



AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000053

Court of Appeal Record No. 2020/155

Circuit Court Record No. 2019/5526

O'Donnell C.J.

Charleton J.

Baker J.

Woulfe J.

Hogan J.

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT 1947

(AS AMENDED) – A CASE STATED FROM THE CIRCUIT COURT TO THE

COURT OF APPEAL

Between/

ELG

(a minor suing by her mother and next friend SG)

Appellants/Applicants

- AND -

Health Service Executive

(No. 2)

Respondent/Respondent

JUDGMENT of Ms. Justice Baker delivered on the 11th day of March, 2022

1. The Disability Act 2005 (“the Act of 2005”) was enacted to enable provision to be made for the assessment of the health and education needs of persons with disabilities and to provide the means by which those needs are to be met consistent with the resources available to Government. It also provided a statutory appeal and judicial enforcement mechanism for the services identified to meet the needs of persons with disabilities.

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.

3. Section 2 of the Act of 2005 defines “disability” narrowly, and sets what must be seen as a high threshold:

“‘disability’, in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment”

4. The question arising in this appeal is whether the minor appellant, ELG, now a 6 year old child, suing by her mother and next friend, SG (“the appellants”) who has been assessed as having health needs falling short of a “disability” within the meaning of the legislation, is nevertheless entitled to avail of the rights of personal enforcement under the legislative scheme.

5. This appeal centres on the interpretation of the gateway provision that enables access to the statutory enforcement mechanism, the “service statement”, provided for in s. 11(2) of the Act of 2005. A service statement identifies the needs of a person, the health and/or educational services to be provided to meet those needs and the timeframe within which they

are to be provided by or on behalf of the HSE (referred to as “the Executive” in the Act of 2005) or an education provider.

The facts of the present appeal

6. ELG is a 6 year old girl and her mother submitted a request for an assessment of her needs to the HSE on 4 October 2017, based on the belief that ELG may have a disability. There was a delay in the furnishing of an assessment report, required under the Act to be done within three months of request, and a complaint was made to the statutory complaints officer. In upholding the appellants’ complaint, the statutory complaints officer recommended that *inter alia* an assessment of needs should be carried out and “should [the child] be entitled to a service statement, it should be issued in conjunction with the final assessment report no later than 4 March 2019.” That recommendation must be seen as doing no more than fixing the time limits for the completion of the assessment process and follow-up reports, were such to be required.

7. An assessment of needs was then carried out for ELG, which concluded that she did not have a “disability” within the meaning of the legislation but did identify that she had certain health and education needs and made recommendations as to certain interventions to which referrals should be made, including to primary care psychology, primary care speech and language therapy and primary care occupational therapy. She is now receiving those services and supports and this appeal concerns therefore a general and technical question concerning the operation of the Act which will have no immediate effect on the provision of those services and supports to her.

8. It is useful to briefly explain here the arguments of the parties: the respondent says that a finding that a person does not have a disability means that he or she is not entitled to avail of the statutory redress mechanisms even where health needs and recommendations regarding suitable interventions are identified in respect of that person, and that the full range

of statutory redress and enforcement mechanisms are available only to a person who has been assessed as having a “disability” within the statutory meaning.

9. The appellants argue that once an assessment of a person identifies health needs and health services then, because of the terms of s. 11(2) of the Act of 2005, that person is entitled to trigger these enforcement mechanisms, and must therefore be provided with the service statement, which is the gateway to the enforcement provisions of the Act.

The statutory framework

10. The Long Title to the Act was relied on in argument and it provides as follows:

“An Act to enable provision to be made for the assessment of health and education needs occasioned to persons with disabilities by their disabilities, to enable Ministers of the Government to make provision, consistent with the resources available to them and their obligations in relation to their allocation, for services to meet those needs, to provide for the preparation of plans by the appropriate Ministers of the Government in relation to the provision of certain of those, and certain other services, to provide for appeals by those persons in relation to the non-provision of those services, to make further and better provision in respect of the use by those persons of public buildings and their employment in the public service and thereby to facilitate generally access by such persons to certain such services and employment and to promote equality and social inclusion and to provide for related matters.”

11. The Long Title thus recites that the Act seeks to promote equality, and social and work inclusion for persons with disability, and the Act provides a structure for assessment of disability and the meeting of needs.

12. As the title and Long Title to the Act recite, it is primarily concerned with persons who suffer from a disability, and the definition of disability is set out above in para. 3.

13. This appeal is concerned with Part 2 of the Act, entitled “Assessment of Need, Service Statements and Redress”. As will be apparent the scheme of the Act provides for a

sequence of steps to be taken, from request for assessment leading in some cases to the provision of a statement that entitles a person to be provided with services.

14. Section 7 provides interpretations of certain terms for the purposes of Part 2, and for that purpose “disability” is further refined:

“(2) In the definition of “disability” in section 2, “substantial restriction” shall be construed for the purposes of this Part as meaning a restriction which—

(a) is permanent or likely to be permanent, results in a significant difficulty in communication, learning or mobility or in significantly disordered cognitive processes, and

(b) gives rise to the need for services to be provided continually to the person whether or not a child or, if the person is a child, to the need for services to be provided early in life to ameliorate the disability.”

An assessment and report

15. Section 9(1) makes provision for a request to be made by or on behalf of a person for an assessment. Request may be made by that person or on his or her behalf by a parent, guardian, person acting *in loco parentis*, or other person with responsibility for that person:

“(1) Where—

(a) a person (“the person”) is of opinion that he or she may have a disability,
or

(b) a specified person (“the person”) is of that opinion in relation to another person and the person considers that by reason of the nature of that other person's disability or age he or she is or is likely to be unable to form such an opinion,

the person may apply to the Executive for an assessment or for an assessment in relation to a specific need or particular service identified by him or her.”

