THE HIGH COURT

[2022] IEHC 407

[Record No. 2021/357 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 20 OF THE DISABILITY ACT 2005

BETWEEN

J.N.
T.M.
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND J.N.)

APPELLANTS

AND

JOHN HARRAGHY

RESPONDENT

AND

HEALTH SERVICE EXECUTIVE

NOTICE PARTY

JUDGMENT of Ms. Justice Bolger delivered on the 4th day of July 2022

1. This is an appeal brought pursuant to s.20 of the Disability Act 2005 (hereinafter referred to as 'the Act') against a determination of the respondent Disability Appeals Officer (hereinafter referred to as the 'Appeals Officer') of 25 November 2021. For the reasons set out below I uphold the appeal. The matter will be remitted to an appeals officer for a fresh investigation and determination of the applicant's appeal against the decision of the Complaints Officer.

2. I set out below the applicant's asserted errors of law, the factual background, the Appeal Officer's determination, the submissions of the parties and a consideration of the Act and the powers of the appeals officer. I consider the arguments made about the appropriateness of the statutory appeal versus judicial review. I then assess whether the Appeals Officer fell into errors of law in his analysis and application of his jurisdiction and his consideration of the matters set out in s.11(7) of the Act.

Asserted errors of law

3. The notice of motion asserts the following errors of law:

   (i) The respondent, at para. 10.7 of the determination, took an erroneous view of the law, thus erring in law, in finding that the Disability Complaints Officer did not have

the prerogative to make provision for the delivery of services earlier than outlined in the Service Statement, in the premises that it was open to the said Disability Complaints Officer to make such a finding (and the Disability Complaints Officer, in his determination of 3 August 2020, proceeded on the basis that he had such a jurisdiction and did not deny having the said jurisdiction), pursuant to inter alia s. 14 and s.15 (and taking account of s.11(7)) of the Disability Act 2005;

(ii) The respondent, at para. 10.8 of his determination, took an erroneous view of the law, thus erring in law, in finding that he did not have jurisdiction to make a determination in relation to the dates for provision of any services that are outlined in a service statement, in the premises that the Disability Appeals Officer does not have the said jurisdiction, pursuant to *inter alia* s.18 (and taking account of s.11 (7)) of the Disability Act 2005, wherein the Disability Appeals Officer may affirm, vary or set aside the finding or recommendation;

(iii) The respondent, at para. 10.8 of his determination, took an erroneous view of the law, thus erring in law, in failing to make a determination in relation to the dates for provision of any services that are outlined in a service statement, in the premises that the Disability Appeals Officer does not have the said jurisdiction, pursuant to *inter alia* s.18 (and taking account of s.11(7)) of the Disability Act 2005, wherein the Disability Appeals Officer may affirm, vary or set aside the finding or recommendation;

(iv) The respondent, at *inter alia* paras. 10 and 11 of the determination, does not make his own findings in respect of the appeal, simply finding that the Disability Complaints Officer was obligated to have regard to s.11(7) of the Disability Act 2005, a point not in dispute. The complaint was *inter alia* that consideration was improper and did not take account of the law pertaining to such matters. Clearly the respondent did not properly investigate the applicants' complaints that provision for the delivery of services earlier than outlined in the Service Statement could be directed, in the premises that it was open to the said Disability Complaints Officer to make such a finding (and the Disability Complaints Officer, in his determination of 3 August 2021, proceeded on the basis that he had such a jurisdiction and did not deny having the said jurisdiction), pursuant to *inter alia* s. 14 and s. 15 (and taking account of s. 11(7)) of the Disability Act 2005. It was also open to the respondent to make such a finding;

(v) The respondent's findings should be set aside based on the manner in which the respondent reached his conclusions, amounting to an error in law, in the premises that:

a) No reasonable person/Disability Appeals Officer could draw the conclusions and/or inferences drawn by the Disability Appeals Officer, in the premises that *inter alia* the evidence and superior court authorities before the Disability Appeals Officer, correctly interpreted, supported, only or otherwise, a finding that the Disability Complaints Officer's determination should be varied or set

aside and that the second named applicant was entitled to the provision of services earlier;

b) The conclusions and/or inferences drawn by the Disability Appeals Officer are unsustainable, unreasonable and/or abhorrent to logic and common sense, in the premises that *inter alia* the evidence and Superior Court authorities before the Disability Appeals Officer, correctly interpreted, supported, only or otherwise, a finding that the Disability Complaints Officer's Determination should be varied or set aside and the second named applicant was entitled to the provision of services earlier;

c) The conclusions and/or inferences drawn by the Appeals Officer are vitiated and/or undermined by a serious and significant error or a series of errors which together amount to such an error, in the premises that *inter alia* the evidence and Superior Court authorities before the Disability Appeals Officer, correctly interpreted, supported, only or otherwise, a finding that the Disability Complaints Officer's Determination should be varied or set aside and the second named applicant was entitled to the provision of services earlier;

d) The Disability Appeals Officer in his decision has erred in law and/or breached an express or implied statutory duty and/or breached fair procedures and natural and constitutional justice and/or vitiated and/or undermined the decision by a serious and significant error or a series of errors, in the premises that the Disability Appeals Officer failed to give any or any adequate weight to the evidence and Superior Court authorities;

e) The Disability Appeals Officer in his decision has erred in law and/or breached an express or implied statutory duty and/or breached fair procedures and natural and constitutional justice and/or vitiated and/or undermined the decision by a serious and significant error or a series of errors, in the premises that he failed to give adequate reasons, such as to enable the applicant, and any other reader, to understand/ascertain why the matter/appeal was decided as it was, what conclusions were reached on the principal important controversial issues, failure to disclose how any issue of law or fact was resolved and to enable the applicant or any other reader to know if the Disability Appeals Officer has directed her/his mind adequately to the issues the Appeals Officer has considered or is obliged to consider.

