AN CHÚIRT ACHOMHAIRC

THE COURT OF APPEAL

APPROVED – NO REDACTION NEEDED

Court of Appeal Record Number: 2024/236
High Court Record Number: 2023/216/JR
Neutral Citation Number [2025] IECA 54

Meenan J.
Hyland J.
Collins J.

BETWEEN/

L.A.

APPLICANT/RESPONDENT

- AND -

THE CHIEF APPEALS OFFICER, THE SOCIAL WELFARE APPEALS OFFICER AND THE MINISTER FOR SOCIAL PROTECTION

RESPONDENTS/APPELLANTS

JUDGMENT of Mr. Justice Anthony M. Collins delivered on the 5th day of March 2025

I. Introduction

1. Part 10 of the Social Welfare Consolidation Act 2005, as amended, ("the Act of 2005") contains a detailed code for the revision of, and appeals against, decisions made thereunder. The Supreme Court (in *Petecel v. Minister for Social Protection* [2020] IESC 25 and in *McDonagh v. Chief Appeals Officer* [2021] IESC 33) and this Court (in *F.D. v. Chief Appeals Officer* [2023] IECA 123) have considered a number of the circumstances in which that code provides an effective remedy, with the consequence that a dissatisfied claimant may be required to exhaust the options it offers instead of seeking to challenge such decisions by way of judicial review. This appeal raises a discrete issue as to the adequacy of the remedy that s. 318 of the Act of 2005 affords to L.A. ('the respondent') given the nature of the case that arises from her personal circumstances.

II. Factual Background

2. On 6 April 2022, the Department of Social Protection received an application from the respondent for a Disability Allowance under Part 3, Chapter 10 of the Act of 2005, supported by reports from her General Practitioner and a radiologist. On 21 April 2022, the Department's Medical Assessor reviewed her application and provided an opinion in accordance with s. 300A(1)(o) of the Act of 2005. In the meantime, ongoing marital difficulties led to the respondent and her husband separating in May 2022. Upon request, in early June 2022, the respondent provided a Deciding Officer in the Department with three payslips referrable to her spouse's earnings and an up-to-date statement of a bank account that she held in her own name.

3. On 14 June 2022, the Deciding Officer refused the respondent's application, which decision was communicated to her by letter of even date. Having recited the provisions of s. 210(1)(b) of the Act of 2005 and art. 137 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007, as amended, the letter stated that the respondent was not substantially restricted in seeking suitable employment by reason of a specified disability expected to last for a period of at least one year. Whilst the medical evidence demonstrated that the respondent suffered from a level of incapacity, it did not show a substantial restriction that precluded her from taking up work or training and indicated that there was scope for her to retrain for another occupation. By reason of those findings, the respondent was deemed not to meet the requirements for a Disability Allowance laid down in s. 210(1)(b) of the Act of 2005. The letter represented that if the respondent considered that decision was incorrect, she could request a review of the decision by a Deciding Officer and, for that purpose, submit any further documentary evidence in support of her application; appeal the decision to the Chief Appeals Officer; or seek both a review and an appeal of the decision. The letter also assessed the respondent's means as of 6 April 2022 as consisting of income received from her spouse's employment, which brought it above the applicable threshold.

4. On 23 June 2022, the respondent appealed that decision. On 31 August 2022, a Deciding Officer submitted comments to the Social Welfare Appeals Office on her appeal. By decision of 22 September 2022, communicated to her by letter dated 3 October 2022, an Appeals Officer disallowed the respondent's appeal on two grounds: first, her means as of the date on which she had submitted her application had been correctly assessed together with those of her spouse; second, the respondent had not established, by reference to the medical evidence adduced, that she was substantially restricted from

partaking in all types of work for a continuous period of at least one year, with particular reference to what was described as lighter and sedentary types of work.

5. By email of 25 October 2022, the respondent sought a review of the decision of 22 September 2022 pursuant to s. 317 of the Act of 2005 and submitted affidavit evidence in support. By decision of 12 December 2022, communicated to the respondent by letter dated 21 December 2022, the Appeals Officer, having re-examined all of the evidence before him, stated that he remained of the view that the decision both as to the amount of the respondent's means and her medical eligibility should stand, and disallowed her appeal accordingly.