16. An “assessment” is defined at s. 7(1) as:

“[...] an assessment undertaken or arranged by the Executive to determine, in respect of a person with a disability, the health and education needs (if any) occasioned by the disability and the health services or education services (if any) required to meet those needs”

17. Section 9(5) provides that the assessment is to be commenced within three months of receipt of the application or request and “to be completed without undue delay”.

18. The carrying out of the assessment is delegated to “assessment officers” as provided for in ss. 8(1), 8(2), and 8(4), they provide that the assessment officer is to be “independent in the performance of his or her functions.” This is understood to mean that the assessment is “resource blind”, and s. 8(5) provides that the assessment officer carries out the assessment 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.

19. The assessment results in the preparation of a report in writing, an “assessment report”, which is to be furnished to the applicant, the Executive, and, if appropriate, the person making the request for assessment, and the Chief Executive Officer of the Council. The range of recipients or possible recipients shows the level of importance given by the legislation to the assessment report, and that it is not a private matter for an applicant only. The assessment report can, and does in some instances, result in the creation of obligations and rights, and I return later to this point.

20. Section 8(7) makes mandatory provision as to the contents of an assessment report, which is to set out the findings of the assessment officer and his or her determinations in relation to a number of questions as follows:

“(7) A report under subsection (6) (referred to in this Act as “an assessment report”) shall set out the findings of the assessment officer concerned together with determinations in relation to the following—

(a) whether the applicant has a disability,

(b) in case the determination is that the applicant has a disability—

- (i) a statement of the nature and extent of the disability,
- (ii) a statement of the health and education needs (if any) occasioned to the person by the disability,
- (iii) a statement of the services considered appropriate by the person or persons referred to in subsection (2) to meet the needs of the applicant and the period of time ideally required by the person or persons for the provision of those services and the order of such provision,
- (iv) a statement of the period within which a review of the assessment should be carried out.”

21. In the present appeal, as noted above, the assessment report stated that ELG does not have a disability but that she had a need for specified services.

22. Section 11(1) in turn makes provision for the appointment of “liaison officers” where an assessment report is furnished to the Executive and where that assessment report includes a determination that the provision of health services or educational services, or both, are appropriate for the applicant. The liaison officer in turn prepares a statement, a “service statement” in which the services which will be provided to the applicant are specified in accordance with s. 11(2):

“(2) Where an assessment report is furnished to the Executive and the report includes a determination that the provision of health services or education services or both is or are appropriate for the applicant concerned, he or she shall arrange for the preparation by a liaison officer of a statement (in this Act referred to as “a service statement”) specifying the health services or education services or both which will be provided to the applicant by or on behalf of the Executive or an

education service provider, as appropriate, and the period of time within which such services will be provided.”

23. Section 11(7) makes provision for the contents of the service statement:

“(7) Without prejudice to the generality of subsection (2), in preparing a service statement the liaison officer concerned shall have regard to the following—

- (a) the assessment report concerned,
- (b) the eligibility of the applicant for services under the Health Acts 1947 to 2004,
- (c) approved standards and codes of practice (if any) in place in the State in relation to the services identified in the assessment report,
- (d) the practicability of providing the services identified in the assessment report,
- (e) in the case of a service to be provided by or on behalf of the Executive, 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,
- (f) the advice of the Council, in the case of a service provided by an education service provider, in relation to the capacity of the provider to provide the service within the financial resources allocated to it for the relevant financial year.”

24. The Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (SI No. 263 of 2007) (“Regulations of 2007”) made under the Act provided further detail regarding the content of a service statement.

25. 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

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).

26. Section 14(1) makes provision for the making of complaint by or on behalf of a person in regard to a number of matters:

“14.—(1) An applicant may, either by himself or herself or through a person referred to in section 9(2) , make a complaint to the Executive in relation to one or more of the following:

- (a) a determination by the assessment officer concerned that he or she does not have a disability;
- (b) the fact, if it be the case, that the assessment under section 9 was not commenced within the time specified in section 9(5) or was not completed without undue delay;
- (c) the fact, if it be the case, that the assessment under section 9 was not conducted in a manner that conforms to the standards determined by a body referred to in section 10;
- (d) the contents of the service statement provided to the applicant;
- (e) the fact, if it be the case, that the Executive or the education service provider, as the case may be, failed to provide or to fully provide a service specified in the service statement.”

27. This statutory provision was availed of by the mother of ELG when her request for an assessment was not carried out within the prescribed statutory timeframe.

28. Complaints are dealt with by a designated “complaints officers” appointed under s. 15(1) who “shall be independent in the performance of his or her functions” under s. 15(2) and provision is made for a report of the complaints in s. 15(8):

29. Thereafter, s. 18(1) provides that an applicant may appeal a recommendation by a complaints officer to the appeals officer, and also provides that an applicant may appeal to the appeals officer the failure of the Executive to implement to a recommendation made by a complaints officer. Provision is made for the hearing of submissions and evidence from the relevant parties under s. 18(7).

30. Finally, s. 20 provides for an appeal against a determination of an appeals officer only on a point of law to the High Court.

Application to the Circuit Court

31. It is critical to the structure established by the legislation that the ultimate power of enforcement lies by virtue of s. 22(1)(a) in the Circuit Court. This provides that:

“(1)(a) If the Executive or the head of the education service provider concerned fails—

(i) to implement in accordance with its terms a determination of the appeals officer in relation to an appeal under section 18, or

(ii) to give effect to a resolution arrived at under section 19, or

(iii) to implement in full a recommendation of a complaints officer,

within 3 months from the date on which the determination, resolution or recommendation is communicated to him or her or, where the determination, resolution or recommendation specifies a date for the provision of a service, within 3 months from the date specified in the determination, resolution or recommendation for such provision, then, the applicant concerned, a person referred to in section 9(2) or the appeals officer may apply to the Circuit Court on notice to the Executive or the head of the education service provider concerned for an order directing him or

her to implement the determination or recommendation in accordance with its terms or to give effect to the resolution, as the case may be.”