4. In summary, the errors of law as asserted by the applicant can be grouped into two issues pertaining to the process applied by the Appeals Officer in reaching his determination:

(1) A challenge to the Appeals Officer's finding that neither he nor the Complaints Officer had jurisdiction over the date identified in the service statement for the provisions of services to the appellant.

(2) Whether the Appeals Officer properly discharged his statutory duty pursuant to s.18(20)(d) to consider the matters referred to in s.11(7).

Factual background

5. The appellant is a special needs child who was found to meet the definition of disability in the Act. His mother applied for an assessment of needs in June 2018 and an assessment report issued on 27 January 2020 which stated that the appellant requires occupational therapy, psychology, physiotherapy and speech and language therapy with a timescale of "ASAP". A service statement was issued on 18 August 2020 which identified a date of March 2023 for the provision of inter-disciplinary support to the appellant. The appellant's mother submitted a complaint to the disability Complaints Officer in September 2020, the detail of which was supplemented in April 2021, taking issue with, *inter alia*, the content of the service statement and particularly the start date of March 2023 for the services given that the assessment report confirmed that the appellant needed the services ASAP. She claimed that the HSE was failing to provide a service specified in the service statement.

6. The Complaints Officer's report of 3 August 2021 did not uphold the complaints. The Complaints Officer found, *inter alia*, that the contents of the service statement were correct, accurate and compliant with Clause 18 of the Regulations and Section 11(7) of the Act, and that the start date for the services to be commenced was "within the realms of the Act". The appellant appealed this decision to the Appeals Officer (the respondent in the within proceedings) and submitted a detailed written submission which attached the HSE approved service plan for 2020 and criticised the Complaints Officer's finding that the provision of services to the appellant would result in a cost over-run, when considered against a budget of that size. The Appeals Officer dismissed the appeal by determination dated 25 November 2021, against which this statutory appeal is taken.

The Appeal Officer's determination

7. Part 1 of the determination sets out the background, part 2 sets out the issues raised by the appeal and part 4 outlines the Appeal Officer's investigation. The Appeals Officer confirmed that he had considered the documents furnished by the appellant and had asked the HSE to set out the present position regarding the provision of services for the appellant and particularly the most up-to-date efforts made by the HSE to provide the services outlined in the service statement within a reasonable period. The Appeals Officer set out in his determination the contents of the reply he received from the HSE by letter dated 5 October 2021 (a copy of which was also made available to this Court). The letter includes an account of the waiting list the appellant was on at that time, the HSE's programme of reform and why the HSE expected this programme to have a positive impact on the appellant's timely access to services. The letter referred to the decision of Barr J. in *CM v HSE* [2020] IEHC 406 and emphasised Barr J.'s acceptance of the liaison officer's function as a practical one depending on the number of places available and that if the best that can be done is that a child is put on a waiting list for a particular health service, then that is what the liaison officer can state in the service statement. The letter also set out the factors set out in s.11(7) that a liaison officer should consider when preparing a service statement.

8. The Appeals Officer decided that it was not necessary or proportionate to seek to obtain further documents or information through the exercise of his powers under s.18 of the Act (at 4.5 of his determination) or to hold an oral hearing (at s.4.6).

9. Part 5 of the determination set out the appellant's case in a brief ten-line summary which made scant, if any, reference to the appellant's detailed written submissions. Part 6 set out the HSE's position by reference to its letter of 5 October 2021 and stated, at 6.4 of the determination, that the HSE "noted" the liaison officer having taken account of the provisions of s.11(7) of the Act in preparing the service statement. In fact, a review of the HSE's letter confirms that the HSE simply described s.11(7) as setting out the factors that a liaison officer should (my emphasis) consider when preparing a service statement. The HSE did not assert that the liaison officer in this case had done so (albeit that the Complaints Officer's report had found that the contents of the service statement complied with s.11(7)).

10. At part 8 of the determination the appeals officer set out the "Matters required to be taken into account". At 8(d) he set out his consideration of each of the matters prescribed by s.11(7) of the Act where relevant including:

    (i) The Assessment Report dated 27 January 2020;

    (ii) The appellant's eligibility for services under the Health Acts 1947 to 2004;

    (iii) The approved standards in relation to the provision of services identified in the Assessment Report as being appropriate for the appellant's needs;

    (iv) The practicality of providing the services as outlined in the Service Statement dated 18 August 2020. The need to ensure that the provision of such services to the appellant will not result in any expenditure in excess of the amount allocated to implement the approved service plan of the HSE for the present financial year.

11. At part 10 of the determination, the appeals officer set out his "Findings in respect of the issues raised by the Appeal". Section 10.4 and 10.5 merit quotation in full:

    "[at 10.4] In consideration of the argument that staff shortages or lack of resources are not a defence to the appellant's complaint I find that the complaints officer is obligated by virtue of the provisions of section 15(7) of the Act to give due consideration to the resources available in preparing his or her report.

    (a) The complaints officer must also take account of all the matters referred to in section 11(7) of the Act. In particular sections (d) which make specific reference to the '*practicability of providing the services identified in the assessment report*' and in the case of (e) '*the need to ensure that the provision of the service would not result in any expenditure in excess of the*

amount allocated to implement the approved service plan of the Executive for the relevant financial year'.

