

THE HIGH COURT

[2023] IEHC 88

[Record No.: 2021/204 SP]

BETWEEN

M. D. [IDENTITY PROTECTED]

APPLICANT

AND

**MINISTER FOR SOCIAL PROTECTION,
CHIEF APPEALS OFFICER**

AND

SOCIAL WELFARE APPEALS OFFICE

RESPONDENTS

JUDGMENT of Ms. Siobhán Phelan, delivered on the 24th day of February, 2023

INTRODUCTION

1. This matter comes before me by way of a statutory appeal on a question of law pursuant to s.327 of the Social Welfare Consolidation Act, 2005 (as amended) [hereinafter “the 2005 Act”] from a decision of the Appeal’s Officer made on 8th of November 2021. The decision was to disallow the Applicant’s appeal of a refusal of Domiciliary Care Allowance [hereinafter “the Allowance”] in respect of her care of her teenage daughter [hereinafter “the Child”].

2. The application for the Allowance was refused on the basis that the governing conditions of s. 186C(1) of the 2005 were not met because the Child does not require a level of care and attention substantially in excess of the care and attention normally required by a child of the same age.

3. The Applicant complains that the decision to refuse the Allowance was not properly reasoned and/or that the Respondents erred in law by unreasonably refusing the Allowance having regard to the evidence and/or construing s. 186C(1) of the 2005 Act as requiring a higher level of need than has been prescribed by the Oireachtas.

BACKGROUND AND CHRONOLOGY

4. The Child was born in April, 2006. She reached early developmental milestones at appropriate times (feeding, sitting, walking and talking) but was referred to Speech and Language Therapy following her commencement in primary school due to the possibility that she was presenting with selective mutism. Although she also presented as clumsy and awkward with social difficulties interacting with others, some sensory challenges (e.g. intolerance of noise and certain fabrics) and some other difficulties, she attended mainstream school and her difficulties were managed, the expectation being that she would grow out of them.

5. When her problems failed to improve and there was a concern that she was getting worse, she was referred for assessment. She was diagnosed with Development Co-Ordination Difficulties/Dyspraxia (hereinafter “DCD”) following assessment by an occupational therapist in 2018, as subsequently confirmed in a report dated the 15th of February, 2019 (when the Child was nearly thirteen years old). An ASD Multidisciplinary Assessment conducted in January, 2020 further diagnosed the Child with Autism Spectrum Disorder (hereinafter “ASD”). Various recommendations were made as to how the Child and her parents might be supported. It was suggested in the ASD Multidisciplinary Assessment Report that as the Child had a diagnosis of ASD, her parents might be entitled to apply for the Allowance, payable until age 16, on her behalf. It was further suggested that the Child may be entitled to Disability Allowance when she turns 16.

6. The Applicant submitted an application for the Allowance in March, 2020 in respect of the care needs of the Child who was 13 years and 10 months at the time of the application. The application was supported by a medical report from the Child’s GP together with: (a) Occupational Therapy Assessment Report dated the 15th of February, 2019; and (b) the ASD Multidisciplinary Diagnostic Assessment Report dated the 28th of January, 2020 confirming diagnoses of DCD and ASD.

7. On the application form completed by the Applicant, it was confirmed that the Child had normal mobility. The only difficulty identified with personal care was a problem with buttons and zips and a need to be reminded to get ready or dressed. It was indicated that she required encouragement to eat and was selective about the foods she ate. It was confirmed that

she attends mainstream school, that she did not have access to an SNA nor had one been recommended but that she had been recommended for assistive technology and learning support. Interrupted and problem sleeping were identified as a frequent issue (between 1 and 3 times a week). It was confirmed that she could speak normally but did not understand what was said to her or facial expressions/body language. It was elaborated that she sometimes needs to have words explained to her and uses the wrong expressions for emotions. Her social skills were identified as impacted in terms of appropriate problem-solving skills, a need for organisational support and help with her school work and an intolerance of changes in her routine. In terms of behaviour, it was confirmed that she did not display high risk behaviours requiring intervention to prevent injury to self or others but was irritable and prone to outbursts, anxious and could be aggressive to others. It was confirmed that she demonstrated unusual behaviours but that there was no necessity to lock household items away. The only safety issue identified on the form related to road safety. Sensory issues relating to noise or crowds as well as the feel of certain materials and fabrics were identified as a problem resulting, by way of example given, in a refusal to wear certain clothes and a refusal to go shopping.

8. The reports which accompanied and supported the application provided, *inter alia*, details of the history provided by the Child's parents, the Child's presentation and the results of diagnostic assessment. The GP's report was in the standard form required by the First Respondent and addressed the degree to which the child's condition affected her ability in a specified range of areas including mental health, behaviour, learning, communication, social skills, vision, hearing, sensory issues, feeding/diet, sleeping, washing, dressing, continence, sleeping mobility, balance and motor skills. It was confirmed that the Child was scoring normally in many areas including continence and mobility but was either moderately or severely impacted in other areas including mental health, behaviour, communication, social skills, sleeping, balance and motor skills.

9. The Occupational Therapist's Report recorded that the Child was in first year in secondary school where teaching staff reported her to be a hardworking, diligent and motivated girl with excellent behaviour. Concerns were reported by her school, however, in relation to school performance, particularly in the area of motor and processing skills. It was reported that she avoids activities that challenge balance and appears clumsy, stumbles and slouches in a chair at times. An oversensitivity to noise was reported as well as some issues of interpretation and a lack of fluency in her speech. Motor skills assessment using diagnostic

tests gave an overall score which place her at the 0.5 percentile for her age indicating significant motor coordination difficulties in relation to fine and gross motor abilities. She had low average scores in relation to visual motor integration, visual perception and motor coordination. Her handwriting speed was assessed as significantly impaired but her handwriting was described as tidy and legible but it was noted that she fatigues quickly when writing.

10. On the basis of home reporting, it was recorded that she is fully toilet trained but requires supervision around personal hygiene. It was also recorded that she dresses independently but is slow and needs assistance with buttoning and laces. It was noted that she is able to brush her own teeth and hair but requires supervision. While she eats independently, it is stated that she has difficulty with cutlery and cutting food. She is described as a messy eater. Difficulties sleeping were reported. Based on the report of her parents as summarised, the occupational therapist concluded that she “*requires further facilitation in some aspects of personal hygiene, dressing, feeding and using cutleries*”. Of note, greater sensory processing difficulties were identified on the basis of home reporting rather than school reporting. The school indicated typical performance with balance and motion but some problems in social participation. However, the school indicated definite dysfunction in relation to planning and ideas.

11. During assessment by the Occupational Therapist the Child presented with “*some sensory processing needs*”. It was stated in her report that DSM 5 Criteria for DCD confirm that the Child’s assessed motor skills deficit significantly or persistently interferes with academic achievement or activities of daily living. The maximum allowance of one-to-one resource teaching hours, access to a laptop, input from an occupational therapist and referral to an educational psychologist are all recorded as recommendations.

12. The ASD Multidisciplinary Diagnostic Assessment Report records that on cognitive assessment the Child presented with a mixed profile of cognitive abilities with verbal comprehension in the average range, fluid reasoning and working memory both in the low average range and processing speed and visual spatial awareness in the extremely low range. She was found to be presenting with challenges with reciprocal social interaction, communication and restrictive repetitive behaviours indicative of the presence of ASD.

