**THE HIGH COURT**
**JUDICIAL REVIEW**

[2021] IEHC 191
**[2020 No. 577 JR]**

**BETWEEN**

**LL**

**APPLICANT**

**-AND-**

**CHIEF APPEALS OFFICER, MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION**

**RESPONDENTS**

**BETWEEN**

**[2020 No. 578 JR]**

**DZ**

**APPLICANT**

**-AND-**

**CHIEF APPEALS OFFICER, MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION**

**RESPONDENTS**

**JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 10th day of March 2021.**

1. These judicial review applications raise an issue of whether it is fundamental to a claim for benefit or assistance under the Social Welfare (Consolidation) Act 2005 (the 2005 Act) that the claimant be entitled to that benefit or assistance at the time when the claim is made.

2. Changes in circumstances may result in a person becoming entitled to a benefit which was previously claimed at a time when that person was ineligible to receive it. If that happens, is it necessary to make a fresh claim or can an old claim which has been rejected be revived, using the revision provisions in ss.301(1) and 317(1) of the 2005 Act?

3. The applications relate to determinations by appeals officers to refuse to revise earlier decisions of appeals officers which declined to allow claims by the applicants for payment of domiciliary care allowance. The applicants assert that these decisions were made without jurisdiction.

4. Counsel for the applicants invites me to conclude that, on the correct interpretation of provisions of the 2005 Act, it is sufficient for a claimant for benefit to establish that the statutory conditions of entitlement first exist at some point of time later than the date of the claim for that benefit.

5. The applicants argue that appeals officers who were asked to review previous appeal decisions to refuse domiciliary care allowance under Chapter 8A of Part 3 of the 2005 Act acted incorrectly in determining that any new fact or evidence provided in an application to review a decision of an appeals officer must bear on establishing the right of the claimant at the time of the claim for that benefit, and not at some later time. The Chief Appeals Officer disagrees with the applicants' interpretation of the statutory provisions.

6. The contention by the Chief Appeals Officer is correct. The role of deciding officers and appeals officers under Part 10 of the 2005 Act is to adjudicate on claims and not to award benefits. The provisions of the 2005 Act which deal with decisions and appeals do not confer entitlement to benefit. The right to benefit is not sourced in the decision-making powers of these officers. Their function is to decide the question of whether a claimant establishes that he or she has a right to benefit at the time of the claim.

7. The statutory framework governing decisions and appeals relating to a claim does not permit a claimant to demonstrate that changes in circumstances subsequent to the time of that claim give rise to a right to benefit so as to enable this issue to be revisited in a revival of a claim which has been rejected following an appeal. That type of change in circumstances is not within the statutory exceptions set out in the section of the 2005 Act which makes the decision on appeal conclusive.

8. If it ever represented the law that changes in circumstances could be taken into account in this way, that law changed when ss.301(1) and 317(1) of the 2005 Act were repealed and replaced by the provisions set out in ss.3(1)(a) and 4(1) of the Social Welfare and Pensions (No. 2) Act 2013 (the 2013 Act).

9. It follows that proof of change of circumstances which establish that the right of the claimant to benefit has first arisen at some point in time later than the time of making of an unsuccessful claim for that benefit must be the subject of a new claim.

10. Section 317(1)(a) of the 2005 Act, as substituted by the 2013 Act, provides as follows:

    (1) "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…"

11. Section 301(1) of the 2005 Act gives similar revision powers to deciding officers.

12. Claims for assistance under Part 3 of the 2005 Act must be made in the prescribed manner under Part 9. Acceptance or rejection of a claim depends on whether the claimant demonstrates that he or she meets the statutory eligibility criteria for the benefit sought. Claims are decided in the first instance by deciding officers. The relevant provisions are contained in Chapter 1 of Part 10. Chapter 2 of Part 10 deals with various types of appeals, including appeals from decisions of deciding officers to appeals officers. These provisions include the power of an appeals officer to revise a previous decision of an appeals officer under s.317(1)(a).

