

**THE HIGH COURT
JUDICIAL REVIEW**

[Record No. 2018/798 JR]

BETWEEN

JO'SS (A MINOR) (SUING BY HIS MOTHER AND NEXT FRIEND JS)

APPLICANT

AND

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. At the hearing the issues were 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. 2019/1025 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 in this case. This judgment must be read with the main judgment to ascertain the court's determinations and findings on all of the issues raised in this case.

Background

3. By way of background, the applicant was born on 27th November, 2010. An application for assessment of needs dated 14th April, 2016, was lodged on his behalf on 6th May, 2016. It was acknowledged by letter from the respondent dated 13th May, 2016.
4. On 4th July, 2016 the applicant's mother was sent two letters by a Ms. Cummins, an assessment officer assigned to their area. In the first letter, she apologised for the delay in dealing with the application. She stated that due to the volume of applications received and the reduced number of staff available, that processing of applications had been delayed. She stated that applications were being dealt with in strict chronological order and the applicant's application would be dealt with as quickly as possible. It appears that on receipt of that letter the applicant's mother telephoned Ms. Cummins and it appeared that an error had occurred whereby an assessment officer from another nearby area had incorrectly made previous contact with her. Ms. Cummins understood that the applicant's mother had been asked to complete an Early Intervention Team referral form and she further understood that she had completed it and returned it to a particular hospital. She apologised for that error, which I presume was due to the fact that the hospital was in a different administrative area, although this is not clear from the papers. The letter went on to state that Ms. Cummins was sending the applicant's mother information on two drop-in clinics, (OT and psychology), which she might like to avail of while awaiting the assessment of needs. She was also invited to make direct contact with the SLT department on a number that was given, so that her son could be waitlisted for

that service. She was informed that unfortunately there was a delay in the processing of assessment of needs applications at that time.

5. Thereafter, it appears that there was some intervention, because as a result of a referral by Ms. Anne Horgan of the Early Intervention Services, an audiology assessment was carried out on 22nd December, 2016, which revealed that the applicant's hearing thresholds were within normal limits bilaterally. On 6th March, 2017, on foot of a referral from the Early Intervention Team, the applicant was assessed by a speech and language therapist, who was of opinion that the applicant's language skills were at an appropriate level for his age and accordingly he was discharged. The applicant's mother was given activities and suggestions to support the applicant's knowledge of semantic links. The report indicated that the applicant would benefit from assessment of his attention skills with a NEPS psychologist.
6. In an affidavit sworn on 15th October, 2019, the applicant's next friend stated that as the application had been submitted on 6th May, 2016, it should have been completed by 6th November, 2016. She stated that after that date, she contacted the respondent on at least a dozen occasions by phone and inquired when the assessment would be completed. In particular, she spoke to a Ms. O'Sullivan at a particular centre approximately five times and called on the respondent to commence and complete the assessment.
7. On 16th May, 2018, the applicant's mother lodged a complaint in writing due to the fact that her son had not been assessed as of that date. That complaint was acknowledged by Ms. Kennedy, a National Disability Complaints Officer, by letter dated 25th June, 2018. In that letter she noted that there were considerable delays in the area in which the applicant lived, due to the volume of applications received in that area, combined with staffing levels at that time. She went on to state "*it is clear therefore that the [name of area] is breaching legislation in this particular case*". She stated that given the significant and unprecedented increase in the volume of complaints being received by the respondent, combined with staff shortages, there was considerable delay in responding to complaints. She went on to give further information about tracking progress of the complaint and furnished details of an appeal mechanism if she was unhappy with the outcome of the complaint.
8. In a letter dated 30th July, 2018, one of the TD's for the area in which the applicant lives, wrote to the primary care paediatric occupational therapy department on behalf of the applicant. He outlined how they had not yet received an assessment of the child's needs and went on to state as follows: "*The family are at their wits end as to how to move forward as [the applicant's mother] is of limited means and cannot avail of services through the private sector.*" In a letter dated 19th September, 2018, the same representative wrote to the senior clinical psychologist in the area, pointing out that the applicant's mother had first contacted the HSE on 6th May, 2016 and had waited in good faith for a period of three years to obtain an assessment of her son's needs. When she still had not received an appointment, she saved and paid privately to get her son assessed by the Sunflower Clinic. In a report dated June 2018, their assessment

indicated that the applicant had developmental coordination disorder. The letter went on to state that while the applicant's parents were in the process of engaging with occupational therapy supports to meet their son's needs outside the system, they had received very little support since their first contact with the HSE over three years previously. He stated that the applicant's mother had been continually informed that he would be two more years on waiting lists and that without a proper assessment, they may not even be the correct supports for him. He asked the senior clinical psychologist to whom he had written, to expedite the process if at all possible.