13. A Medical Assessor’s Report was received by the Department on the 20th March 2020. The Medical Assessor refers to the reports submitted by the Applicant in support of the application and identifies as a strength of the Child that she is in mainstream school with resource hours and no SNA requirement, an intelligence assessment in the low average range and verbal comprehension assessed as average. It is noted that she had been described by her teachers as “*hard-working, excellent behaving, diligent and motivated girl*”. It is acknowledged that her teachers reported issues with her attention and that processing speed and visual spatial indices of assessment were in the extremely low range. It is noted that the Child did not display self-injurious behaviours or constitute a flight risk (as per reports) and that no repetitive mannerisms had been noted at assessment.

14. Challenges identified by the Medical Assessor include that she had attended with her GP with symptoms of anxiety, displayed reduced eye-contact and some pre-occupations had been reported. Against this it is noted by the Medical Assessor that there were no parental concerns as to language, albeit that the Child had difficulty with small talk. The Medical Assessor notes that the Child is reported as looking and acting her years, having a few friends and presenting to the Occupational Therapist as bright, caring and friendly, notwithstanding difficulty with two-way conversation and reporting that she appeared to mix social cues. Strengths with motor skills identified are that normal mobility was reported albeit that she was fatigued from a lot of walking.

15. It is acknowledged by the Medical Assessor that the Child is on 0.5 percentile on MABC-2 with fine and gross motor issues, difficulty with handwriting (lap top recommended) and does not participate in sports. Strengths noted by the Medical Assessor in this regard were that the Child can use a fork (but has difficulty using a knife), is independent in toileting and independent (albeit takes her time) in dressing. It is noted, however, that she requires help with buttons and zips and has sensory issues with tags, cutting and brushing hair.

16. Following his assessment of the Child’s strengths and challenges, the Medical Assessor reported:

“I acknowledge that [the Child] faces challenges as a result of her recent diagnosis of ASD and she will need additional care and attention. She was diagnosed with DCD in 2019. Supports including maximum resource hours and assistive technology have been

advised. [The Child] has a number of strengths – she does not have a learning disability or a language disorder and she does have friends despite her difficulty with social interaction. She may at some point require placement in an ASD class or SNA support if she is struggling in mainstream school. She is hard working and well-behaved and there are no safety concerns or other medical issues. On balance having considered all of the ME, she does not in my opinion require substantially more care and attention as compared to a similarly aged child.”

17. By letter dated the 30th of April, 2020, the Deciding Officer (CH) refused the application for the Allowance under s. 300 of the 2005 Act on the grounds that the evidence did not indicate that the level of support required by the Child was substantially in excess of that required by children of the same age without the disability. In her detailed decision letter the Deciding Officer not only confirmed that she had read all of the medical evidence and reports but she also provided what she described as “*a broad overview of some of the information I noted in making my decision*” adding that this did not “*purport to be a complete reference of all the facts presented or considered*”. In addition to summarising information gleaned from the application form, the deciding officer referred in some detail to the contents of the GP’s report, the Multidisciplinary Diagnostic Assessment Report and the Occupational Therapy Assessment Report. She also indicated that she had regard to the opinion of the Department’s Medical Assessor. Having considered all of the evidence she indicated that she had decided that the qualifying conditions were not met at that time. She concludes as follows:

“this decision does not mean that I don’t consider your child has a disability or that they don’t need additional care. The diagnosis of your child’s condition is not disputed and it is clear from your application that [the Child] does require additional care and attention. However, the evidence provided does not indicate that the level of additional support required is substantially in excess of that required by children of the same age without their disability, as provided for in the qualifying conditions for the scheme.”

18. The Applicant appealed the Deciding Officer’s decision to the Social Welfare Appeals Office under s. 311 of the 2005 Act. The appeal was supported by (a) a detailed family impact statement; and (b) a further letter from the child’s GP. In the family impact statement, greater detail was given in relation to early difficulties the Child had encountered and there was an elaboration on her issues with food, worrying habits and the impact on the Applicant and the

family of the Child's problems. The further letter from the GP was in standard form and comprised a typed document with the Child's name inserted in typescript and a list of presenting issues with a handwritten notation that those issues which applied to the child were ticked. In the standard, typed part of the form it was confirmed that the Child was suffering from a disability so severe that she requires:

“continuous care and attention/supervision substantially in excess of another child of the same age in order for her to be able to deal with the normal activities of daily living.”

19. The areas identified as requiring substantial extra care ticked by the GP include anxiety and depression, restrictive diet, concentration and rigid thinking, information processing, sleep issues, sensory issues, restrictive routine, communication and ability to meet personal hygiene needs. Although aggression, self-injury, safety of siblings and awareness of danger were listed on the template document, these were not ticked as particular issues in the Child's case.

20. On the 24th of July, 2020, the Applicant was notified that the refusal had been reviewed by a different deciding officer (GMcM) who also maintained that the qualifying conditions were not met and accordingly the appeal would be further considered by an appeals officer. In his decision letter, the second Deciding Officer confirms that having re-examined all the information supplied he did not consider that the Applicant met the qualifying conditions for the payment. He goes on to refer to a list of documents considered including the additional information provided since the original decision. As before, the stated reason for the refusal was that while the Child had additional care needs, the evidence provided does not indicate that the level of additional support required is substantially in excess of that required by children of the same age without a disability, as provided for in the qualifying conditions for the scheme.

21. On the 8th of September, 2020 the Social Welfare Appeals Office notified the Applicant that an appeals officer had disallowed the appeal. The question under appeal identified in the decision letter is whether the Child meets the qualifying conditions for the payment of the Allowance. The governing legislation is also identified and set out in the decision together with a summary background to the application and its refusal. Under the heading *“Evaluation of evidence, conclusion and reason for decision”*, the Appeals Officer refers to the medical evidence submitted in support of the application and summarises the findings contained in the

various reports and the contents of the family impact statement. The GP's professional opinion that the Child meets the criteria and the contents of her report is similarly summarised. Having reviewed this evidence in some detail, the Appeals Officer concludes:

“I acknowledge that the appellant’s daughter is diagnosed with autism spectrum disorder and developmental coordination disorder and that she has additional parenting demands because of her disability. However, when I examine the additional support that she requires, particularly in relation to significant functions such as mobility, dressing, bathing, feeding and toileting, I am not satisfied that the appellant’s daughter requires care and attention substantially in excess of another child of the same age without that disability. For that reason this appeal is disallowed.”

22. In February, 2021 correspondence was received by the Social Welfare Appeals Office from the Applicant’s legal representative expressing astonishment at the decision to refuse the Allowance notwithstanding that a number of boxes on the medical assessment form forming part of the application had been ticked as “severe” and requesting that the Applicant be given an opportunity to make the case for her appeal at an oral hearing. As a result of this correspondence, an oral hearing was afforded to the Applicant and on the 2nd of April, 2021 the Applicant was given the opportunity to make the case for her appeal in a hearing using secure online communication technology.

23. On the 21st of April, 2021, the Applicant was informed that following review by the Appeals Officer of the decision under s. 317 of the 2005 Act in the light of information given during the oral hearing that her request that the decision be revised was refused. In a further written decision, the Appeals Officer refers to the evidence which had been submitted in support of the application and to the evidence given by the Applicant and the Child’s father during the oral hearing, but adds that:

“there was no significant new information or evidence provided at oral hearing which had not already been provided by the appellant on the original application form or in the comprehensive family impact statement that she had submitted in support of her appeal.”

24. The Appeals Officer concludes:

“When I consider the additional support that the appellant’s daughter requires it is my opinion that the care and attention that her daughter requires is not substantially in excess of that required by another child of the same age particularly in relation to significant functions such as mobility, dressing, bathing, feeding and toileting.”

