AN ARD-CHÚIRT
THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 187

[2023 No. 216 JR]

BETWEEN:

L.A.

APPLICANT

AND

THE CHIEF APPEALS OFFICER

THE SOCIAL WELFARE APPEALS OFFICE

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 28th day of March 2024.

1. Sections 300(1) and (2) of the Social Welfare Consolidation Act 2005 (the 2005 Act) empower deciding officers to decide "every question arising under…" provisions in that Act which govern eligibility of claimants to receive benefits and allowances.

2. Part 10 of the 2005 Act contains provisions which permit revision of decisions by deciding officers and appeals officers and give claimants rights of appeal from adverse decisions by these decision-makers.

3. Section 317(1)(a) of the 2005 Act provides that: "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".

4. Section 327 of the 2005 Act provides that: "Any person who is dissatisfied with – (a) the decision of an appeals officer, or (b) the revised decision of the Chief Appeals

Officer, may appeal that decision or revised decision, as the case may be, to the High Court on any question of law."

5. Section 318 of the 2005 Act confers power on the Chief Appeals Officer to revise a decision of an appeals officer "…at any time, 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."

6. LA's application for judicial review challenges validity of a decision of a social welfare appeals officer on 21 December 2022 to refuse to revise an earlier decision by that appeals officer which was adverse to her. This earlier decision rejected her application for disability allowance under Chapter 10 of Part 7 of the 2005 Act.

7. A deciding officer decided that LA had not proved that she was eligible to receive this allowance. She appealed against this decision to an appeals officer. The appeals officer examined her application afresh and decided that she had not proved that she was eligible. The appeals officer decided that LA's weekly means at the time of her application were above the relevant threshold. He also decided that the evidence did not demonstrate that LA was "substantially restricted" in undertaking employment "suited to (her) age, experience and qualifications", as required by s.210(1)(b) of the 2005 Act.

8. LA applied for a revision of this decision of the appeals officer under s.317(1)(a) of the 2005 Act. She submitted an affidavit which provided further information relating to both her means and her claim that she was unable to work as a result of health issues.

9. The question before the appeals officer was whether, in the light of this new material, his previous decision that LA did not satisfy two conditions of eligibility was factually erroneous. The appeals officer decided that this material did not demonstrate that LA's weekly means at the time of her application were below the relevant threshold. He also decided that this further material was insufficient to alter his previous conclusion that LA was not "substantially restricted" in undertaking employment "suited to (her) age, experience and qualifications," as required by s.210(1)(b) of the 2005 Act.

10. LA did not exercise her right to appeal this decision to the High Court on a question of law under s.327 of the 2005 Act. Instead, she applied for judicial review. She claimed that the appeals officer acted unlawfully. She contended that he incorrectly disregarded information relevant to her means at the time of her application. She also claimed that he acted irrationally in deciding that the information relating to her

medical condition and capacity to work did not establish that she met the criteria set out in s.210(1)(b) of the 2005.

11. My conclusions on these issues are as follows:

    (a) The appeals officer erred in law in deciding that material presented in LA's affidavit was not relevant to assessment means mandated by Rule 1(2) of Schedule 3 Part 2 of the 2005 Act.

    (b) The appeals officer did not err in law in determining that his initial decision that LA did not meet the qualifying condition specified in s.210(1)(b) of the 2005 Act was erroneous in light of the further material contained in her affidavit.

12. The respondents raised a preliminary issue. They submitted that I should refuse to entertain this application. They said that LA should ask the Chief Appeals Officer to revise the decision dated 21 December 2022 on grounds that it was "erroneous by reason of some mistake having been made in relation to the law or the facts", as provided for by s.318 of the 2005 Act.

13. Litigants frequently invoke the jurisdiction of the High Court in judicial review to challenge decisions by appeals officers. Their grounds of challenge often raise questions of law which are capable of being decided in appeals under s.327 of the 2005 Act. The issues raised by LA in this application are capable of being decided in a statutory appeal.

14. I asked the respondents whether they were contending that this application should not be entertained because LA should have exercised her statutory right of appeal. They nailed their colours to the mast. They said that LA's first port of call for resolution of her complaint about the decision of the appeals officer was to request a revision under s.318 of the 2005 Act. Their statement of opposition confines their procedural objection to this point.

15. If the respondents are correct, every adverse decision by an appeals officer will be submitted to the Chief Appeals Officer for revision under s.318 of the 2005 Act as a precursor to judicial review proceedings. This additional workload will fall on the Chief Appeals Officer. Claimants who avail of their statutory right of appeal to the High Court on a question of law are not obliged to take this step.

16. The respondents referred to the judgment of Heslin J. in *T v. Minister for Social Protection* [2023] IEHC 763. They argued in that case that an application for judicial

review of a decision of an appeals officer should not be entertained because *T* omitted to avail of revision and appeals options provided by ss. 318 and 327(a) of the 2005 Act. Heslin J. rejected these contentions.

17. The respondents referred to principles on which the High Court may depart from legal precedent: see Clarke J. in *Re Worldport Ireland Ltd (in liquidation)* [2005] IEHC 189 at 14; Parke J. in *Irish Trust Bank v. Central Bank of Ireland* [1976-7] ILRM 50 at 53-54.

18. They asserted that Heslin J. erred in law in concluding that dissatisfied claimants need not ask the Chief Appeals Officer to exercise the power to revise conferred by s.318 of the 2005 Act prior to applying for judicial review of decisions of appeals officers. They said that legal authorities which Heslin J. relied on did not support his conclusion.

19. I agree with the submission of the respondents that the judgment in *LL and DZ v. Chief Appeals Officer* [2021] IEHC 191 does not have a bearing on the issue of whether a claimant must request a revision under s.318 of the 2005 Act.