13. Section 318 of the 2005 Act gives the Chief Appeals Officer power "at any time" to " 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."

14. Section 327 of the 2005 Act gives a right to any person "who is dissatisfied with- (a) the decision of an appeals officer, or (b) the revised decision of the Chief Appeals Officer" to "appeal that decision or revised decision, as the case may be, to the High Court on any question of law." It seems that this may not allow an appeal on a point of law to the High Court from a determination by an appeals officer or by the Chief Appeals Officer not to revise a decision. This arises from reasoning in an *obiter dictum* at para. 14 of the judgment of the Supreme Court delivered by Geoghegan J. in *Castleisland Cattle Breeding v. Minister for Social Welfare* [2004] 4 I.R. 150 at 156-157 that such determinations by the Chief Appeals Officer are not "decision[s]" within s.327.

15. Section 311 deals with appeals to appeals officers. Section 311(1) provides that "…where any person is dissatisfied with the decision given by a deciding officer…, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer." Section 311(3) deals with the manner in which an appeals officer may approach an appeal and specifies as follows:

> "An appeals officer, when deciding a question referred under subsection (1), shall not be confined to the grounds on which the decision of the deciding officer…, was based, but may decide the question as if it were being decided for the first time."

16. This gives the appeals officer a wide discretion in conducting an appeal. The appeal is not restricted to a review of the findings of the deciding officer. The question to be decided is whether the claimant demonstrates eligibility for the benefit claimed. While fresh material can be introduced in the course of the appeal, it must be borne in mind that it is necessary to prove the right to the benefit at the time of the claim and not at some later time.

17. The 2005 Act does not expressly identify the point of time when eligibility must be established by a claimant for a benefit. However, s.241(1) provides that "It shall be a condition of any person's right to any benefit that he or she - (a) makes a claim for that benefit in the prescribed manner, …". The provisions of s.241(2)-(8) regulate the position where a person fails to make a claim for benefit within the time prescribed by regulations under the Act, by precluding or limiting payments retrospective to the date of claim, except to the extent allowed by those provisions. The relevant subsection dealing with domiciliary care allowance is s.241(4A) which allows a maximum of 6 months payment, retrospective to date of application.

18. It is clear from this that the 2005 Act requires that a claimant be entitled to the benefit sought at the time when the claim is submitted. The right of any person to a benefit is a question of objective fact. Where the right exists, a claim must be made in the prescribed manner.

19. A purpose of regulations under the 2005 Act which prescribe details which must be provided by persons making claims for various types of benefits is to elicit materials which will demonstrate to the deciding officer that the claimant is entitled to the benefit claimed. The relevant regulations are the Social Welfare (Consolidated Claims, Payments

and Control) Regulations 2007 (S.I. No. 142 of 2007) and various amending regulations, including the Social Welfare (Consolidated Claims, Payments and Control) (Domiciliary Care Allowance) (Amendment) (No. 3) Regulations 2009 (S.I. No. 162 of 2009).

20. The provisions of the 2005 Act relating to making of claims for benefit and retrospectivity of payments in respect of periods prior to the date of a claim are premised on the assumption that the claimant is eligible at the time of claim. They do not contemplate that retrospection exists except by reference to the date of claim. The claimant must have a right to the benefit at that time. It would be a peculiar and anomalous outcome if a person who does not have a right to a benefit at the time of a claim and is refused for this reason could, by reason of having a file relating to that failed claim in the system, be in a more advantageous position on retrospectivity of payments than a person who has a right to benefit and makes a claim in the prescribed manner.

21. I have been referred to the judgment of Hogan J. delivered on 14 November 2013 in *CP v. Chief Appeals Officer and Others* [2013] IEHC 512.

    The issue in that case was whether, under s.317 of the 2005 Act as it then stood, fresh information could be considered as "any relevant change of circumstances since the decision was given."

22. The wording of s.317 at that time was as follows:

    > "An appeals officer may, at any time revise any decision of an appeals officer, where it appears to the appeals officer that the decision was erroneous in the light in the light of new evidence or of new facts brought to his or her notice since the date on which it was given, or where it appears to the appeals officer that there has been any relevant change of circumstances since the decision was given."