25. On the 12th of May, 2021, the Applicant’s representative requested the Chief Appeals Officer to review the appeal under s. 318 of the 2005 Act. In seeking a review, the Applicant’s legal representative states that the statutory test was misapplied in that all of the medical evidence pointed in one direction i.e., that this is a child whose care needs are substantially more than other children of the same age. Further information accompanied the solicitor’s letter in relation to the average day of the Child’s parents in respect of her care. Additional information is provided in this document in relation to the Child’s habits with regard, *inter alia*, to the wearing of fake tan, eating, mood issues and tantrums involving instances of damage to property, physically aggressive behaviour towards her mother and periods of absence from school. Reference is made in the Applicant’s solicitor’s letter to the number of children in the State of the Child’s age and the number who require services at the level the Child requires them to argue that:

“it is difficult to understand how it could be said that [the Child’s] care needs are not substantially greater than other children within the general population of her age”.

26. It is contended that the criteria for the Allowance were met and that:

“any assertion to the contrary would be irrational and not reflective of the level of care needs she requires.”

27. On the 28th of May, 2021, the Applicant’s representative was informed that the Chief Appeals Officer had declined to revise the decision of the Appeals Officer under s. 318 of the 2005 Act. Again, a written decision letter issued. This decision letter refers to all of the evidence submitted in support of the application from the time it was first made and also refers to the detail of the Appeal Officer’s Report of oral hearing and what had been outlined during the hearing including that the Child is fussy about what she eats, works out in her room doing

weights after dinner, showers after her work out and uses a lot of toiletries. Seemingly, it had been indicated during oral hearing that the Child cannot be left unsupervised in the house. Reference is also made in detail to the contents of the letter seeking a review by the Chief Appeals Officer. The Chief Appeals Officer notes that while it is contended that insufficient emphasis was placed on the reports submitted, no specific error of fact or law had been identified. The Chief Appeals Officer does not find the assertion that insufficient weight had been given to the evidence in the reports to be substantiated noting that it is clear from the decision of the Appeals Officer and the outcome of his review of that decision that he had regard to all the evidence and evaluated that evidence in the context of the statutory requirement. Having regard to the totality of that evidence the Appeals Officer, while acknowledging that the child has additional parenting demands because of her disability, records that she is not satisfied that the evidence supported a conclusion that the statutory criteria were met. In a detailed decision letter, the Chief Appeals Officer observes:

“From my review of the papers that were before the Appeals Officer, and as was acknowledged by the Appeals Officer, it is clear that [the Child] requires additional support in certain areas of her life but the evidence also indicates that the child is independent in many aspects of daily living – feeding, dressing, bathing, toileting.

While it is asserted that the statutory test was misapplied and that the medical evidence points in one direction I do not find this to be the case nor do I consider that the Appeals Officer misapplied the statutory test in the manner submitted. I am satisfied that having regard to the totality of the evidence presented as set out in detail by the Appeals Officer it has not been established that [the Child] requires continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age.

In summary, having reviewed all of the evidence that was before the Appeals Officer and taking account of the grounds submitted by [legal representatives on behalf of the Appellant] I do not consider that the Appeals Officer has erred in fact and/or law and having regard to the totality of that evidence I find no reason to revise his decision on the grounds submitted by [the Appellant’s legal representatives].

In the circumstances I must decline to revise the decision of the Appeals Officer.”

28. On the 17th of September, 2021, the Applicant’s representative wrote a lengthy letter to the Social Welfare Appeals Office requesting another review of the appeal under s. 317 of the 2005 Act on the basis that the submission made by the representative to the Chief Appeals Officer on 12th of May, 2021 contained new evidence and new facts relative to the appeal which were not before the Appeals Officer when the decisions that were notified on the 8th of September, 2020 and 21st of April, 2021 were made. The letter of the 17th of September, 2021 from the Applicant’s legal representative sought to further elaborate on the Child’s difficulties said to require care and attention from her parents and urged a review based on the totality of the evidence – the evidence previously submitted and the new evidence - which it was said together clearly establishes that the Child requires continual care and attention substantially in excess of the care and attention normally required by a child of the same age.

29. On the 8th of November, 2021, correspondence was addressed to the Applicant’s legal representative advising that the Appeals Officer had disallowed the appeal. It is this decision which the Applicant impugns on this statutory appeal pursuant to s. 327 of the 2005 Act.

THE IMPUGNED DECISION

30. By letter dated the 8th of November 2021, the Appeals Officer communicated a decision following a re-examination of the evidence in the appeal document pursuant to s. 317 of the 2005 Act. In this written decision the Appeals Officer identifies the parameters of his jurisdiction under s. 317 and set out the background to the application and the decision-making process. In the decision letter the Appeals Officer re-examines the evidence under a number of different headings, specifically, mobility, personal care, toileting, feedings/diet, education/schooling, sleeping, communication, social skills, behaviour, safety and sensory issues. Under each of these headings the Appeals Officer refers to the various reports and representations that had been made in summary detail.

31. On the basis of evidence referred to by the Appeals Officer, he concludes that the Child does not appear to require assistance with her mobility. As regards personal care he concludes, following a review of the evidence, that the Child is “*mostly independent for personal care but requires some level of assistance in relation to certain areas of personal care*”. Under the heading “*toileting*”, the Appeals Officer records the opinion that the Applicant was “*mostly*

independent for toileting". Addressing the topic of feeding and diet, the Appeals Officer further says that the Child is mostly independent for feeding but she has a restricted diet.

32. In terms of her education and schooling, the Appeals Officer acknowledges that the Applicant requires some care and attention in this area. It is further acknowledged that she requires some care and attention in relation to sleeping. The Appeals Officer concludes, based on the evidence with regard to communication, that the Child does not have a requirement for a significant level of care and attention in this regard. It is accepted by the Appeals Officer that the Child has issues in relation to social skills but that these issues are not considered to give rise to a requirement for a significant level of care and attention.

33. In terms of the Child's behaviour it is acknowledged by the Appeals Officer that her tantrums and meltdowns give rise to significant demands on the Applicant's parenting resources. The Appeals Officer does not consider the evidence in relation to safety issues to demonstrate a requirement for a significant level of care and attention but the Appeals Officer considers her sensory issues to give rise to significant demands on the Applicant's parenting resources.

34. Having reviewed the evidence and indicated conclusions under different sub-headings, the Appeals Officer finally concludes with regard to the totality of the evidence:

"It is my opinion that the Appellant's daughter has a disability that requires the appellant to commit time and effort to supervising and encouraging her daughter. I acknowledge that the Appellant's daughter requires some level of care and attention. However, I am not satisfied that the level of care and attention that the appellant's daughter requires is substantially in excess of the care and attention normally required by a child of the same age and the decision on the appeal that issued to the appellant on 8 September 202 and 21 April 2021 should not be revised."

35. It is contended on behalf of the Applicant that this conclusion is vitiated by error of law.

STATUTORY PROVISIONS

36. The statutory criteria governing eligibility for the Allowance are contained in Chapter 8A of Part 3 of the 2005 Act and are framed by reference to a qualified child and a qualified adult to whom the payment is made. In the case of the Applicant, the application was determined on the basis that the care criteria contained in s. 186C of the 2005 Act were not met.

37. Section 186C provides:

“(1) A person who has not attained the age of 16 years (in this section referred to as the ‘child’) is a qualified child for the purposes of the payment of domiciliary care allowance where –

(a) the child has a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age, (b) the level of disability caused by that severe disability is such that the child is likely to require full-time care and attention for at least 12 consecutive months,

(c) the child – (i) is ordinarily resident in the State, or (ii) satisfies the requirements of section 219(2), and (d) the child is not detained in a children detention school.”

38. Section 241(1) of the 2005 Act provides:

“It shall be a condition of any person’s right to any benefit that he or she– (a) makes a claim for that benefit in the prescribed manner, and (b) satisfies the Minister as to his or her identity.”

