that given the desirability of early assessment in ASD cases, they would be willing to travel to whatever part of the country was necessary to obtain such an assessment. However, it seems to the court that this misses the point entirely that such assessments in order to be comprehensive, need to be carried out in the home and school environment of the child. Furthermore, it seems to me that if one were to apply the national chronological order of assessing children, this would require the medical professional or therapist, who was going to carry out the assessment travelling from whatever part of the country they may be in to the place of residence of the applicant."

12. The trial judge made the following finding at para. 70:-

"The statutory regime provides that the assessments must be done in strict chronological order. The purpose of that is probably twofold. Firstly, to prevent people seeking to exercise influence to jump the queue and gain priority, so that everyone, rich or poor, well connected or otherwise, is treated in a fair manner;

rather than having the person with power or influence gaining priority in terms of obtaining an initial assessment. Secondly, it avoids the HSE being put in the invidious position of having to decide priority on the basis of disability or needs, when that has not been established at the time that the application is lodged. In other words, it prevents the HSE having to make a decision as to which child applicants should be seen first, when no assessment of their disability or needs has at that time been carried out”.

13. The trial judge then held that those two aims were achieved by the system which has been put in place by the respondent. He held that the court should not micromanage the respondent in how it chooses to carry out its specialist functions. He was also satisfied that in adopting the procedure which it has, the respondent has complied with both the letter and the spirit of the obligation which was placed upon it to carry out such assessments in strict chronological order. He accepted that it made more sense to carry out what are often multidisciplinary assessments on a regional basis rather than having the experts criss-crossing the country.

The Statutory Regime

14. Section 8 of the Disability Act sets out the requirement for the respondent to carry out an assessment of needs. Section 9(5) provides that where an application (or request) is made for an assessment “the Executive shall cause an assessment of the applicant to be commenced within 3 months of the date of the receipt of the application or request and to be completed without undue delay.”
15. Section 21(a) of the Disability Act permits the Minister to make regulations to give effect to Part 2 of the Act. These may provide for, amongst other matters, the different periods within which an assessment is to be carried out or reviewed and different periods in respect of a) different categories of disability or b) persons of different ages.
16. Regulation 4 of the 2007 Regulations requires applications for assessments to be made in writing “using the form published for that purpose by the Executive.” Regulation 5, recited above, uses the word “process” but “process” is not defined in the Disability Act or in the 2007 Regulations. “Application” is defined in the 2007 Regulations by reference to s. 9 of the Disability Act. It is defined as follows: “‘application’ means an application for an assessment in accordance with section 9 of the Act of 2005”.
17. Regulation 6(1) provides:-

“The Executive shall acknowledge receipt of the completed application form within 14 days of the receipt thereof. This acknowledgement shall specify the date on which the completed application form was received by the Executive. This acknowledgement shall also specify the date on which the assessment will commence which date shall not be later than three months from the date of the receipt of the completed application form.”

Regulation 6(2) deals with the situation whereby an application form is sent to the respondent but is incomplete. It provides that:-

“If any application form received by the Executive is incomplete the Executive shall, without undue delay, notify the applicant in writing of the omissions and shall advise the applicant of the steps which require to be taken in order to ensure the application form is completed.”

18. Regulation 7 deals with the acknowledgement that must be sent by the respondent of the receipt of the application form and it sets out whether it is sent to the applicant or the applicant’s representative (where the applicant is a minor). Regulation 8 then deals with refusals of applications and the communication of the reasons therefore to the appropriate recipient.
19. Regulation 9 states that “the Executive shall commence the assessment process as soon as possible after the completed application form has been received but not later than three months after that date”. Regulation 10 provides that the respondent “shall complete the assessment and forward the assessment report to the Liaison Officer within a further three months from the date on which the assessment commenced, save for in exceptional circumstances, when the assessment will be completed without undue delay”. The regulation then provides that where the assessment will not be completed within three months of the commencement, the respondent must explain in writing before the end of those three months why it will not be completed and specify a time-frame for completion.
20. Section 14 of the Disability Act provides for a complaints procedure that deals, amongst other matters, with the situation where an assessment was not commenced within the time specified in s. 9(5) of the said Act. The fact that this complaints mechanism is used by the respondent to give greater priority to those applicants who successfully complain under this mechanism emerged only at the High Court hearing.
21. The wider statutory context within which the respondent operates is the Health Act, 2004 (“the Health Act”). Section 67(1) provides for the division of the respondent into functional areas mapped onto the geographical boundaries of the former health boards as follows:-

“(1) An area that before the establishment day was a function area of –

- (a) a health board,
- (b) the Eastern Regional Health Authority, or
- (c) an Area Health Board,

becomes on that day a functional area of the Executive with the same geographical boundaries as it had before that day.”