(b) I find that the complaints officer took account of the provisions outlined and issued his report in accordance with the provisions of the Act.

[at 10.5] Section 18(20) of the Act outlines the considerations which the Appeals [Officers] must have regard to, and these are included in section 11(7) of the Act. The express provision of a reference to resources is a significant stipulation".

12. The Appeals Officer's determination made two findings in relation to his jurisdiction and that of the Complaints Officer at 10.7 and 10.8 of his determination as follows:-

"[at 10.7] I find that the complaints officer did not have the prerogative to make provision for the delivery of services earlier than outlined in the Service Statement.

[at 10.8] I find that the jurisdiction of the Appeals Officer is outlined in the Disability Act and in that context the Appeals Officer can only perform his or her functions conferred by this Act. Therefore, the Appeals Officer does not have jurisdiction to make a determination in relation to the dates for provision of any services that are outlined in a service statement".

13. At part 11 the Appeals Officer confirmed that the appeal should be dismissed and that the findings of the Complaint's Officer should be affirmed.

The appellant's submissions

14. The appellant emphasises the remedial nature of the Act and the need to interpret it in the light of the legislative intent. They submit that the Appeals Officer's jurisdiction is conferred widely by ss.14, 15 and 18 of the Act. S.14 allows a parent to make a complaint in relation to the content of a service statement or complain that the HSE has failed to provide or to fully provide a service specified in the service statement. Section 15 sets out what a Complaints Officer can do, including pursuant to sub 8(e) make a finding that the contents of the service statement are inaccurate or incorrect. Section 18 allows the Appeals Officer to affirm, vary or set aside the Complaint Officer's finding or recommendation. The appellant contends that the scope of a complaint about the content of a service statement is very wide and that a complaint that something in the service statement was incorrect embraces any legal infirmity including any errors in the application of the matters set out at s.11(7). Therefore, the appellant contends that the Appeals Officer has jurisdiction to determine a complaint in relation to the timeframe for the provision of a service which does not accord with the urgency set out in the assessment report and points out that it comes within the assessment report which is the first of the matters to be considered in s.11(7). The appellant disputes that a complaint can only be made when the time provided for the service has elapsed and argues that had the Oireachtas intended to impose this restrictive approach advocated by the respondent, it would have provided so expressly.

15. The appellant condemns the Appeals Officer for not having invoked the extensive inquisitorial powers afforded to him by the Act in his investigation and submits that those

wide powers would not be necessary if the Appeals Officer's jurisdiction was as narrow as the Appeals Officer contends.

16. The appellant describes the Appeals Officer as having treated s.11(7) as a formula the mere invocation of which was sufficient to dispose of the appellant's argument. They rely on the many practical and financial matters, including the child's assessment report at subs.(a), that are included in s.11(7) and contend that there is a significant difference between the "practicality of providing the services identified in the assessment report" as averred to s.11(7)(d) and the issues set out at s.11(7)(e), i.e. "the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive for the relevant financial year". Therefore, the appellant says financial cost arises only under subs.(e) as if cost arises under subs.(d), then subs.(e) would be superfluous, and it must be presumed that the Oireachtas did not add a superfluous provision: *Cork County Council v. Whillock* [1993] 1 IR 231. In illustrating how the concepts of practicability and costs are distinct, the appellant cites s.27 which requires accessibility to services supplied by a public body to people with disabilities but sub. (2) disapplies this obligation if the provision of access would, inter alia, not be 'practicable' or (my emphasis) would not be justified having regard to the cost of doing do.

17. The appellant contends that the HSE's letter of 5 October 2021 did not indicate that the provision of the service sought was impracticable or that it would lead to an over-run of the HSE's annual budget, but in any event that s.11(7) does not give the HSE carte blanche to delay service provision on resource grounds and should not be treated by the Appeals Officer as if it does.

The Appeals Officer's submissions

18. Whilst not contended for in his statement of opposition or written submissions, counsel for the respondent in his oral submissions to this Court argued that the reliefs sought by the appellant were not appropriate within a statutory appeal and should have been sought by the appellant by way of an application for leave for judicial review.

19. The Appeals Officer, in his substantive submissions, in effect sought to validate the unfortunate reality of waiting lists because of practicality and resources and in doing so relied on the decision of Barr J. in *DB v. HSE* [2020] IEHC 404 who found there it was sufficient, in order to comply with the provisions of s.11, for the service statement to state that the child had been placed on a waiting list; and on the conclusions of Barr J. in *CM v. HSE* that: -

> "It may not be possible for a liaison officer to give a firm time within which a particular service will or may, become available to an applicant.
>
> If places are not available in particular health services, that is not the fault of the respondent, or of the liaison officer. If an applicant is dissatisfied with the level of funding for a particular disability in a particular area, that is something that they must take up with the Minister for Health or with their local representative."

20. The Appeals Officer relied on the decision of the Court of Appeal in *G. v. HSE* [2021] IECA 101 where an important distinction was drawn by the Ni Raifeartaigh J. between the assessment report, which looks purely to the needs of the child, and the service statement which takes account of the practical realities caused by limited resources, for which there are multiple competing interests.

21. The Appeals Officer disputed the categorisation of a date for delivery of a service as coming within the complaint officer's jurisdiction via the concept of "incorrect" in s.15(8)(e) and argued that the appellant's case on that point would involve an impermissible rewriting of the statute. He submitted that there was no jurisdiction to correct a service statement or to require the HSE to provide services on earlier dates, which would override the considerations set out in s.11(7)(d) and (e) by ignoring the practicability of providing the services in question and/or compelling the HSE to incur expenditure in excess of the amount allocated to implement its approved service plan for the relevant financial year.