39. Further to s. 241(1) of the 2005 Act the rules governing the grant of Domiciliary Care Allowance have been expanded upon in Social Welfare (Consolidated Claims, Payments and Control)(Domiciliary Care Allowance)(Amendment)(No.3) Regulations, 2009 (S.I. No.: 162/2009) including the various medical procedures to be used certifying the extent of the qualified child’s disability and the likely duration.

40. Part 10 of the 2005 Act encompasses provisions relating to, *inter alia*, decisions by Deciding Officers, decisions by Appeals Officers and an appeal on a question of law to this

Court. Detailed provision is made for a full appeal to an independent office in respect of a first instance decision and a further right of review.

41. Section 300(1) provides that:

“[s]ubject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer”.

42. Section 300(2) provides that:

“[s]ubject to subsections (3) and (3A), [section 300] applies to every question arising under [...] Part 3 (social assistance) [...]”.

43. Section 311(1) provides:

“Subject to subsection (4), where any person is dissatisfied with the decision given by a deciding officer or the determination of a designated person in relation to a claim under section 196, 197 or 198, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer.”

44. Section 311(3) provides that:

“[a]n appeals officer, when deciding a question referred under [section 311(1)], shall not be confined to the grounds on which the decision of the deciding officer or the determination of the designated person, as the case requires, was based, but may decide the question as if it were being decided for the first time”.

45. The entitlement to an appeal is contained in s. 311(1) of the 2005 Act from which it is clear that the jurisdiction of the Appeals Officer is expressly defined by reference to “*the question*” which arises in the appeal.

46. Section 317(1)(a) provides:

“An appeals officer may at any time revise any decision of an appeals officer [...] 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”.

47. Section 318 provides:

“The Chief Appeals Officer may, 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.”

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

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

49. This provision contemplates the finality of decisions on claims, except in specific circumstances.

50. An appeal to the High Court is provided for in s. 327 which provides:

“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.”

51. Accordingly, one of the situations in which a decision of an appeals officer is not final and conclusive is where it is appealed to the High Court on a question of law.

QUESTIONS OF LAW

52. The questions of law which arise can be reduced to the following:

- (a) Did the Appeals Officer fail to provide reasons for his decision in November, 2021 which were adequate as a matter of law?
- (b) Is the decision of the Appeals Officer in November, 2021 unreasonable / irrational as a matter of law?
- (c) Did the Appeals Officer apply the incorrect statutory test in making his decision in November, 2021?

JURISDICTION ON APPEAL UNDER S. 327 OF 2005 ACT

53. It is urged on behalf of the Applicant that my jurisdiction on a statutory appeal pursuant to s. 327 of the 2005 Act is wider than in judicial review proceedings. The courts have consistently held that a statutory appeal, even an appeal not confined to a point of law, is not intended to take the form of a re-examination from the beginning of the merits of the decision appealed against. A leading authority in this regard, in the context of a statutory appeal which is not confined to an appeal on a point of law, is the judgment of the High Court (Finnegan P.) in *Ulster Bank Investment Funds Ltd v. Financial Services Ombudsman* [2006] IEHC 323. Having carefully considered a number of judgments addressed to the nature of statutory appeals, including the decision of the Supreme Court in *Orange Ltd v. Director of Telecoms (No 2)*[2000] IESC 22; [2000] 4 I.R 159 which was relied upon by the Applicant herein, the former President of the High Court observed that it was desirable that there should be consistency in the standard of review on statutory appeals. The threshold for a successful appeal was then stated as follows:

“[...] To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant. The deferential standard is that applied by Keane C.J. in Orange v The Director of Telecommunications Regulation & Anor and not that in The State (Keegan) v Stardust Compensation Tribunal.”

54. The passage from the judgment of the Supreme Court in *Orange Ltd v. Director of Telecoms* relied upon above reads as follows (from p. 184 to 85 of the judgment):

“In short, the appeal provided for under this legislation was not intended to take the form of a re-examination from the beginning of the merits of the decision appealed from culminating, it may be, in the substitution by the High Court of its adjudication for that of the first defendant. It is accepted that, at the other end of the spectrum, the High Court is not solely confined to the issues which might arise if the decision of the first defendant was being challenged by way of judicial review. In the case of this legislation at least, an applicant will succeed in having the decision appealed from set aside where it establishes to the High Court as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In arriving at a conclusion on that issue, the High Court will necessarily have regard to the degree of expertise and specialised knowledge available to the first defendant.”

55. The scope of an appeal on a point of law was analysed by both Clarke J. and McKechnie J. in their respective judgments in *FitzGibbon v Law Society of Ireland* [2014] IESC 48, [2015] 1 IR 516. Clarke J. stated the law as follows at paras 558 to 560:

“7. Appeal on a point of law

[125] Many statutes make provision for an appeal on a point of law either from statutory bodies or decision makers to the courts or within the courts system. Examples in the former category include s 123(3) of the Residential Tenancies Act 2004, which provides for an appeal on a point of law to the High Court by any of the parties in respect of a determination of a tribunal of the Private Residential Tenancies Board; and s 42(1) of the Freedom of Information Act 1997, which provides for an appeal on a point of law to the High Court by a person affected by a decision of the Information Commissioner following a review under s 34 of the Act of 1997. Appeals within the courts system to the High Court on a point of law are, for example, provided for in s 26(3)(b) of the Data Protection Act 1988 in relation to a decision of the Circuit Court on a requirement or a prohibition in a notice or certain actions of the Data Protection Commissioner; and in s 169(4) of the Personal Insolvency Act 2012, in relation to a decision of the Circuit Court on appeal from the Insolvency Service.

[126] *There is an established jurisprudence as to what the term 'appeal on a point of law' means. Much of the jurisprudence on the scope of such an appeal overlaps with the concept of case stated. In Insp. of Taxes v Hummingbird [1982] ILRM 421, Kenny J, delivering the judgment of this court, explained, at p 426, the approach a court should take when examining the determination of an expert body, in that case, the Appeal Commissioners:-*

'A case stated consists in part of findings on questions of primary fact, ... These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw.'

This passage was quoted and the principles therein were applied by Keane CJ in Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare [1998] 1 IR 34, which concerned an appeal on a point of law from a decision of the Chief Appeals Officer under the then applicable social welfare statutory provisions (s 300(4) of the Social Welfare (Consolidation) Act 1981).

[127] *The applicable principles were helpfully summarised by McKechnie J in Deely v Information Commissioner [2001] 3 IR 439 at p 452, which concerned an appeal under s 42 of the Freedom of Information Act 1997, as follows:-*

'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:

- (a) *it cannot set aside findings of primary fact unless there is no evidence to support such findings;*
- (b) *it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*
- (c) *it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;*
- (d) *if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision ...'*

This passage was later cited in the Supreme Court judgments of both Fennelly and Kearns JJ in Sheedy v Information Commissioner [2005] IESC 35, [2005] 2 IR 272. [128] In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decision maker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)."

The appellant has relied on this passage, subject to his submission that there is a distinction between a case stated which concerns a question of law and an appeal on a point of law, in that the former proceeds on the basis of facts recited by the referring court whereas different considerations are at play in the latter."

56. The legal principles governing the jurisdiction of the High Court in an appeal on a point of law were again considered by the Supreme Court in *Attorney General v. Davis* [2018] 2 I.R. 357 (in the context of extradition). In that case McKechnie J. held (at para. 53) that a statutory

appeal on a point of law will enable the Court to interfere with a decision appealed against in four-overlapping-circumstances as follows:

- 1) errors of law as generally understood;
- 2) errors such as would give rise to judicial review including illegality; irrationality, defective or absence of reasoning, and procedural errors of some significance;
- 3) errors which may arise in the exercise of discretion which are plainly wrong; and
- 4) certain errors of fact.