6. By order of 15 May 2023, the High Court (Meenan J.) granted the respondent leave to apply by way of an application for judicial review for an order of certiorari to quash the decision of 12 December 2022 and an order to remit the respondent's review application for further consideration by a different Appeals Officer. The grounds upon which the High Court granted leave may be described under two headings. First, the decision was erroneous in law because the Appeals Officer had failed to consider whether developments in the respondent's marriage that post dated her application cast fresh light on her means, and, in particular, had acted unreasonably and irrationally in assessing her means by taking account of those of her spouse. Second, in his assessment of the medical evidence, the Appeals Officer had failed to consider a number of relevant matters, including, but not limited to: the severe effect upon the respondent of the disability from which she suffered; what constituted suitable employment having regard to the respondent's age, experience and qualifications; and the types of lighter and sedentary work that she could have performed.

7. On 26 July 2023, the appellants caused to have filed a Statement of Opposition in the Central Office of the High Court. In addition to a traverse of the respondent's Statement of Grounds, they pleaded, by way of preliminary objection, that the respondent had failed to exhaust all of the remedies available to her under the Act of 2005 and, in particular, had failed to apply for a revision of the decision of the Appeals Officer of 12 December 2022 to the Chief Appeals Officer pursuant to s. 318 of the said Act, by reason of which the application should be dismissed. It is common case that the determination of this preliminary objection is sufficient to resolve this appeal.

III. High Court Judgment

8. The application for judicial review came on for hearing before the High Court (Owens J.) on 15 and 21 February 2024 and he delivered a reserved judgment on 28 March 2024 ([2024] IEHC 187). Paragraphs 14 to 18 of that judgment record that, in a response to a question, the appellants represented that their preliminary objection to the availability of judicial review was grounded upon the respondent's failure to seek a revision of the decision of 12 December 2022 under s. 318 of the Act of 2005. To that end, they invited the High Court to depart from its judgment in *T. v. Minister for Social Protection* [2023] IEHC 763. At paragraph 23, the learned High Court Judge agreed with the conclusion that the High Court (Heslin J.) had arrived at in *T. v. Minister for Social Protection* that a claimant's omission to seek a revision under s. 318 of the Act of 2005 is not a good reason to refuse to entertain an application for judicial review of an Appeals Officer's decision, that requirement being inconsistent with the appeal structure in Part 10 of the said Act. At paragraph 58, Owens J. held that there was no obligation on a person to seek a review of a decision under s. 318 of the Act of 2005 prior to

exercising the right to appeal an Appeals Officer's decision to the High Court on a question of law under s. 327 thereof, observing at paragraph 66 that such a requirement "*would add an extra layer of administrative bureaucracy and delay*". Since a review under s. 318 of the Act of 2005 was not a prerequisite for an appeal under s. 327 thereof, Owens J. concluded at paragraph 67 that the High Court was "*not required to concern itself with whether that claimant has availed of that option as a pre-condition to entertaining an application for judicial review*." Holding that the appeal under s. 327 of the Act of 2005 gives the High Court jurisdiction to determine most issues of law that are likely to arise from Appeals Officers' decisions, Owens J. expressed doubts whether paragraph 100 of the High Court judgment in *T. v. Minister for Social Protection* was correct where it held that a claimant dissatisfied with the legality of an Appeals Officer's decision may proceed by judicial review, rather than by way of that statutory appeal.

9. In his consideration of the substance of the respondent's claim, the High Court (Owens J.) reached the view at paragraph 107 that, in calculating the respondent's means "*during the succeeding year*" from 6 April 2022, the Appeals Officer erred in not taking account of the fact that she and her spouse had ceased to cohabit in the course of that year. As for the respondent satisfying the medical eligibility requirements in s. 210(1)(b) of the Act of 2005, at paragraphs 109 to 115 of the judgment the High Court found that the Appeals Officer's decision was not irrational, was properly reasoned and was one that a reasonable decision maker could reach on the basis of the information available to him. As a consequence, the High Court declared that the Appeals Officer had erred in law in the manner in which he had determined the respondent's means, set aside the conclusion reached on that issue and remitted the matter to him for reconsideration in accordance with law.