20. The Chief Appeals Officer has always taken the view that the 2005 Act requires that a person who applies for a benefit or allowance qualify at time of application and not at some later time. The issue in *LL and DZ* was whether this view of the law was correct.

21. If *LL* and *DZ* had referred decisions by appeals officers which applied this view of the law for revision by the Chief Appeals Officer, nothing could be achieved. This Court declined to treat their omission to ask for this revision as a ground for refusing to entertain their applications for judicial review.

22. This reasoning involved no determination on whether the underlying premise that claimants must ordinarily apply to the Chief Appeals Officer for a revision on grounds of error of law as a prelude to an application for judicial review was correct.

23. However, I agree with Heslin J.'s conclusion that omission by a claimant to seek a revision under s.318 of the 2005 Act is not a good reason to refuse to entertain an application for judicial review of a decision of an appeals officer.

24. The argument that LA was obliged to resort to s.318 of the 2005 Act is unsound. Any such requirement is inconsistent with the appeals structure set out in Part 10 of the 2005 Act.

25. Should the High Court permit claimants such as LA to ignore remedies provided by the Oireachtas within the statutory revision and appeals structure set out in Part 10 the 2005 Act?

26. Many legal issues relating to decisions of statutory decision-makers are capable of resolution either by a statutory appeal on a question of law or by availing of jurisdiction of the High Court to review lawfulness. Both of these processes are concerned with legality and not with factual merits. An error of law, whether it is identified in a statutory appeal or on judicial review, may invalidate a decision.

27. Any person who is aggrieved by a decision by a statutory decision-maker may have two potential avenues of redress. The first is any statutory right to seek revision of that decision or statutory right of appeal. The second is to invoke jurisdiction of the High Court to review of that decision. What is the appropriate forum? An incorrect choice of judicial review may be fatal.

28. This point arises more frequently nowadays as a result of recognition that errors of law go to "jurisdiction" of administrative tribunals. This means that if legal error by such a decision-maker is sufficiently serious, the High Court exercising jurisdiction in judicial review may set aside a decision which results from such error and remit the matter for reconsideration.

29. It is understood by the Oireachtas that administrative decision-makers who do not act lawfully are subject to judicial control. The High Court has original jurisdiction to oversee the legality of decisions by these bodies. The High Court exercises this power in judicial review proceedings.

30. The Oireachtas has power to enact legislation which provides for revisions of, or appeals from, decisions of statutory decision-makers. Statute may confer a right of appeal to a court. An appellant may be given a right to a full or partial rehearing or a right of appeal which is confined to questions of law. Powers conferred by statute on appellate bodies may mirror those enjoyed by the High Court exercising jurisdiction in judicial review proceedings.

31. In the context of social welfare, s.327 of the 2005 Act gives the High Court extensive jurisdiction to review decisions of appeals officers: see *M.D. v. Chief Appeals Officer* [2023] IEHC 88 at paras. 53 to 59. Questions of law may relate to findings of fact, adequacy of reasoning, unreasonableness, irrationality or error of law by an appeals officer which would justify intervention.

32. Article 15.2.1 º of the Constitution of Ireland vests in the Oireachtas "the sole and exclusive power of making laws for the State." The High Court, while retaining jurisdiction to grant judicial review, must respect laws enacted by the Oireachtas. This obligation of judicial restraint requires that the High Court insist that aggrieved claimants pursue appeal or review procedures provided by statute where these give a forum and remedies which are as effective as those available in judicial review proceedings.

33. This principle limits scope for claimants to choose judicial review by the High Court as the forum for resolution of disputes relating to legality of decisions of these bodies. If the High Court disregards this principle, the right of the Oireachtas to enact laws providing for such appeals will count for nothing.

34. The general rule which gives effect to this principle was authoritatively stated by O'Higgins C.J. in *The State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381 at 393:

> "The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

35. The following statement of Clarke J. in the Supreme Court in *EMI Records (Ireland) Limited v. Data Protection Commissioner* [2013] 2 I.R. ([2013] IESC 34) 669 at 728-729 paras. [41] and [42] follows from this and other authorities:

> "[41] Thus the overall approach is clear. The default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings.

> The reason for this approach is, as pointed out by Hogan J. in Koczan v. Financial Services Ombudsman [2010] IEHC 407, (Unreported, High Court, Hogan J., 1st November 2010), that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned.
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> [42] However, there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision. As pointed out by Hogan J. in Koczan v. Financial Services Ombudsman [2010] IEHC 407, (Unreported, High Court, Hogan J., 1st November 2010), that may be so because of constitutional difficulties or other circumstances where the body to whom the statutory appeal lies would not have jurisdiction to deal with all the issues. Likewise, there may be cases where, in all the circumstances, the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues such that confining them to an appeal would be in truth depriving them of their entitlement to two hearings."

36. In *EMI records (Ireland) Ltd v. Data Protection Commissioner* Clarke J. also quoted with approval the extract from the judgment of O'Higgins C.J. in *The State (Abenglen Properties Ltd) v. Dublin Corporation* set out in this judgment: see para. [34] at page 725.

37. The main class of cases where an application for judicial review remains appropriate is where a tribunal has failed to provide due process: see *Kocsan v. Financial Services Ombudsman* [2010] IEHC 407 at para. 19. An example might be where the complaint relates to an allegation of breach by an appeals officer of the right to fair procedures. In other cases, for jurisdictional reasons, resort to judicial review may be more appropriate: see *Petrecel v. Minister for Social Protection and others* [2020] IESC 25 per O'Malley J. at para. 109.