57. McKechnie J. went on to identify (at para. 54) a non-exhaustive list of the issues of fact which may be regarded as issues of law:

- i. findings of primary fact where there is no evidence to support them;*
- ii. findings of primary fact which no reasonable decision-making body could make;*
- iii. inferences or conclusions:*
 - which are unsustainable by reason of one or more of the matters listed above;*
 - which could not follow or be deducible from the primary findings as made; or*
 - which are based on an incorrect interpretation of documents.”*

58. From the foregoing it is apparent that there is a significant overlap between the High Court’s jurisdiction in judicial review proceedings and by way of statutory appeal on a point of law. I approach this appeal, however, on the basis that my jurisdiction to intervene to set aside a decision in respect of an error of law is wider than in judicial review proceedings in that the jurisdiction on a statutory appeal is not constrained to errors of law which go to the jurisdiction of the decision maker and the decision maker is not entitled to deference in areas of law. Although not every error of law is sufficient to vitiate the decision on a statutory appeal, nonetheless, where the ground of challenge constitutes a pure error of law (for example, a failure to apply the correct statutory test or a breach of the duty to give reasons) and I am persuaded that an error of law which has occurred is significant enough in terms of the actual decision made to vitiate that decision, then I should set the decision aside without regard to the special position of the Appeals Officer as a specialist decision maker. This is because the Appeals Officer does not have expertise or specialised knowledge relative to the High Court in deciding questions of law.

59. On the other hand, the Appeals Officer is entitled to deference in deciding mixed questions of law and fact such as arise when a challenge is brought on the basis that the decision is unreasonable having regard to the evidence adduced. Clearly, however, if there is no evidence to support a finding of primary fact, the findings made are not ones which a reasonable decision-making body could make and/or or inferences or conclusions are drawn which are unsustainable because they could not follow or are based on an incorrect interpretation of documents, then I should set aside that decision notwithstanding the special expertise of the Appeals Officer because these constitute errors of law and fall to be treated as such.

DISCUSSION AND DECISION

60. The question arising for determination by the Appeals Officer was whether the Child had care needs substantially in excess of the care and attention ordinarily required by a child of the same age who did not have a disability. This was a mixed question of law and fact involving an application of the statutory eligibility criteria to the facts as established in evidence before the Appeals Officer. Certain aspects of the manner in which the eligibility criteria contained in s. 186C are framed merit note, before turning to address each of the three questions of law identified on this appeal,

61. Firstly, it is common case that the criteria are framed by reference to the care needs of a child rather than any particular diagnosis which has been made in respect of the said child. While a diagnosed disability is a prerequisite to eligibility, that diagnosis is not, of itself, sufficient to meet the eligibility criteria. Instead, the criteria will be met only where, *inter alia*, the disability results in the child having a certain level of care needs. The fact that the Child in this case has a serious disability has not been disputed. This alone is not determinative.

62. Secondly, the assessment of eligibility requires a comparative assessment of the care and attention needed by the child the subject of the application as against the care and attention normally required by a child of the same age. This requires an understanding on the part of the decision maker of the comparative care needs of children of similar age. In this case the Child is a teenage girl and the comparison which falls to be carried out is with similarly aged children who do not have a disability.

63. Thirdly, the level of care which is required by the child the subject of the application must be “*substantially*” in excess of that which is required by a child who does not have a disability. This sets the threshold for eligibility at a high level and means that the fact that a child has some additional care needs arising from a disability is not sufficient to meet the statutory threshold. Those additional needs, which are also expressed as continual and continuous (reinforcing the significance of the additional needs), must be major or important as they must be “*substantially*” in excess of a child of the same age without a disability.

64. While a comparative exercise is mandated under the applicable statutory test, there is no further guidance as to what might be considered a “*normal*” requirement for care and attention and nor any further guidance as to what might constitute “*substantially*” greater needs for care and attention. Assessing as a matter of fact where on the spectrum of care and attention need the Child lies is a matter for the decision maker appointed under the 2005 Act. One purpose of the regulations adopted under the 2005 Act in prescribing the details which must be provided by persons making claims for various types of benefits is to elicit materials and information which will demonstrate to the deciding officer whether the claimant is entitled to the benefit claimed (see Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 (SI 142 of 2007) and Social Welfare (Consolidated Claims, Payments and Control)(Domiciliary Care Allowance)(Amendment)(N. 3) Regulations 2009 (SI 162 of 2009) (see para. 19, *LL*). Entitlement to the benefit is an objective fact but in deciding this objective fact, an assessment of the Child’s needs on the evidence is required with a conclusion on the mixed question of fact and law made with regard to this evidence in view of the comparative care needs of other children of the same age who do not have a disability. Establishing the objective facts as to entitlement therefore involves the exercise of judgment on the part of the decision maker having regard to the evidence presented and the decision maker’s knowledge and experience of the relative care and attention needs of other children. Thus, while Owens J. describes the question of entitlement to the benefit sought at the time when the claim is submitted as a question of objective fact (*LL v. Minister for Employment Affairs and Social Protection* [2021] IEHC 191 at para. 18), that objective fact is determined by the decision maker in a process which measures comparative need.

65. In this case the Appeals Officer received new evidence during the course of the appeal and extensive reliance was placed on this new material, over and above the evidence submitted to support the application when first made, to argue that the decision arrived at was

unsustainable as unsupported by the weight of the evidence or a proper assessment of the evidence. It was suggested during the hearing before me that an issue arose in relation to the entitlement of an Applicant to rely upon evidence which was not before the Deciding Officer on the basis that it has recently been found by Owens J. in *L. v. Chief Appeals Officer* [2021] IEHC 191 (Owens J.) (at para. 16) that new evidence does not alter the legal framework regarding the question to be determined, namely whether the applicant was eligible for the payment in question at the time of the application.

66. The Respondents appeared in submissions to rely on the decision in *L. v. Chief Appeals Officer* to contend that the new evidence submitted should not be relied upon to ground a challenge in these proceedings, albeit this contention was at odds with the position of the Appeals Officer who very obviously had regard to the new evidence in reaching the impugned decision. While I am advised by counsel for the parties that the particular question of whether new evidence should or should not be considered is under appeal in a separate case, it seems to me that in circumstances where the Appeal Officer received the new information and took it into account, that the Respondents' argument is not helpful or relevant in this case. It involves a shifting of position from that adopted in the decision-making process and in the response to these proceedings. I note in any event that the "*new information*" relied upon in this case can be read as an expansion or an elaboration of the evidence relating to the Child's condition and care needs rather than a change in the condition or needs of the Child such that a fresh application would be required to assess the Child's eligibility on the basis of changed circumstances prevailing at the date of the new application.

67. In the circumstances of this case and having regard to the approach of the Respondents to date, I am satisfied that the proper course for me to take is to consider the lawfulness of the decision having regard to the new evidence or information provided. I do not propose to address the separate question, which does not arise from the pleadings, as to whether the Appeals Officer was entitled to have regard to evidence of greater needs than those present when the application was first made, if any such greater needs were in fact identified. This further question falls to be determined in a case in which it properly arises. Instead I am proceeding on the basis, as all parties have until shortly before the hearing before me, that the new information does not amount to information of different needs compared with when the application was first made. Rather the needs are unchanged but better information has been provided. Therefore, I can properly consider whether the decision to refuse the Allowance is

sustainable in the light of the new information which was treated by the Appeals Officer as being before him.

Is the Decision of the Appeals Officer adequately reasoned?