32. The Circuit Court may state a case to the Court of Appeal, as occurred in the present case.

33. The appellants, in accordance with the procedures provided by the legislative scheme, issued an originating notice of motion in the Circuit Court returnable for 14 October 2019, for orders under s. 22 of the Act of 2005 directing/compelling the HSE to implement in full the recommendations of a Disability Complaints Officer, made on 10 January 2019, that:

- i. ELG’s psychology report is provided to the Assessment Officer no later than 28 January 2019 unless there are clinical indications identified during this process that shows an extension of this time period is required;
- ii. ELG’s Final Assessment Report is issued to the Case Manager for preparation of her Service Statement no later than 4 February 2019;
- iii. Should ELG be entitled to a Service Statement, it should be issued in conjunction with the Final Assessment Report no later than 4 March 2019.

34. Following the exchange of affidavits and submissions the parties agreed that the issue reduced to whether ELG was entitled to receive a service statement under s. 11(2), and it was that legal question that led the Circuit Court judge to state a case.

35. This appeal arises from a case stated by Her Honour Judge Linnane to the Court of Appeal from the Circuit Court. The question posed by the case stated was as follows:

“Where an Assessment Report prepared under the Disability Act 2005 concludes that an applicant has no disability, but nonetheless identifies that the applicant has health needs and requires health services, is that applicant entitled under *inter alia* s. 11 of the Disability Act 2005 to a service statement?”

36. The Executive resisted the application on the grounds that an applicant is entitled to a service statement only when there is in fact a finding that the person suffers from a disability within the meaning of the Act. It accepted, however, that the present appeal presented a net legal question of systemic importance.

The Court of Appeal judgment

37. This is the appeal from the order of the Court of Appeal made on 26 April 2021 for the reasons set out in the written judgment of Ní Raifeartaigh J. (with which Costello and Pilkington JJ. concurred) delivered 1 April 2021: [2021] IECA 101. The question posed in the case stated was answered in the negative, that is that under the Disability Act 2005 the applicant was not entitled to a service statement.

38. The Court of Appeal held that as no authority had directly dealt with the question posed by the case stated, the usual principles of statutory interpretation had to be applied. The Court held that s. 11(2) cannot be read as if it were a free-standing provision, as terms relevant to that section such as “assessment report” or “determination” used in earlier sections of the Act had to be an aid to interpretation.

39. The Court of Appeal accepted the contention that the Act of 2005 is a remedial social statute, and therefore should be construed as widely and as liberally as can be done fairly within the constitutional limits of the court’s interpretative role, in accordance with the *dicta* of Clarke C.J. in *J.G.H. v. Residential Institutions Review Committee* [2017] IESC 69, [2018] 3 I.R. 68 at para. 4.5 of his judgment. This was subject, however, to the limit he set out para. 4.2:

“the Court can only adopt an interpretation which can be said fairly to arise on the wording of the legislation itself. To go beyond a meaning which can fairly be attributed would be to impose a liability on the State which it could not properly be said that the Oireachtas intended to accept.”

40. The Court of Appeal concluded that interpreting s. 11(2) of the Act of 2005 as entitling a person who has health needs, but does not have a disability, to a service statement would be outside the constitutional limits of their interpretive role.

41. The Court of Appeal therefore held that, having regard to other provisions of the Act of 2005, s.11(2) cannot be read in isolation and has the effect that a person who has health needs, but does not have a disability, is not entitled to a service statement, even where needs and services are stated to be appropriate for that person in an assessment report, as the clear intention of the Oireachtas was to limit the provision of service statements to those found to have a disability so as to best use the resources available.

The appeal

42. This Court granted leave to appeal by Determination on 21 July 2021 ([2021] IESCDET 84).

43. The grounds of appeal are as follows:

- a. The Court of Appeal erred in its interpretation of s. 11(2) of the Act of 2005 in finding that it did not impose a duty upon the respondent to issue a service statement where a special needs child has been identified by the HSE as requiring services.
- b. The Court of Appeal erred in distinguishing between special needs children who are defined as having a disability and those who are not, where both have been determined to require services but only the former, on its interpretation, are entitled to seek enforcement of the services.
- c. The interpretation of the Act of 2005 by the Court of Appeal excluded the Appellants' arguments on narrow or technical grounds contrary to established Supreme Court *dicta* on the purposive treatment of remedial statutes.

44. At case management, counsel for the appellants clarified that they do not intend to address the definition of disability, that they do not see this as “an equality case” and do not raise constitutional issues.

45. The question before this Court is therefore one of statutory interpretation.

Issues identified

46. The parties helpfully prepared a joint issue paper following case management which further clarifies what is in issue in this appeal.

47. The parties agree that the issue in this appeal is one of statutory interpretation of the Act of 2005 and in particular, s. 11(2), and agree that the Act can be regarded as a remedial social statute.

48. The appellants do not agree that the Act of 2005, and in particular s. 11(2), applies only to those with a disability as defined under the Act, nor do they agree that ELG can be excluded from the provisions of the Act by reason of the assessment that she does not have a disability. The appellants say that they do not challenge the constitutionality of the Act of 2005 *per se*, rather, they wish to argue that this Court should give a constitutional interpretation to the Act.

49. The submissions may usefully be broken down into three subheads as follows: the interpretative process, the approach to a remedial statute and constitutional interpretation.

First submission: the interpretative process

50. The dispute between the parties centres primarily on the interplay between ss. 8(7) and 11(2) of the Act of 2005. The appellants contend that s. 11(2) must be seen to govern the entitlement to a service statement, and the respondent argues that s. 11(2) cannot be read in isolation from s. 8(7), such that, unless an assessment officer finds that an applicant has a disability, no obligation arises to provide a service statement.

