

**THE HIGH COURT  
JUDICIAL REVIEW**

**[Record No. 2019/30 JR]**

**BETWEEN**

**DB (A MINOR) (SUING BY HIS MOTHER AND NEXT FRIEND GB)**

**APPLICANT**

**AND**

**THE HEALTH SERVICE EXECUTIVE**

**RESPONDENT**

**JUDGMENT of Mr. Justice Barr delivered electronically on the 30th day of July, 2020**

**Introduction**

1. This case is one of three test cases that were heard together. Prior to the hearing, an amalgamated statement of grounds and issue paper was furnished by counsel on behalf of the applicants concerning the issues raised in the three cases. At the hearing, that was netted down to five broad issues which arose to a greater or lesser extent across the three cases. In *CM (A Minor) v. HSE* [Record no. 2019/1023 JR], delivered electronically on 30th July, 2020 (hereinafter referred to as "*the main judgment*"), the court gave its decision on the five broad issues which arose for determination.
2. This judgment will not repeat the arguments, or findings in the main judgment. It will solely deal with the circumstances pertaining to the applicant herein. This judgment must be read with the main judgment to ascertain the court's directions and findings on all the issues, including the issues raised in this case.

**Background**

3. The applicant was born on 21st August, 2011. An application for an assessment of needs was lodged on his behalf by his next friend on 22nd September, 2014. This led to the issuance of the first assessment report on 31st March, 2015, wherein it was determined that the applicant had a disability as defined in the 2005 Act, but he did not meet the criteria for a diagnosis of ASD. It was thought that he suffered from Hyperlexia III. It was also noted that there was evidence of anxiety difficulties. The report stated that it would be prudent for the applicant to undergo a multidisciplinary team assessment for ASD. It was noted that in an assessment carried out by a psychologist, he had recommended in his report dated 19th March, 2015, that the applicant should be seen by an occupational therapist; a speech and language therapist; he should have an audiology assessment and should receive an occupational therapy home programme targeting pencil grasp and scissors skills. The psychologist also recommended that he required a comprehensive eye examination. The psychologist did not identify any education needs in his report.
4. On 19th November, 2015, a service statement by way of letter was issued by Ms. Nealon a liaison officer with the respondent who stated: "*Having consulted with service providers, it is recommended that you see your GP for medical referral to the Lucena Clinic.*" The letter went on to state that if circumstances changed, or if additional resources became available, the legislation allowed them to make changes to the service statement. If the

child's circumstances changed, the mother was asked to contact Ms. Nealon and they could discuss the matter. Similarly, if more resources became available, the liaison officer stated that she would be in contact to discuss changes to the service statement.

5. An autism assessment was carried out on the applicant by Dr. Sharon Elias, Clinical Psychologist and Dr. Caroline Winstanley, Speech and Language Therapist, who issued a report on 5th January, 2016. Their opinion was that while the applicant had certain presenting symptoms, he did not meet the criteria for a diagnosis of autism; however, the presence of Hyperlexia III could be confirmed. The authors of the report stated that the applicant did not require speech and language intervention at that time. They noted that he and his family might benefit from psychological intervention to explore his anxiety. No educational needs were identified in the report. Arising out of that report, a second assessment report was issued by Ms. Louise Casey on 25th February, 2016.
6. On 21st October, 2016 the applicant's mother wrote to the respondent, informing it of a change in her son's behaviour. In light of that, she requested that his assessment be "*appealed*". It was accepted that what she was really requesting was a review of his case.
7. That request appears to have led to a further autism assessment, which was carried out by Dr. Avril Rea O'Shaughnessy and Dr. Cindia Madan, Clinical Psychologists, who reported on 29th November, 2017, that the applicant did meet the criteria for a diagnosis of ASD (Asperger's). The authors noted that he required access to a service that provided interdisciplinary clinical supports to children with ASD; in particular, in the areas of occupational therapy, speech and language therapy and clinical psychology. It was recommended that the applicant be referred to an appropriate multidisciplinary team for his ongoing care needs. The report also noted that he required anxiety management as a matter of urgency.
8. The report also noted that the applicant was eligible for the maximum allocation of resource teaching hours. It further recommended that he should be facilitated with sensory breaks throughout the school day and that his parents and school staff would need to work in close liaison in the development of an individualised educational plan for him. A number of interventions were stated as being required in the following areas: psychology; occupational therapy; speech and language therapy; educational supports and parenting supports and training, which were all stated to be immediately required. This was set out in the third assessment report issued by Ms. Casey on 20th January, 2018.
9. Arising out of that report was the service statement, which was one of the main areas of complaint for the applicant and his mother in these proceedings. By letter dated 27th February, 2018, Ms. Pauline Morgan, the liaison officer for the applicant's area, informed the applicant's mother of the following:

*"Having consulted with you and potential service providers, I regret to inform you that the services outlined in the assessment report as required to address the needs identified for [the child] are not available at present.*

*However, [the child] has been waitlisted for the HSE school age team – current waitlist is 36 months from date of referral (19th November, 2015).*

*If circumstances change, or if additional resources become available, the legislation allows us to make changes to this service statement. If [the child's] circumstances change, please contact me and we can arrange to discuss this. Similarly, if more resources become available, I will contact you to discuss changes to the service statement.*

If you have any queries, please do not hesitate to contact me."

10. On 21st January, 2019, the applicant obtained leave from the High Court to seek relief by way of judicial review. A statement of grounds was served and a statement of opposition was filed thereto on 29th July, 2019.
11. In an affidavit sworn on 29th July, 2019, Ms. Carol Cuffe, Head of Social Care for the respondent for a number of areas, including the area where the applicant lives, stated that as appeared from the service statement, the applicant had been waitlisted since 19th November, 2015 for the respondent's school age team, which was a multidisciplinary team comprising occupational therapy, speech and language therapy, physiotherapy, psychology and social work, for children aged 5-18 years, who presented with a disability, developmental delay or complex needs requiring a coordinated team approach. She stated that while it had been anticipated that the applicant would have had access to the school age team from 19th November, 2018, due to ongoing delays in the waitlist, the child had not yet been seen by them.
12. Ms. Cuffe went on to note that the service statement had provided that it could be amended in the event of additional resources becoming available. She stated that as of the date of swearing her affidavit, no such resources had become available. She stated that since the application for assessment of needs had been received in respect of the applicant on 22nd September 2014, no further services had become available to the child. She went on in the affidavit to deal with historical delays that had occurred within the assessment of needs process and the efforts to address same in the revised SOP. She stated that it was intended that the revised SOP would significantly streamline and consolidate existing practices and policies across the country, thereby minimising delays to the benefit of applicants for assessment of needs such as the applicant herein. She went on to deal with aspects of the statutory complaints procedure, which have been outlined in detail in the main judgment.
13. In an affidavit sworn on 14th October, 2019, the applicant's mother stated that as of that date, they had received no services from the respondent to address her son's needs, despite having first applied for an assessment of needs on 22nd September, 2014. She

stated that it was well established that early intervention for children suffering from ASD, could provide lasting beneficial effects; conversely, she feared that if there was a delay in providing services to her son, he would suffer long term irreparable adverse effects to his health. She referred to the report of an Oireachtas committee and to reports of psychological studies referred to therein, which clearly established that early intervention was vital in the treatment of ASD.

14. The applicant's mother stated that she had written to the respondent on 21st October, 2016 seeking a further assessment, but that had not been completed until the issuance of the assessment report on 20th January, 2018. She stated that she had requested the respondent on several occasions to complete the assessment in the period January 2017 to January 2018. She gave evidence of having spoken to Ms. Pauline Morgan and Ms. Louise Carey, who both told her that there were very long delays and significant backlogs in carrying out these assessments.
15. The applicant's mother was particularly critical of the service statement dated 27th February, 2018, which she stated was of no assistance to her or her child, as it failed to provide any meaningful information as to what services would be provided to him and when they might be provided to him. Instead it was a pro-forma letter which merely stated that there were no services available for her son at that time. It was completely silent on what practicability or resources issues had arisen. She stated that the service statement which had been provided was grossly deficient and was in breach of her son's rights. She also stated that she would be very happy to travel to any part of the country to obtain the services required.
16. Ms. Cuffe swore a further affidavit on 29th November, 2019, in which she accepted that as had been averred by the applicant's mother, the applicant remained on the waiting list for services with the respondent's school age team. At that time there were approximately 350 children on that waiting list. She stated that having regard to the lack of capacity in the relevant school age team, progress in processing the waitlist was slow. She regretted that it was not possible to indicate a date on which the child would be seen. She went on to state that the service statement dated 27th February, 2018, was being reviewed. She stated that there was no record of the applicant's mother ever having called on the HSE to comply with its statutory duty, or to remedy the purported failure asserted therein. Nor was there any record that the applicant's mother had ever called on the HSE to expand on the reasons given in the service statement, or of having made any complaint in relation to the adequacy of the reasons provided therein. She stated that the willingness of the applicant's mother to bring the applicant wherever was necessary for an assessment, was first indicated in the affidavit sworn by her.
17. Those assertions were contradicted by the affidavit sworn by the applicant's mother on 4th December, 2019, wherein she stated that she had called the respondent on several occasions in relation to making progress with her son's application. She had also made email contact with the relevant Minister on or about January 2018. In this regard she referred to a portion of a letter that she had received from the relevant Minister.