IV. Appeal

10. By notice received in the Court Registry on 30 September 2024, the appellants ask this Court to allow the appeal against the High Court judgment and Order, set the latter aside, dismiss the proceedings and order the respondent to pay the costs thereof, or, in the alternative, make no costs order. The nine extant grounds of appeal contain three distinct criticisms of the High Court judgment. First, it is alleged that it failed to conclude that, because the respondent had not exhausted all of the equally efficacious alternative remedies available to her under ss. 318 and 327 of the Act of 2005, she was not entitled to relief by way of judicial review. Second, the High Court incorrectly concluded that the Appeals Officer had erred in his assessment of the respondent's means pursuant to Rule 1(2) of Schedule 3, Part 2 of the Act of 2005. Third, the High Court ought not to have quashed the Appeals Officer's decision in circumstances where the respondent's application had been refused due to her failure to satisfy the medical eligibility requirements in s. 210(1)(b) of the Act of 2005 and not by reference to her means.

11. By notice received at the Court Registry on 23 October 2024, the respondent pleads that the High Court did not err in its findings on the availability of alternative remedies and, moreover, challenges the appellants' entitlement to rely upon her decision to seek relief by way of judicial review instead of bringing an appeal under s. 327 of the Act of 2005. She also asks this Court to uphold the High Court's findings that the Appeals Officer had erroneously assessed her means and granted certiorari on the basis of what is described as "*a non-contingent alternative finding*". The respondent advanced a number of grounds additional to those upon which the High Court delivered judgment in support of this Court affirming the High Court

Order. These include the appellants' failure to inform her of any remedy as may have been available to her under s. 318 of the Act of 2005; their failure to take account of the fact that the respondent's difficulties with her spouse existed at the date of her application; the fact that she had provided sufficient information about the impact of her medical condition upon her capacity to work, which information the Appeals Officer had not properly taken into account; and that her difficulties in expressing herself in English were a factor relevant to the consideration of her application.

V. Availability of Statutory Remedies and Judicial Review

12. Every week, public authorities take hundreds, if not thousands, of decisions in the exercise of their powers that have a direct impact upon the lives of individuals. The validity of those decisions depends upon the correct exercise of the decision-making power. A feature of a state governed by the rule of law is that persons directly affected by such decisions have access to an independent, impartial body established by law with competence to test if they were made in accordance therewith and, in the event of error on the part of the decision-maker, to have available an effective remedy. Subject always to the High Court's power under the Constitution to decide whether they have acted in accordance with law, since the seminal Supreme Court judgment in *Tormey v. Ireland* [1985] I.R. 289 the *Oireachtas* may confer an exclusive jurisdiction upon statutory bodies to determine the correctness of such decisions (see *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168 at 183 per Keane C.J.: *Grianán an Aileach Centre v. Donegal County Council (No 2)* [2004] 2 I.R. 625, paras 29 – 31 per Keane C.J.). Where, as here, the *Oireachtas* establishes a statutory procedure to determine whether certain decisions are correct without vesting it with an exclusive power to do so, issues may arise as to whether persons seeking to challenge the correctness

of those decisions must engage with that process as an alternative to availing of the judicial review jurisdiction vested in the High Court.

13. There is well-established case-law to the effect that the availability of alternative remedies will constitute what is sometimes described as "*a discretionary bar*" to relief by way of judicial review. In *State* (*Abenglen Properties Ltd*) *v Dublin Corporation* [1984] I.R. 381 at 405, Henchy J. (with whom Griffin and Hederman JJ. agreed: O'Higgins C.J. *conc.*), referred approvingly to practice in the United States of America before concluding that: -

> *"... where Parliament has provided a self-contained administrative and quasi-judicial scheme, postulating only a limited use of the Courts, certiorari should not issue when, as in the instant case, use of the statutory procedure for the correction of error was adequate (and, indeed, more suitable) to meet the complaints on which the application for certiorari is grounded."*

14. In *EMI Records (Ireland) Ltd. and Ors. v. Data Protection Commissioner* [2013] IESC 34, [2014] 1 I.L.R.M. 225, Clarke J. (Fennelly and O'Donnell JJ. *conc.*), after a review of the post *Abenglen* case-law, made the following observations at paragraphs 4.8 to 4.10 of his judgment: -

> "*4.8 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], 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.*
>
> *4.9 However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such*

> *circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision. As pointed out by Hogan J in* Koczan*, that may be so because of constitutional difficulties or other circumstances where the body to whom the statutory appeal lies would not have jurisdiction to deal with all the issues. Likewise, there may be cases where, in all the circumstances, the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues such that confining them to an appeal would be in truth depriving them of their entitlement to two hearings.*
>
> *4.10 However these and any other examples must be seen as exceptions to the general rule."*

15. It follows from the foregoing that a court, asked to adjudicate upon a plea that the availability of a statutory appeal or review bars access to the High Court's judicial review jurisdiction, must consider the nature and scope of that statutory remedy with a view to determining if, by reference to all relevant circumstances, it can afford the person who seeks to challenge the correctness of a decision an effective remedy in order to address his or her complaint.