22. Section 7 of the Health Act provides in part that:-

- (1) The object of the Executive is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public.
- (2) Subject to this Act, the Executive shall, to the extent practicable, further its object.
- (3) [...]
- (4) The Executive shall manage and shall deliver, or arrange to be delivered on its behalf, health and personal social services in accordance with this Act and shall-
 - a) Integrate the delivery of health and personal social services, [...]
- (5) In performing its functions, the Executive shall have regard to -
 - a) Services provided by voluntary and other bodies that are similar or ancillary to the services the Executive is authorised to provide,
 - b) [...]
 - c) [...]
 - d) the resources, wherever originating, that are available to it for the purpose of performing its functions,
 - e) the need to secure the most beneficial, effective and efficient use of those resources."

The Issues

23. The respondent's primary contention is that regulation 5 only deals with *the processing of applications* and not *the process of carrying out the assessments* of need. Much of the submissions, and indeed the judgment of the High Court, was taken up with the issue of the deference that must be shown to a public body such as the respondent when carrying out its statutory duty in its own area of competence and expertise.
24. The respondent itself distinguishes in submissions between the interpretation of legislation and the need for the court to show deference to the respondent in carrying out its statutory functions *i.e.* the court must not micromanage. The respondent submits that the issue of deference will come into play only if this court rejects its submission that regulation 5 refers to the processing of applications and not the processing (as in the carrying out) of assessments of need. The respondent refers to Hogan and Morgan, *Administrative Law in Ireland* (5th Edn., Round Hall, 2019) at para 17.114: "... *there is more likely to be deference where the point is one demanding judgement or experience in the particular field; less so, if at all, where the issue is one of pure law.*"
25. Although the above quote may appear to leave open the issue as to whether a Court must give deference to an experienced body when the issue is one of pure law, the respondent did not dispute that this Court was not obliged to show deference to the respondent's interpretation of the statutory provisions under which it operates because of its status as a statutory body. In those circumstances it was accepted that the interpretation of legislative provisions is one for the courts to decide in accordance with the well-established canons of statutory interpretation. In so far as the trial judge may have appeared to give deference

to the respondent's regional management of assessments of need in his interpretation of the relevant statutory provisions as distinct from the operation of the assessments themselves, such an approach will not be followed.

Does Regulation 5 only direct priority for the administrative processing of applications?

26. The appellant's submission is a straightforward one based upon the ordinary and plain meaning of the statutory provisions; the meaning is that the priority applies to the processing of assessments. The appellant submits there would be no reason for such an elaborate scheme to be put forward for the processing of applications but to leave the timing of the carrying out of the assessments completely at the discretion of the respondent.
27. The respondent submits that it is "striking" that s. 9 of the Disability Act which deals with "applications for an assessment" is "hived off" within the statutory scheme and dealt with separately from s. 8 which concerns the actual assessment of needs process. The respondent submits that unlike s. 9, section 8 concerns itself with substantive matters such as *inter alia*, referral for assessment of educational needs, the substantive question of whether a person has a disability and the content of assessment reports.
28. Immediately prior to regulation 9 there is a new heading: "Timescale for the completion of the assessment of needs". The respondent submits that this indicates that regulations 4 to 8 concern the processing of applications for assessment, and that regulation 9 deals with the second process, *i.e.* the actual carrying out of the assessment.
29. In support of his submission that regulation 5 pertains to the carrying out of assessments, the appellant distinguishes priority for an assessment of needs from priority on a housing list wherein it is entirely appropriate for different local authorities to have different schemes of letting properties according to demographic considerations as noted in *Fagan v. Dublin City Council* [2020] 1 I.L.R.M. 157. The Disability Act, as submitted by the appellant, envisages that all children are treated equally. Counsel for the appellant relies on *J.F. and Anor. v. The HSE; K.K. and Anor. v. The HSE* [2018] IEHC 294 to support his argument that where a child is not assessed in a timely manner and does not receive appropriate intervention, then the harm caused to their health and education may be permanent.
30. The respondent submits that Faherty J. in *J.F. v. HSE; KK v. The HSE* was in fact directing herself not to the question of *processing of applications* but rather, on the issue of *carrying out of assessments*. The respondent relies on para. 55 of her judgment wherein she stated that:-

