THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 652

[2021 879 JR]

BETWEEN

R.C., D.R. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND R.C.)

APPLICANTS

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 28th day of November 2022

Introduction

1. The Applicant is the mother of the second named Applicant, D.R. D.R. has been diagnosed with Autism Spectrum Disorder ("ASD") and 2p 16.3 Deletion Syndrome. It should be noted that this diagnosis was obtained privately by the Applicant. The Applicant wishes to access services, including appropriate schooling and educational services for her son.

2. In order to access the required services, the Applicant requires a diagnosis of D.R.'s condition to be set out in an Assessment of Needs (AON) under the provisions of the Disability Act 2005 (the Act of 2005). One might have assumed that obtaining such a diagnosis would not be an insuperable difficulty for the Applicant to obtain from the Respondent, but this is not the case. These are the third set of proceedings that the Applicant has been required to bring to

obtain a diagnosis from the Respondent, a diagnosis that has already been given by a suitably qualified professional not working for the Respondent. One can readily understand the following statement in one of the Applicant's affidavits:

> "The report is fundamental to (D.R.'s) progress and prognosis. It is the only key to the assistance and services that (D.R.) needs. I have been fighting for (D.R.) since 2018 when he was four years old. I am consumed and exhausted by it. It should not be this way. I am not asking for anything extraordinary. All I ask is that (D.R.) is properly assessed and that he be provided with the services indicated by that assessment within a reasonable timeframe."

Legal Background

3. The Applicant firstly applied for an AON in December 2016. The Report was issued in January 2018. A finding of disability was made in the AON. The Report stated:

> "(D.R.) remains "at risk" for the development of ADHD and requires intervention & monitoring over time."

This AON Report stated that it was to be reviewed on 19 January 2019. This did not occur and the Applicant issued proceedings compelling the Respondent to do so. These were the first Judicial Review proceedings.

4. The first Judicial Review proceedings were compromised, resulting in a Court order made on consent on 18 December 2019 stating:

> "The Court doth grant an Order of Mandamus compelling the Respondent to commence and complete a Review of the second named Applicant's Assessment of Need, pursuant to the Disability Act 2005…**to include any necessary assessments/re-assessments, within 9 weeks**…" (emphasis added).

I have added emphasis to this part of the agreed Court order and it should be looked at in the context of the stance taken by the respondent in these proceedings.

5. A review of the AON was given on 19 February 2020. However, no adequate diagnosis was given. The Applicant took the view that this was in breach of the agreed Court order "to include any necessary assessments/re-assessments". The second set of Judicial Review proceedings were issued in June 2020. These proceedings were struck out on consent in February 2021. The Applicant believed that a fresh review of D.R.'s AON was imminent. It should be noted that a letter was received from the Respondent outlining that the Applicant's privately obtained diagnosis of D.R. would be accepted.

6. Unfortunately, matters did not proceed as the Applicant had anticipated. By letter dated 13 August 2021 the Applicant's solicitors wrote to the solicitors instructed by the Respondent as follows:

> "You will recall, that this case was struck out of the High Court judicial review list in February of this year on the basis, *inter alia*, that a fresh review was imminent. No review has yet taken place, in breach of the statutory timeframe and the understanding reached between the parties six months ago. This is unacceptable.
>
> Please confirm within fourteen days of today's date the timeframe envisaged for the provision of the review and any appropriate assessments and/or reassessments, failing which further proceedings will issue and this letter used to fix costs against the HSE."

This letter was responded to by the Respondent as follows on 16 August 2021:

> "It appears to us that your client may be under some misapprehension in respect of the striking out of the above Judicial Review in February 2021. No agreement was made to the effect that (D.R.) was entitled to nor would receive any further Assessment of Need Review.
>
> Following discussions between Counsel it was agreed that our client would provide a letter confirming that the HSE accepted the diagnosis of ASD as a valid record of his

diagnosis and that the NDT would assist with recognition of this child's diagnosis by the SENO or any other party as required".

7. The Applicant then initiated the instant Judicial Review proceedings, the third of such proceedings. On 1 November 2021 this Court granted the Applicant leave to apply for certain reliefs by way of Judicial Review including:

> "An order of Mandamus compelling the Respondent to commence and complete a Review of the second named Applicant's Assessment of Need, pursuant to the Disability Act 2005 and the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263/2007), to include any necessary assessments/re-assessments, within six weeks or other such period considered reasonably by this Honourable Court."

It will be noted that the order of Mandamus being sought is in almost precisely the same terms of the agreed order that had been made on consent on 18 December 2019, set out above.

8. On 3 December 2021 a review AON was furnished to the Applicant. This AON does not contain a diagnosis by the Respondent but rather refers to the diagnosis which the Applicant obtained privately.