9. A response to that correspondence was received by the public representative on 6th September, 2018 from a Ms. O'Donovan, the Head of Service – Primary Care for the particular area. She stated that a referral for the SLT service was received into occupational therapy for the applicant on 14th March, 2017. The referral was reviewed and the applicant had been placed on a standard waiting list for intervention. She stated that there was approximately a 2.5 year waiting timeframe from date of referral. However, the health care team for that area were progressing a plan for a waitlist initiative for children longest on the waiting list and that would bring improvements in waiting times within the next twelve months. She went on to state that the referral rate and demand continued to increase for this essential paediatric service. She stated that it was regrettable that children had such an extensive waiting time. However, she stated that the relevant health care provider had to live within its resource allocation for the service.
10. By letter dated 28th September, 2018, the clinical psychologist replied to the representative, stating that they first received a referral from the assessment officer in respect of the applicant on 25th January, 2018 for "*an assessment of his health needs*" and a second referral from his mother on 30th January for advice regarding his behaviour problems. He stated that it was expected that the applicant's assessment of needs assessment would take place in the coming months. The referral for psychological intervention had been placed on their intervention waiting list, which was then running at 18 – 24 months. The psychologist stated that he had spoken to the applicant's mother by phone to explain the situation and had explained that she might benefit from attending their drop-in service, which was held every Tuesday for parents, where she could discuss her son's needs further with one of their staff and general advice could be provided to her.
11. On 8th October, 2018, the applicant was given leave to seek judicial review in the form of an order of *mandamus* compelling the respondent to complete the assessment of needs. On 9th December, 2018 the respondent consented to an order for *mandamus* compelling them to complete the assessment of needs in respect of the applicant within eight weeks.
12. On 28th January, 2019, an assessment report was issued. In essence, it provided that the applicant was presenting with a sufficient number of symptoms of ASD to warrant the need for an ASD assessment. It stated that there was sufficient evidence too, but

depending on the ASD assessment results, for an assessment with the Child Adolescent Mental Health Service (CAMHS) with a query of attention deficit hyper activity disorder (ADHD). The assessment officer understood that the applicant had already been referred to the CAMHS team and that contact had already been made with the applicant's parents. The report also indicated that involvement from the National Educational Psychology Service at that stage would be beneficial in order to assist teaching staff in drawing up an appropriate individual education plan. In relation to education needs, the report stated:

"In line with section 8(3) of the Disability Act, I wrote to the special education needs organiser, National Council for Special Education, today requesting them to assist in the carrying out of the assessment and, in particular, the assessment of any need for an education service. When the report is received, this assessment report will be amended by a letter issued to you, including the results of the educational assessment."

13. In the submissions lodged on behalf of the applicant in this case, there is reference at para. 7 thereof to a letter dated 29th January, 2019 wherein the assessment officer allegedly wrote to the NCSE in the following terms:

"Under the Disability Act 2005 an application for statutory HSE needs assessment was made on behalf of [the child]. During the course of the assessment I have formed the opinion that there may be a need for an education service to be provided to [the child]. I am referring the child to you under the terms of s.8(3) of the Disability Act."

Unfortunately, I have not been able to locate a copy of that letter in the papers before me. In any event, as I do not think that there is any material difference between a referral "under" s.8(3) and a referral "in line with" that section, its absence is not material.

14. On 29th January, 2019, a service statement was issued in respect of the applicant. It stated that following an assessment dated 25th January, 2019 by the primary care psychology department, there was now a recommendation for an autism assessment. It went on to state that Kids' Clinic, on contract to the HSE, would commence an ASD assessment on 4th February, 2019. If recommendations were made for service interventions following that assessment, the service statement could be updated and amended accordingly. The statement also noted that a referral was made to CAMHS for the area in which the applicant resided.
15. On 3rd April, 2019 having obtained the leave of the High Court, an amended statement of grounds was delivered on behalf of the applicant.
16. On 16th April, 2019, an amended service statement was issued. It stated that the applicant was to be referred to community occupational therapy for intervention for sensory issues and organisational issues. It identified the particular service provider and gave its address. It went on to state that the applicant was on the HSE OT waiting list

initiative. His date of referral was 14th March, 2017 and he would be seen in order of that referral date. It was anticipated that he would be seen within the next six months, once all up to date paper work had been received from the parents and the school. The service statement also referred to psychology services that were to be provided by a named service provider. It stated that following the applicant's ASD assessment in February 2019 and a recommendation for a referral to primary care psychology, the applicant had been placed on their waiting list. The timeline to be seen was stated to be 24 months. Under the heading Other Relevant Information, it was noted that in correspondence with the assessment officer dated 5th March, 2019, a consultant psychiatrist had advised that a full cognitive assessment was required to be completed by NEPS and the result forwarded to the CAMHS team, before they were in a position to decide whether CAMHS involvement was indicated. Finally, under the heading speech therapy, it was noted that the SLT service had declined to accept a referral for the applicant, because on his language assessment of 6th March, 2017, he had scored within normal limits.