"Arising from the pleadings in the within proceedings, the following issues arise:

- (1) *Do the provisions of the 2005 Act impose a legal obligation upon the respondent to carry out an assessment of need as would entitle the applications to an order of mandamus". (Emphasis in respondent's submissions).*

31. The respondent submits that Faherty J. expressly distinguished what she described as “the administrative exercise” of processing applications, from the substantive step of actually commencing the assessment. She stated as follows at para. 56 that:-

“It is also clear from Article 6(1) of the 2007 Regulations that the administrative exercise involved in the preliminary determination of whether or not an assessment of need is necessary and the preparation of the acknowledgment letter (setting out the time frames) cannot constitute commencement of the assessment of need.”

32. As discussed in the judgment in *C.M. (A Minor) v. HSE* also delivered today, that the Disability Act (and the Education of Persons with Special Educational Needs Act, 2004, “the EPSEN Act”) represent “the ideal” in terms of assessment of needs and delivery of services in health and education for people with a disability. For budgetary reasons primarily (so it appears), many of the provisions in those Acts have not been commenced or have been commenced only in respect of a limited category of applicants (*e.g.* assessment of needs is limited to children under 5 years). Section 9 of the Disability Act is an example of what should be the ideal; it contains a clear direction to the respondent that it *shall cause an assessment* to be carried out within 3 months and to be completed without delay. That provision and the relevant part of the 2007 Regulations amount to *statutory imperatives*, to borrow the phrase from Faherty J. in *J.F. v. The HSE; K.K. v. The HSE*, for commencement and completion of assessments.
33. The 2007 Regulations reflects the *statutory imperative* of s. 9 of the Disability Act. That is apparent from regulation 9 which reflects the time scale in s. 9 when it says that the respondent shall commence the assessment process as soon as possible after the completed application form has been received but not later than three months after that date. I reject the respondent’s strained view of this regulation in which it submits that the heading “Timescale for the completion of the assessment of needs” immediately above regulation 9, demonstrates that the earlier regulations 4 to 8 concern the processing of applications for assessment and regulation 9 deals with the second aspect *i.e.* the processing of the carrying out of assessments. It is correct that they are dealing with different issues, regulations 4 to 8 dealing with the order in which the assessment applications must be dealt with whereas regulations 9 to 12 deal squarely with the time in which the assessments are to be completed.
34. Contrary to the respondent’s contention, there is a great deal to show that regulation 9 is following on from the strict criteria set down in regulations 4 to 8 as to the order in which the assessments must be processed. The most obvious is that the word *process* is used. Contrary again to the respondent’s submission, there is no basis for believing that the process being referred to is something different in each regulation. Moreover, the reference to the completed application form being received in regulation 9 makes a link with the earlier regulations dealing with those issues.
35. Regulation 6(1) also requires the respondent to acknowledge receipt specifying the date on which the assessment will commence which is a date not later than three months after the receipt of the completed application form. I do not agree, as argued by the respondent

that, the *dicta* of Faherty J. in *J.F. v. The HSE; K.K. v. The HSE* to the effect that the time taken for carrying out the administrative exercise in respect of the application forms is not to be considered the commencement of the assessment, supports the view that these are two different processes. That case was answering a different question, and, in any event, Faherty J. was emphasising that it was the carrying out of the assessment that was mandatory and not to be confused with what amounted to an administrative process. This, in my view, demonstrates that the emphasis of both the legislature and the Minister was on the assessment process itself and not on mere administrative processes. Instead, one must return to the wording of regulation 5. Interpreting statutory provisions, including those of secondary legislation, means giving the words their ordinary and natural meaning in the context in which they are found.