38. Similar principles apply in England and Wales: see Lewis on *Judicial Remedies in Public Law* (6th Edition, 2021) at paras. 12.042 to 12.076. One of the rationales advanced for the rule in that jurisdiction is that "…if Parliament directly or indirectly has provided for an appeals procedure, it is not for the court to usurp the functions of the appellate body.": see Lord Donaldson M.R. in *R v. Take-over Panel Ex p. Guinness Plc* [1989] 2 W.L.R. 863 at 886A.

39. The issue of whether an application for judicial review will be appropriate depends on the extent of jurisdiction conferred on any appellate body designated by statute. Does the relevant statute confer jurisdiction on the statutory appellate or review tribunal to deal with the legal issue which is being ventilated in the judicial review? If the answer to that question is "yes," then an appeal should be brought in the manner envisaged by statute.

40. These principles have been applied where a statutory procedure for review of decisions can provide a dissatisfied party with an adequate remedy. Judgments in judicial review proceedings which complained of alleged failures by social welfare appeals officers to provide oral hearings illustrate this: see *LD v. Chief Appeals Officer* [2014] IEHC 641; *FD v. Chief Appeals Officer* [2022] IEHC 454; [2023] IECA 123. These applicants were denied recourse to judicial review to challenge the decisions of the appeals officers.

41. In both of those cases applicants for judicial review advanced tenuous claims that appeals officers had wrongly deprived them of a right to an oral hearing. These claimants did not engage fully with the appeals process. In *LD,* the claimant did not seek an oral hearing. In *FD*, the claimant sought an oral hearing but did not back up her claim by providing any information which could justify such a course.

42. An offer by the Chief Appeals Officer to facilitate the applicant with an oral hearing in the context of revision under s.317(a) was declined by *LD*. *FD* failed to engage with the statutory process.

43. Their appeals to the appeals officers failed on the merits and not because they were deprived of a substantive opportunity to make their case.

44. It followed that they did not lose any procedural right which they were otherwise entitled to as a result of being required to pursue recourse within the social welfare revision regime set out in s.317(1)(a) of the 2005 Act: see *FD v. Chief Appeals Officer* [2023] IECA 123 per Donnelly J. at para. 50.

45. The courts decided that judicial review should not be granted in exercise of discretion (High Court in *LD*) and that an application for judicial review should not be entertained on the merits (Court of Appeal in *FD*) on grounds that s.317(1)(a) of the 2005 Act gave the applicants an adequate remedy. This provision allowed *LD* and *FD* to seek revision of the decisions of appeals officers on grounds that those decisions were "erroneous in the light of new "evidence or new facts which have been brought to his or her notice since the date on which (they were) given."

46. The objective of judicial oversight of administrative decision-making is to correct legal errors of maladministration. No maladministration was established in either of these two cases. The generous ambit of the revision mechanism provided by s.217 the 2005 Act allowed appeals officers to revisit these decisions, if any new material presented by the dissatisfied claimants justified a merits-based reappraisal.

47. The respondents submit that I should apply the same approach as that taken in the judgments in *LD* and *FD* and that there is no difference in principle between requiring that a claimant pursue a revision under s.317 of the 2005 Act and requiring that a claimant pursue a revision under s.318 of that Act.

48. Section 318 of the 2005 Act confers power on the Chief Appeals Officer to revise a decision of an appeals officer "at any time…where it appears…that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts."

49. The power of revision given to an appeals officer by s.317(1)(a) or (b) of the 2005 does not extend to correcting mistakes of fact or law in previous decisions by appeals officers. Section 318 of the 2005 Act reserves this power to the Chief Appeals Officer. Deciding officers are also given power to revise earlier decisions of deciding officers on the same grounds: see s.301(1)(a)(II) of the 2005 Act.

50. These powers obviate any need for judicial intervention where factual or legal errors by deciding officers and appeals officers have led to incorrect decisions. Such mistakes can be corrected.

51. The 2005 Act does not require claimants to request revisions on these grounds as a pre-condition to taking the next steps in the statutory appeals process. These next steps are appeals from deciding officers to appeals officers and appeals from appeals officers to the High Court on a question of law.

52. Many factual and legal errors by appeals officers are amenable to being cured by the Chief Appeals Officer exercising the revision power conferred by s.318 of the 2005 Act.

53. Any revision under s.318 of the 2005 Act is based on consideration of material which was available at the time of the decision which has been found to be defective. If there was a flaw in reasoning relating to findings of fact or inferences from facts or application of the legal rules relating to benefit or assistance which affected outcome, that decision can be revised. This power to revise is exercised by substituting a corrected decision on the question.

54. The Chief Appeals Officer can interfere in fact-finding by an appeals officer if he or she can point to some significant incorrect inference, conclusion of fact or misstatement or misunderstanding of fact which justifies a change in the result. Similarly, the Chief Appeals Officer can act to correct errors of law which justify a change in the result. The Chief Appeals Officer may have insufficient information to take this course.

55. Section 318 of the 2005 Act does not empower the Chief Appeals Officer to remit a decision to an appeals officer for reconsideration. The Oireachtas did not grant the Chief Appeals Officer powers equivalent to those conferred on the High Court in statutory appeals on a question of law or the power of the High Court exercising jurisdiction in judicial review.

56. At the hearing of this application the respondents referred an observation in para. 43. of the judgment of Donnelly J. in *FD v. Chief Appeals Officer* [2023] IECA 123. They claimed that this passage supported the proposition that s.318 of the 2005 Act confers power on the Chief Appeals Officer to remit a matter for rehearing by an appeals officer.

57. The courts which decided *LD* and *FD* did not conclude that dissatisfied claimants who omit to ask for a revision under s.318 of the 2005 Act should be precluded from seeking judicial review. That issue did not require to be decided. Any observations of the Court of Appeal in *FD* relating to the extent of power conferred on the Chief Appeals Officer by s.318 of the 2005 Act were *obiter dicta*.