22. The Appeals Officer relied on the decision of Phelan J. in *CTM v. The Assessment Officer and Anor.; JA v HSE* [2022] IEHC 131 where she said that a statutory appeal left an applicant at risk of a finding that the Complaints Officer had no jurisdiction to determine a complaint that exceeds the parameters of what they can deal with as the Complaints Officer can only deal with complaints within the jurisdiction vested on them by s.14 of the Act. This, the Appeals Officer submitted, meant that there was no error of law in the application of his jurisdiction (or a lack thereof) in this case.

23. In relation to consideration of the s.11(7) matters, the Appeals Officer cited at part 8 of his determination the multiple different factors he had considered before coming to his determination. Whilst he was obliged to and did have regard to s.11(7) before deciding on the appeal, he was not required to expressly state that he had regard to those matters. He emphasised other provisions of the Act including ss. 5 and 13 which leave issues of allocation of resources exclusively to the Executive. He acknowledged that the Act brought in a new enforcement regime but claimed this did not apply to allocation of resources and to that end, described the Act as a "toothless tiger". He described 11(7)(e) as preventing a service statement from increasing costs and if a service is not practical in terms of sub. (d), then it can never be rendered practicable as to do so would involve an increase in cost. The Appeals Officer argued that he must consider the fact that he cannot increase costs and that he did so in this case by considering the HSE's letter of 5 October 2021 wherein he was told that they do not have the resources to provide services to the appellant any sooner than the date identified.

Submissions of the HSE

24. The HSE did not make written submissions but counsel made oral submissions on their behalf. Counsel for the HSE drew a distinction between the obligations of the Complaints Officer to "have regard to" the matters set out in s.11(7) and the obligation of the Appeals Officer to "consider" them. He relied on the decision of the High Court in *McEvoy & Smith v. Meath County Council* [2003] 1 IR 208 which followed the decision of the Supreme Court in *Glencar Exploration Plc v. Mayo County Council (No. 2)* [2002] 1 IR 84

that the phrase "*having regard to*" certain policies did not mean that the Council had to implement them. On the evidence, the Supreme Court found that the County Council had regard to the policies in question by adjourning the meeting at which they were due to make the vital decision so that the Minister's views could be considered. Quirke J. in McEvoy interpreted that to mean that the Council, in having regard to the guidelines, was not required to rigidly or slavishly comply with them, but was obliged to "*inform itself fully of and give reasonable consideration to*" the guidelines. He held that the Council had done so as they were fully and repeatedly informed of the existence and nature of the guidelines by different officials on a number of different occasions (at p. 225 of his decision). This, he found, was a proper consideration of the guidelines.

25. Counsel for the HSE made submissions on the meaning of "*varying*" in relation to the Appeals Officer's jurisdiction in s. 18(5). He relied on s.5 of the Act which, he said, ringfenced State expenditure and prohibited any additional spending. He cited s.13 as confirming a gap between the ideals of the assessment report and the realities of the service statement that had been accepted by the Oireachtas. Similar to the submissions of the Appeals Officer, the HSE relied on the decision of the Court of Appeal in G v. HSE on the allocation of resources and the decision of Barr J. in *CM v. HSE* on how the liaison officer carries out its function.

26. Counsel addressed the contents of the HSE's letter of 5 October 2021 which he claimed had dealt with the matters set out in s.11(7), even though he accepted that the letter did not expressly address them. He submitted that the Appeals Officer demonstrated he had considered the HSE's service plan because he confirmed in his determination that he had considered all documents furnished to him by the appellant, which included that service plan.

The Disability Act, 2005

i) The legislative intent

27. The appellant relied heavily on the remedial nature of the Act and its statutory right of enforcement of individual rights. The innovative and far reaching effects of the Act have been recognised, most significantly by the Supreme Court in its decision in *G v. HSE* [2022] IESC 14. At para. 2 of her decision, Baker J. set out the following (at para. 2):-

> "The Act of 2005 was innovative and far reaching as it provides a statutory complaints enforcement mechanism, up to judicial enforcement, to remedy failure to provide the services proposed to meet needs, once identified. The right of enforcement is a valuable personal right not found in general within the national health services and was not found in the Health Act 2004".

Baker J. went on at para. 25 to consider the service statement as follows:-

> "The provision of a service statement is at the centre of this appeal. Whilst the assessment report is described as "resource blind", the service statement is to take account of any limitation in resources. The service statement creates a system of rights and 9 obligations and, as was noted by the judgement of the Court of

Appeal, it is "a valuable document", because the legislation in turn provides for a complaints and enforcement mechanism which was described by Faherty J. in *JF v. HSE* [2018] IEHC 294 as "an integral statutory system of redress for complaints about breaches of those timelines, together with an inbuilt mechanism for judicial enforcement." (at para. 16)".

ii) Preparation of an assessment report and a service statement

28. There is an important distinction between preparation of the assessment report and the service statement, illustrated by the decision of Ní Raifeartaigh J. in the Court of Appeal in *G v. HSE* [2021] IECA 101 where she sets out at para. 14:-

"Article 18 of the Regulations provides that the service statement shall be written in a clear and easily understood manner and shall specify: (a) the health services which will be provided to the applicant; (b) the location(s) where the health service will be provided; (c) the timeframe for the provision of the health service; (d) the date from which the statement will take effect; (e) the date for review of the provision of services specified in the service statement; and (f) any other information that the liaison officer considers to be appropriate, including the name of any other public body that the assessment report may have been sent to under s. 12 of the Act. Article 19 provides that the service statement shall be completed within one month following receipt of the assessment report by the liaison officer".

