

THE COURT OF APPEAL

Neutral Citation [2023] IECA 275

Appeal Number: 2021/277

Collins J.

Whelan J.

Pilkington J.

**IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT, 1947 (AS
AMENDED) - A CASE STATED FROM THE CIRCUIT COURT TO THE COURT
OF APPEAL**

BETWEEN

A B

Applicant

AND

HEALTH SERVICE EXECUTIVE

Respondent

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Intervening Party

(RE HSE STANDARD OPERATING PROCEDURE 2020)

JUDGMENT of Mr Justice Maurice Collins delivered on 10 November 2023

1. I agree with the judgment of Whelan J and with the answer she proposes to the question referred to this Court by His Honour Judge O' Connor.
2. I wish, however, to add some brief observations of my own. For that purpose, I gratefully adopt the comprehensive account set out by my colleague of the background to these proceedings, the terms of the case stated and the arguments made by the parties.
3. The question posed by the learned Circuit Court Judge is in the following terms:

“Where it has been determined by an assessment officer that an applicant has a disability, can the assessment of need be regarded as complete for the purpose of the Disability Act 2005 if it does not incorporate any diagnostic assessment of the child’s disability, whether in determining the existence of a disability, or in setting out the nature and extent of the disability in question.”

4. The reference to the “*assessment of need*” is a reference to the assessment that is central to the operation of Part 2 of the Disability Act 2005 (“*the 2005 Act*”). Part 2 is titled “*Assessment of Need, Service Statements and Redress*”. “*Assessment*” is defined in section 7 as “*an assessment undertaken or arranged by the Executive 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.*” Further guidance on the scope and purpose of such an assessment is provided by section 8 of the 2005 Act. It provides that the assessment officer is to be independent in the performance of his or her functions (section 8(4)) and that the

assessment is to be carried out without regard to the cost of, or the capacity to provide, any service identified as being appropriate to meet the needs of the person concerned (section 8(5)). The effect of section 8(5) has been described in the case-law as requiring appropriate services to be identified on a “*resource blind*” basis. The assessment officer is required to prepare a report in writing “*of the results of the assessment*” (section 8(6)) which “*assessment report*” is required (by section 8(7)) to “*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.”*

5. That assessment report is then furnished (*inter alia*) to the HSE and where the report includes a determination that the provision of health services or education services (or both) is appropriate, a “*liaison officer*” authorised by the HSE must prepare a “*service statement*” the purpose of which is to specify “*the health services or education services or both which will be provided to the applicant by or on behalf of the [HSE] or an education service provider, as appropriate, and the period of time within which such services will be provided*” (section 11(2)). Where the subject is a child, the service statement is not to contain any provisions relating to education services (section 11(6)).¹ The assessment report is an input – presumably a significant one – into the service statement but the practicability of providing the services identified in the assessment report, and the resources available to the bodies charged with providing such services, are also relevant considerations (section 11(7)). In contrast to the section 8 assessment, the identification of services to be provided is not “*resource blind*”. The service statement is nonetheless an important document because Part 2 of the 2015 Act provides a mechanism for enforcing the provision of the services identified in it (the mechanism invoked by the Applicant here).
6. The proper approach to the exercise of statutory interpretation has been considered in a number of recent decisions of the Supreme Court, including *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, [2020] 3 IR 480; *Bookfinders Ltd v Revenue*

¹ The section 8 assessment should nonetheless include a statement of any education needs of a child with a disability: *CM (a Minor) v HSE* [2021] IECA 283, [2022] 1 ILRM 40.

Commissioners [2020] IESC 60; *People (DPP) v AC* [2021] IESC 74, [2021] 2 ILRM 305; *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 and, most recently, *A, B & C v Minister for Foreign Affairs* [2023] IESC 10, [2023] 1 ILRM 335. *A, B & C v Minister for Foreign Affairs* conveniently synthesises the earlier caselaw. In his judgment (with which Dunne, Charleton and Woulfe JJ agreed),² Murray J explained that the caselaw puts beyond doubt that language, context and purpose are potentially at play in every exercise in statutory interpretation, with no element ever operating to the complete exclusion of the other (§73). He continued:

“The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words.”

² Hogan J delivered a separate judgment which also agreed with the judgment of Murray J on the issue of statutory interpretation.