58. Section 327 of the 2005 Act grants a right of appeal on a question of law directly to the High Court to any claimant who is dissatisfied with the decision of an appeals officer. Dissatisfied claimants have no obligation to seek review by the Chief Appeals Officer under s.318 of the 2005 Act as a preliminary to exercise of that right.

59. The respondents suggested that s.327(a) of the 2005 Act allows a claimant who is dissatisfied by a decision by the Chief Appeals Officer not to revise a decision of an appeals officer to appeal that decision of the Chief Appeals Officer to the High Court on a point of law. This argument relied on s.305 of the 2005 Act which provides that the Minister must designate one of the appeals officers to be the Chief Appeals Officer. They submitted that the reference to "the decision of an appeals officer" in s.327(a) includes a decision of the Chief Appeals Officer not to revise.

60. The legislative history of s.327 of the 2005 Act is relevant. This section is identical to s.271 of the Social Welfare (Consolidation) Act 1993 (the 1993 Act). It was enacted in the knowledge of an observation of Geoghegan J., delivering the judgment of the

Supreme Court in *Castleisland Cattle Breeding Society Ltd v. Minister for Social and Family Affairs* [2004] 4 I.R. 150 ([2004] IESC 40) at 156-157, para. 14., that s.271 of the 1993 Act did not permit an appeal to the High Court on a question of law against a refusal by the Chief Appeals Officer to revise a decision of an appeals officer.

61. Where the Chief Appeals Officer revises a decision of an appeals officer in exercise of power under s.318 of the 2005 Act, the Minister may be dissatisfied with the outcome. The Social Welfare (Miscellaneous Provisions) Act 2010 inserted section 327A into the 2005 Act to provide for this. This provision permits the Minister to appeal to the High Court on a question of law against a decision of the Chief Appeals Officer to revise or to refuse to revise a decision of an appeals officer.

62. Section 320 of the 2005 Act provides that a decision by an appeals officer on a question is conclusive, subject to ss.317, 318 and 327 of that Act. So, if the Chief Appeals Officer does not revise a decision by an appeals officer, that decision remains conclusive unless and until the High Court sets it aside.

63. The statutory right of appeal by a dissatisfied claimant is always against a decision of an appeals officer; not against a decision of the Chief Appeals Officer not to revise that decision: see s.327(a) and (b) of the 2005 Act. Any decision of the Chief Appeals Officer not to revise a decision is irrelevant where the statutory right of appeal is exercised. For an example of how this rule operates in practice see *Meagher v. The Minister for Social Protection* [2015] 2 I.R. 633 ([2015] IESC 4) at 637 para. [4].

64. It follows that the term "appeals officer" in s.327(a) of the 2005 Act is not intended to refer to the Chief Appeals Officer.

65. I have reconsidered a comment made by me in *LL and DZ v. Chief Appeals Officer* [2021] IEHC 191 at para. 14. My suggestion that s.327 of the 2005 Act does not permit an appeal on a question of law from a decision by an appeals officer not to revise an earlier decision was incorrect. These decisions can be appealed using s.327(a) of the 2005 Act.

66. The contention of the respondents that dissatisfied claimants have a self-serving duty to seek a revision by the Chief Appeals Officer under s.318 of the 2005 Act is not consistent with the right of appeal conferred by s.327(a) of that Act. This course would add an extra layer of administrative bureaucracy and delay.

67. As the Oireachtas has chosen not to make recourse to the High Court on an appeal on a point of law contingent on a claimant invoking the revision procedure permitted by s.318 of the 2005 Act, it follows that the High Court is not required to concern itself with whether that claimant has availed of that option as a pre-condition to entertaining an application for judicial review.

68. The scope of the statutory appeal allowed by s.327 of the 2005 Act is also relevant to statutory intent. While this statutory appeal is confined to questions of law, such grounds "…are so many and so various that it virtually means that an erroneous exercise in discretion is nearly always due to an error in point of law": see Lord Denning M.R. in *Re DJMS (a minor)* [1977] All ER 582 at 589e.

69. The High Court may reverse the decision of an appeals officer and substitute its own decision in an appropriate case. While some Irish statutory provisions giving a right of appeal to the High Court on a question of law do not include an express power to remit a matter back to the statutory tribunal whose decision is being appealed, it appears that this further power will be implied in order to give full effect to statutory intention: see, for example, the judgment of McMenamin J. in *Nano Nagle School v. Daly* [2019] 3 I.R. 369 ([2019] IESC 63), pages 417, 418 at para. [112] dealing with an appeal on a question of law under s.90(1) of the Employment Equality Act 1998 to 2011.

70. I consider that s.327(a) of the 2005 Act gives the High Court power to remit decisions for reconsideration by appeals officers. If this is correct, it follows that the statutory appeal on a question of law under s.327(a) of the 2005 Act gives the High Court jurisdiction and power to determine most issues of law which are likely to arise from decisions by appeals officers.

71. It may also follow that Heslin J. erred in concluding that a claimant who is dissatisfied with legality of a decision of an appeals officer may elect to proceed by way of application for judicial review, rather than by statutory appeal under s.327(a) of the 2005 Act. That is the effect of his judgment in *T v. Minister for Social Protection:* see para. 100 of same.

72. In *T v. Minister for Social Protection* Heslin J. held that judgments in *EMI records (Ireland) Ltd v. Data Protection Commissioner* and *Kocsan v. Financial Services Ombudsman* confine the principle that the High Court exercising jurisdiction in judicial review should require that applicants for relief to pursue alternative statutory appeal and review procedures to cases where the statutory appeal procedure allows an appeal which is not confined to a point of law.