51. The appellants submit that the Court of Appeal erred in concluding that there must be a link between having access to the statutory appeal mechanism and a finding that a person

has a disability. Counsel argues that a person is entitled to a service statement once an assessment report specifies that the provision of health or other services is appropriate to that person's needs, and that the entitlement is not linked to or limited to a finding of disability. It is argued that ELG clearly needs certain services and has been assessed as having these needs, and that a proper reading of the legislation means that she must have the statutory redress and enforcement mechanisms available when those needs are not met.

52. It is argued that s. 8(7) does not contain the qualifying requirements, but deals rather with the content of an assessment report once it is determined that an applicant has a disability. The appellants say that such a reading is consistent with art. 17 of the Regulations of 2007 which states that the Executive shall arrange for the preparation of a service statement by a liaison officer *in accordance* with ss. 11(1) and 11(2), and the link to the service statement is made with regard to s. 11(2) but without reference to s. 8(7).

53. The respondent says that the appeal can be dealt with on a plain reading of s. 11(2) in the context of Part 2 of the Act of 2005. Section 5 of the Interpretation Act 2005 sets out the criteria for going beyond such a reading, but these criteria do not arise.

54. The respondent relies on, *inter alia*, *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317 and *Bookfinders v. Revenue Commissioners* [2020] IESC 60 as authorities for the proposition that a statute should be examined as a whole in order to ascertain its purpose.

55. The respondent accepts that if the Court approaches the interpretation of the provisions of Part 2 of the Act of 2005 in a purposive manner it can do so on the basis that it is a remedial statute. However, the respondent says that the purpose of the statutory mechanism is to address the needs of persons with a disability, as defined in the Act of 2005.

56. If a purposive reading is taken, the respondent submits that the purpose of the Oireachtas was to enact a process that would identify citizens with a disability, identify the extent of their needs in a resource blind manner, identify within the limits of the resources

the services that can be delivered, and to afford to persons with a disability an enforceable right to delivery of those identified services. The purpose of the Act of 2005 is not to advance the interests of those who suffer from a “substantial restriction” that falls short of disability.

57. The respondent agrees with the analysis of the Court of Appeal at para. 47 of that Court’s judgment that if the Oireachtas wished to extend the redress mechanism to all children with needs, it would have used explicit language to do this. Such an approach would have incurred greater expenditure and would have been made clear.

Second submission: the approach to a remedial statute

58. Both parties agree that the Act of 2005 is a remedial social statute, and the correct interpretation requires a consideration of the purpose of the legislation and the category of persons to whom it is directed.

59. The appellants argue that without recourse to the statutory mechanism children such as ELG, who have identified needs, will be unable to access an appropriate appeal process. The approach for which the appellants contend is that a broad and not overly technical or narrow construction should be adopted which facilitates the conferring of a benefit, in the light of that described by Clarke C.J. in *J.G.H. v. Residential Institutions Review Committee* where he stated that the Oireachtas:

“having decided it is appropriate to apply public funds to compensate a particular category of persons, did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation.”

60. The respondent says that although the Act of 2005 is a remedial statute, there are limits on the power of a court as held in *J.G.H. v. Residential Institutions Review Committee*, set out *supra* at para. 39.

Third submission: constitutional interpretation

61. The appellants also submit that the Act of 2005 must be read in a constitutional manner such that, if two interpretations of a statute are reasonably open to a court, and one such interpretation is constitutional and the other is not, then the court should adopt the constitutional interpretation. The argument is that equality of treatment is the only safe constitutional construction.

62. The appellants state that ELG should not be treated differently to others in a similar position, and that this argument can be made by analogy with the judgment of Dunne J. in *McDonagh v. Chief Appeals Officer* [2021] IESC 33. The appellants say in that case this Court addressed the lawfulness of the exclusion of a category of social welfare claimants from utilising the appeals process under the relevant statute. The appellants submit that these proceedings relate to a similar issue as judicial review would present insurmountable obstacles as a remedy for a child such as ELG. The appellants quote from the judgment of Dunne J. in *McDonagh v. Chief Appeals Officer* (at para. 76):

“Why would one class of claimant be treated less favourably than another? There is no explanation in the Act for such a difference in treatment and there is no apparent justification for such a difference in treatment.”

Dunne J. held that:

“Obviously if there was such a difference in treatment there could be a concern as to the constitutionality of the legislation but obviously such a concern would only arise if the view of the respondents that a decision not to revise a decision is not a decision which can be appealed.”

63. In reliance on *McDonagh v. Chief Appeals Officer*, the appellants submit that the Court must presume that the Oireachtas intended not to treat a certain class of claimants less favourably than another without apparent justification.

64. The respondent contends that there is nothing to prevent the Oireachtas from limiting access to a scheme, provided this is done within constitutional bounds *per J.G.H. v. Residential Institutions Review Committee*. The respondent also says that the reliance on the judgment of this Court in *McDonagh v. Chief Appeals Officer* is misconceived, as in that case there was an absence of relevant definitions, whereas the Act of 2005 is replete with definitions specific to the assessment of needs process.

65. The respondent submits that the appellants' arguments on the requirement to apply a constitutional construction of the Act of 2005 amount to a collateral attack on the constitutionality of the Act and that such argument was not raised in the Court of Appeal. The respondent says that such an approach is flawed as there is no constitutional challenge to the legislation, the State is not a party to the proceedings, the respondent is not a proper *legitimus contradictor* to such a challenge, that the nature of the underlying proceedings render it a "poor vehicle for a consideration of broader constitutional issues", and the nature of the challenge is unclear.

66. The respondent says that there was a deliberate choice by the Oireachtas to apply a higher threshold for disability in the Act of 2005, which would be undermined by the appellants' interpretation, and the benefits intended to be delivered to those persons with a disability would likely be opened to a far broader cohort of applicants with a need for a health service.

Discussion

67. As noted above, the Act of 2005 provides a structure within which a person can request an assessment as to whether he or she has a disability, and thereafter certain other processes are engaged. As will be apparent from the sequence described above, the Act provides a series of stepping stones, from a request for an assessment through the preparation of an assessment report and thereafter a service statement, each step to be performed by the persons identified in the legislation.