29. The function of the liaison officer in preparation of service statements was recognised by Barr J. in *CM* at paras. 123 to 124 as follows

"123. In carrying out this function, which must be done within the tight timeframe provided for under the Act of one month, the liaison officer is not adjudicating on any interests or rights of the applicant child, but is merely ascertaining whether any particular health services are available in the region and whether there are any places available within those services to cater for the applicant. The liaison officer is not adjudicating on the person's entitlement to receive the services, but is merely indicating what services are available to the applicant at that time.

124. The function carried out by the liaison officer in this regard is a very practical one. It depends on the number of places available at any given time. If there are no places available for a person of the applicant's age on a particular course or programme, the liaison officer cannot create extra places; he has to tell the applicant's parents that there are no places available at that time.

…

144. In the event that the applicant remains on the waiting list to be seen by the EIT, or in the event that he has been seen by them but after a considerable delay, it may well be frustrating for the applicant's mother that there is, or has been, such a delay; however, the existence of such a delay in progressing up the waiting list is not a defect in the provision of the service statement. The liaison officer can only

say what services are available to meet the needs of an applicant in his area and put the child on a waiting list for those services. If there is a waiting list that is regarded as being unduly long, or if the applicant's parents are of the view that inadequate resources have been made available for services in their area, those are matters that will have to be raised with the Minister for Health, or the Minister for Education and Skills or with the Minister for Children, Disability, Equality and Integration, with a view to securing more funding, but it is not evidence of a breach of statutory duty in relation to the provision of the assessment report or the service statement as required under the 2005 Act".

30. The relevance of budgetary constraints in the preparation of the service statement was highlighted by Donnelly J. in *CM v. HSE* [2021] IECA 283 at para. 23 as follows:-

"Under s. 8(5), the assessment must be carried out without regard to the cost of or the capacity to provide, any service identified in the assessment as being appropriate to meet the needs of the applicant concerned. It thus will indicate the 'gold standard' of service requirements. Budgetary constraints etc. are addressed later in the Disability Act under the heading of 'service statement'. The identification of services in the course of the assessment which might meet the needs of an applicant is a utopian position, whereas the 'service statement' remains grounded in the reality of what may be available having regard to the resources of the respondent".

31. Those authorities all recognise the difference in the approach to be taken to an assessment report and thereafter to the preparation of a service statement, the former being utopian and resource blind and the latter being practical and constrained by the available budgetary and other resources. However for the reasons I set out further below, I do not consider that this recognised difference can justify the Appeals Officer's approach in reaching his determination.

iii) The Appeal Officer Process

32. Section 18 of the Act sets out the process to be followed by the Appeals Officer. Subs. (1) sets out the rights of the parties to an appeal to be heard and the time within which an appeal must be initiated. Subsection (5) sets out what the Appeals Officer can do (i.e. their jurisdiction) in stating that the Appeals Officer "shall make a determination in writing in relation to the appeal affirming, varying or setting aside the finding or recommendation concerned and shall communicate the determination (including the reasons therefor) to the applicant, the Executive and, if appropriate, the head of the education service provider concerned who shall comply with the determination".

33. Section 18(5) requires the Appeals Officer to communicate not only the determination but also "*the reasons therefor*" to the appellant and the Executive. This is different to the obligations of the liaison officer pursuant to s.11 which imposes no similar statutory obligation to give reasons. The liaison officer's obligations were considered by the court in *DB v. HSE* where Barr J. rejected the argument that the liaison officer is obliged to give reasons for a delay in providing or a decision not to provide services in the service

statement. Barr J. held (at para. 122 of his decision) that in issuing a service statement, a liaison officer is not making a decision that would require reasons, given that by the time it reaches the liaison officer upon the completion of the assessment report, all the necessary determinations have been made.

34. By contrast an Appeals Officer is required to give reasons for their determination of the appeal not only because it is a decision affecting rights and interests of persons who must know if they have grounds to appeal or judicially review it (*Mallak v. Minister for Justice and Law Reform* [2012] IESC 59) but also because s.18(5) expressly requires the Appeals Officer to do so.

35. Section 18(6), (7), (8), (9) and (10) set out the Appeals Officer's extensive inquisitorial powers to secure information and/or documentation, enter premises, require persons to furnish information and to examine and take copies of records found on premises. Subsections (12) and (13) entitle the Appeals Officer to hold an oral hearing and to subpoena any person and/or require them to produce documentation. Subsection (14) renders it an offence for a person to them give false evidence and subsection (15) grants privileges and immunities to such persons who do not appear or answer questions or produce documents.

36. Section 18(20) sets out the statutory duties of the Appeals Officer in deciding on an appeal, requiring them to consider, *inter alia*, the matters set out in s.11(7). This applies to an appeal lodged by a parent pursuant to s.14(1)(d), such is at issue here. I note the wide and unlimited nature of what s.14(d)a parent may complain about in relation to a service statement, i.e. its contents. I return to that further below in relation to the Appeals Officer's jurisdiction.