23. A feature of this authority is that the analysis was confined to interpretation of the meaning of s.317 without reference to how that provision sat within the statutory structure and whether other provisions within the scheme of the 2005 Act cast light on the intention of the Oireachtas in using the words "or where it appears to the appeals officer that there has been any relevant change of circumstances since the decision was given."

24. The appeal procedures under the 2005 Act apply to a large number of types of benefit and assistance. A review may be appropriate where a person is in receipt of benefit or assistance. A change of circumstances may alter or remove entitlement to a benefit. A consequent review may lead to adjustment upwards or downwards of the amount of benefit or to withdrawal of that benefit. The issue of whether the 2005 Act requires that eligibility of a claimant must be decided by reference to the position at date of the claim for benefit was not considered in *CP v. Chief Appeals Officer and Others* [2013] IEHC 512. This authority does not assist the applicants.

25. The purpose of the statutory application procedure is to prove the entitlement claimed at the time of the claim and not at some later date. This is the "question" to be decided under s.300 and the subsequent sections where the claim is for a benefit or assistance. The mechanisms relating to decisions, appeals and reviews cannot alter the question to be decided.

26. The changes made by ss.3 and 4 of the 2013 Act which became law on 25 December 2013 reversed the effect of the judgment of Hogan J. There is no longer a reference to "or where it appears to the appeals officer that there has been any relevant change of circumstances since the decision was given" in the context of the power of an appeals officer to revise a previous decision of an appeals officer. The new provision in s.317 relating to change of circumstances reads as follows:

" (1) 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

(b) Where-

(i) the effect of a decision was to entitle a person to any benefit within the meaning of section 240, and

(ii) it appears to the appeals officer that there has been any relevant change of circumstances which has come to notice since that decision was given.

(2) In subsection (1)(b)(ii), the reference to any relevant change of circumstances means any relevant change of circumstances that occurred before, or occurs on or after, the coming into operation of the Social Welfare and Pensions (No. 2) Act 2013."

27. Change of circumstance may result in increased or reduced benefit or assistance or even a loss of benefit or assistance because the person has ceased to meet the statutory conditions establishing entitlement. This provision does not allow an appeals officer to revise a decision by an appeals officer to refuse benefit and decide that a person is entitled to a benefit as a result of change of circumstances.

28. The amended s.320 of the 2005 Act provides for finality of decisions of an appeals officer and states as follows:

"The decision of an appeals officer on any question shall, subject to sections 301(1)(b), 317, 318, 324(1)(b) and 327, be final and conclusive."

29. This provision contemplates finality of decisions on claims, except in specific circumstances. If a claim has been finally decided against a claimant, it cannot become undecided because the claimant may be able to demonstrate entitlement to a benefit

from some later date. New circumstances which establish entitlement to benefit must be followed by a claim in accordance with the statutory procedure for making claims.

30. Counsel for the applicants referred to s.319 as supporting an interpretation of the 2005 Act which allows appeals officers to consider material showing change of circumstances after the date of a claim for benefit which has been rejected. This provision reads as follows:

> "A revised decision given by an appeals officer shall take effect as follows:
>
> (a) where any benefit, assistance, child benefit, working family payment, continued payment for qualified children or back to work family dividend will, by virtue of the revised decision be disallowed or reduced and the revised decision is given owing to the original decision having been given, or having continued in effect, by reason of any statement or representation (whether written or verbal) which was to the knowledge of the person making it false or misleading in a material respect or by reason of the wilful concealment of any material fact, it shall take effect from the date on which the original decision took effect, but the original decision may, in the discretion of the appeals officer, continue to apply to any period covered by the original decision to which the false or misleading statement or representation or the wilful concealment of any material fact does not relate;
>
> (b) where any benefit, assistance, child benefit, working family payment, continued payment for qualified children or back to work family dividend will, by virtue of the revised decision, be disallowed or reduced and the revised decision is given in the light of new evidence or new facts (relating to periods before and after the commencement of this Act) which have been brought to the notice of the appeals officer since the original decision was given, it shall take effect from the date the appeals officer shall determine having regard to the new facts or new evidence and the circumstances of the case;
>
> (c) in any other case, it shall take effect from the date considered appropriate by the appeals officer having regard to the circumstances of the case."