36. In its ordinary meaning, *to process an application* would be understood as dealing with the application in a substantive manner. The fact that this type of wording is used in the context of setting out very specific instructions as to how that must be done down to the alphabetical order of the surname of the applicant strongly points to that conclusion. It is simply inconceivable in my view, that the Minister would impose a strict sequencing in respect of mere administrative actions *i.e.* that of replying to applications, while leaving it entirely in the hands of the respondent to decide the order in which the actual assessments themselves will be carried out. Such an interpretation does not accord with the ordinary and plain meaning of regulation 5 on its own or when viewed in the context of the 2007 Regulations or the Disability Act. Indeed, it would lead to the absurd situation where the chronology of the paperwork involved in acknowledging receipt of an application was legislatively provided for but the carrying out of the assessments themselves were entirely left to the respondent to carry out in any order it so chose.
37. The trial judge was correct when he stated that the purpose of the strict chronological scheme was probably twofold. It provides equality of access and fair treatment in preventing queue jumping and also avoids the respondent being put in an invidious position of having to decide priority on the basis of disability or needs, when those needs have not been established at the time that the application is lodged. I am satisfied that the correct and proper interpretation of regulation 5 is that it requires the respondent to process the carrying out of assessments of needs in a strict chronological order.

Must the respondent process the assessments on a national basis?

38. The conclusion that regulation 5 refers to the processing of assessments and not merely the processing of applications still leave a fundamental issue to be decided: Whether regulation 5, in laying down a requirement of chronological processing, permits the respondent to process the assessments chronologically *on a regional basis* or requires assessments to be processed on a *national basis*?
39. Both parties have relied upon what Dodd in *Statutory Interpretation in Ireland* (1st Edn., Bloomsbury Professional, 2008) describes as “the informed interpretation rule”. The author says as follows at para. 8-06:

"In Ireland, it is usually safe to presume that it is intended by the legislature that the courts be fully informed as to legal matters relevant to an enactment (as opposed to any and all matters that potentially aid interpretation), and that interpretation is to proceed from such an informed standpoint".

40. I agree therefore that the fact that the Health Act has permitted the division of the respondent into functional areas based upon former health board areas is a matter which must inform the courts when seeking to interpret legislation. The legislature (and the Minister in so far as he does so *intra vires*), is, however, free to legislate for issues to be dealt with on a countrywide basis. Whether it has so been legislated for in an individual situation is a matter for the court to determine. It is noteworthy that s. 67(2) of the Health Act expressly provides that:-

"References (however expressed) in any enactment referred to in Schedule 3 to a functional area of a health board, the Eastern Regional Health Authority or an Area Health Board are on and after the establishment day to be read as references to

- (a) the corresponding functional area of the Executive or that area as redefined in accordance with this section, or
- (b) if the context so requires, the area comprising all of the corresponding functional areas of the Executive or comprising all of those areas as redefined in accordance with this section." (Emphasis added).

Schedule 3 includes the EPSEN Act as it was enacted prior to the Health Act. Section 67(3) goes on to permit the respondent to redefine for any specified purpose the geographical boundaries of a functional area of the Executive. No section of the Health Act which states that a reference to "the Executive" in later Acts is to be interpreted as a reference to a particular functional area of "the Executive" unless the context requires otherwise, has been opened to this Court.

41. The trial judge held that the court is not to micromanage the respondent in the carrying out of its specialist functions and held that the respondent has complied with both the *"letter and the spirit of the obligation which was placed upon it to carry out such assessments in strict chronological order."* The appellant submits that the present case is not concerned with the micromanagement of the respondent but rather, because the respondent is not complying with the legislation, that the appellant is prejudiced in the form of delayed assessments and consequent delays in the provision of essential services.
42. The submission is that the wording of the Disability Act, and regulation 5 in particular, is straightforward and requires the assessments of needs to be carried out in a nationwide chronological sequence in accordance with the date of receipt of the applications for assessments. The appellant submits that the trial judge erred in holding that issues of administrative convenience could be permitted to affect the meaning to be attributed to the terms of regulation 5.