VI. Nature and Scope of the Statutory Remedy

16. As the Introduction observes, Part 10 of the Act of 2005 contains procedures for the revision of, and appeals against, decisions made by and under the authority of that Act. Section 300(1) and (2) of the Act of 2005 empower Deciding Officers to determine "*every question arising under…*" its provisions that govern eligibility to receive benefits and allowances. By s. 301(1)(a) of the Act of 2005, a Deciding Officer may, at any time, revise any decision of a Deciding Officer where it appears that the decision was erroneous in the light of new evidence or of new facts brought to his or her notice since the date on which that decision was given, or by reason of some

mistake having been made in relation to the law or the facts, or where it appears there has been a relevant change of circumstances since the decision was given. A person dissatisfied with a decision of a Deciding Officer may also appeal against it on notice to the Chief Appeals Officer, which appeal is referred for determination by an Appeals Officer under s.311(1) of the Act of 2005. By virtue of s. 311(3) of the Act of 2005, an Appeals Officer seized of such a question is not confined to the grounds upon which the decision under appeal was based, but may decide it as if it were being decided for the first time.

17. Under s. 317(1)(a) of the Act of 2005, as amended by s. 4(1) of the Social Welfare and Pensions (No. 2) Act 2013: -

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

18. By s. 318 of the Act of 2005: -

> "*The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts*."

19. Section 327 of the Act of 2005 provides that: -

> "*Any person who is dissatisfied with –*
>
> *(a) the decision of an appeals officer, or*
> *(b) the revised decision of the Chief Appeals Officer,*
>
> *may appeal that decision or revised decision, as the case may be, to the High Court on any question of law*."

20. In the context of applications seeking to dismiss judicial review proceedings on the ground that there is an effective alternative to remedy the complaint being made, a number of Superior Court judgments have considered the nature and scope of the scheme that Part 10 of the Act of 2005 establishes for the appeal/revision of decisions. Two of these judgments are of particular relevance. In *McDonagh v. Chief Appeals Officer*, the Supreme Court was faced with the question whether a decision not to revise a Deciding Officer's decision could be the subject matter of an appeal under s. 311 of the Act of 2005. At paragraphs 57 to 62 of her judgment, Dunne J. (Clarke C.J., MacMenamin, Charleton and Baker JJ. *conc.*) interpreted the Act of 2005 as a remedial statute, citing with approval passages in the judgments of Peart J. in *L.D. v. Chief Appeals Officer* [2014] IEHC 641 and Clarke C.J. in *J.G.H. v. Residential Institutions Review Committee* [2017] IESC 69. She then observed at paragraphs 65 and 66 of her judgment: -

> "*65. ... that the legislative provisions at issue in these proceedings were drafted in such a way as to ensure that a claimant for an allowance has every possible opportunity to make their case to be entitled to the particular allowance. Not only is there an appeal procedure for a disappointed claimant but there is also a procedure to have an adverse decision revised. Admittedly, in such cases it will be necessary to provide new evidence or facts not before the original decision maker. Why then should a decision not to revise the original decision be regarded as not appealable, particularly as in the majority of cases, the revision is sought on the basis of new evidence not before the original decisionmaker? As was noted on behalf of the appellant, the extent of the flexibility as to revision is emphasised by the fact that a revision can be sought "*at any time*". This point was noted in the case of* Corcoran v. Minister for Social Welfare *[1991] 2 I.R. 175 in which it was observed at page 183 that there was "*an unlimited right to reopen the issue*" when the previous legislation which contained similar provisions to those at issue in these proceedings was being considered.*
>
> *66. Given the degree of flexibility built into the legislation for claimants dissatisfied with a decision on an application for an allowance, the question must be asked if there is a lack of logic or*

absurdity in having a system which on the one hand is flexible and generous in allowing for a process of revision and/or appeal and on the other hand, a system which denies a claimant an appeal from a decision not to revise a decision?"