31. Section 302 of the 2005 Act contains identical provisions where a deciding officer makes a revised decision.

32. I agree with the submission of counsel for the Chief Appeals Officer on this. If an appeal decision on entitlement to benefit is revised under s.317(1)(a), this will mean that the new facts or new evidence produced to the appeals officer establish the claim as originally made and the right of the claimant to benefit from the date of the claim. The benefit will be paid accordingly. This will not be a matter of discretion. In the case of domiciliary care allowance, the claimant may also be entitled to payment for a period of six months prior to the date of the claim under s.241(4A).

33. Section 319(c) may deal with changes of circumstances resulting in a claimant being entitled to increased levels of benefit. This provision does not support an interpretation of

the 2005 Act which allows appeals officers to make a finding that a claimant, subsequent to a claim, has, as a result of change of circumstances, acquired a right to a benefit. The revision relates back to the decision on the appeal and this decision is on the "question" of whether the claimant has demonstrated a right to the benefit at the time of the claim.

34. The revision power under s.317(1)(a) is limited. While the reviewer is obliged to consider any new evidence or new facts having a bearing on the correctness of the original decision and examine whether these would lead to a conclusion 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 [the decision] was given," what is being examined is the decision on the claim for benefit which relates to whether the claimant has established a right to benefit at the date of the claim. The comments by Peart J. on the revision procedure in the passages in his judgment in *LD v. Chief Appeals Officer and Others* [2014] IEHC 641 opened by counsel do not assist the applicants.

35. This authority relates to whether an appeals officer acted contrary to law in deciding to determine a revision in a summary way, and having done so, had a change of mind and offered an oral hearing which the applicant did not appear to want. The following comment by Peart J. at para. 47 of that judgment on the issue of whether he would have decided that the respondent was entitled to an oral hearing resonates in the context of some of the material which was advanced by the applicants in these judicial reviews:

> "While the letters from the Mater Hospital and the applicant's GP support the applicant's application, those do not amount to medical evidence as such. They are supportive but do not constitute medical evidence in the sense of stating that her son meets the criteria for DCA (and explaining why) under section 186C(1) of the Act of 2005 (as substituted by section 10 of the Social Welfare (Miscellaneous Provisions) Act 2010)."

36. I now turn to the decisions challenged in these judicial review applications.

37. I have decided not to accede to the preliminary objection by the Chief Appeals Officer that these judicial review applications should not be entertained because of failure by the applicants to exhaust remedies under the 2005 Act by requesting a revision by the Chief Appeals Officer under s.318. The Chief Appeals Officer takes the view that new material presented on an application for a revision of a decision must have a bearing on entitlement to benefit at the date of the relevant claim. The Chief Appeals Officer would have maintained this position if the applicants sought a revision under s.318.

38. I have rejected the claims that the appeals officers acted contrary to law in determining that a claimant for a benefit under the 2005 Act must establish entitlement at the time of submission of the claim.

39. The decision of the appeals officer dated 31 January 2020 relating to the claim of DZ will be set aside and the matter remitted for further consideration. I am upholding a complaint in the grounds for judicial review that reasoning of the appeals officer in that

letter includes an error of law. I cannot be satisfied that this error in reasoning did not play a material part in the rejection of the application for a revision under s.317(1)(a) of the 2005 Act. This makes it appropriate that the decision be revisited by an appeals officer.

40. DZ may have further material which can be placed before the appeals officer in an application for a revision. General statements in medical reports in support of an application for domiciliary care allowance may not have much evidential value for reasons identified in the extract from the judgment of Peart J. which I have already quoted.