43. Moreover, the appellant submits that the trial judge's criticism of the appellant's failure to explain how the undertaking of assessments in strict chronological order on a national basis would take place in practice, was misplaced. The appellant submits that it is not the case that an applicant must show how a system might work otherwise before he or she can point to a clear failure to apply the law properly. The appellant submits the operation of the law is a matter for the government and the Oireachtas. The appellant submits that he was forced to come to court because he was prejudiced due to the failure of the respondent to comply with the law.
44. The appellant relied on *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539. *O'Neill v. Minister for Agriculture* concerned the licensing regime set up for the artificial insemination of livestock. The Act permitted the Minister to adopt a licensing regime as set out in regulations which required a service provider to have a licence in order to provide the service in question. The regulations were silent on the division of the country as a way of organising the licensing of any applicants. The Minister divided the State into nine regions and he determined that he was only going to grant one licence in respect of each region, for good clinical and administrative reasons.
45. The Supreme Court was of the view that the objectives of the Minister were laudable. Keane J. stated at p. 546 of the reported judgment that:-

"There is nothing in the Act to suggest that the Oireachtas intended that, for the reasons given in the passage in the High Court judgment already cited, the first respondent should divide the country into a number of regions, in respect of each of which only one licence was to be granted. I am satisfied that in adopting the exclusivity scheme the first respondent acted ultra vires the Act of 1947 and, on that ground alone, the appeal should be allowed."

The trial judge rejected that case as authority "for the proposition that the respondent cannot decide how best to carry out its statutory function." The appellant submits that the issue was not "how best to carry out its statutory function" but was whether the respondent was acting *ultra vires* in the manner in which it carried out the processing of applications.

46. The appellant also relied upon the decision of the Supreme Court in *M.C. v. The Clinical Director of the Central Mental Hospital* [2020] 2 I.L.R.M. 309 which concerned the decision of the Mental Health Review Board to release the applicant subject to conditions. The relevant section of the Criminal Law (Insanity) Act, 2010 required the Clinical Director to make such arrangements as may be necessary for, *inter alia*, facilitating compliance by the patient who is the subject of the proposed order with the conditions of the order. The Clinical Director refused to assess the living arrangements as directed by the Review Board. He viewed the planned arrangements as not being clinically appropriate or in the best interests of the applicant. Baker J. in the Supreme Court held that the word *shall* imposed a mandatory obligation in the case. She said that "[i]t is not a question of whether the Clinical Director had reasons or good reasons, whether they be clinical or otherwise, for not putting the conditions in place or for taking the logically prior step of asserting what

conditions were necessary." Baker J. held that the Clinical Director had breached the statutory duty imposed upon him and therefore acted unlawfully.

47. The respondent submits that in contrast to the detailed systems provided for processing applications for assessments, the Oireachtas have chosen not to direct the HSE's discretion as regards the manner in which assessments themselves are processed or carried out beyond those terms. The respondent submits that pursuant to s. 7 of the Health Act, the Oireachtas has delegated to the respondent, the decision on how the system is to be operated on the basis of the respondent's specialised knowledge. The respondent submits that it is as against this backdrop, that the trial judge was correct to distinguish the present case from *O'Neill v. Minister for Agriculture*. The respondent submits that *O'Neill v. Minister for Agriculture* involved the implementation of a scheme by the Minister in a way that was not contemplated or presaged in primary or secondary legislation. The question in that case, according to the respondent, was whether such legislation provided a proper legal basis for the Minister to implement a policy that the applicant described as a regional monopoly. The issue was not the division of the country into areas as such, but rather the basis for deciding that only one licensee would be permitted to operate in a particular region.
48. The respondent submits that for the courts to interfere to the extent of directing it to carry out assessments on a national basis would be incorrect. It does so without prejudice to the argument that this was not properly an issue in this case and that there was no challenge to the reasonableness of the approach of the respondent. A challenge on reasonableness could only succeed if there was relevant and cogent evidence that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense, per Fennelly J. in the well-known passage in *Meadows v. Minister for Justice* [2010] 2 I.R. 701. The respondent submits that this is the underlying principle of "fact deference" where the judiciary give latitude to the Executive in the discharge of its functions. The respondent submits that the task of providing complex, individualised, multi-disciplinary assessments informed by a broad range of clinical and professional disciplines to a large number of children with varying ages and diverse needs, is a type of decision requiring specialist knowledge.
49. The respondent concedes that there is a variation of waiting times per region. The respondent submits that this does not impugn the validity of the system and relies on *McC v. Eastern Health Board* [1996] 2 I.R. 296 to that effect. In this case, the assessing health board was mandated by statute to carry out the relevant assessments "as soon as practicable". Delays ensued and applicants in one functional area established that the waiting list in another functional area were significantly shorter. Keane J. rejected this discrepancy as a justiciable basis of complaint. The Oireachtas in the present case has dealt with how delays are to be addressed in the Disability Act; such as the strict deadlines and the availability of redress by way of Circuit Court enforcement proceedings. The respondent submits that there is no statutory basis for the appellant's position that the appropriate response to differences in waiting times for the carrying out of assessments across the country is for the courts to intervene to substitute a different method of ordering