Decision

i) Statutory appeal versus JR

37. There have been a number of cases in which a respondent has questioned an applicant's decision to challenge the treatment of issues arising under the Disability Act by way of judicial review rather than the statutory appeal process provided for by s.20 of the Act. It is more unusual for a respondent to suggest that judicial review would have been more appropriate than the default statutory appeal, as the respondent here seems to contend. The Appeals Officer relies on the recent dicta of Phelan J. *CTM v. HSE* [2022] IEHC 131where an applicant sought an order of certiorari quashing an assessment report and the standard operating procedure applied by the HSE in preparing the reports, which did not diagnose the child's condition but simply identified the services that the child required. The HSE challenged the applicant's decision to proceed by way of judicial review rather than a statutory appeal, which would have required the applicant to proceed through the statutory system of making a complaint to the Complaints Officer and an appeal to the Appeals Officer and, thereafter, bring an appeal before this Court on a point of law. Phelan J. upheld the applicant's decision to proceed by way of judicial review rather than the default statutory appeal process and observed (at para. 169) that had the applicant pursued a complaint under the Act, she risked a finding that the Complaints Officer had no jurisdiction to entertain or determine the complaint as it exceeded the

clearly prescribed parameters of what the Complaints Officer can deal with. Phelan J. observed, quite correctly, that the Complaints Officer is confined by law to dealing with complaints which come within the four corners of the jurisdiction vested on that office under s. 14 of the Act.

38. Phelan J. also observed (at para. 174) that there will be circumstances where the statutory remedy is the more appropriate remedy and referred to the decision of Faherty J. in *JF v. HSE* [2018] IEHC 294 where the court's discretion to refuse to grant leave in judicial review proceedings was considered in relation to a complaint which fell within the ambit of s.14 of the Act.

39. Therefore in determining the appropriate avenue for a challenge to a decision on a complaint to be heard before this court, the question is whether the complaint falls within the ambit of the Act or not. The complaint in *CTM v. HSE* related to the statutory interpretation of the assessment of needs process, an issue which would likely have fallen outside the jurisdiction of both the Complaints Officer and the Appeals Officer. In the instant case, the appellant takes issue with the Appeals Officer's analysis of his jurisdiction and whether the Appeals Officer properly considered the matters set out in s. 11(7) in accordance with his obligation to do so under s.18(20)(d). Those matters are well within the four corners of the jurisdiction vested in the Appeals Officer by s. 18 and, therefore, are appropriately challenged here by way of a statutory appeal rather than by way of an application for leave for judicial review.

40. In addition, the appellant claims that there has been a breach of the Appeals Officer's statutory duty which of itself, in accordance with the decision of the Supreme Court in *Nano Nagle School v. Daly* [2019] IR 369, gives rise to a statutory appeal on a point of law.

41. If I am incorrect in that, and the issues in this appeal are more properly issues of judicial review, then I follow the decision of McKechnie J. in the Supreme Court *in Attorney General v. Davis* [2018] 2 IR 357 where he included in a statutory right of appeal on a point of law, errors such as would give rise to judicial review.

42. I am therefore satisfied that the appellant has properly proceeded by way of the default remedy of a statutory appeal rather than an application for leave for judicial review.

ii) The Determination of the Appeals Officer

43. The Appeals Officer's determination does not identify the following:

(i) How the Appeals Officer considered the matters set out in s.11(7) of the Act or what documents or information, within the documentation and information furnished to him by the appellant and the HSE, he took account of in his consideration of those matters.

(ii) A basis for his finding at s.10.4 that the Complaints Officer was obliged by virtue of the provisions of s.15(7) of the Act (which requires the Complaints Officer to have

regard to the matters set out in s.11(7)) to give due consideration to the "resources" available in preparing their report.

In referring to the s.11(7) matters again at s.10.5, the Appeals Officer said "the express provision of a reference to resources is a significant stipulation".

Neither s.18(20) nor s.11(7) contains any reference, express or otherwise, to "resources".

The references to "resources" seem to be the Appeals Officer's analysis and/or summary of the matters set out in s.11(7) and if that is so then it is not clear how he came to it.

(iii) A basis for the Appeal Officer's finding at s.10.4(b) that the Complaints Officer took account of the provisions outlined (which seems to refer to the s.11(7) matters).

The Complaint Officer's decision (on its 6th page) refers to s.11(7)(d) and (e) which he, correctly, says he is obliged to have regard to. Apart from confirming that services cannot be provided any sooner than the date identified in the service statement, there is no account of the Complaints Officer's regard for the practicality of providing the services or for how the provisions of an earlier service to the appellant would result in expenditure in excess of the amount allocated to implement the HSE's approved service plan for the relevant financial year.

(v) How or why the Complaints Officer did not have prerogative to make provision for the delivery of services earlier than outlined in the service.

(vi) How or why the Appeals Officer did not have jurisdiction to make a determination in relation to the dates for provision of any services that are outlined in a service statement or how that function is not conferred or excluded by the Disability Act.

iii) The jurisdiction of the Appeals Officer

44. The Appeals Officer's determination made two findings in relation to his jurisdiction and that of the Complaints Officer at 10.7 and 10.8 of his determination, set out at para. 12 above. There are no reasons provided by the Appeals Officer for these findings in spite of his obligation pursuant to s.18(5) to include the reasons for his determination.

45. I note the wide scope of the complaints which a parent can make pursuant to s14 including about the "*contents*" of the service statement (i.e. contents plural thereby confirming the parent's right to complain about a number of elements of the service statement) and/or the HSE's failure to provide a service specified therein. I am satisfied that s.14 is wide enough to allow a parent to complain about the date on which the service statement says the service will be provided as that date must be part of the contents of the service statement. If a parent is permitted to complain about that date, then the Complaints Officer and the appeals officer must have jurisdiction to address it.