73. He relied on a quotation from part of para. 20. of the judgment of Hogan J. in *Koczan*, and he underlined for emphasis an observation made by Hogan J. on a comment by Costello J. in *Dunne v. Minister for Fisheries* [1984] I.R. 230 at 237. The words underlined are: "…a right of statutory appeal from an administrative decision which is not confined to an appeal on a point of law…"

74. The complete quotation by Clarke J. from the judgment of Hogan J. in *Koczan* is to be found at para. [40] of his judgment in *EMI* ([2013] 2 I.R. 699 at 727, 728). It reads as follows:

> "[40] A recent summary of the law in this area can be found in the judgment of Hogan J. in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407, (Unreported, High Court, Hogan J., 1st November 2010). At pp. 11 and 12 of his judgment, the following is said-
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> > '19. There are, doubtless, certain categories of cases where the le-gal argument raised falls properly to be canvassed by means of judicial review rather than by way of a statutory appeal. As indicated in *Square Capital Ltd. v. Financial Services Ombudsman* [2009] IEHC 407, [2010] 2 I.R. 514, an argument directed towards a total lack of subject matter jurisdiction is perhaps one such case. Judicial review might also be appropriate where the complaint relates to the integrity or basic fairness of the decision-maker ought to be afforded an adequate opportunity of defending his or her position in judicial review proceedings which admit of the possibility of cross-examination and oral evidence. There may well be other cases – such as, e.g., those touching on the constitutionality of legislation or the validity of statutory instruments – where the legal issues cannot properly be raised by way of appeal (whether by virtue of the special rule contained in Article 34.3.2º of the Constitution or otherwise) and which must be dealt instead with by means of a declaratory action: cf. the discussion of this issue in the judgment of Kearns J. in *S.M. v. Ireland* [2007] IESC 11, [2007] 3 I.R. 283.
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> > 20. These cases must, however, be regarded as the exception rather than the rule. It is well established that the Oireachtas must be presumed to know the law and the Oireachtas is, of course, well aware of the existence and parameters of the High Court's judicial review jurisdiction. It follows, therefore, that the creation by legislation of a right of statutory appeal from an administrative decision which is not con-fined to an appeal on a point of law generally raises the inference – albeit a rebuttable inference – that the Oireachtas 'must have intended that the court would have powers in addition to those already enjoyed at

> common law' in respect of its judicial review jurisdiction: see Dunne v. Minister for Fisheries [1984] I.R. 230 at p. 237 per Costello J. That in turn suggests that the Oireachtas further intended that the statutory appeal would form the vehicle whereby the entirety of an appellant's arguments could be ventilated in such an appeal without any need to commence a further set of proceedings, at least to the extent that it was procedurally possible to do so: see, e.g., the comments in this regard of Laffoy J. in *Teahan v. Minister for Communications* [2008] IEHC 194, (Unreported, High Court, Laffoy J., 18th June, 2008)'."

75. The *Koczan, Dunne* and *Teahan* cases were concerned with whether appellate jurisdiction conferred by statutes enabled the High Court to resolve legal questions raised by appellants who brought statutory appeals. The answer to that question depended on interpretation of the relevant statutory provisions. This answer was "yes" in each of those cases.

76. These authorities stated nothing which confines the rule that the High Court exercising jurisdiction in judicial review will defer to the power of statutory appellate bodies to determine appeals to cases where statute has conferred on those bodies jurisdiction to determine issues relating to both legality and other merits.

77. In my view, neither Clarke J. nor Hogan J. intended to limit operation of the general rule to cases where the Oireachtas has provided a statutory right of appeal which is not confined to a question of law.

78. Turning to the substantive issues, a decision under s.317(1)(a) of the 2005 Act on whether to revise a previous decision requires assessment by an appeals officer of the correctness if the decision being reviewed "…in the light of new evidence or new facts which have been brought to his or her notice since the date on which…" that decision was given.

79. The expression "where it appears to him or her that the decision was erroneous" in s.317(1)(a) of the 2005 Act means a conclusion by an appeals officer that a decision being reviewed was incorrect because of what any new evidence or new facts establish. This assessment is carried out with reference to material relied on in reaching the original decision. New material may undermine a previous conclusion or inference. It may lead to rejection of evidence which was previously accepted or acceptance of evidence which was previously rejected as insufficient. It may supply proof of a matter which was not sufficiently established at the time of the earlier decision. It may lead to no change of view.

80. By s.209(1) of the 2005 Act "weekly means" for the purposes of Part 3 Chapter 10 dealing with disability allowance are defined as meaning, subject to a qualification which is not relevant to this case "the yearly means divided by 52". Section 209(2) of the 2005 Act provides that means must be "calculated in accordance with the Rules contained in Part 2 of Schedule 3."

81. Disability allowance is payable to a person who fulfils criteria set out in s.210(1) of the 2005 Act which provides that it is payable "…to a person- (a) who has attained the age of 16 years but has not attained pensionable age, (b) who is by reason of a specified disability substantially restricted in undertaking employment (in this Chapter referred to as 'suitable employment') of a kind which, if the person was not suffering from that disability, would be suited to that person's age, experience and qualifications, whether or not the person is availing of a service for the training of disabled persons under section 68 of the Health Act 1970, (ba)…, the reason for whose substantial restriction in undertaking suitable employment is as a direct result of the person concerned being incapable of work and for no other reason, (bb) who, were it not for the substantial restriction, would be available to work in insurable employment or insurable self-employment, and (c) whose weekly means, subject to subsection (2), do not exceed the amount of disability allowance (including any increases of that allowance) which would be payable to the person under this Chapter if that person had no means."

82. By s.210(8) of the 2005 Act: "The conditions under which a person shall be regarded for the purposes of this section as being substantially restricted in undertaking suitable employment by reason of a specified disability shall be specified by regulations."