such assessments. The respondent submits that this is particularly the case where the Oireachtas, having chosen to prescribe in minute detail the order in which the respondent is to deal with certain aspects of the assessment of need system, has chosen not to prescribe how the respondent is to exercise its discretion to administer the rest of the assessment of need system.

50. The respondent also relied upon *E.T. v. Clinical Director of the Central Mental Hospital* [2010] 4 I.R. 403 where Charleton J. applied this principle in the area of waiting lists for scarce clinical resources in the Central Mental Hospital. He held that it was only in circumstances of an extreme nature should the court interfere.
51. The legal issue in *E.T. v. Clinical Director of the Central Mental Hospital* was however, entirely different to the present case. In this appeal, the appellant's submission is based, correctly or incorrectly, on a specific legal provision that he says entitles him to priority in his assessment based upon the date of application taken on a national basis. No corresponding statutory provision was at issue in *E.T. v. Clinical Director of the Central Mental Hospital*. Therefore, there is little to be gained from this line of authority as the present appeal is primarily one of statutory interpretation.
52. The case of *O'Neill v. Minister for Agriculture*, relied upon by the appellant, is useful in so far as it demonstrates that a Minister or other public body is obliged to carry out its statutory duties in accordance with legislative provisions. It is not however as strong an authority as the appellant urges upon the Court. In *O'Neill v. Minister for Agriculture* there was no provision in any relevant legislation which indicated that the licensing arrangements were to be restricted by drawing up separate regions and for one license only to be provided per region. Neither primary nor secondary legislation had envisaged such a scheme whereby a regional monopoly would apply.
53. In the present case, the respondent's argument is that the Health Act envisages its division into functional areas mapped onto the previous geographical boundaries but subject to change by the respondent in accordance with the legislation. While there is a legislative basis for saying that the respondent is permitted to manage and deliver its health and personal social services on that basis, the legislation does not expressly say that it *must* so deliver on that basis. Section 67(2) operates as a "lookback" provision whereby references in earlier Acts to, for example "the relevant health board", are to be taken as references to particular functional areas of the respondent. That certainly permitted the respondent to carry out its statutory duties in such a similar manner. On the other hand, there is nothing in the Health Act (or at least nothing to which this Court was referred) which *requires* services to be delivered or provided only on the basis of established geographical boundaries. Instead the Health Act appears, at least in s. 7, the section to which the respondent referred the Court, to permit the respondent to manage and deliver health and personal social services in accordance with the Act while having regard to services provided by other bodies, to resources and to the need to secure the most beneficial, effective and efficient use of those resources.