68. The process under the Act of 2005 starts with an application by a person, or one made on his or her behalf, for the carrying out of an assessment. The application is for an “assessment”, which itself is defined in s. 7 as a process to determine the health and education needs occasioned by a disability and the services required to meet those needs. The definition is recited at para. 16 above and on a plain reading the request is for an assessment of needs and the services to meet those needs “in respect of a person with a disability”.

Definition provisions in a statute

69. The Act of 2005 contains a short definition section at s. 2, and thereafter specific definition sections for the purposes of Part 2, 3, 4 and 5 of the Act. This appeal is concerned with Part 2, and the relevant interpretation section is s. 7 which is expressed to apply to Part 2 only.

70. Dodd, *Statutory Interpretation* (Tottel Publishing, 1st ed., 2008) at para. 10.74 suggests that the purpose of a definition provision is to allow for precision and to show the “exact” intention of the Oireachtas. Section 20 of the Interpretation Act 2005 provides that where an enactment contains a definition or other interpretation provision “the provision shall be read as being applicable” except where the contrary intention appears in the enactment itself or in a parent Act.

71. Thus the Oireachtas anticipates that the inclusion of an interpretative or definition provision in an Act may restrict or modify the ordinary meaning of a word when used in an Act or in that part of the Act to which the definition applies. It was precisely the absence of a definition of “decision” that led this Court in *McDonagh v. Chief Appeals Officer* to conclude that an interpretation should be given to that word so as to include the decision which the applicant there sought to appeal.

72. The definition is therefore not a superfluous or unnecessary element of the Act but makes “assessment” a specific term of art for the purposes of the statutory scheme.

73. Thus the starting point on a literal reading of the Act is that it permits an application to be made for an assessment of needs and services by or on behalf of a person with a disability. But the legislation also envisages circumstances where a request for an assessment is made by or on behalf of a person where a determination that the person has a disability has not yet been made.

74. Section 9 deals with that scenario, and envisages an application for an assessment but only by someone who himself or herself is of the opinion that he or she may have a disability, or by a person on his or her behalf when that person is unlikely to be able to form such an opinion by reason of age or the nature of his or her disability. That is the gateway in Part 2 of the Act and there will likely be persons who make an application for an assessment who are found not to have a disability within the meaning of the Act. Thus the legislation provides for the making of an “assessment report” under s. 8 and the first thing to be decided in such a report is whether the applicant has a disability.

75. The application form whilst it does not expressly ask whether the applicant asserts that the relevant person has a disability, does ask questions such as: “What are your concerns about the child/young person?” and “Are there specific services that you feel are necessary to address these concerns?” There is also a question about whether they were advised to apply by a healthcare professional. The answer, and how the process is to evolve, requires an assessment of whether a disability exists.

76. That conclusion is available on a reading of the legislation which takes into account first, the definition section, second, the clear terms of s. 9 which identifies the persons with standing to seek an assessment, and third, s. 8(7) which identifies the contents of a report of such assessment.

77. On that reading therefore, the Act envisages that a report of an assessment must first ascertain whether a person seeking an assessment does in fact have a disability within the

meaning of the Act. That this must be done is clear by reason of the fact that the provisions of s. 8(7) are clearly mandatory.

78. This analysis of the first stage of the process is consistent with the Long Title to the Act which explains its aim as “to enable provision to be made for the assessment of health and education needs occasioned to persons with disabilities by their disabilities”. I will return later to analyse the Long Title, but for the present merely note that health and education needs are there described as those occasioned by a disability.

79. This reading is also consistent with the fact that the Act contains definition of the relevant terms used in Part 2, which therefore cannot be read as if an “assessment” is meant in the general sense in which that word is used in ordinary language, but is confined to an assessment of the needs of and services required by a person with a disability.

80. This reading is also consistent with s. 8(7)(b) which provides for the contents of the assessment report. The definition section also makes the term “assessment report” a term of art for the purposes of Part 2, and the report is to contain details of the disability, the needs of that person occasioned by that disability, and the services deemed appropriate to meet those needs. It is also important, for the purposes of understanding the place of the assessment report in the scheme of the Act, that s. 8(7)(b) is prefaced by the proviso that the statement as to the needs of, and services required by, a person are to be identified only “in case the determination is that the applicant has a disability”.

81. Once a person who has applied for an assessment has satisfied the assessment officer that he or she has a disability, then the assessment report will identify the needs occasioned by the disability and the services required to meet those needs.

82. Therefore the requirements of the Act take the form of a causal conditional: if a person meets the threshold test of having a disability within the meaning of Part 2, then an assessment report will be prepared identifying the needs and the services required to meet those needs. It is limited to these circumstances, and s. 8(7) and the definition section do

not provide for the preparation of an assessment report other than for the identification of the needs of, and services required by, a person with a disability, as defined by the Act.

83. It is however s. 11(2) that has formed the basis of the argument made by the appellants because the report prepared at the request of the mother of ELG came to a conclusion that she did not have a disability within the meaning of the Act, but thereafter went on to identify three types of services that were regarded as appropriate to a number of needs falling short of disability that had been highlighted by the assessment officer.

84. Counsel for the appellants argue that the report prepared at the request of ELG's mother did identify certain needs and services appropriate for her, and that therefore the report prepared at her request must be understood as containing a statement of her needs, of the services appropriate to meet those needs, and the timeframe within which these were to be provided.

85. I cannot agree that that is a correct literal reading of s. 11(2). An assessment report in the technical sense in which this is meant for the purposes of Part 2 of the Act is a report of the assessment of a person to first ascertain whether that person has a disability, and which sets out in detail the needs occasioned by *that* disability and the services required to meet those needs. The report carried out by the assessment officer on ELG shows that she failed at the first hurdle, that she was found not to have a disability within the meaning of the Act and was therefore not entitled to a statement of the nature and extent of the disability, of the health and education needs (if any) occasioned by the disability, and of the services considered appropriate to meet the needs. This is what is required to be set out in a "service statement", and only a person who has a disability can ask that the next stage of the process be performed.