21. At paragraph 76 of her judgment Dunne J. concluded that: -

"*The regime for challenging a decision under the 2005 Act is generous and flexible. Not only is there provision for an appeal from a decision but there is a generous scheme for the revision of a decision. Whilst an appeal is time-limited, a revision can be sought at any time, albeit certain requirements have to be met in the case of a revision as mentioned previously. The view that the decision not to revise a decision is one that cannot be appealed is very much at odds with the scheme as a whole provided for under the 2005 Act which provides for both appeal and revision. …"*

22. In *F.D. v. Chief Appeals Officer*, this Court identified the first issue before it as whether the High Court had erred in dismissing relief sought by way of judicial review by reason of the alternative remedy in s. 317 of the Act of 2005. At paragraphs 42 to 44 of her judgment, Donnelly J. observed that: -

"*42. The breadth of the revision provisions is, possibly, unique in the field of the administration of public law. The Act provides extensive rights to seek to revise the decisions of both the deciding officers and the appeals officers. It is noted that s. 301 provides the deciding officer with not only the jurisdiction to,* inter alia*, revise on new facts or new evidence, but also to revise by reason of some mistake having been made in relation to the law or the facts. Section 317 only provides jurisdiction to the appeals officers to revise where new facts or new evidence are put before him or her. Lest it be thought that there was no power to revise an appeal decision for a mistake of law or facts, s. 318 provides that the Chief Appeals Officer has that jurisdiction. The respondents also pleaded the availability of the s. 318 mechanism in their statement of opposition but, in the High Court as in the appeal, they focused on s. 317. It also bears repetition that the power of revision includes the power to hold an oral hearing and the right to review a decision not to grant an oral hearing.*

> *43. The extent of the powers of revision and the remedial intent behind those powers distinguish these social welfare appeals from those concerning immigration, criminal procedures, and other areas of law. What is envisaged in the 2005 Act is as broad a scheme of review as possible of assessments and the entitlement to allowances/benefits. The point raised by the appellant that she has lost her opportunity to have an "*appeal*" is not the same loss of an appeal in other areas of administrative law or in the course of a criminal prosecution. In effect, borrowing from Barron J. [*in McGoldrick v An Bord Pleanála [1997] 1 I.R. 497 *(ed.)], common sense must be applied to this issue in combination with a consideration of the ability of the appellant to deal with the questions raised in the review and in accordance with the principles of fairness.*
>
> *44. Common sense dictates that applicants for social benefits/allowances ought to use the very wide provisions in the Act which are intended to ensure that potentially qualifying applicants would not be excluded on narrow or technical grounds. The power of revision is as broad as it could possibly be. In an appropriate case, it will permit a decision not to provide for an oral hearing to be reversed and it can accommodate an oral hearing itself. All matters that could be raised on appeal can be dealt with there. This is not the same as a loss of the possibility of first instance fair procedures. In effect this is a continuation of the entire process which is designed to be fair to applicants. …"*

23. It is in the light of these authorities that I turn to consider the nature of the remedy which s. 318 of the Act of 2005 affords. That provision confers, in terms, a power on the Chief Appeals Officer to revise, at any time, any decision of an Appeals Officer where it appears to him or her that that decision was erroneous by reason of some mistake having been made in relation to the law or the facts. On a literal reading, these words are very broad. My first observation is that whilst s. 305(1) of the Act of 2005 provides that the Chief Appeals Officer is an Appeals Officer "*who is an officer of the Minister*" with the power to revise decisions of other Appeals Officers and, unlike them, to make decisions on his/her own initiative (see ss. 306 and 318 of the Act of 2005) that does not operate so as to put him or

her outside the Part 10 procedures for the appeal and/or review of decisions. Second, the Chief Appeals Officer has a power to revise a decision at any time. That contrasts with R.S.C. Ord. 84, r. 21(1), which provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose, which period may be extended provided that the requirements of r. 21(3) are satisfied. During the hearing, Counsel for the appellants confirmed that, in the event his clients' appeal was allowed, the respondent could engage the s. 318 procedure. Third, the Chief Appeals Officer has a power to review any decision taken by an Appeals Officer. Fourth, the scope of that review extends to errors in the decision caused by "*some mistake having been made in relation to the law or the facts* (my emphasis)." Expressed in those terms, the range of matters the Chief Appeals Officer can assess goes well beyond the scope of judicial review, which focusses on the regularity of the exercise of power and only exceptionally engages with errors of fact. A mistake of law includes errors of a procedural and of a substantive character, including any disapplication of national law deemed to be inconsistent with EU law. As O'Malley J. observes at paragraphs 100 to 103 of her judgment in *Petecel v. Minister for Social Protection*, there are few limits to the concept of mistake of law in this context. When s. 318 of the Act of 2005 is read as part of a remedial statute, and in the light of the judgments cited at paragraphs 20 to 22, above, the remedy that section affords appears capable of engaging almost any issue of fact or law that might possibly bear upon the correctness of the decision under challenge. Notwithstanding the absence of evidence on the point, this Court can, moreover, take judicial notice that the procedure under s. 318 of the Act of 2005 affords claimants a more accessible remedy in terms of time and costs as compared to the High Court judicial review procedure.