54. What the respondent appears to contend for in its interpretation of the 2007 Regulations is that a reference to "the Executive" must be understood as a reference to the Executive broken down to its functional areas. It must however be remembered that even in the "lookback" provisions of s. 67(2) to earlier legislation, the reference to "health board" may not only be a reference to a particular functional area but a reference to "if the context so requires, the area comprising all of the corresponding functional areas of the Executive or comprising all of those areas as redefined in accordance with this section" (section 67(2(b))). In other words, context is the key to understanding the reference to "the Executive" within legislation. On some occasions in prior legislation where "health board" or "Eastern Regional Health Authority", or "Area Health Board" is referred to, the reference to that entity may, if the context requires it, be interpreted as comprising the entire area of the respondent. If references in previous legislation may mean the entire area of the respondent, there is no reason in principle that a reference in subsequent legislation to the Executive *must* only mean a reference to individual functional areas.
55. The Disability Act makes reference to "the Executive" meaning the respondent. We have not been referred to any section or sub-section of the Act which breaks down that reference to the Executive to mean a functional area of the respondent. The assessment officers, liaison officers and complaints officers are all to be authorised by the respondent from among its employees to perform the functions conferred by the Act. Although they may be assigned by the Executive to different functional areas, the Executive in this sense means the respondent body as a whole is their employer. Under s. 9, applications are to be made to "the Executive" for assessments. Again, there is nothing to indicate that these applications *must* be made on a regional basis.
56. The statutory requirement under the Disability Act is to carry out the assessment of needs. Some aspects of how it is to be carried out are set down by law; the *C.M. (A Minor) v. The HSE* judgment also delivered today gives an indication of the procedural steps that are statutorily mandated. Section 10 of the Disability Act requires assessments to be carried out in accordance with relevant standards by a body standing prescribed by regulations made by the Minister (now the Health Information and Quality Authority) under s. 8(1)(m) of the Health Act, 2007. As set out above, s. 21(a) of the Disability Act specifically permits the Minister to make regulations in relation to, *inter alia*, "the procedure for and in relation to such assessments". It is important to point out that this case does not involve a challenge to the *vires* of the Minister to make regulation 5, this case only concerns its interpretation. Arising from the foregoing it may be said that the respondent is obliged to follow the law in so far as it provides for the carrying out of assessments but where the law does not so regulate, the respondent is left to decide the manner in which it is to be carried out (subject of course to judicial review where the performance of the statutory duty is not in accordance with law).
57. How then is regulation 5 to be interpreted? The 2007 Regulations refer to "the Executive" and make no reference to functional areas. Regulation 4 required that an application in writing be made using the form published for that purpose by the Executive. That form

could, in theory at least, therefore require an application to be made to a relevant person in a functional area. It is necessary however to see if that is in fact permitted.

58. Regulation 5 expressly requires “the Executive” to process the applications for assessment in order of the date on which they are received by “the Executive”. As found above, this is a direct command to the respondent to carry out the processing of assessments chronologically. In my view, it is undoubtedly also a direct command to carry out the process of assessments in a chronological fashion in accordance with how they are received by the respondent *regardless of the functional area*. The context is the key. As stated above, this statutory requirement was to ensure equality and fair treatment for an applicant and to lessen the burden on the respondent to have to make preliminary determinations of need. This is a command to the respondent by the Minister, pursuant to the powers granted to him in accordance with s. 21(a) of the Disability Act, as to the order in which the assessments must take place. Unlike the provision of other health or personal services (no other comparable statutory provision as regards waiting lists has been referred to us), this is an area where the Minister, having been permitted to do so by the Oireachtas, has chosen to prescribe the order in which applicants are to receive this particular service. There is nothing in the Health Act, the Disability Act or in the 2007 Regulations that requires regulation 5 to be read as meaning that priority is only granted chronologically as per the date of receipt of applications in each individual CHO region of the respondent. The plain and ordinary meaning is a direction to the respondent (“the Executive”) to carry out these assessments in the order that the applications are received by the respondent as a body. Nothing in any other legislation points to any other interpretation of that; operating in functional areas is permissive but not mandatory. As it is a statutory mandate as to the order in which assessments are to be carried out, it is not a command that can be re-interpreted by the respondent as meaning chronological within each functional area. Therefore, as a statutory provision no judicial deference is to be accorded to the interpretation given to it by the respondent.
59. The respondent has referred to the evidence of Dr. Morgan who says it would not be possible to facilitate a system where this was centrally managed and that “in practice, it would be virtually impossible, if not counter-therapeutic to operate”. These concerns were questioned in this appeal by the appellant (but not apparently challenged in the High Court). There was however evidence to show that in the appellant’s case, a teacher’s report/statement was submitted in writing and that travel was not an insurmountable obstacle. The issue of statutory interpretation for a court does not depend on how the statute might operate in practice (subject of course to consideration of whether a literal approach may lead to an absurdity). I do not consider that the respondent has established an evidential basis to show that an absurd result would be reached in this case based upon an interpretation that requires chronological processing of assessments at a national level. Indeed, the creation of strict geographical boundaries with huge time differentials based upon geographic location appears absurd when one considers that children are being affected by these delays. These are all matters of which the Minister must have been aware when he chose to legislate in this fashion.