83. By article 137(1) of the Social Welfare (Consolidated claims, Payments and control) Regulations 2007 (S.I. 142 of 2007) "...for the purposes of section 210, a person shall be regarded as being substantially restricted in undertaking suitable employment by reason of a specified disability where he or she suffers from an injury, disease, congenital deformity or physical or mental illness which has continued or, in the opinion of a deciding officer or an appeals officer, may reasonably expect to continue for a period of at least 1 year."

84. Schedule 3, Part 1 of the 2005 Act, which deals with rules as to calculation of means, specifies that "'spouse' means each person of a married couple who are living together." Schedule 3 Part 2 specifies what must be taken into account and excluded in calculating means of a person for the purposes of disability allowance. Rule 1(2) specifies that account shall be taken of "…all income in cash and any non-cash benefits that may be prescribed which the person or his or her spouse, civil partner or cohabitant may reasonably expect to receive during the succeeding year,

whether as contributions to the expenses of the household or otherwise, but…," excluding a series of payments which are set out in that provision. The term "income in cash" as used in this rule includes salary and other like receipts which might be paid in cash.

85. This rule envisages assessment of yearly means of a claimant at the time of application for disability allowance based on information which the decision-maker uses to take a view on likely income in cash of the claimant and the claimant's spouse "during the succeeding year." The phrase "may reasonably expect to receive" requires assessment of whether income in cash, such as salary, currently being received will be likely to continue during that succeeding year. If there is solid information which tells the decision-maker that income in cash is likely to stop during that year for any reason, this will affect the assessment.

86. LA was born in 1977. She is originally from Romania. She has lived in Ireland for some years. She applied to the Department of Social Protection for disability allowance on 6 April 2022. This application was submitted to a deciding officer.

87. LA stated on her application form that she was not employed but that her husband was employed. She stated that neither of them was receiving maintenance. She provided no details of her previous work history or level of education and training. She provided no details of her partner's earnings. She stated that her husband and their child lived with her.

88. Her application form included a report from a GP dated 4 April 2022. This disclosed that she was a cleaner. Her GP stated that her medical condition started at the end of June 2021. She had low back pain and was attending a physiotherapist. The GP provided a copy of an MRI report. In March 2022 LA had surgery for breast cancer which she was described as recovering from. She was also awaiting surgery for a right carpal tunnel syndrome. She had a positive Anti-RO and was attending rheumatology at the Mater Hospital and the breast clinic at St James's hospital.

89. Her GP completed an ADL (activities of daily living) grid. LA was assessed as having moderate disability in mental health, sitting and rising, standing and walking and severe disability lifting and carrying, bending kneeling and squatting and climbing stairs and ladders. Her reaching and manual dexterity were normal. Her straight leg raising was restricted on the right and on the left, with pain.

90. This documentation was referred to a medical assessor pursuant to s.300A of the 2005 Act. The medical assessor concluded that LA was suffering from a physical illness which may reasonably be expected to continue for at least a year. The medical

assessor noted that no specialist's reports were provided and that a description of how her conditions affected her daily living was not available. The medical assessor noted the results of the ADL. He thought that "at present a substantial restriction for all categories of work, especially light or sedentary work could not be established." He was not of the opinion that LA was substantially restricted in undertaking employment of a kind which, if she were not suffering from her disability, would be suited to her age, experience and qualifications.

91. The deciding officer asked LA to produce payslips for her husband. These disclosed that he was earning €514 odd gross pay per week. LA's total weekly means were assessed by the deciding officer at €260 odd. These means were derived from her husband's employment income.

92. On 14 June 2022, the deciding officer refused LA's application for disability benefit on medical grounds. His reasons were as follows: "I have examined all the documents provided in support of this application and having weighed up the evidence, including the MA opinion, I have decided that the applicant is not substantially restricted in seeking suitable employment, by reason of a specified disability, which is expected to last for a period of at least one year. Although the medical evidence shows a level of incapacity it does not show substantial restriction which would preclude the person from taking up work or training. Given the person's age there is scope for her to retrain for another occupation."

93. LA appealed this decision on 23 June 2022. Her appeal form appears to have been filled out by her daughter. LA has poor English. LA indicated that she had "applied for help with money" and was rejected because of her husband's income. She complained that he came and went as he pleased and came and went from the house for days and sometimes for a week at a time. She complained that he did not give her money for herself or her daughter. She did not provide any further medical evidence. She stated she was receiving radiotherapy and waiting for surgery for carpal tunnel syndrome. She stated that her health and family problems were affecting her mental health.

94. The appeals officer rejected this appeal for reasons set out in a letter dated 3 October 2022. These reasons included a finding that LA's means at the time of her application for disability allowance exceeded the eligibility limit, taking her husband's salary into account in assessing her means. The appeals officer was not confined to the grounds on which the decision of the deciding officer was based: see s.311(3) of the 2005 Act.

95. The appeals officer gave the following reasons for this decision:

"I have carefully examined all the evidence in this case. It must be emphasised that the question at issue in this appeal relates to the appellant's means and her medical circumstances. Means – I note the appellant wrote in her letter of appeal that her husband does not support her financially. However, she does not dispute that they are a couple or that he is engaged in employment and in the circumstances, she is liable to be assessed with means from his employment. Having carefully examined the assessment of means by the department, I conclude the assessment of means is correct with all statutory deductions provided for, her means at the time she made her application exceed the eligibility limit. As a result, there is no basis upon which this appeal can succeed, in relation to her means.