24. There is, nevertheless, no obligation upon a claimant to invoke the procedure under s. 318 of the Act of 2005. Section 327(a) thereof impliedly confirms that interpretation since it provides for an appeal against a decision of an Appeals Officer "*on any question of law"*. A claimant may thus legitimately challenge the legality of, as distinct from the factual basis for, an Appeals Officer's decision without asking the Chief Appeals Officer to review that decision or, indeed, after s/he has already done so: see, for example, *M.D. v. Minister for Social Protection & Ors.* [2024] IECA 28. Neither a statutory appeal on a point of law under s. 327 (a) of the Act of 2005, nor judicial review, are designed to facilitate the assessment of factual errors in an Appeals Officer's decision. Contrary to paragraph 66 of the judgment of the High Court (Owens J.), far from being inconsistent and adding "*an extra layer of administrative bureaucracy and delay*", recourse to the procedures under Part 10 of the Act of 2005, which include s. 318 thereof, enables a comprehensive review of almost all of the often complex issues of law, fact and mixed questions of law and fact that make up the majority of appeals against decisions taken under the authority of the Act of 2005 to be carried out.

25. As paragraphs 12 to 14, above, demonstrate, the availability of an appropriate remedy arises for consideration where an individual can choose between the routes available to obtain an effective remedy for his or her complaint. That choice does not exist where statute requires a person to follow a given procedure. Paragraph 67 of the High Court judgment represents that *"[a]s the* Oireachtas *has chosen not to make recourse to the High Court on an appeal on a point of law contingent on a claimant invoking the revision procedure permitted by s.318 of the 2005 Act, it follows that the High Court is not required to concern itself with whether that claimant has availed of that option as a pre-condition to entertaining an application for*

judicial review." It is precisely because the *Oireachtas* did not make access to the High Court by way of an appeal contingent upon recourse to s. 318 of the Act of 2005 that, as Owens J. appears to accept, the respondent could choose the procedure by which she could seek the resolution of her complaint. It follows that, contrary to the approach of the learned High Court judge, when called upon to adjudicate upon the respondent's entitlement to prosecute her complaint by way of an application for judicial review, the High Court must ask itself the question whether the respondent could have availed of another equally, if not more, appropriate procedure for that purpose as compared with that by way of judicial review. The High Court's disregard of that element, consideration of which was essential for the proper determination of the issues before it, caused it to fall into error.

26. In so far as it addresses the question whether s. 318 of the Act of 2005 is an appropriate alternative remedy in a context similar to that under consideration, I have doubts whether *T. v. Minister for Social Protection*, to which both parties to this appeal referred, was correctly decided. First, that judgment does not refer to either the decisions of the Supreme Court in *McDonagh v. Chief Appeals Officer* or that of this Court in *F.D. v. Chief Appeals Officer*, cited at paragraphs 20 to 22, above. The absence of any consideration of these leading authorities raises the possibility that *T. v. Minister for Social Protection* was decided *per incuriam*. Second, at paragraphs 90 to 95 of his judgment, Heslin J. took the view that s. 318 of the Act of 2005 was not an alternative remedy since the Chief Appeals Officer had not invoked the procedure under s. 318 of the Act of 2005 of his own motion. In my view, it does not follow from the fact that s. 318 of the Act of 2005 allows the Chief Appeals Officer to exercise a review power without *"new evidence or new facts"* having come to light, that that provision would not afford the respondent an effective alternative remedy to

address her complaint. Third, paragraphs 86 to 89 of the judgment suggest that the respondent's omission to draw the applicant in that case's attention to the procedure under s. 318 of the Act of 2005, whilst having done so as concerns ss. 311 and 317, was '*instructive*' of an attitude on the respondent's part that s. 318 of the Act of 2005 was not a remedy. That observation appears to have been seized upon in the course of oral submissions before Owens J. in the High Court to suggest that the appellants could not assert that s. 318 of the Act of 2005 was an alternative remedy since they had not communicated its availability to the respondent. At the hearing before this Court, Counsel for the appellants objected that no evidence had been led as to the respondent's state of knowledge or of the consequences of that omission for her circumstances. That submission explains the absence of a High Court finding on the point, by reason of which the issue does not arise for determination in this appeal.