60. It must also be recalled that if there were sufficient resources in each CHO region for the appropriate experts then it is less likely that there would be an issue in principle with these being carried out chronologically on a nationwide basis. The Court must have regard in interpreting the legislation to how it was intended that the legislation would operate at its optimal level. On that basis, the respondent was clearly intended to be able to carry out most if not all these assessments within a three month (extendable to six months) time frame. Therefore, even if the respondent, while pursuing a nationally mandated priority list, carries out the assessment process using local experts and assessment officers based in CHO regions but with an ability (and duty) to cross into bordering regions (and beyond) where a need may be greater, then the entire assessment process would be more fair and more equal and would not amount, as it actually does at present, to a geographical lottery. In this lottery, the access to assessments is dependent on where an applicant lives and not on when she or he applied (or age or even disability need). In my view, it is the respondent's interpretation of the 2007 Regulations that has led, in fact, to that absurdity in practical terms. If the correct interpretation is applied, each applicant will have a more equitable chance of receiving an assessment in a reasonable amount of time (even if not within the three to six months envisaged under the Act and Regulations) than at present where the length of the wait is primarily determined by the place of residence. At least from an applicant's perspective there will be a transparency in a national list of priority for assessment that is missing from the regional listings.
61. It is appropriate to observe however that the statutory duty to process the carrying out of assessments chronologically in accordance with the date of receipt of the application is still subject to the discretion of the respondent as to the best use of its resources. There is nothing to prevent the respondent from designing and delivering the particular statutory function of the assessment of needs by CHO region in accordance with its own objective to use its resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public. There may well be instances where, for example, the best use of resources is to have a psychologist with expertise in diagnosing ASD who has travelled a significant distance to examine one child in her home, to then carry out an assessment, somewhat out of turn, on a second child in that locality. This might save resources where otherwise double travel time might reduce the available hours for the professional assessment. Where there are delays beyond three months in carrying out a particular assessment, the respondent may specify in accordance with regulation 10 why the assessment is not being completed within the time required.
62. I conclude therefore that regulation 5 requires the respondent to process *i.e.* to carry out assessments of needs, on a chronological basis according to when the applications were received by reference to the entire functional area of the respondent and not within each CHO region of the respondent. How the respondent manages and delivers those assessments in compliance with its statutory duty will be subject to the respondent's duty to make the best use of its resources. Whether any particular applicant has been subject to the breach of regulations by reason of the manner in which their application has been processed will be a matter for legal argument in any future case that may be brought by or on behalf of a disappointed applicant.

Conclusion

63. Regulation 5 of the 2007 Regulations refers to the carrying out of the assessments of needs pursuant to the Disability Act in a chronological order based upon receipt of applications rather than merely referring to the administrative processing of applications for assessments. The priority must be accorded to applicants for assessment on a national basis and not on a regional basis.
64. The respondent, subject to law, retains a discretion as to the manner in which those assessments are carried out. A policy of carrying out assessments by region is not necessarily a breach of the legal duty imposed by regulation 5 so long as the principle of carrying out the assessments is in accordance with the priority accorded on a countrywide basis to applications pursuant to the date upon which they were received by the respondent.
65. I would therefore allow this appeal. Subject to further submission from the parties, I would propose the making of the following order consequent on the conclusions reached above:

“A Declaration that the Respondent has acted *ultra vires* the Disability Act, 2005 in carrying out assessments of needs otherwise than in chronological order on a countrywide basis in accordance with the date upon which the respondent received the applications.”
66. The issue of costs can be addressed before the Court on the agreed date for mention in the case of *CM v. The HSE* the judgment in which has also been delivered today.
67. *In circumstances where this judgment is being delivered electronically, Ní Raifeartaigh and Binchy JJ. have authorised me to record their agreement with it.*