18. In relation to the assertion that she would be happy to travel to another part of the country to obtain the services required, she stated that she had not voiced her willingness to travel, because it was common case that the respondent does not provide any facility to parents or children to travel to other parts of the country where waiting lists are shorter for assessment or services. She stated that she and her husband would be happy to travel wherever was needed in order to have their son assessed and/or services provided to him. She stated that the alternative was the appalling situation in which they found themselves, whereby their child had been registered with the respondent at the age of four, only to be told that he would be nine before he was provided with the necessary health and education supports.
19. The applicant's mother stated that it was not good enough for Ms. Cuffe to state that "*it is not possible to indicate a date on which the child will be seen*", when the entire purpose of a service statement was that it should set out information from the service providers as to when the child will be seen and what services he will receive. She had been advised and believed that in the light of the legislation, it was not open to the respondent simply to state that it was not possible to provide such services. She finished her affidavit by stating as follows:

*"Further, it is most regrettable that the respondent, with an annual budget of €16bn, states to a four-year-old child with autism that they have no idea when they will be able to meet the health and education needs, even on an aspirational basis."*

#### **Discussion**

20. The gravamen of the applicant's complaint herein, as articulated by his mother, is to the effect that notwithstanding the lodgement of an application for an assessment of needs on his behalf as far back as 22nd September, 2014, and despite an initial diagnosis of Hyperlexia III and anxiety, which was followed by a diagnosis of ASD in January 2018, he has yet to receive any services whatsoever from the respondent. All the applicant has received was the initial service statement of 19th November, 2015, which recommended that the applicant's mother should bring him to the GP for medical referral to the Lucena Clinic and the second service statement, dated 27th February, 2018, informing her that notwithstanding the recommendations contained in the assessment report, there were no services available for the child at that time. The letter only informed her that he had been waitlisted for the HSE school age team as and from 19th November, 2015, but it had a waitlist time of thirty-six months. It was clear from the affidavit sworn by Ms. Cuffe and the applicant's mother, that that timeline had not been met, in that as of 4th December, 2019, the applicant had not received a place with that service.
21. The main complaint of the applicant's mother is that she was not told in the service statement why it was that the services were not available, nor was she told when it might be anticipated that those services would be available to him. In fairness, the latter complaint may be unjustified, in that Ms. Morgan in the letter dated 27th February, 2018, did state that he had been put on the waitlist for the HSE school age team, but that due to the length of that waiting list it was not anticipated that he would be seen by them before November 2018. So an indication had been given as to when he might expect to

receive services, notwithstanding that we now know that that hope seems to have been misplaced.

22. The issue in relation to the duty to give reasons and the adequacy of the content of the service statement have already been addressed in the main judgment. In essence, the court has found that this is not really a reasons case in the usual legal sense of that term, because the liaison officer is not adjudicating on whether the applicant is entitled to, or should get, any particular services, but rather is simply making a practical statement as to what services are available for the applicant at that time.
23. Where it is the case that services are simply not available for an applicant, the court is of the view that a statement to that effect is sufficient compliance with the provisions of s.11 of the 2005 Act and the Regulations. However, as pointed out in the main judgment, where one is dealing with an issue that is of such immediate concern to both the applicant and his or her parents, the liaison officer could attempt to set out some information showing why the services are not available at that time. However, the court appreciates that it is not the job of the liaison officer to create places, or to make resources available, nor can they give false hope to the parents of applicants by stating that places might become available at some future date, when there is no realistic prospect of that happening. Accordingly, for the reasons set out here and in the main judgment, the court has to decline to grant *certiorari* of the service statement dated 27th February, 2018.
24. That is really the main point at issue in this case and insofar as there are other issues raised, they have already been covered in the main judgment. In the light of its findings therein, the court refuses the reliefs sought by the applicant, save for the declaration in relation to the non-provision of the s.13 reports, which was common to all three cases. The court will receive submissions from the parties in due course as to the final order to be made in this case.
25. Unfortunately, the sad fact of this case remains that despite an application for an assessment of needs and for the provision of services as far back as 22nd September, 2014, the applicant has not received any services from the respondent to date. That is a matter which the applicant's mother will have to take up with her local representatives and with the relevant Ministers to see if they can provide more resources so that the services outlined in the assessment reports can be provided to her son.