VII. Effective Remedy for the Respondent's Complaint

27. Paragraph 35 of the respondent's replying submissions in this appeal describes "*the substantive issues in this case*" as relating, "*first, to the assessment of Ms. A.'s means and, secondly, to the assessment of whether or not she satisfied the qualifying medical criteria set out in the 2005 Act*."

28. The respondent accepts that her means are to be assessed as of the date on which she made her application for disability allowance. In her submission, that exercise consists of a forward-looking assessment, taking account of the income that she might reasonably anticipate that she would receive in the course of the succeeding year. By not conducting that exercise, the Appeals Officer erred in law. Having been informed of her marital difficulties, it was also irrational and illogical that the Appeals Officer did not take account of the likelihood that the level of financial support from her

spouse would diminish during that period, by reason of which his decision on this issue was bad at law.

29. As for her meeting the qualifying medical criteria in s. 210(1)(b) of the Act of 2005, the respondent criticised the Appeals Officer for (a) failing to have proper regard to the entirety of the evidence placed before him as regards her capacity to take up what he considered was suitable employment; (b) failing to specify the types of lighter and sedentary work that she could perform; and (c) misconstruing and/or misunderstanding the Medical Assessor's report. These deficiencies rendered that aspect of the decision unreasonable and/or irrational, and thus equally bad at law.

30. Both of these complaints are capable of being addressed within the scope of the capacious power that s. 318 of the Act of 2005 confers upon the Chief Appeals Officer to review a decision on the ground of error "*by reason of some mistake having been made in relation to the law or the facts.*" To paraphrase Henchy J.'s conclusion in *Abenglen*, since recourse to the statutory procedure for the correction of error is adequate to meet the complaints on which the application for certiorari is grounded, the latter remedy is unavailable to her. Aside from a plea that, by reference to her personal circumstances, the justice of the case warranted the exercise of the High Court's discretion to grant relief, the respondent has not sought to argue that the substantive relief that she seeks is unavailable through recourse to the available statutory remedies, such that her circumstances come within the established exception that judicial review is available where a statutory appeal process cannot provide an effective remedy: see *Petecel v. Minister for Social Protection* per O'Malley J. at paragraphs 103 to 110. I might further observe that, whilst it is certainly possible to analyse the respondent's complaints within a framework of irrationality and unreasonableness, at its

heart her case consists of allegations that the Appeals Officer erred in deciding the issues of fact, law and mixed questions of fact and law described at paragraphs 27 to 29, above. These are precisely the type of matters that s. 318 of the Act of 2005 is designed to resolve. In that context, it is not obvious that relief by way of judicial review is capable of providing an effective remedy with respect to all of the issues that the respondent may seek to ventilate in the circumstances of her claim.

31. It follows that a claimant who finds him or herself in circumstances similar to those of the respondent and is dissatisfied with an Appeal Officer's decision under s. 317(1) of the Act of 2005 can elect to seek a review of any mistake of fact and law under s. 318 or to appeal that decision on a question of law to the High Court under s. 327 thereof. Whilst the issue is not before this Court, the availability of these two routes to persons who seek to challenge the legality of such decisions raises a significant question mark over whether they can be permitted to make that case by way of judicial review.

VIII. Orders

32. By reason of the foregoing, I propose that this Court allows the appeal, sets aside the Order of the High Court of 15 April 2024 and dismisses these proceedings.

33. In the light of the Supreme Court decision in *Little v. Chief Appeals Officer et al.* [2024] IESC 53, the Court will hear the parties as to the appropriate order to make in respect of the costs of the proceedings. The appellants should file and serve a written submission of not more than 2,000 words within 14 days of the delivery of this judgment, after which the

respondent will have a further 14 days in which to file and serve a reply of a similar length.

34. Since this judgment is delivered electronically, I am authorised by Meenan and Hyland JJ. to state that they agree with it and the order that it proposes.

Appearances:

For the Respondents/Appellants: Douglas Clarke SC and Patrick Fitzgerald, instructed by the Chief State Solicitor

For the Applicant/Respondent: Conor Power SC and Joanne Williams, instructed by CSHR Solicitors