68. The case-law in relation to the duty to give reasons is now well developed and was rehearsed by counsel in argument before me. The extent of any obligation to give reasons must be considered “*by reference to [inter alia] the particular statutory provision*” (per Fennelly J., *Mallak v Minister for Justice* [2012] 3 IR 297, para. 53). The type of reasons which may be necessary will depend on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached (*Connelly v An Bord Pleanála* [2021] 2 IR 752, para. 5.3). In *Connelly*, Clarke C.J. observed that where a decision-maker is required to determine whether very precise criteria have been met, the reasons should identify whether the criteria had been satisfied. However, he added (at paras. 5.2-5.3) that other decisions:

“involve much broader considerations involving general concepts, and often, to a greater or lesser extent, a degree of judgment or margin of appreciation on the part of the decision maker.”

69. In both *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, paras. 177-178 and *Connelly*, para. 6.11, the Supreme Court held that insofar as reasons for an administrative decision have to be provided, the decision should:

“at least disclose the essential rationale on foot of which the decision is taken”; “[t]hat rationale should be patent from the terms of the decision or capable of being inferred from its terms and context”.

70. It is true that “*box-ticking exercise*” exemplified by stating the legal test and baldly confirming that it has been applied is not usually sufficient and as found in *Connelly*, para. 10.1, the information furnished:

“cannot be so anodyne that it is impossible to know why the decision went one way or another”,

71. Equally, however, a “*discursive determination*” is not required and at para. 10.15 of the judgment in *Connelly* the Supreme Court stated:

“the law does not require a level of reasoning which goes beyond that required to afford an interested party reasonable information as to why the decision was made and whether it can be challenged.”

72. In similar vein in *Duggan v. Irish Auditing and Accounting Supervisory Authority* [2019] IEHC 748, Simons J. held that given “*the broad statutory discretion which the Supervisory Authority*” enjoys under the relevant section, there was “*no requirement that the reasons be detailed or elaborate*” (para. 67).

73. The duty to give reasons in the social welfare context has been considered in a number of cases. In *A.M. v. Minister for Social Protection* [2013] IEHC 524, Hanna J. considered a complaint that the decision of the deciding officer was inadequately reasoned. The learned judge reviewed the case-law culminating with the then recent decision of the Supreme Court in *Rawson v. The Minister for Defence* [2012] IESC 26 before finding (para. 21):

“In this case I find the reason of the 10th May, 2012 for refusal to grant the DCA is clear and unambiguous. The threshold simply has not been reached in light of the evidence submitted. It has not been established that the extra care and attention required by the applicant's son, G., was [not] substantially in excess of that required by a child of the same age who does not suffer from G.'s condition. Furthermore, the reasons given were sufficient to enable the applicant to request a revision of the decision (s.301 of the 2005 Act), to appeal the decision under s. 311 et seq of the 2005 Act and/or to seek relief by way of judicial review. This language was reflected in the decision on the 22nd and 26th October, 2012 and I am satisfied that adequate and identifiable reasons were given. There is not an obligation on the Department to explain its decisions in detail but rather to inform applicants of the grounds for the decision so that the appeal is not impaired. Decision makers should not have to provide reasons that are extremely detailed explaining every step of the decision as this would render the process unworkable”

74. This dictum of Hanna J. as to the duty to give reasons in respect of the refusal of Domiciliary Care Allowance was reaffirmed by Baker J. in *M.D. v. Minister for Social Protection* [2016] IEHC 70 where she stated (at para. 44) as follows:

“My approach must be governed by the decision in an almost identical set of facts delivered by Hanna J. in A.M. v. Minister for Social Protection.”

75. Both Hanna and Baker JJ. were each dealing with precisely the statutory regime as applies in the present case, and almost identical grounds of challenge were advanced insofar as a failure to make a reasoned decision was concerned albeit on different factual bases. In her judgment in *M.D.*, Baker J. recorded the argument of Counsel for the applicant to the effect that the strength of the evidence in *A.M. v. Minister for Social Protection* was considerably less than that advanced by the applicant in the *M.D.* case then before her and observed (at para. 45):

“while that may be so, it seems to me that his argument is misplaced in that it suggests I have a jurisdiction, which I do not have, to engage with the facts of the case, or to assess the weight of the evidence. I cannot distinguish the judgment of Hanna J. in A.M. v. Minister for Social Protection merely on account of the fact that the evidence in the present case has a greater weight nor has a different quality or value than that proffered to the decision maker in the case before Hanna J.”

76. In *M.D.* Baker J. added to the approach of Hanna J. in *A.M.* in reliance on the decision of Kelly J. in *Mulholland v An Bord Pleanala (No. 2)* [2006] 1 I.R. 453 (a case concerned with a statutory duty to provide a statement of considerations) where he broke down the duty to give reasons and the rationale for the existence of such a duty (at para. 34) in the following terms:

“The obligation at (b) above to state the considerations on which a decision is based is, of course, new. I am of opinion that, in order for the statement of considerations to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must therefore be sufficient to:-

(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision;

(2) arm himself for such hearing or review;

(3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and

(4) enable the courts to review the decision.

Thus, the criteria which must be met for the statement of considerations are precisely the same as those which apply in respect of the statement of main reasons.”

77. Since both *A.M.* and *M.D.* were decided, the Supreme Court have pronounced clearly on the duty to give reasons in . The clear principle identified by the Supreme Court in *Connelly v. An Bord Pleanála* is that it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents, from the context of the decision, or in some other fashion. This is subject to the requirement that the reasons [or considerations] must actually be ascertainable and capable of being determined. In that regard, context is important, and the nature of the inquiry will depend on the decision-making process. As the Supreme Court stated in *Connelly* (p. 778):

“a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear.”

78. The test set in *Connelly* is met where the reasons can be identified, following a reasonable inquiry. It would appear to follow that where it is possible following reasonable inquiry to be satisfied as to the considerations which led to the decision, there is no need to address each document sequentially at each stage of the process or in the final record of the decision. While the Appeals Officer is obliged to analyse and assess all of the evidence adduced and to weigh the evidence in arriving at a conclusion and the Appeals Officer is not entitled to “*cherry pick*” as found to have occurred in *National Museum of Ireland v. Minister for Social Protection* [2016] IEHC 135, evidence of such consideration may be derived from the reasons given in the decision itself or be otherwise discernible from the decision-making process as a whole. As Donnelly J. observed in *Olaneye v. Minister for Business, Enterprise and Innovation* [2019] IEHC 553 at para. 46:

“the process undertaken all leads to the inevitable conclusion that in considering the extent of the reasons given, the Court has to be cognisant of the level of information made available to an applicant”.

79. When the analogy with the duty to give reasons which was drawn by Kelly J. in *Mulholland* in the context of a specific statutory duty to provide a statement of considerations (no similar statutory duty arises here) is continued in considering whether a duty to demonstrate consideration of relevant material is discharged, it must equally follow that it is not always essential to the fairness of the decision-making process that a statement of considerations is recited in the decision itself. The requirement to provide a statement of considerations found by Baker J. in *M.D.* was squarely based on the principle that the affected person should know if the decision maker has directed his or her mind adequately to the issues which were required to be considered in arriving at the decision which impacted on their interests. In the absence of a specific statutory duty (as considered in *Mulholland*) if the considerations are discernible such that the applicant can be taken to know what material informed the decision, then any duty to demonstrate in the text of the final decision that the decision maker has directed his or her mind adequately to the issues which were required to be considered in arriving at the decision is discharged.