In respect of her medical circumstances, I note the appellant did not outline the effect of her certified medical conditions on her abilities and activities of daily living, and she did not give any information or evidence about her education or previous work experiences. I note the opinion and certification by her own GP in respect of the expected duration of how long her conditions will continue. The opinion of the medical assessor from the Department is also considered. While it is accepted that the appellant will require ongoing treatment and follow-up after surgery for cancer and other medical issues, the question at issue is whether she is substantially restricted from partaking in suitable work for a continuous period of at least one year. I conclude the appellant has not established that she is substantially restricted from partaking in all types of work for a continuous period of at least one year, with particular reference to lighter and sedentary types of work."

96. On 25 October 2022, the LA applied to the appeals officer to revise his decision of 3 October 2022. She supplied an affidavit in support of this request.

97. This affidavit provided the following further information relating to LA's husband:

"I say first of all that the documents provided included my husband's details as we are still legally married however separated since May 2022. I say that (it) is very difficult for me to address this and in particular to provide instructions in this regard as this is very hurtful for me. Since my surgery and radiotherapy our relationship deteriorated, and my husband has been seeing someone else leaving the house for days or week at the time. When he is coming to the house he sleeps in a different bedroom. We are not a couple since May 2022, and I do not believe this will change although this is very hurtful for me. I say that my husband's means should not be considered as part of the means assessment and should be noted that I have extreme financial difficulty as he is not providing me with any financial support but for €50 to €70 per week as agreed

maintenance for our 17 years daughter. … I do not have any means for food, transport or basic needs expenses and I sometimes get help in this regard from family or friends but not from my husband of whom I am separated from. I have not had the physical and mental burdens I would have engaged in any necessary legal proceedings to address and confirm our separation however past few months have been very difficult for me."

98. This affidavit also provided the following further information about LA's work experience and current medical condition:

> "In respect of my capacity to engage employment I say and believe the nature of my medical condition is speaking for itself. However I say that in terms of education I have finished high school and have no formal education. I did a hairdressing course in Romania. I worked in Romania as a bartender and shop assistant. I say since I came to Ireland I did cleaning work. I say that I have very little English, and cleaning has been the only job I was able to do. Because of current medical condition and treatment I am unable to use my hands and due to cancer treatment I am very tired and weak and can't stand or sit for long period of time. I say that I want to work however I am unable to do so for reasons outlined by my doctors in medical letters provided."

99. Unfortunately, LA omitted to provide any medical report to support the content of her affidavit. She had referred to radiotherapy in her notice of appeal and she provided information about side-effects of this in her affidavit. Her statement that she was unable to use her hands was at odds with her doctor's assessment of her manual dexterity.

100. Claimants who avail of the procedures set out in Part 10 of the 2005 Act have a self-serving duty to engage positively with decision-makers. An application is more likely to succeed where the claimant produces medical evidence which addresses issues in a manner which will enable a decision-maker to give a favourable decision.

101. On 21 December 2022, the appeals officer issued a decision adverse to LA. He declined to revise his decision dated 3 October 2022. The first relevant extract from his reasoning dealt with LA's means and stated as follows:

> "In the first instance it must be emphasised that the question at issue in this appeal relates to the appellant's means and her medical circumstances, at the time of application. Changes of circumstances or events which may have happened after the date of application are not in question and are not before the Appeals Officer in this appeal… It is also noted that the appellant clearly

informed on this affidavit that she is still legally married and she asserts that she and her husband separated since May 2022. The date of application in this case was 6/4/2022 and the appellant's change of circumstances did not occur until after her application. Accordingly, her circumstances at the date of her application must be the basis upon which her application and appeal is decided. In relation to her means the appellant informed that her husband does make a financial contribution, they were still a married couple at the time of application, she does not dispute that they were a couple or that he is engaged in employment and in the circumstances, she is liable to be assessed with means from his employment."

102. The respondents rely on the fact that LA and her husband were living together as a couple when she applied for disability allowance on 6 April 2022. However, Rule 1(2) of Schedule 3 Part 2 of the 2005 Act does not set the date of application in stone for the purposes of calculation of means of a claimant. This provision obliges the decision-maker to take account of "…all income in cash and any non-cash benefits that may be prescribed which the person or his or her spouse, civil partner or cohabitant may reasonably expect to receive during the succeeding year, whether as contributions to the expenses of the household or otherwise…" subject to statutory exceptions. This rule does not require the decision-maker to assume that LA and her husband would continue to live together throughout "the succeeding year."

103. If there is a real prospect that a spouse will cease to live together with a claimant during the "succeeding year," then an issue will arise as to whether "his or her spouse…may reasonably expect to receive" "income in cash" as defined in Schedule 3 Part 2 of the 2005 Act. The salary may continue to be received by the other party to the marriage during that period. However, if the parties to a marriage are no longer living together, the other party ceases to be the claimant's "spouse" as defined in Schedule 3 Part 1 of the 2005 Act.

104. This type of information may be relevant to assessment of means in accordance with Rule 1(2) of Schedule 3 Part 2 of the 2005 Act. For example, a claimant may disclose at the time of an application that cohabitation with a spouse is about to cease. That information can be taken into account in the assessment mandated by Rule 1(2).

105. The information in the notice of appeal had a bearing on that issue. LA's affidavit provided further information which were relevant to that issue. This information was relevant to the state of LA's marriage prior to 6 April 2022 and to deterioration of LA's relationship with her husband and separation after that date.

106. This new information left room for revised finding, based on the fact that the couple were likely to be living apart "during the succeeding year" referred to in rule 1(2). If

so, "income in cash" received by LA's husband during that year would not be received while he was "living together" with her. While he could reasonably expect to continue to receive this salary during that period, he would not cease to be LA's "spouse."