41. The claim by LL for domiciliary care allowance for her daughter H was made in April 2015. The eligibility criteria for entitlement to this allowance are set out in s.186C and D of the 2005 Act. These are that a child under 16 normally resides with the claimant who provides for care of that child and that the child has a "severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age". The level of disability caused by that severe disability must be such that the child is likely to require full-time care and attention for at least 12 consecutive months.

42. The initial decision of the deciding officer who examined LL's claim was unfavourable. This decision was reviewed. The review did not alter the decision. The decision was then appealed to an appeals officer.

43. An oral hearing in the appeal was held in September 2016. LL was advised by letter dated 10 October 2016 that the appeal was unsuccessful. The conclusion was that H did "not require 'the continual or continuous care and attention which is substantially in excess of that required by a child of the same age' as required under the legislation governing Domiciliary Care Allowance". Some additional medical material from the Child and Adolescent Mental Health Service was not available at the oral hearing. This was submitted after the hearing and was taken into account in the decision. This included a diagnosis that H was suffering from attention deficit hyperactivity disorder (ADHD).

44. On 30 April 2019 Dr Mícheál Morgan, NCHD to the Locum Consultant Child and Adolescent Psychiatrist attached to a hospital in Drogheda provided a letter for the purpose of supporting an application by LL for domiciliary care allowance for H who was then aged 14 years and 3 months and in a mainstream school.

45. This set out H's diagnosis, current condition and treatment. It provided some additional information on medication prescribed while H was in primary school in 2017 in order to deal with her ADHD and her difficulty in sustaining attention at home and in school as a result of this condition. The letter also referred to H's impulsive eating which was impacting on her general health. The letter continued as follows:

> "H's key symptoms in this neuro-developmental disorder as noted above are inattention and impulsivity. Due to these symptoms she needs very significant maternal oversight and re-direction on a daily basis, far above the levels for girls of

her age who do not suffer from this condition. At home, L has to spend far in excess of the normal time expected for a girl of her age in directing her to homework and normal everyday tasks such as getting dressed and washed, such is her inattention and inability to stay on task. L also has to be very watchful of H's impulsivity in that she has urges to eat snacks throughout her wakeful hours, and this is a constant strain for L.

With all the above in mind, we would be very supportive of L's application for Domiciliary Care Allowance to be approved, given the hours of constant care she puts in for H to help keep her focussed (given her severe inattention) and staying in the main stream school despite the severity of her symptoms, and also try to keep her medically healthy given her impulsive eating pattern."

46. On 26 September 2019 LL's solicitors wrote to the Chief Appeals Officer enclosing this letter from Dr Morgan. The solicitors described the letter as "further evidence which was not available at the time of the oral hearing" and claimed that it demonstrated that the statutory criteria for domiciliary care allowance were met. They sought reviews of the previous decisions of the deciding officers and appeals officers under ss.301 and 317 of the 2005 Act and indicated that: "Our client is available to attend an oral hearing should the appeals officer not reach a summary decision in her favour".

47. It was clear from the letter from Dr Morgan that information was being provided about H's treatment and progress since the 2016 decision. It might well be that LL would be in a position to demonstrate that as of the date of the letter or some earlier date circumstances had changed and that H suffered from a disability which now required "continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age" and could show that the other statutory criteria set out in s.186C and D of the 2005 Act were met.

48. The application for review by the deciding officer under s.301 was carried out. This concluded that the decision given on 29 July 2015 in relation to the April 2015 claim was correct and that it was not demonstrated that a revision was warranted. This decision has not been challenged.

49. The result of the review by the appeals officer was communicated by letter dated 12 February 2020. The decision was that the material from Dr Morgan was not sufficient to render the original decision by the appeals officer erroneous. It followed that a revision of the original decision under s.317 of the 2005 Act was not warranted.

50. There is nothing in this letter which demonstrates that the appeals officer who conducted the review under s.317 misdirected himself in law or took irrelevant considerations into account or acted in breach of fair procedures. The letter correctly stated that a decision of an appeals officer can be revised where new facts or new evidence, which were not before the appeals officer who made the original decision, demonstrate that the original decision was erroneous.