7. The 2005 Act is undoubtedly a remedial statute: *G v Health Service Executive* [2021] IECA 101, §49 per Ní Raifeartaigh J (Costello and Pilkington JJ agreeing). It “*was enacted to offer additional support for, and to provide for the first time enforcement mechanisms designed to assist, persons with disability in the accessing of public services to meet the needs occasioned by that disability*” *G v HSE* ([2022] IESC 14, §111 per Baker J (O’ Donnell CJ and Charleton, Woulfe and Hogan JJ agreeing). Even so, the fundamental task of the court is the proper interpretation of the language actually employed by the Oireachtas, in its proper context, and the court is not entitled to rewrite that language in the name of giving effect to the remedial purpose of the 2005 Act.

8. Here, the language and scheme of Part 2 appear to me to be clear. The provisions of Part 2 relating to assessment, and in particular the definition of “*assessment*” in section 7 and the provisions of section 8(7) which prescribe the output of such an assessment, make it clear that the focus is on the identification of the health and/or education needs of the person concerned and the health and/or education services required to meet those needs. It is, of course, the case that consideration of needs and services arises only where the relevant person is found to have a disability: *G v Health Service Executive* [2021] IECA 101; [2022] IESC 14. Having a disability, as that term is defined in section 2(1) of the 2005 Act, is therefore a condition precedent to accessing services under Part 2 but the focus of Part 2 is on the identification of needs and appropriate services, even if, as a matter of practicality and/or resources, it may not be possible to deliver all those services and/or deliver them within the “*ideal*” timeframe identified in the relevant assessment report.

9. Thus, the assessment must go beyond confirming that the person concerned has a disability and must identify “*the nature and extent of the disability*” so that any “*health and education needs ... occasioned to the person by the disability*” may be identified, which will in turn enable the identification of “*the services considered appropriate ... to meet the needs of [that person] and the period of time ideally required ... for the provision of such services and the order of such provision.*”

10. The assessment must, accordingly, be such as to enable the assessment officer to identify the health and education needs of the person concerned and the services appropriate to meet those needs. The fact that assessments are subject to review (section 8(7)(iv)) and that further assessments may be carried out in certain circumstances (section 9(7) & (8)) does not imply that section 8 assessments are intended to be “*preliminary*” or in any way dilute the obligations imposed on assessment officers under Part 2. On the contrary, every assessment is clearly intended to identify the nature and extent of the relevant disability and to comprehensively identify needs and services as of the date of assessment. The provisions in Part 2 providing for the review of assessments and/or the carrying out of further assessments simply recognise that no assessment is necessarily for once and for all. A definite diagnosis may not be possible. Disability and diagnosis may develop, needs may change and the services required to meet those needs may require adjustment (and new services may become available for existing conditions). That is particularly likely to be the case where children are involved.

11. Part 2 of the 2005 Act makes no reference to “*diagnostic assessment*”. Much is made of that fact by the HSE. In my view, however, the absence of such a reference does not have the significance suggested by the HSE. If in a given case or category of cases of disability, a diagnostic assessment is needed in order to identify the nature and extent of the disability and/or to identify relevant needs and services, then such an assessment is required to be carried out.

12. There may be instances where the disability at issue is such that its nature and extent and the consequent needs of the person concerned and the services appropriate to meet those needs may be identified without diagnosis of the disability. But such is not the case here. Strikingly, neither the assessment report nor the *preliminary team assessment summary* on which it is based (the assessment officer did not appear to have met with either the child here, to whom I shall refer as C, or his parents) actually identifies the disability that C has. That being so, the report could not – and does not – identify the “*nature and extent*” of that disability. Instead, it simply describes how C presented to the preliminary assessment team. The report does not identify any educational needs and the health needs, and the services to meet those needs, are identified and expressed in wholly generic terms.

13. One of the health needs identified in the assessment report is “*further diagnostic assessment*”. That reflects a recommendation contained in the preliminary team assessment summary. If the assessment officer considered that C required diagnostic assessment (it is not clear why the reference was to *further* diagnostic assessment given that no such assessment appears to have been carried out up to that point) that can only

have been because such assessment was considered necessary to properly identify C's needs and the services appropriate to meet those needs. It follows inevitably that a diagnostic assessment was an essential element of a proper section 8 assessment here and that the assessment carried out here did not comply with the requirements of section 8.