46. The jurisdiction of the Complaints Officer to amend, vary or add to a service statement (as per s. 15(8)(e)) and the jurisdiction of the Appeals Officer to affirm, vary or set aside the complaint officer's finding or recommendation (as per s. 18(5)) allow them both to change the contents of a service statement, including any date for the provision of a service that is set out in the service statement. This jurisdiction can be exercised if the Complaints Officer or Appeals Officer considers it appropriate to do so, having had regard to or having considered all the matters they were obliged to have regard to or consider including those set out in s. 11(7).

47. I am fortified in my conclusions on the jurisdiction of the Complaints Officer and the Appeals Officer by the findings of Faherty J. in *JF v. HSE* [2018] IEHC 294 at para. 82 where she found that a Complaints Officer would have to take cognisance of the timeframes set out in the Act and the Regulations for commencement or completion of an assessment of needs. This was in spite of the fact that there is no statutory provision directing the Complaints Officer who has upheld a complaint to specify a particular timeframe for the commencement or completion of the assessment of needs. Faherty J.'s findings are consistent with and support my finding that the Complaints Officer and the Appeals Officer have jurisdiction over a date set out in the service statement for the provision of a service.

48. Therefore the single fact that a parent's complaint is about the length of time identified by the HSE for the provision of the service, does not deprive a parent of the right to have that complaint addressed and, if the parent is successful in their complaint, to seek enforcement of a determination in their favour from the Circuit Court. The Complaints Officer and the Appeals Officer have jurisdiction to make a determination on such a complaint. If it were otherwise there would be no protection for a child whose service statement contained an error, for example, in the date provided in the service statements as this could not be the subject of a parent's complaint pursuant to s. 14 to the Complaints Officer or an appeal to the Appeals Officer. That cannot have been the Oireachtas' intention in implementing this remedial innovative legislation to, as confirmed by the long title to the Act, "enable provision to be made for the assessment of health and education needs occasioned to persons with disabilities by their disabilities ... [and] to provide for appeals for those persons in relation to the non-provision of those services".

49. Whether or not there was compliance with s. 11 in the Appeals Officer's determination in the instant case will be considered further below, but for the purpose of addressing the jurisdiction point, I am satisfied that the Appeals Officer fell into an error of law in his findings at 10.7 and 10.8 of his determination. A complaints officer and an appeals officer both have jurisdiction to determine a complaint made in relation to s. 14. Section14 casts its net sufficiently wide to allow a parent to complain about the date provided in the service statement for the provision of a service specified therein, which means that both the liaison officer and the appeals officer must have jurisdiction to consider that date in the liaison officer's investigation of that complaint and the appeal officer's appeal.

50. This finding about the Complaints Officer's and Appeals Officer's jurisdiction is not inconsistent with the findings of Barr J. in DB v. HSE [2020] IEHC 404 and *CM v. HSE* [2020] IEHC 406 that a statement stating that services are not available is sufficient compliance with s. 11. That decision was a judicial review challenging the process set out in the act for the preparation of an assessment of needs and a service statement. There was no challenge to the jurisdiction of the appeals officer to deal with an appeal about the length of time the HSE had said it would take for the service to be provided. The challenge by way of judicial review was brought after the liaison officer issued the service statement and before the matter was ever brought before a complaints officer or an appeals officer.

iv) The Appeals Officer's Duty to consider the matters set out in Section 11(7)

51. The Appeals Officer is required by s.18(20)(d) to consider, inter alia, the matters referred to at s.11(7). Similarly (though not in identical terms) the Complaints Officer is required by s.15(7) to have regard to those s.11(7) matters. Consideration may be a relatively light test, as outlined in *McEvoy v Meath County Council and Glencar v. Mayo County Council*, but a statutory duty to consider specified matters has to have some meaning.

52. The Appeals Officer in his determination confirmed that he has had regard to the information and documents that were obtained, which would have included the HSE service plan for 2020 and the applicant's additional grounds of appeal furnished in April 2001 to the Complaints Officer in which the appellant asked the Complaints Officer to consider, inter alia, the HSE budget of €17 billion per annum. The Appeals Officer says he relied on the information contained in the HSE's letter of 5 October 2001 in making his determination. He must have considered that he had sufficient information therein, along with the appellant's submissions, to make his determination as he did not consider it necessary to invoke his extensive powers to request any further information or seek any further documentation from the HSE.

53. The HSE's letter was a response to the Appeals Officer's request (as confirmed at s. 4.2 of the determination) to set out the present position regarding the provision of services for the appellant and the most up to date efforts made by the HSE to provide the services outlined in the service statement within a reasonable period. The letter is a reasonable response to what the Appeals Officer says he asked of the HSE. It does not say anything about the matters contained in s. 11(7)(e) but that information had not been requested by the Appeals Officer. The letter confirms that the appellant is on the waiting list, sets out the HSE's reform programme and their plan to transition children on the waiting list to one of the twelve new Children's Disability Network Teams which, it anticipates, will have a positive impact on timely access to services for the appellant. The letter confirms that the appellant has been transferred to a particular CDNT and that development posts have been allocated which, when recruited, will enhance capacity. The remainder of the letter is taken up with references to the decision of Barr J. in *CM/Goss/DB v. HSE* and a transcription of s. 11(7). The letter ends with an invitation to the Appeals Officer to contact the writer if he has any further queries. This invitation was never availed of by the

Appeals Officer from which I assume he decided it was not necessary or proportionate for him to obtain further documents or information.