51. The letter also correctly stated that the "question" before the appeals officer was whether LL was entitled to domiciliary care allowance in respect of H at the date of her claim in April 2015. The letter pointed out that the earliest reference to material which was not previously available at the time of the decision of the appeals officer in October 2016 was in spring of 2017 and "therefore does not provide any additional information relating to the care required by H at the time of Ms L's application in 2015."

52. The Chief Appeals Officer correctly stated in her affidavit in opposition to judicial review that "while an applicant is entitled to rely on evidence that post-dates the original application or any earlier decision, the substance of that evidence must relate to the eligibility of an applicant at the time of the original application for the purpose of deciding whether a decision to refuse that payment was erroneous."

53. It follows that LL is not entitled to judicial review on grounds that the appeals officer in coming to a decision on a revision under s.317(1) had regard to the question of whether the evidence showed that she was entitled at the time of her claim. This was always the "question" for both the deciding officers and the appeals officers who dealt with that claim.

54. The LL application for judicial review was made a very long time after the date of the decision which it challenged. Solicitors were involved in the correspondence which led to the challenged decision. The averment in the affidavit that "the delay arose due to the Covid-19 restrictions, insofar as I was not able to have the pleadings sworn until the restrictions were lifted" does not tell me much. The affidavit is by a deponent who resides in County Meath. It was sworn in Dublin on 14 August 2020. The application for leave was made on 7 September 2020. There was nothing to prevent the deponent from having this affidavit sworn in County Meath or coming to Dublin and having it sworn there long before 14 August 2020. I was not told anything about when the affidavit was prepared.

55. This excuse is not sufficient to establish circumstances outside the control of the applicant and her advisers or good and sufficient reason to extend the time limit for judicial review under O.84, r.21(3) of the Rules of the Superior Courts (RSC). The affidavit should have contained more factual detail.

56. The claim by DZ for domiciliary care allowance for her son K was made on 26 March 2018. The initial decision by a deciding officer to deny her claim was notified by letter dated 7 June 2018. A review in October 2018 did not lead to a revision in favour of the claim. DZ appealed the decision to an appeals officer and an oral hearing took place on 21 March 2019. This appeal was disallowed. A letter dated 3 April 2019 advised DZ of the result of the appeal and of the reasons why it was disallowed.

57. The appeals officer took the view that the evidence did not establish that DZ was "providing a level of continual or continuous care and attention which is substantially in excess of the care and attention normally required by a child of his age which is the threshold required in the governing legislation for the payment of DCA." The statutory criterion mandates an assessment of what the child requires. Evidence of the care and

attention which an applicant provides for a child is relevant as it goes towards establishing what care that child requires.

58. K was born in June 2007. A report from an educational psychologist dated 5 April 2017 was submitted in support of the claim. This related to an assessment carried out in February 2017 which identified severe receptive and expressive language difficulties. The report recommended intensive speech and language therapy, a classroom support plan and art therapy.

59. In February 2018 K was admitted to a Health Service Executive community-based programme called "The 6-18 Years Disability Team". These therapists work with children who present with a diagnosed disability such as autism spectrum disorder or mild intellectual disability, or a suspected disability or complex needs in two or more areas of development, such as speech, motor skills and cognition.

60. At the time of the appeal K was still waiting to engage actively with the services of "The 6-18 Years Disability Team" and there was as yet no HSE assessment report available on him in accordance with the Disability Act 2005.

61. A report of "The 6-18 Years Disability Team" became available in August 2019 and was submitted by DZ in October 2019 with a request for a review of the appeal decision under cover of an e-mail referring to it as a new document giving K a diagnosis of autism spectrum. The report was prepared by a senior psychologist, an occupational therapist and a senior speech and language therapist. It concluded that he presented with behaviours consistent with a diagnosis of autism spectrum disorder (ASD) level 1 and scored above the clinical cut-off for autism spectrum disorder "as rated by the ADOS-2".