80. Turning to the decision challenged in these proceedings, the context is that the assessment of entitlement to benefits under the statutory regime is reserved to deciding officers. An elaborate appeal process is provided for and an appeal lies to a specialised administrative appeals officer, subject to further review by the Chief Appeals Officer. This process was fully utilised by the Applicant. At each stage of the process invoked by the Applicant she was provided with a reasoned decision in writing. There is no doubt that the statutory process relating to the application and reviews and appeals of the Applicant was “*fair, open and transparent*” (*Mallak*, at para. 68) and the Applicant was able to (and did) participate fully therein to the extent that, on my count, there were no less than six separate decisions taken on the application during the course of the appeal and review process provided for under the 2005 Act.

81. In this case, just as in *A.M.* and *M.D.*, the Applicant has been advised that the application has failed because the decision maker has decided following an assessment of the evidence that

the threshold for additional care needs has not been met. This case may be distinguished from *M.D.* in that the decision challenged addresses precisely what Baker J. identified as lacking in *M.D.* The decision sets out a summary of the material which provided a factual basis on which the appeals officer could come to conclusions as to the Child's care and attention needs. The Appeals Officer patently engages in a process of comparing or weighing the competing factors relative to the nature and extent of need present. The approach of the Appeals Officer in framing his decision demonstrates analysis of the evidence and a consideration of the individual factors in the case. In arriving at the decision which is challenged in these proceedings, the Appeals Officer engages coherently and objectively with the facts before concluding that the statutory threshold for eligibility is not met on the evidence. The Appeals Officer does not "*cherry pick*". There is no ambiguity as to the basis for the decision and no failure to reflect a consideration in the decision-making process of the material which informed that decision.

82. Based both on the terms of the impugned decision itself the Applicant should have been left in no doubt from the terms of the decision that the reason the Allowance stands refused is because, while it is accepted that the child had a disability and has additional care needs, the evidence as to those care needs does not reach the statutory threshold. There is no basis for any suggestion that the reasons provided involved "*boxticking*". I am satisfied that the rationale for the impugned decision was patent from the terms of the decision.

83. Even if there were a doubt in this regard, which I do not consider there to be, it is manifest from the decision-making process as a whole that at each stage it was considered by each decision maker that the evidence adduced did not meet the prescribed statutory threshold because the identified need was not at the level prescribed. In arriving at this decision, the Appeal Officer and the other decision makers, involved in the process up to that point engaged with the material before them in successive written decisions. Quite apart from the decision impugned, which I consider to be adequately reasoned, it is also possible to be satisfied from the decision-making process as a whole that information has been provided to the Applicant which is sufficient to enable her to know the reasons for refusal of the Allowance. Were the final decision unclear, which in my view it was not, it would still be material to the Applicant's understanding of the decision that at each stage of the process pursued by her, that a written reasoned decision was given which decisions when read together cumulatively made the basis for refusal manifestly clear.

84. As particular emphasis was placed in argument on behalf of the Applicant on the failure of the Appeals Officer to explain why he did not accept the opinion of the GP as to the relative care needs of the Child, it is appropriate that I address this. It is clear that the statutory decision maker appointed under the 2005 Act, namely the deciding officer, appeals officer and chief appeals officer, and not the GP, who is charged with deciding whether the evidential threshold under the 2005 Act is met. There is no obligation on the Appeals Officer to spell out why he does not accept the opinion of the GP as to compliance with the statutory criteria in circumstances where this is properly a question for determination of the Appeals Officer and not the GP. It is noted that the file also contained the Medical Assessor's report to contrary effect. The GP and the Medical Assessor's function is to provide evidence as to the child's needs so that the prescribed decision maker can evaluate that evidence in arriving at a conclusion as to whether the statutory requirements are met or not. Neither the GP nor the Medical Assessor have a role in deciding whether the eligibility criteria are met. Where the GP or the Medical Assessor trespass beyond their respective roles, it is proper for the decision maker to consider the medical evidence contained in their reports, which was clearly done in this case, as opposed to the opinions offered in relation to compliance with statutory criteria.

85. I am satisfied that the Applicant was provided with sufficient information / reasons for the decision to refuse and must be taken to know why the application failed. The fact that she does not agree with those reasons or does not accept the correctness of the decision does not ground an appeal on a point of law.

Is the decision of the Appeals Officer unreasonable/irrational as a matter of law?

86. In advancing the argument that the decision of the Appeals Officer should be set aside as unreasonable and therefore wrong in law, it is submitted on behalf of the Applicant that my jurisdiction on a statutory appeal on a point of law such as this one is wider than in judicial review proceedings. The Respondents argue on the other hand that contentions to the effect that the decision of the Appeals Officer was unreasonable / irrational fall to be judged in accordance with principles well established in the judicial review sphere. The Respondents further contend that the Applicant's complaint of unreasonableness or irrationality is without substance when considered in the light of the applicable legal principles (albeit principally developed in judicial review proceedings) and the materials before the Appeals Officer in reliance on a series of cases.

87. The Respondents rely especially on the principle that, even if a court might have reached a different conclusion to the decision-maker, it does not follow that the decision-maker failed to act in accordance with law or that the Court is entitled to substitute its opinion for that of the decision-making body. Further, it is contended on behalf of the Respondents that there is limited scope to interfere with the exercise of discretion by an administrative body and, in particular, an administrative body with special technical or professional skill and/or making a decision with special competence in an area of special knowledge. The Respondents refer, *inter alia*, to *O’Keeffe v. An Bord Pleanala* [1993] 1 IR 93, *Carrigaline Community Television Broadcasting Co. Ltd. v. The Minister for Transport, Energy and Communications* [1997] 1 ILRM 241 and *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701.

88. In *Meadows*, Denham J. observed that notwithstanding refinement to the reasonableness test in that case the decision in *O’Keeffe* “*is relevant to areas of special skill and knowledge, such as planning and development*”. Further, in *Carrigaline* Keane J. stated that as follows:

“It is [...] clear from [the] authorities that this Court cannot set aside a decision of a competent authority merely because it disagrees with the view of that authority. It cannot, in short, act as a court of appeal from the decision where no such appellate jurisdiction has been conferred on it by law...”

89. In light of my conclusions set out above with regard to my jurisdiction on a statutory appeal, I cannot accept the Respondents’ submission that my jurisdiction on this appeal, albeit very similar, is coterminous with the High Court’s jurisdiction in judicial review. As set out above, it is my view that my jurisdiction on this statutory appeal is somewhat broader than in judicial review proceedings. It follows that decisions directed to the High Court’s jurisdiction by way of judicial review are not automatically or directly applicable and care is required in relying on a decision made in one context or the other.

90. Notwithstanding a difference between the jurisdictions, I accept that even though these proceedings come before me as a statutory appeal on a point of law rather than by way of judicial review the decisions of Deciding Officers and Appeals Officers in respect of applications / reviews / appeals concerning the Allowance under the Social Welfare legislation

are made in the exercise of “*special skill and knowledge*”. As recognised by Baker J. in *M.D. v. Minister for Social Protection* [2016] IEHC 70 (para. 42), although not medically qualified, the Deciding Officer / Appeals Officer is an:

“expert body with particular knowledge of the questions that arise in the context of the application for domiciliary care allowance”

91. In opposing the reasonableness challenge advanced on behalf of the Applicant, the Respondent relies to a very significant extent on a series of cases referred to above (*viz. O’Keeffe, Carrigaline, Meadows*) decided by way of judicial review in which the established unreasonableness test has been applied or endorsed by the Court as limiting its power to intervene where there is evidence to support the decision made by the Appeals Officer. While cautious not to improperly extend the *ratio* of decisions given in the judicial review context to a statutory appeal on a point of law, I have not been directed to any authority which states that the standard of unreasonableness or irrationality, which is the error of law identified on behalf of the Applicant here under consideration, is different depending on whether proceedings are by way of judicial review or statutory appeal. Where the error of law identified is that the decision is unreasonable or irrational, then it seems to me that the test is the same whether that claim is advanced in judicial review proceedings or by way of statutory appeal.