54. I have no reason to assume that the HSE would not have furnished the Appeals Officer with information in relation to the matters set out at s. 11(7)(e) had they been asked. It was the responsibility of the Appeals Officer to request (if necessary by the exercise of his statutory powers) the correct information to enable him to consider the matters set out at s.11(7). He failed to do that. Whether or not an analysis of any further relevant information that might have been available, had the Appeals Officer sought it, would have allowed the Appeals Officer to properly reject the appellant's complaint is not a matter for this Court. This Court is only tasked with a consideration of the process applied by this Appeals Officer and whether he complied with his statutory duties pursuant to the Act.

55. There are two points, in particular, in the Appeals Officer's determination that show his misunderstanding of the matters set out in s. 11(7) which he is required to consider:

(i) The Appeals Officer seemed to conflate the matters set out at 11(7)(d) and 11(7)(e) into a single purported consideration at 8(1)(d)(iv) of his determination, rather than a consideration of the two separate matters that they are. The practicality of providing the service is different and is a separately identified matter to the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive to the relevant financial year. Support for that conclusion can be found in the similarly separately identified issues in s.27(2) firstly of what is practicable and secondly of cost. The matter identified at s.11(7)(e) certainly involves money but ss. (d) may or may not. For example, recruitment is identified in the HSE's letter as something due to happen which, they anticipate, will increase capacity. There is no explanation for why that recruitment has not yet happened. That may be an issue of practicality or a separate issue around expenditure in excess of the monies allocated in the approved service plan. It is speculative to say which it is, if either or any.

I find that the information furnished by the HSE in response to the appeal officer's specific request was not sufficient to enable the Appeals Officer to consider the matters set out at s. 11(7) and, in particular, s. 11(7)(e).

(ii) The Appeals Officer's finding at 10.5 in referring to s.11(7) that "The express provision of a reference to resources is a significant stipulation". The phrase "resources" does not appear in s. 11(7).

I find that the Appeals Officer is incorrect in claiming that the subsection expressly refers to resources.

56. I was not satisfied by the attempts of the Appeals Officer or the HSE to demonstrate how the Appeals Officer determination (or to the extent that the argument was made, the Complaints Officer decision) considered (or in relation to the Complaints Officer had

regard to) the matters set out in s. 11(7) and, in particular, subs. (e). The Appeals Officer's consideration does not have to be done by way of a detailed narrative, but it has to be done in a way that complies with the Appeals Officer's statutory duty pursuant to s. 18(20) and given what was required by the High Court in *McEvoy v. Meath County Council* and the Supreme Court *in Glencar Explorations v. Mayo County Council* to satisfy the court that consideration had been given to the necessary matters. The Appeals Officer simply stating that he has considered all the documentation (implicitly including the HSE's service plan of 2020) cannot evidence a consideration of the matter set out in s. 11(7)(e) when there was no evidence put before the Appeals Officer of how the provision of services to the appellant by the date specified in the service statement ensured expenditure within the amount allocated to implement the approved service plan of executive for the relevant financial year, or the converse, i.e. that the provision of the service on an earlier date would result in such expenditure. To the extent that the Appeals Officer says he did consider the matter set out in s.11(7)(e), it can only have been speculative in the absence of that evidence or anything akin to it.

57. I see no basis in either the Appeals Officer's determination or in the limited information and documentation on which the Appeals Officer based his findings, that satisfies me either that he had sufficient information to allow him to consider the matters set out in s.11(7) or that he complied with his statutory duty to do so. The low bar identified by the High Court in *McEvoy v. Meath County Council* and by the Supreme Court in *Glencar Explorations v. Mayo County Council* was not passed here, such that this court could be satisfied that the Appeals Officer did give the consideration to the s.11(7) matters as he was required to do.

Conclusions

58. Section 14 allows a parent to make a complaint about a wide range of issues including the contents of the service statement or any alleged failure by the HSE to provide or fully provide a service specified in the service statement. Section 15 requires a Complaints Officer to investigate that complaint and make findings and recommendations in relation to it, which can be appealed to an Appeals Officer pursuant to s.18, and the Appeals Officer can affirm or vary them or set them aside. If the service statement identifies a date by which the service is to be provided, then that is a content that come within the jurisdiction of the complaints officer and the appeals officer. The Appeals Officer fell into an error of law in finding that he did not have jurisdiction over the date identified in the service statement for the provisions of services to the appellant and in finding that the Complaints Officer did not have the prerogative to make provision for the delivery of services earlier than outlined in the service statement.

59. The Appeals Officer did not properly consider the matters set out s.11(7). The information and documents to which the Appeals Officer could had regard in reaching his determination were insufficient to allow the Appeals Officer to consider s.11(7)(e), namely how the earlier provision of the service for which the appellant contended would result in expenditure in excess of the amount allocated to implement the approved service plan of the HSE for the relevant financial year. Insofar as the Appeals Officer made such a

finding, it was not a finding available to him on the evidence that was before him, particularly in circumstances where he could have obtained further evidence had he availed of the HSE's offer to deal with any further queries he had or had he sought to exercise his extensive statutory powers to do so. Therefore the Appeals Officers did not properly comply with his statutory duty to consider the matters set out at s. 11(7) and in doing so, fell into an error of law.

60. The matter will be remitted to an Appeals Officer for a fresh investigation and determination of the appellant's appeal against the decision of the Complaints Officer.

61. For the avoidance of doubt, I wish to make it clear that I make no assessment of the HSE's decision to identify a waiting time or the length of that time in the service statement. It will be a matter for the Appeals Officer to deal with that and any other aspect of the appellant's complaint in the remitted assessment of the appeal.

62. I will put the matter in for 10 a.m. on 20 July for final orders.