62. The report recorded that K "has a strong interest in computers and gaming and has significant difficulty coping when limits are set around this by his mother and her partner and he experiences anger outbursts around this and difficulty with emotional regulation. He reported Moderately Elevated scores in the areas of anxiety, depression and anger on the Beck Youth Inventories."

63. The report stated as follows:

> "This report may be used in support of an application for Domiciliary Care Allowance given that K presents with care needs which are significantly greater than those experienced by same aged children, including: communication, self-care, social interaction and safety awareness."

64. These are general statements. In order to succeed in a revision, it would be necessary to demonstrate that K's care requirements at the time of the claim were in fact greater than had previously been identified.

65. The decision of the appeals officer on the revision application is set out in a letter dated 31 January 2020. The letter noted the extra information relating to care needs concerning

anger outbursts, self-care and safety awareness and that these did not feature in the evidence at the oral hearing.

66. The letter stated that an appeal may only be reviewed under s.317 of the 2005 Act if new information or facts come to light which would render the initial appeal decision erroneous at the time it was made.

67. This is correct in the sense that it is not enough to show that the decision was correct at the time it was made but that circumstances changed at some later date in a manner which establishes entitlement of the claimant to the benefit. This element of the judicial review challenge cannot succeed.

68. The letter correctly stated that "an appeal decision must be based on the evidence prevailing at the time of application and the oral hearing provides an opportunity for an Appellant to elaborate on and clarify same." The writer was conveying that the appeal decision relates to evidence which has a bearing on the position at the date of the claim. The letter indicated that the appeals officer was satisfied that the ASD level 1 diagnosed since the date of the appeal "would have been present at the time of application." This is a finding that it was proved that K was suffering from ASD level 1 at the date of the claim for domiciliary care allowance.

69. The letter went on to refer to the extracts from the report in which the multi-disciplinary team referred to care needs relating to communication, self-care, safety awareness and social interaction and the difficulty with regulating K's access to computers and observed that the claim form and evidence at the appeal did not indicate any specific care requirements in relation to these matters.

70. The letter concluded as follows:

> "All of the information you have provided has been carefully considered and the Appeals Officer acknowledges the content of same. However, they must revert to the evidence offered at the time of the application and at the oral hearing in relation to the care being provided. We appreciate that K's conditions will present challenges but regret that it has not been established that the original appeal decision in this case was erroneous based on the evidence available at the time, notwithstanding the new diagnosis of Autism Spectrum Disorder Level 1, and for this reason that decision is upheld.
>
> The Appeals Officer advises that you may re-apply to the Department at any time, in the event of changes to K's care requirements since the initial application."

71. The "evidence offered at the time of application" is a reference to the lengthy claim form which initiated the claim and any accompanying documents and reports. These documents and the evidence at the appeal hearing demonstrated the level of care "being provided". However, this did not necessarily mean that the level of care being provided equated with that which was the requirement of the child at the time of the claim.

72. The question to be decided was whether "the child has a severe disability requiring continual or continuous care…" and fulfils the other statutory criteria at date of the claim. A diagnosis after the date of the appeal might show that at the date of the claim the child had a severe disability which required at that time continual or continuous care in areas which the carer was unaware of. It may be that the claimant did not offer evidence on such issues at the appeal hearing because the claimant was unaware of these care needs, or for some other reason.

73. This is a different situation to that which arises where there is a change in care requirements after a claim is made. This might happen where care requirements evolve as a child with a disability grows older and a point is reached where the statutory eligibility criterion of a "disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age" is met.

74. The issue in a review under s.317(1)(a) of the 2005 Act is whether new material demonstrates that the initial decision of the appeals officer was wrong. Has some further evidence in the sense of information which was available at the appeal hearing but which was not provided at that time, been produced to the appeals officer? Has some new fact such as a diagnosis which was not available at the appeal hearing been produced to the appeals officer? Does the appeals officer accept the new material at face value? How does the new material, which may comprise a mixture of new evidence and new facts, and which may expand on or contradict material previously available, impact on evidence which led to the original decision? Does it demonstrate that the original decision was incorrect?