107. I agree with the submission on behalf of LA that the judgment in *Little v. Chief Appeals Officer* [2023] IESC 25 does not preclude consideration of events after the time of an application for assistance where these are relevant to calculation of yearly means mandated by Rule 1(2) of Schedule 3 Part 2 of the 2005 Act. The appeals officer erred in concluding that the fact that LA and her husband ceased to live together after 6 April 2022 could not be considered when calculating LA's means "during the succeeding year".

108. While an applicant for a benefit or allowance must meet qualifying criteria at time of application, evidence of medical findings or of events which take place afterwards may be relevant. Such evidence may show that a medical condition present at the time of application is more severely disabling than was previously perceived by a decision-maker. Such evidence may also show that assumptions which a decision-maker made relating to a claimant's yearly means at that time were incorrect.

109. The second substantive issue to be decided is whether the appeals officer erred in law in his decision not to revise his earlier decision that LA had not established the condition of eligibility set out in s.210(1)(b) of the 2005 Act. The issue which he identified was: "Are the medical conditions for disability satisfied?" He gave the following reasons for his decision:

> "In respect of her medical circumstances, the appellant did not outline the effect of her certified medical conditions on her abilities and activities of daily living, and she did not give any information or evidence about her education or previous work experiences. While she has provided details of her former employments in her affidavit, and some minimal information on how she is affected by her medical conditions, the Appeals Officer again notes the opinion and certification by her own GP in respect of the expected duration of how long her conditions will continue, the fact that specialist reports are not available and the opinion of the medical assessor from the Department. The appeals officer accepts that the appellant will require ongoing treatment and follow-up after surgery for cancer and other medical issues, and that partaking in certain types of work, particularly of a physical nature may not be possible in the interim, the question at issue is whether she is substantially restricted from partaking in suitable work for a continuous period of at least one year. The appeals officer remains of the view that the appellant has not established that she is substantially restricted from partaking in all types of work for a continuous

period of at least one year, with particular reference to lighter and sedentary types of work. Having carefully re-examined all of the evidence in this case, under Section 317 of the Social Welfare Consolidation Act, 2005, the Appeals Officer remains of the view that the decisions in this case in relation to the appellant's means and her medical eligibility should stand."

110. LA claims that the appeals officer disregarded new evidence relating to her medical condition and qualifications which she provided in the affidavit.

111. The appeals officer stated earlier in his decision that changes of medical circumstances which occurred after the date of application could not be considered in the appeal. However, no medical evidence was tendered of any deterioration which increased her level of disability from that which was present at the time of her application for disability benefit. Her affidavit stated that she was receiving radiotherapy, and this made her very tired and weak and that she could not stand or sit for a long period of time.

112. The appeals officer was incorrect in stating that LA had not outlined the effect of her medical conditions on her activities of daily living, or details of her education or previous work experience. LA's affidavit supplied information on these matters. However, the appeals officer also described this information as minimal. That was a fair description of the content of her affidavit.

113. The issue which the appeals officer had to decide was whether LA was "by reason of" her disability "which in the opinion of the appeals officer may reasonably expect to continue for a period of at least one year." "substantially restricted in undertaking employment… of a kind which, if…" she "…was not suffering from that disability, would be suited to (her) age, experience and qualifications, …" He referred to the view of LA's GP and the medical assessor of the likely duration of LA's medical conditions. They both expressed a view that her conditions would persist for longer than one year.

114. What did the appeals officer decide on this issue? His statutory role was to examine any new evidence and see if it persuaded him that his previous conclusion was erroneous. He decided that the additional information provided by LA, when added to the material which was previously considered, did not prove that she was substantially restricted from undertaking light or sedentary types of work by reason of her disability. This conclusion which was based on a re-examination of all of the evidence.

115. This element of the appeals officer's decision was not irrational. It was properly reasoned. It was open to a reasonable decision-maker to reach that conclusion on the basis of the available information. I am not persuaded by arguments advanced that the appeals officer misunderstood the conclusions of the medical assessor or had insufficient regard to aspects of the GP's report or that he was obliged to specifically list out and comment on every point that might be made for and against his conclusion. His reason for his conclusion was clearly stated. LA's difficulty in obtaining suitable employment due to language difficulties was not relevant: see s. 210(1)(ba) of the 2005 Act.

116. The decision by the appeals officer that the part of his decision dated 3 October 2022 relating to s.210(1)(b) of the 2005 Act was not shown to be erroneous in the light of new evidence or new facts was valid. In light of my conclusion on that aspect of this application, what should happen now?

117. A valid decision by an appeals officer that a claimant does not meet any condition set out in s.210(1) of the 2005 Act will not be affected by an invalid determination that such claimant does not meet a different condition specified in that provision. This is because any claimant must satisfy all conditions specified in s.210(1) in order to be eligible to receive disability allowance.

118. This valid determination precludes an order setting aside the appeals officer's decision not to revise his initial decision: see *Murtagh v. An Bord Pleanála* [2023] IEHC 345.

119. However, s.317(a) of the 2005 Act allows LA to ask the appeals officer to revise his decision of 3 October 2022. She will succeed on this point she can produce new facts or new evidence such as medical evidence which persuades an appeals officer that the decision relating to s.210(1)(b) was erroneous.

120. I propose to make a declaration that the appeals officer erred in law in the manner in which he decided the issue relating to LA's means. I also propose to make an order setting aside the appeals officer's conclusion on that issue and remit that discrete matter back for reconsideration in accordance with law.

121. She can also avail of the revision procedure under s.317 of the 2005 Act. This will enable her to put forward new evidence and further facts relating to means and level of disability at the time of her application for disability allowance. New evidence or new facts relating to means, medical conditions, symptoms, treatment and incapacity prior to and after 6 April 2022 may be relevant to those issues.

122. This case will be listed at 10.00 hours on 15 April 2024 to deal with costs and any other issues which arise from this judgment.