86. I take this view again by reason of the definition of "assessment" in the Act, and because s. 8(7) in its clear terms envisages that a statement of needs and the services required to meet those needs is to be furnished in respect only of those persons found to have a

disability. That conclusion is borne out not just by the clear terms of s. 8(7)(b) but also by the definition of “assessment” in the earlier s. 7.

87. The Oireachtas made provision in the Act for the making of a finding as to whether a person had a disability, and in the clear terms of the Act only those persons could be entitled to move to the next stage of the process, and the legislation did not envisage self-certification by or on behalf of a person of the existence of the disability as understood in this legislation.

88. It is in my view relevant that s. 8(7) provides for “findings” and “determinations” in both cases in the plural, and that s. 8(7) envisages a determination being made as to whether an applicant has a disability or not.

89. Counsel for the appellants argues that s. 11(2) must be read to mean that, as the report did contain recommendations a service statement must inexorably follow by reason of the statutory entitlement and the mandatory nature of s. 11(2).

90. I do not agree with this submission because on a plain reading of s. 11(2), while an assessment report was furnished in response to the request, and while that assessment report did contain, as it was required to under s. 8(7), a determination of whether ELG did have a disability, the conclusion was that she did not. Therefore, while the report did contain recommendations regarding health and service needs, those recommendations did not amount to a “determination” within the meaning of s. 8(7). As noted above s. 8(7) makes reference to the contents of an assessment report and defines these in the plural as “determinations”, being conclusions as to the existence or not of a disability and thereafter in the case of a person found to have a disability, “determinations” or statements as to the needs of, and services to be provided to, that person. There could not have been a determination in this second sense and while an assessment report was furnished in respect of ELG those elements of the report that made recommendations regarding how her specific identified needs were to be met were not “determinations”, nor indeed “statements” to use the statutory language, and therefore could not be said to have amounted to a conclusion

within the meaning of the statutory scheme that ELG is entitled to the preparation of a service statement.

91. I come to this conclusion because of the definition section in Part 2 of the Act and in particular the definition of “assessment” and “assessment report”, both of which are linked to the assessment of the needs of, and services required by, a person with a disability, and are linked to s. 8. Section 8(7) envisages the preparation of a report which first determines whether an applicant has met the gateway provision of having a disability, and thereafter, once that hurdle is crossed, the identification of the needs of and services appropriate for that person. The report prepared with regard to ELG found that she did not meet the gateway test.

92. Furthermore, and this argument was central to oral argument on the appeal, I agree with the approach of the Court of Appeal that it is not appropriate to read s. 11(2) as if it were a wholly standalone provision and where the phraseology used is not linked to, or to be seen as similar to, that used in the remainder of Part 2.

93. The requirement that a statute be read as a whole is well established and needs little analysis at this point.

94. It was put eloquently by Black J. in *The People (Attorney General) v. Kennedy* [1946] I.R. 517 at p. 536:

“A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented. If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of *eiusdem generis* and *noscitur a sociis* utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone,

has a clear meaning, must be given a quite different meaning when viewed in the light of its context.”

95. In the most recent decision of this Court concerning the interpretation of statutes O’Donnell J. (as he then was) in *Bookfinders v. Revenue Commissioners* noted that it was never correct to approach the interpretation of a statute “as if the words were written on glass, without any context or background” (at para. 52). Walsh J. in *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* stated the broad proposition as follows:

“Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or ambiguous.”

96. More recently Charleton J. in *O’Sullivan v. Ireland* [2019] IESC 33, [2020] 1 I.R. 413 (at p. 443) made the following observation which is clearly on point:

“Construction of a section of a statute should take place within the context of all other provisions of the legislation that bear on the section under consideration and against the background of the purpose for which a provision was enacted.”

97. I will not deal here with the purpose of this legislation but merely comment that s. 11(2) is found within Part 2 of the Act of 2005 which provides for the carrying out of assessments and the preparation of reports and service statements, and the correct approach to the interpretation of s. 11(2) is to interpret the words in that section by reference to the use of those words in other parts of the Act, or more particularly of Part 2 in which they are found, and also in the light of the definition section specifically referable to that Part in s. 7.

98. The importance of context was emphasised too by Henchy J. in *Dillon v. Minister for Post and Telegraphs* (unreported, Supreme Court, Henchy J. 3 June 1981). In that case the question was whether Mr. Dillon’s election leaflet (which described politicians as “dishonest”) was “grossly offensive” within the meaning of the Inland Post Warrant Act 1939. Henchy J. stressed that the words could not be simply read in isolation, but rather must be read in the context of the rest of the adjoining statutory language:

“But the embargo is not simply against the words of a grossly offensive character. The embargo is against ‘any words, marks, or designs of an indecent, obscene or grossly offensive character’. That assemblage of words gives the words a limited and special meaning to the expression ‘grossly offensive character.’ [...]

Applying the maxim *noscitur a sociis*, which means that a word or expression is known from its companions, the expression "grossly offensive character" must be held to be infected in this context with something akin to the taint of indecency or obscenity. Much of what might be comprehended by the expression if it stood alone is excluded by its juxtaposition with the words "indecent" and "obscene". This means that the Minister may not reject a passage as disqualified for free circulation through the post because it is apt to be thought displeasing or distasteful. To merit rejection it must be grossly offensive in the sense of being obnoxious or abhorrent in a way that brings it close to the realm of indecency or obscenity. The sentence objected to by the Minister, while many people would consider it to be denigratory of today's politicians, is far from being of a "grossly offensive character" in the special sense in which that expression is used in the Act.”