75. It was incorrect to apply a test of whether it was established that "the original appeal decision in this case was erroneous based on the evidence available at the time" if the appeals officer meant by this that the only matter to be looked at was whether the evidence available at the time of the appeal showed the decision of the appeals officer to be correct. The whole point of s.317(1)(a) is that "new evidence or new facts" may be presented which may have a bearing on conclusions taken on the basis of the body of evidence relied on in the appeal and available at that time. This material may demonstrate to the reviewing appeals officer that the initial conclusion on the appeal was wrong. It may add to evidence already available which supports the claim for benefit or subtract from some evidence considered at the appeal which was relied on in the decision to disallow the claim.

76. There was no requirement that the appeals officer "must revert to the evidence offered at the time of application and at the oral hearing in relation to the care being provided" if there was new evidence or facts which tended to establish the child's care requirements at the time of the claim were greater than those identified at the time of the appeal hearing.

77. These elements in the letter dated 31 January 2020 point to a mistake in the reasoning of the appeals officer which may have affected the outcome of the process. It follows that

there will be an order setting aside the decision of 31 January 2020 and directing that the application for a revision under s.317(1)(a) be remitted back to the appeals officer to be decided in accordance with law.

78. A later letter dated 12th June 2020 suggested that the appeals officer may have viewed some additional material contained in the multidisciplinary report as establishing care requirement changes in the sense of changes of circumstances after the date of the appeal. It is not clear what was being referred to here.

79. I have decided that in this case there is sufficient evidence to allow me to extend time for leave to apply for judicial review under O.84, r.21(3). It was necessary to look for this evidence within the material in the affidavit supporting the application for judicial review as the issue of delay was not separately addressed in any affidavit.

80. DZ was acting without a solicitor when she made her claim and participated in the appeal and applied for a revision of the appeal decision based on the multi-disciplinary report. She only instructed solicitors after her application for a revision had been turned down. Her solicitors needed to obtain the documentation from the Department in order to establish what happened.

81. When the solicitors succeeded in obtaining the documents, they sought to persuade the Social Welfare Appeals Office in their letter dated 18 May 2020 that the decision communicated in the letter dated 31 January 2020 was unreasonable and should be revised. They also asserted that other relevant information had been provided by their client to the appeals officer at the appeal hearing. They stated that if there was no confirmation within 21 days that the decision would be revised, there would be a challenge to the decision-making process.

82. This was responded to by a letter from the Social Welfare Appeals Office dated 26 May 2020 indicating that the file was being recalled and requesting that "you…refrain from instigating legal proceedings, as these are not necessary and will not advance or assist the consideration of your client's appeal." This was a sensible approach by both the solicitors and the Social Welfare Appeals Office. Why rush off to court if the revision procedure within the appeals process could be revisited as this letter suggested?

83. The matter was reviewed and a letter dated 12 June 2020 which was received on 16 June 2020 stated as follows:

> "The basis for the outcome of the Section 317 review was fully outlined in our letter dated 30 January, 2020. Furthermore, the Appeals Officer was cognizant that the multi-disciplinary report was indicative of care requirement changes when compared to your client's application and direct oral hearing evidence. These changes may, at your client's discretion, give rise to a new application to the Department and our letter advised of this fact."

84. I do not regard this as a new decision. However, the approach taken by the Social Welfare Appeals Office made it reasonable to postpone taking steps to challenge the decision set out in the letter of 31 January 2020 until the response dated 12 June 2020 was received. The application for judicial review was made within three months of receipt of the letter dated 12 June 2020.

85. I have decided that there is good and sufficient reason to extend the period for leave to apply for judicial review and that the initial delay related to circumstances outside the control of DZ and her solicitors in that the solicitors had to get the necessary files to advise their client. The Chief Appeals Officer is prevented by the terms of the letter dated 26 May 2020 from making any point about delay from 18 May 2020. The three-month period within which it was necessary to apply for judicial review started running on 16 June 2020.