Subsequent Legal Steps

9. A Statement of Opposition was filed by the Respondent in which several grounds of opposition were put forward. Firstly, it was maintained that the issue of the AON of 3 December 2021 made the application herein moot. Secondly, at para. 10 (7) the following is stated:

> "The Respondent is aware of and accepts its statutory obligation to carry out a review of assessments of need in accordance with the terms of the Disability Act 2005 and Regulations made thereunder. If necessary and appropriate, such reviews can incorporate fresh assessments …"

Para. 10 (11) states:

> "The assessment of need process does not require the attaching of a specific diagnosis to a child, or the carrying out of diagnostic examinations to attach such diagnoses. This issue is the subject of litigation in which judgments are awaited from the High Court and the Court of Appeal."

10. Some days prior to the date fixed for the hearing of the application herein the Respondent sought to amend its Statement of Opposition. These amendments were as follows. In the place of para. 10 (5) as referred to above the following amendment was sought:

> "i. Neither the Disability Act 2005 nor any regulations made thereunder creates an obligation enforceable by way of judicial review to compel the carrying out of a review of an assessment report.
>
> ii. If necessary and appropriate a review of an assessment report may incorporate fresh assessments. Where a parent wishes to cause a new assessment to be carried out, the Act makes express provision for the carrying out of a new assessment at s.9, including the circumstances asserted here, during the currency of an existing assessment report (s. 9 (8))."
>
> And:
>
> "The assessment of need process does not require attaching of a specific diagnosis to a child, or the carrying out of diagnostic in examinations to attach such diagnosis <u>every case. Such steps are, however, required where necessary to establish the cause, nature and extent of an applicant's disability".</u> The reference to judgments being awaited in the High Court and the Court of Appeal were to be deleted.

11. It will be seen that the proposed amendments presented a remarkable about turn for the Respondent from its earlier position. Indeed, the new position on whether or not there was an

enforceable statutory duty to carry out a review was a radical departure from the position taken by the Respondent in many previous actions.

12. At the hearing I refused the application to amend on the issue concerning statutory obligation to carry out a review but permitted the other amendments given the decision by Phelan J. in *C.T.M. (a minor) v. the Assessment Officer and HSE* [2022] IEHC 131.

Submissions of Parties

13. The Applicants submitted that they were entitled to a diagnosis in the AON. This entitlement arose, firstly, under the provisions of the Act of 2005 and, secondly, under the mandatory order that had been agreed between the parties set out at para. 4 above. In answer to the submission by the Respondent that the Review had been carried out under the "Assessment of Need Standard Operating Procedure (Disability Act 2005)", the Applicants relied on the judgment of Phelan J. in *CTM (A Minor) v. The Assessment Officer and HSE* [2022] IEHC 131.

14. The Respondent submitted that the furnishing of the review of 3 December 2021 rendered these proceedings moot. The Respondent also submitted that the case being made by the Applicants was outside the grounds upon which leave had been granted and so could not be entertained by this Court.

15. The central submission of the Respondent was that this was a "Review" not a new or re-assessment of the AON. Reliance was placed on certain provisions of Part 2 of the Act of 2005.

16. Section 8 provides for the provision of AON's. Section 8 (7) sets out what findings should be in the AON. The only reference to "review" is s. 8 (7) (iv) which states:

> "a statement of the period within which a review of the assessment should be carried out."

17. The Respondent placed particular reliance on s. 9 which makes provision for applications for an AON. Section 9 (8) provides:

> "(8) A person who has previously made an application under *subsection* (1) may make a further application if he or she is of opinion that since the date of the assessment—
>
> (a) there has been a material change of circumstances,
>
> (b) further information has become available which either relates to the personal circumstances of the applicant or to the services available to meet the needs of the applicant, or
>
> (c) a material mistake of fact is identified in the assessment report."

18. It was submitted that the Applicants did not invoke the provisions of s. 9 (8) and so, what was involved here was a "Review" and not the carrying out of a new assessment. If the applicants required a diagnosis, then s. 9 (8) ought to have been invoked.

19. The Respondents submitted that the Review in this case was carried out in accordance with the Standard Operating Procedure (SOP) and referred to p. 80 of same which states:

> "**Review of the Assessment Report**
>
> The Regulations accompanying the Disability Act state that the maximum period for a review of the Assessment Report to be carried out is 12 months from its completion or 12 months from the last review, but may be earlier if there is a significant change in health or education needs."
>
> **Please see note that what is required is <u>review of the assessment report</u> not reassessment".**

<u>Consideration of Submissions</u>

20. The AON of 3 December 2021 does not contain a diagnosis by the Respondent. The whole point of these and the two earlier proceedings is that there has been no diagnosis by the

Respondents of DR notwithstanding a legal obligation to provide one. Therefore, it cannot be said that these proceedings are moot.