99. Thus, on a contextual reading of s. 11(2) the word “determination” must, in the context of s. 8(7) where it also appears, refer not to findings, conclusions, or decisions in the broad sense, but rather determinations in the sense in which that is meant in s. 8(7), that is to say, a determination as to disability, and thereafter, if a disability is found, as to the needs occasioned by that disability and the services to be provided to deal with those needs.

100. Again, by reference to s. 11(2) the purpose of the assessment report is *inter alia* to determine once a person has been found to have a disability the services “appropriate” to meet the needs of that person, and that word is found in s. 8(7)(b)(iii). That precise language is mirrored in s. 11(2) by reference to the conclusion that certain services are “appropriate” to a person.

101. It would in my view be wrong in the light of the principles of statutory interpretation explained above for this Court to come to the conclusion that the Oireachtas intended in s. 11(2) to provide for a service statement in any case where a conclusion is reached in the assessment report that certain services are suitable or appropriate for a person, when the language in s. 11(2), when read in conjunction with that in s. 7 and s. 8(7), is to be read in the more narrow or constrained sense.

102. It is also to be noted that the definition of “assessment report” and of “assessment” are framed in mandatory terms:

“Assessment report shall be construed in accordance with s. 8, and “assessment” means an assessment undertaken or arranged by the Executive to determine, in respect of a person with disability, the health and education needs (if any) occasioned by the disability and the health services or education services (if any) required to meet those needs.”

103. It is thus neither appropriate nor necessary to depart from those definitions in construing ss. 8(7) and 11(2). The contents of an assessment report are identified expressly and in mandatory terms as being those provided in s. 8. Further, the word “assessment” does not have a plain meaning but in this context rather bears the more narrow technical meaning applicable to Part 2, namely an assessment to determine in respect of a person with disability the needs of and services to be provided to that person. An “assessment” in that more narrow sense is not to be given meaning divorced from the statutory context, but is to be linked to an assessment of needs and services required by person with disability. The context and language of Part 2 of the Act of 2005 clearly limits the word “assessment” to those specific needs and service arising from a disability.

104. If a canon of construction is required then the appropriate one it seems to me should be *expressio unius est exclusio alterius*, i.e. that the definition of “assessment” and of “assessment report” excludes the construction for which the appellant contends.

The Long Title

105. The Long Title of an Act is regarded as a proclamation of its purpose: see Fennelly J. in *Sheedy v. The Information Commissioner* [2005] 2 I.L.R.M. 375. Insofar as the purpose of the present legislation the Long Title does offer a useful recital of those purposes. In *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General Walsh* J. considered that the interpretative process of having regard to the entire of an enactment must include regard being had to the Long Title.

106. But like all recitals, the Long Title is an expression of purpose and not, as in the present case, a creation of rights and structures to enforce those rights. It may be an aid to interpretation, but it may not always be the case that an interpretative aid is required: Henchy J. in *Minister for Industry and Commerce v. Hales* [1967] I.R. 50. The Long Title may not be used to modify the clear statutory language: in the words of Griffin J. in *The People (Director of Public Prosecutions) v. Quilligan* [1986] I.R. 495 at 519, the Long Title “cannot be used to modify or limit the interpretation of plain and unambiguous language.”

Conclusion on Long title

107. I am of the view that the provisions of ss. 8(7) and 11(2) do not admit of an ambiguity, and that is especially so when one reads the two subsections in conformity with the definitions that govern their meaning. However, and insofar as a purposive approach is required, the Long Title to the Act expresses its purpose as being to enable provision to be made for an assessment of needs occasioned to persons with disabilities by their disabilities, and for services to meet those needs, and to provide appeals by persons in relation to “those” needs. I cannot accept the argument made by counsel for the appellants that the reference to “those services” in the Long Title must be read so broadly as to inform the interpretation of s. 11(2). ELG was assessed not to have a disability and while certain services and interventions were identified as being required, this does not mean that the Long Title may afford this broad interpretation of s. 11(2), in that the Long Title throughout uses the

expression “those persons” or “those” in each case linked back to the needs occasioned to persons with disabilities by their disabilities. “Services” is not to be seen in isolation from that necessary link made in the Long Title.

108. Quite apart then from the starting point that the Long Title may not be used to assist in an interpretation which is inconsistent with the plain words of a statute, the Long Title does not afford the reading for which the appellants contend.

Purposive approach in the interpretative process

109. The first principle of statutory interpretation is that, insofar as may be, a court is to interpret a section in the light of its plain or ordinary meaning, that is by not giving any special or technical meaning or sense to a provision. If ambiguity is found, or if as discussed above, if certain words are defined in an Act or some part of an Act, those words become words of art or technical words for the purposes of the legislation. The function of an interpretative or definition section is to add clarity, and sometimes to constrain the interpretation within a defined parameter.

110. Again, as well established in the authorities there may be circumstances where a reading of legislation reveals an ambiguity. This is what was contented for in *Bookfinders v. Revenue Commissioners*. The parties are agreed that in the event an ambiguity arises from a literal interpretation or a plain reading of the words in a section that the court is entitled to take a purposive approach, and I do not therefore need to spend much time in this judgment in considerations of the rationale that supports the purposive approach to legislation. The parties are also agreed that the legislation is to be read as if it were a remedial social statute and counsel for the appellants argues that a reading of s. 11(2), whether read in conjunction with or wholly separate from s. 8(7), must look at the purpose of the legislation as a whole which he argues is to offer support to, and enforcement mechanisms for, a person with disability so that that person may properly access services that meet their needs.

111. There can be no doubt in the light of the Long Title of the Act of 2005 that this legislation was enacted to offer additional support for, and to provide for the first time enforcement mechanisms designed to assist, persons with disability in the accessing of public services to meet the needs occasioned by that disability. The legislation had a particular social function and provided a mandatory enforcement mechanism, even where the provision of those services involved a cost to the Exchequer.