17. It would appear that in response to the referral to the NCSE, by letter dated 24th July, 2019, a Ms. McDonnell, who was a SENO for the relevant area, stated in relation to the applicant's education needs:

"Supports have already been applied for and put in place by the NCSE. Supports have been put in place for [the child] in [a named school] as follows: Access to SNA support around [the child's] care needs arising from his physical disability (DCD)."

Thus, it appears that his education needs were addressed by the SENO on behalf of the Council, but it is not clear whether the content of that letter was ever brought to the attention of the applicant's next friend.

18. I note that in her affidavit sworn on 15th October, 2019, the applicant's next friend complains that the assessment report dated 28th January, 2019 was incomplete in that it did not include the assessment of any need for an education service. She went on to state that as of the date of swearing of that affidavit, her son had received no intervention from the respondent in relation to occupational therapies, psychiatry or psychological needs, as identified in the assessment of needs report. She states that in the absence of a completed education assessment he had been prejudiced, since such a report could identify his educational needs and provide solutions for them. She stated that had her son received timely intervention, he could have made much better progress mentally and physically in terms of his deficits. She went on to state that if he did not receive the appropriate resources and services to meet the education, educational therapy, psychiatry and psychological needs that he had, his development may be permanently affected as a result.
19. Finally, in an affidavit sworn on 19th November, 2019 by Mr. Ger Reeney, the Chief Officer for Community Health Care in the area, he gave an update on the position which he had outlined in his previous affidavit, wherein he had noted that the formal

assessment commenced on 20th July, 2017. He noted that both prior to and after that time, the child had received a number of assessments as set out at para. 14 thereof. In his supplemental affidavit, he noted the frustration of the applicant's mother, but stated that the matters which appeared to concern her, were in relation to the education of her son, over which the HSE had no control and also concerned the actions of the NCSE, which was a body over which the HSE did not have any authority. He stated that the respondent had not received any input from the NCSE subsequent to the letter already referred to dated 29th July, 2019. He went on at para. 6 of the affidavit to update the services and assessments which had been carried out in respect of the applicant.

Discussion

20. As already noted, a referral was made by the assessment officer in this case to the Council pursuant to s.8(3). It does not appear to the court to be that relevant whether such referral was stated by the assessment officer to have been made "*under*" the section, or "*in line with*" the section. This issue is germane to the question of the true statutory interpretation of s.8 of the 2005 Act, which has been dealt with comprehensively in the main judgment.
21. Insofar as the applicant's mother complains that a referral was not made by the assessment officer to the Council, or that the response of the Council or the SENO was not contained in either the assessment report or the service statement, it is clear that such a referral was made and indeed that a response was furnished by a SENO on behalf of the Council by letter dated 29th July, 2019. Although, as already noted, it is not clear that the content of that letter was ever formally drawn to her attention. If it was not, that was very regrettable, because it would have shown her that her child's education needs had in fact been addressed by the body that was charged with looking after the requirements of children with special education needs.
22. Insofar as the applicant's mother is critical of the onward referrals made in the service statements issued in this case, that has been addressed in the main judgment. As stated therein, the court is of the view that a service statement is not defective by reason of the fact that it does not specify what exact services will be provided, but makes a referral to the requisite body, which will carry out their own assessment and based on that, provide whatever service they deem to be appropriate based on their assessment of the child's needs. As stated in the main judgment that is in compliance with the provisions of the 2005 Act.
23. There did not appear to be any other discreet issues in this particular case, which are not covered in the main judgment. However, it is clear from the affidavit sworn by the applicant's mother and from the content of the letters written by the public representative on her behalf, that the applicant's parents have gone to great lengths to look after the needs of their son. That an application for an assessment of needs form was completed on 14th April, 2016 and submitted on 6th May, 2016, but did not result in an assessment report being issued until 28th January, 2019, must be a matter of profound regret not only to the respondent, but also to the various ministerial departments which have responsibility for looking after the education and health needs of children with disabilities.

It is to be noted that the revised SOP as described by Dr. Morgan in his affidavits and the additional funding that has been made available for the assessment of needs process, will mean that such inordinate delays hopefully will not occur in the future.

24. For the reasons set out in the main judgment and in this judgment, the court refuses the reliefs sought by the applicant in these proceedings, save for the declaration in relation to the failure to furnish the reports required by s.13 of the 2005 Act, which finding was made globally in respect of each of the three cases. The court will receive written submissions from the parties on the precise terms of the Order in each case.