92. The Appeals Officer was required to make a decision on the evidence following the application of the statutory test. In terms of the evidence available to the Appeals Officer, it is fair to observe that there were certain variances between what was submitted at different stages throughout the process as regards the child’s level of care needs. Reference is made to some of these variances in the Affidavit sworn on behalf of the Respondents in this appeal by the Appeals Officer whose decision is subject to appeal and I do not propose to rehearse them further.

93. In short, the evidence available to the Deciding and Appeals Officers dealing with this case was mixed and much of the evidence available to the Appeals Officer tended to show that the Applicant was independent in many aspects of daily living. This material contained positive as well as negative information in relation to the Child’s needs and painted a mixed picture. From the summary of the evidence set out in the various decisions throughout the Respondents’ decision-making process, there is without doubt a basis for concluding that while

the Child at the heart of this case has challenges, as accepted by every decision maker in the process, she is largely independent in important areas of daily living despite these challenges. This is evident from the fact that she attends mainstream school without the assistance of an SNA and she does not require mobility aids. The question of judgment for the decision maker is whether the care and attention need of the Child in this case are significantly quantitatively greater than the care and attention needs of teenage girls generally who do not suffer disabilities. In making the decision, the Appeals Officer measures the challenges presented to the Applicant by the Child's needs against the challenges presented in parenting teenage girls without the additional factor of a disability.

94. During oral argument, very significant emphasis was placed on the pro-form letter from the Child's GP with hand written ticks and commentary which, in its pro forma aspect, confirmed the GP's Opinion that the Child had needs substantially in excess of the majority of other children of the same age who have no disability. However, as noted above, the GP is not the statutory decision maker and whilst the GP's opinion and more particularly the basis for it constitutes medical evidence which requires to be weighed, it is not determinative of the application. It is for the Respondents, not me or the Child's GP, to assess the relative levels of need and the extent of the challenge presented as demonstrated on the evidence to determine whether the statutory criteria are met. The Appeals Officer should put the evidence from the GP in the balance with all of the other medical evidence available in respect of the application, but the Appeals Officer should not defer to the GP's opinion as to whether this evidence satisfies the statutory criteria but should make the decision. It is apparent from the impugned decision that the Appeals Officer had regard to the GP's opinion, to which particular weight has been attached on behalf of the Applicant, together with the other evidence but having considered the totality of the evidence did not share the GP's opinion that the statutory criteria were met.

95. It is my view that when the decision of the Appeals Officer is considered in the light of the applicable legal principles and the materials before the Appeals Officer, there is no basis for concluding that the decision is unreasonable or irrational. While not fully independent in all activities, it was open to the Appeals Officer to conclude on all of the information available that the Child's level of independence relative to other children of her age is similar in many but not all areas. In those areas where she has greater needs, her additional needs are not at such a significant level as to justify a conclusion that they are substantially greater. The

Appeals Officer was entitled on the evidence before him to come to the conclusion that the Child did not require continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age and that the Allowance should be refused.

96. The Applicant has failed to discharge the burden of establishing that it was or that there is any basis for granting any of the reliefs claimed by reason of the asserted unreasonableness or irrationality of the impugned decision.

Did the Appeals Officer apply the incorrect statutory test in making his decision in November 2021?

97. The contention that the Appeals Officer applied an incorrect test was not pursued at any length in oral argument with the focus being on the rationality of the decision in view of the evidence as to the level of the Child's needs. The Applicant has sought to rely, however, on the decision of the Supreme Court in *McDonagh v. Chief Appeals Officer* [2021] IESC 33, which involved a consideration of the circumstances in which an appeal can be brought against a decision not to revise an earlier decision. The Applicant appears to rely on the *McDonagh* decision to contend for a wide and generous approach to be taken to eligibility for the Allowance such that the criteria for eligibility are construed in a manner which establishes eligibility for the Allowance where an applicant has a serious disability and demonstrates additional care and attention needs as the Applicant has done in this case.

98. The Respondent maintains in this context that the distinction between substantive eligibility and the procedural determination of claims under Part 10 of the 2005 Act is central to understanding the *McDonagh* decision. It is contended that the multiplicity of opportunities which the 2005 Act provides an applicant to challenge an earlier refusal and to make their case was central to the analysis of the Supreme Court in *McDonagh*. The decision to give a wide and generous interpretation to the appeal provisions considered arises in circumstances where the 2005 Act does not limit the number of applications which can be made by an individual.

99. The provisions under consideration in this appeal are different to those in *McDonagh*. The purpose of the 2005 Act in s. 186(C) is to provide a benefit to a particular category of persons and to establish the criteria by which it can be decided who qualifies for a payment and

who does not (see *LD v. Chief Appeals Officer* [2014] IEHC 641, at para. 40). The fact that the legislation serves a remedial or social purpose does not expand the category of persons eligible for the benefit. As noted by Owens J. in *L.L. v. Minister for Social Protection* [2021] IEHC 191, the entitlement to a benefit is not sourced in the decision-making powers of the Deciding or Appeals Officer. Their function is to decide the question of whether a claimant establishes that he or she has a right to a benefit at the time of the claim (see para. 6). Acceptance or rejection of a claim depends on whether the claimant demonstrates that he or she meets the statutory eligibility criteria for the benefit sought (see para. 9). Where a person is found to not be eligible for a payment, the intention of the Oireachtas is that such a claim would be refused. The test for eligibility is not altered by the fact that the legislation serves a remedial or social purpose.

100. I am satisfied that the Appeals Officer properly identified the statutory test and applied it on the basis of a rational assessment of the evidence submitted in support of the application. The Allowance was refused in a reasoned decision from which it was explained that notwithstanding the evidence of additional demands on parenting resources arising from the Child's disability, the statutory criteria were not met on the basis of the evidence submitted as to the Child's condition at the date of the application. As reiterated in *LL*, however, where a child's condition deteriorates, there is nothing to preclude a further application.

CONCLUSION

101. The fact that a child places significant demands on the parenting resources of parents, which demands are acknowledged as arising by the Appeals Officer in this case, does not mean that the conditions of s. 186(C) are met. A significant demand on parenting resources does not necessarily mean that a child requires continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age. It is a relative question.

102. As explained in the decision, the reason the application in this case fails is because it has been concluded that the statutory threshold is not met on the evidence presented. There is no ambiguity in this regard. In assessing the evidence, the Appeals Officer is applying knowledge and common sense as decision maker under the 2005 Act. I am satisfied from the terms of the decision that the Appeals Officer had regard to all of the evidence and that the

conclusion that the Child is mostly independent in important areas of daily activity is amply supported by the evidence. It has not been established that the decision is unreasonable in law. The Applicant has failed to satisfy me that there was an error of law in the Appeals Officer's Decision.

103. In conclusion, while I find against the Applicant in these proceedings, I have considerable sympathy for her and appreciate the pressures she experiences in parenting a teenage girl with additional needs. I note that the Applicant is free to make a fresh application for Allowance at any time. The question of relative need is not static. The normal care and attention need of children change as they age. Depending on the nature of the disability and other factors, the difference or disparity between a particular disabled child and their non-disabled peer age group may increase or decrease. Furthermore, the outcome of an application for the Allowance does not determine any future application for Disability Allowance which may or may not be presented when the Child reaches sixteen years of age. Each case requires individual assessment having regard to the applicable statutory eligibility criteria and the circumstances at the time of the application.

104. In view of my findings, I must dismiss this appeal. I will hear the parties in relation to any consequential matters and this matter will be listed on a date to be notified for final orders to be made.