112. The Court of Appeal took the view at para. 27 of the judgment of Ní Raifeartaigh J. that, had the Oireachtas wished to extend the redress mechanism to all persons with need, it would have said so expressly, in part because such a provision would clearly have involved expenditure at a perhaps significant level, but also because that might have meant a diversion of resources from persons found to have a disability to a more general cohort of persons with needs falling short of disability.

113. I agree with that observation and, as noted by the Court of Appeal, the legislation does not so provide. In my view no ambiguity exists such as to entitle this Court now to conclude that such an extensive and broad extension of the redress scheme was intended by the Oireachtas in the enactment of s. 11(2).

114. I do not agree that the recent judgment of this Court in *McDonagh v. Chief Appeals Officer* offers an alternative approach. The problem there identified was that the statute did not define the term “decision”, and the Court concluded that the remedial purpose of the Act could be called in aid and led to the conclusion in the light of the scheme of the Act that different classes of applicant were to be treated in a similar way.

115. I cannot agree, by reason of the view I take that there is no ambiguity in s. 11(2), when it is read in the definition section in Part 2 and in the context of the Act as a whole, that s. 11(2) must be read so as to apply to a person who has been found not to have a disability. This in my view is not an “overly rigorous, technical and narrow” interpretation, but rather in my view is one supported by the general purpose of the Act as recited in the

Long Title and the general scheme of the Act which provides for a series of steps to be taken by a person to first obtain a conclusion as to whether he or she has a disability, and if disability is found to obtain an independent and “resource blind” assessment of the needs occasioned by that disability and the services required to meet those needs.

116. I do not therefore consider that, while the process in regard to ELG did result in a conclusion that she had certain needs and that certain services ought to be provided to her, she was therefore to be treated as part of the cohort of persons in respect of whom an assessment report came to a conclusion that a disability existed and that the statutory redress scheme was thereby triggered.

117. The conclusion which the appellants invite is one that is available only if s. 11(2) can be read in isolation both from s. 8(7)(b) and the definition in s. 7. That approach to statutory interpretation is not one supported by the authorities, and indeed even were one to approach s. 11(2) in a flexible or purposive way the conclusion must still be that the statutory redress and enforcement mechanism was intended to benefit those with a disability because the Oireachtas considered that the disability was such that additional and further supports were required to assist that person in having a more complete life and playing a more full role in society generally. A purposive approach in the context of a remedial social statute cannot mean drawing a conclusion that is plainly contrary to the legislation.

118. In the course of argument a question was raised of counsel as to whether the conclusions in the report carried out on ELG that she did have certain needs and would benefit from certain services was one made by the assessment officer in excess of his or her power. The answer provided by counsel for the respondent seems to me to be correct: the assessment officer has an obligation, arising under general administrative law principles, to provide reasons for a conclusion, that the reasons were given in the context of the conclusion (repeated twice in the report) that ELG did not have a disability, but that while she had

certain health needs for which services were appropriate, these were identified for the purpose of giving a fully reasoned opinion as the conclusion drawn.

The appeal mechanism in the Act: a useful indication of intention

119. Another factor that influences my reading of this legislation, and the enforcement and redress scheme available thereunder, is that the Act provides an appellate structure which permits an applicant or somebody acting on behalf of that applicant to make a complaint in relation to a determination that that person does not have a disability: s. 14(1)(a). The section also contains provisions to complain or appeal against the time within which the assessment was carried out, the manner in which it was carried out, the contents of the service statement, and that the services specified were not carried out.

120. With regard to the contents of the assessment report, the complaint or appeal therefore can be made only with regard to a determination as to whether a person does or does not have a disability. This shows the importance of a finding that a person has a disability for the purposes of the Act and of the enforcement and redress scheme contained therein. No complaints process is available with regard to the recommendations in the assessment report (or “determinations”, to use the language of the Act) as to the services to be provided to meet the needs of the person with a disability, although the contents of a service statement prepared by the liaison officer and after an assessment report has been furnished may be challenged under the complaints mechanism.

121. One might ask why the Oireachtas thought it appropriate to permit a complaint or appeal to be made in regard to a finding that a person has a disability but not in regard to other conclusions in an assessment report, if the Oireachtas did not consider that it was precisely the finding that a person had a disability that enabled the triggering of the balance of rights and remedies in Part 2. To put it another way, the finding that a person has a disability is a gateway or hurdle which must be crossed in order that a person may avail of the enforcement and redress scheme provided in the Act, and it is scarcely surprising that

the Oireachtas thought fit to provide an appeals mechanism with regard to that finding, as this finding is the critical gateway to the support systems found in the Act.

122. An appeal lies from a decision of a complaints officer to an appeals officer and an appeal lies to the High Court under s. 20 but limited to an appeal on a point of law.

123. Thus the Oireachtas has put in place an elaborate hierarchy of structures enabling a person dissatisfied with *inter alia* the finding as to whether he or she has a disability, and an equally complex structure to enable enforcement and redress when services identified in a service statement are not provided, but does not, and did not need to, provide a mechanism to deal with a more informal statement opinion or conclusion in an assessment report as to services which may benefit a person when the conclusion is that the needs of that person fall short of a disability. To put it another way, a finding of disability within the meaning of the Act of 2005 unlocks the appeals mechanism as well as the redress and enforcement mechanism, and therefore it seems to me that a finding of disability is critical to the operation of the Act and to the unlocking of those mechanisms.

124. That analysis supports the conclusion to which I come in regard to s. 11(2), and the correct characterisation of the report prepared in respect of ELG. She was found not to have a disability, but rather to have certain needs falling short of a disability and from which she could benefit from certain identified services. No determination was made that it was appropriate that services be provided to her within the meaning of s. 8(7) and therefore the contents of the assessment report insofar as it did state certain opinions or even recommendation, cannot be read as a determination that those services were required on account of her disability.

Conclusion

125. For these reasons I conclude that the word “assessment” in s. 11(2) does not bear the wide meaning for which the appellant contends, I agree with the conclusion of the Court of

Appeal that the case stated posed by her Honour Judge Linnane must be answered in the negative.