21. A review of the Statement of Grounds clearly shows that this application is firmly within the stated grounds. Paragraph (E) 4 states:

> "The Respondent has failed to carry out the Review of the Assessment of Need, and necessary assessments/re-assessments contrary to its statutory obligations (the review should have been commenced on 19 February 2021) and despite requests to carry out the review from the Applicant's solicitors on 10 September 2021 the Respondent has not indicated a willingness to carry out the review and has subsequently failed or refused to do so…"

This is reflected in one of the reliefs being sought by the Applicants being a mandatory order compelling the Respondents to complete a review … "to include any necessary assessments/re-assessments …"

22. I do not accept the narrow view of the Respondent that it was only obliged to carry out a "Review" which did not involve an "assessment/re-assessment". Firstly this approach flies in the face of the mandatory order of Court which it consented to, which clearly required assessments/re-assessments that were necessary. Secondly, such completely ignored the content of the correspondence from the Applicants which clearly stated that what was required was a diagnosis and the reasons for it.

23. The Respondent has stated that it relied on the SOP. There is no diagnosis by the Respondent in the various AON notices. The SOP does state at p. 77 under the heading "essential points to note":

> "The Disability Act does not give a right to access to a diagnosis. Diagnostic assessments may be identified as a health need for a child/young person."

And p. 79:

> "The Disability Act does not require a diagnosis to be made as part of the assessment of need."

And, under the heading "Report stage":

> "There is no requirement to provide a diagnosis at this point".

The provisions of the SOP were recently considered by Phelan J. in *CTM (a minor) v. The Assessment Officer and HSE* [2022] IEHC 131. This case considered the provisions of the SOP in that it expressly provided that a diagnosis was not required under the Act of 2005 assessment process. Phelan J. was required to determine whether the SOP met the statutory requirements for a Part 2 assessment under the Act of 2005. Phelan J. stated:

> "156. Therefore what is required under Part 2 is an assessment of the nature and extent of the disability without any conditioning of the assessment as "*preliminary*" but rather a full and comprehensive assessment which identifies needs, identifies services appropriate to those needs and the time-frame in which ideally they would be provided. None of this can be effectively achieved without also assessing the cause of the child's disability in an accurate and competent manner.
>
> 157. I am thus satisfied that to determine the existence of a disability and its nature and extent, it is necessary to consider and reach a decision on the cause of the restrictions through appropriate and indicated diagnostic assessments.
>
> 158. To be clear, I do not construe Part 2 of the 2005 Act as requiring a definitive diagnosis in every case. It stands to reason that as a child grows and a condition evolves, there may be a clinical need for further assessment. What the Act requires is that to the extent practicable at that time, the nature and extent of a disability should be fully assessed during the Part 2 process."

Phelan J. further stated:

> "181. The assessments in this case of CTM and JA were "*preliminary team assessments*" conducted in accordance with the newly introduced SOP. The respondent has impermissibly sought through the introduction of the SOP to alter what is required under a Part 2 assessment by directing the conduct of assessments on the basis that all that is required under Part 2 is a preliminary team assessment of up to 90 minutes from which a "broad" statement of the nature and extent of needs may be discerned without requirement for diagnostic assessments. Consequent upon the terms of the SOP and by performing an assessment in compliance with the terms of the SOP, the assessment officers in both cases erred in law. Whilst preparing a report in full compliance with the SOP, they failed to determine that the significant restrictions presenting on initial assessment were caused by an enduring physical, sensory, mental health or intellectual impairment (being the categories of disability identified in s. 2 of the 2005 Act) but proceeded on the basis that diagnostic assessment of the nature and extent of the disability was not required."

It is to be noted that this decision has not been appealed.

24. Applying the terms of the judgment of Phelan J. to the instant case it is clear that the AON fell short of what was required by the Act of 2005. The Respondent was at all times aware that a private diagnosis of DR would not be sufficient for services appropriate to his needs to be made available. What was required was a diagnosis from the Respondent.

25. It is correct that the Applicants did not state that reliance was being placed on the provisions of s. 9 (8) of the Act of 2005 for new/re-assessment. It was always clear to the Respondent what was required. By taking the position it did the Respondent was, in effect, ignoring the Order which it had consented to namely that the AON was "to include any necessary assessments/re-assessments …". The Respondent was also relying on the SOP in not giving a diagnosis. That part of the SOP has been found to be unlawful.

Conclusion

26. The Applicants are entitled to succeed. It should not have taken three sets of Judicial Review proceedings to reach this point. It is hard to avoid the conclusion that the resources spent in dealing with these proceedings and the earlier two might have been better applied.

27. Any submissions on costs (not more than 1,500 words) should be filed on or before 7 December. I will list the matter for final orders on 14 December 2022.