14. The approach taken to the assessment of C here followed the guidance set out in *Assessment of Need Standard Operating Procedure* (Disability Act 2005) (AON 1, Approval Date 24 October 2019 which appears to have come into effect in January 2020) (the "2020 SOP"). I agree with Whelan J that the 2020 SOP impermissibly circumscribes and undermines the proper operation of the section 8 assessment procedure, as well as the statutorily enshrined independence of assessment officers. The purpose and effect of the 2020 SOP is to restrict the scope of the statutory assessment procedure and transform it into a preliminary screening procedure, where meaningful assessment is deferred to the stage of service delivery. That is not consistent with the provisions of Part 2 of the 2005 Act. Apart from any other considerations, such an approach puts the proper identification of needs and services at the hazard of availability of resources, which is directly contrary to the intention of the Oireachtas as expressed very clearly in section 8(5). It also, critically, delays the identification of needs and services, in a context where early intervention is particularly important: see the observations of Peart J in *O'C v Minister for Education* [2007] IEHC 170.
15. One of the arguments advanced by the HSE in support of the approach taken in the 2020 SOP was that, in enacting the 2005 Act, the Oireachtas had deliberately eschewed

a “*medical*” model of disability in favour of a “*social*” model. That, it was said, explained why Part 2 did not refer to diagnosis and explained (and justified) the approach taken in the 2020 SOP. I do not doubt that the distinction between medical and social models of disability may have great significance in certain contexts. As a justification for the 2020 SOP, however, it is wholly implausible. As was pointed out by the Intervening Party, the terms in which “*disability*” is defined in section 2 of the 2005 Act in fact incorporates elements of each model. More significantly, section 8(7) requires the assessment officer to include in every assessment report a statement of the nature and extent of the disability *and* a statement of the health and education needs occasioned by the disability and the services appropriate to meet those needs. Manifestly, compliance with those requirements may require more than the identification of a “*substantial restriction in the capacity of the person*” and necessitate diagnosis of the disability at issue. That this is such a case is apparent from the HSE’s own assessment report here.

16. Rather than reflecting any particular model of disability, the explanation for the approach taken in the 2020 SOP appears to be rather more mundane, namely the resources – financial and human – available to the HSE for the purposes of carrying out its functions under Part 2. The process of assessment under section 8 is undoubtedly resource intensive and the challenges presented to the HSE are sharpened further by the time limits set out in section 9(5) of the 2005 Act. Notably, while Part 2 was commenced on 1 June 2007 in relation to persons under 5 years of age,³ its application

³ Disability Act 2005 (Commencement) Order 2007 (SI 234/2007).

was not expanded beyond that cohort until January 2022, some 16½ years after the enactment of the Act.⁴

17. The 2005 Act was unquestionably an important piece of law reform. Part 3 was significant in terms of providing for access to public buildings and services but Part 2 was particularly notable for the scale of its ambition, involving as it did the establishment of a legally enforceable framework for the assessment of the needs of, and the delivery of services to, persons with a disability. But it is often easier to legislate on paper than it is to ensure that legislation functions as intended and actually achieves its policy objectives. In his stimulating book *Making Laws that Work: How Law Fails and How We Can Do Better* (2022), David Goddard, a Judge of the New Zealand Court of Appeal, observes that it is impossible to design effective laws without paying close attention to the institution(s) that will administer them (page 82). Where that is an existing institution, consideration must be given to whether it has the capacity and the resources needed to play its intended role. If the institution lacks the capacity to administer the law, then it is likely that the law will fail to achieve its policy goals (page 83).

18. That, evidently, is apt to describe the position here. Part 2 of the 2005 Act contemplates that persons with a disability (as defined) should have access to a speedy and comprehensive assessment to identify the nature and extent of that disability and the

⁴ Disability Act 2005 (Commencement) Order 2022 (SI 3/2022) brought Part 2 into operation in relation to persons born on or after 1 June 2002.

consequential health and education needs of the person concerned and the services appropriate to meet those needs. Such services would then be provided as far as practicable. In the real world, however, it seems clear that Part 2 has not operated as intended. As already noted, until January 2022 persons over the age of 5 were excluded entirely from the application of Part 2. As for the limited (but significant) cohorts to which Part 2 did apply, it is clear that many of the parents and children who were its intended beneficiaries - including C and the parents here - were left frustrated and disappointed, resulting in frequent litigation which inevitably consumed resources that might otherwise have been available for the delivery of services. While the HSE has now adopted a new SOP in respect of Part 2 assessments (in response to the decision of the High Court (Phelan J) in *CTM (a minor) v Health Service Executive* [2022] IEHC 131), the history thus far emphasises the need to match legislative ambition with adequate resourcing if the laudable policy objectives of Part 2 are to be achieved in practice.

19. In any event, for the reasons set out above, as well as the further reasons set out in her judgment, I agree that the question posed by the Circuit Court Judge should be answered in the manner proposed by Whelan J in paragraph 131 of her judgment. I also agree with the costs order that she proposes.

Whelan and Pilkington JJ have indicated their agreement with this judgment.