

THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 255

Record No. 2024/2 JR

BETWEEN

KR AND LR (A MINOR) (SUING BY HIS MOTHER AND NEXT FRIEND)

APPLICANTS

and

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Ms. Justice Hyland delivered on 19 April 2024

Introduction

1. This is a most unusual decision as it concerns a consent order i.e. an order that both parties to the litigation agree should be made by the Court. Normally, in private litigation, when parties agree to settle their differences and come to court with an agreed order, the Court will simply make that order without substantively reviewing its contents. However, the situation is somewhat different in judicial review. The position

was explained by Donnelly J. in the recent Supreme Court decision in *Ballyboden Tidy Towns Group v an Bord Pleanala & Ors* [2024] IESC 4 as follows:

“It is important to recall that when the High Court makes an order for judicial review, it is exercising its inherent power to supervise the legality, rationality and procedural fairness of the activities of the District and Circuit Courts, tribunals and other public authorities (Hogan, Morgan and Daly, Administrative Law in Ireland, 5th Ed 2019, Ch 18). Thus, an applicant for judicial review is asking the High Court to exercise its supervisory function. That inherent power of the High Court can only be exercised when it has been established that the decision was unlawful (remedy of certiorari) or that unlawfulness is apprehended (remedy of prohibition) or that an order is required to compel compliance with a legal obligation (remedy of mandamus). Usually where all the relevant parties (including the notice party) are consenting to the quashing of an order, there will be very little to trouble the High Court in the exercise of its supervisory function. Nevertheless, the High Court in granting the relief sought does not do so as a matter of course. Instead, the High Court must be satisfied that it is a lawful exercise of its supervisory function based on the evidence and submissions made to it.”

2. These are judicial review proceedings. Therefore, where I am asked to make an order in these proceedings granting relief without a hearing, even where all parties are consenting to same, I must be satisfied that making the order is a lawful exercise of my supervisory function. In the circumstances identified in this judgment, I decided it necessary to consider in some detail whether I should make the consent order.

Nature of Consent Order

3. This case concerns a failure by the HSE to investigate a complaint under the statutory complaints process established by the Disability Act 2005 as amended (the “2005 Act”). The first applicant, Ms R., made an application on 14 February 2023 for an assessment of need under the 2005 Act in respect of her child, L.R. There is a statutory obligation to commence an assessment of needs within three months of the date of the receipt of the application under s.9(5) of the 2005 Act and the assessment of needs is to be completed within three months from the date the assessment commenced save in exceptional circumstances, per Regulation 10 of the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263 of 2007). In this case, that meant the assessment had to be commenced no later than 14 May 2023 and was required to be completed no later than 14 August 2023 save in exceptional circumstances.
4. The assessment was not completed by that date and a complaint was made to the respondent on 15 August 2023 under the 2005 Act. The solicitor for the applicants issued a protocol/pre-litigation letter to the respondent and the respondent’s solicitors on 29 November 2023. The respondent replied on 7 December 2023 that the complaint would not be processed for a further 7 months.
5. These proceedings were then issued seeking an order of mandamus directing that the HSE process the complaint within 8 weeks from the date of the Order. Leave to seek judicial review was sought and obtained following a leave hearing on 29 January 2024.
6. Once leave was granted, negotiations took place between the parties. The respondent has now agreed to an order providing that the complaint will be processed within 8 weeks from the date of the order and that it will pay the applicant’s costs. It has not filed a statement of opposition or attempted to defend the case in any way.

7. To understand the context of the consent order sought in these proceedings and why I considered it necessary to review the order, it is necessary to consider the statutory regime and the case of *J.F. v Health Service Executive* [2018] IEHC 294, as well as recent events in relation to complaints made under the 2005 Act.

Legislative framework

8. As identified above, the complaints process is governed by the 2005 Act and S.I. No. 263 of 2007. Complaints are made to the HSE and dealt with by individual Disability Complaints Officers ('DCO'), who are, as provided by s.15 of the 2005 Act, independent in the performance of their functions. They are obliged to make findings in a written report, and may make recommendations which are enforceable under s. 22 of the 2005 Act.
9. Section 14 of the 2005 Act allows for complaints to be initiated for a number of reasons and provides in relevant part that:

“14. — (1) An application 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 by 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.*

10. Section 15 of the 2005 Act provides that:

- “(8) A report of a complaints officer may contain one or more of the following:*
- (a) a finding that the complaint was or, as the case may be, was not well founded whether in part or in whole;*
 - (b) if the report contains a finding that the Executive failed to commence an assessment within the period specified in section 9(5) or to complete an assessment without undue delay, a recommendation that the assessment be provided and completed within the period specified in the recommendation;*
 - (c) if the report contains a finding that the person may have a disability, a recommendation that the person be the subject of a further assessment under section 9 within the period specified in the recommendation;”*

11. In this case, the complaint was made under s. 14(1)(b) of the 2005 Act as there was a failure to commence and/or complete the report within the time prescribed. Such a complaint will usually be relatively straightforward as the extent of the investigation only requires the DCO to make enquires with the HSE as to whether or not the assessment of needs has been commenced or completed. If neither has occurred, the DCO will normally issue a report recommending that the assessment be commenced and/or completed with a specified period of time, pursuant to s. 15(8)(b) of the 2005 Act. If the DCO’s recommendation is not complied with, enforcement may be sought in the Circuit Court.

12. There is no statutory timeframe in the 2005 Act or elsewhere for the determination of a complaint, as noted by Faherty J. in *J.F.*, para 72, unlike the position in respect of the commencement and completion of assessments. The case of *J.F.* raised facts similar to those raised in the instant case i.e. delay in the complaints process, where a person sought to complain about delay in the commencement and completion of an assessment of need. The decision in *J.F.* established the principle that complaints require to be completed in a period of time proportionate to the time within which an assessment of need is required to be commenced and/or completed. In her decision in *J.F.*, when considering the question of what was a reasonable period of time for the complaint's process, Faherty J. was influenced by the statutory time frames set out for commencement and completion of an assessment of needs:

“While there is no statutory provision, where a complaint has been upheld, directing the complaints officer to specify a particular timeframe for the commencement or completion of the assessment of need, as the case may be, it seems to me that any such recommendation would have to take cognisance of the timeframes set out in s.9(5) of the 2005 Act and the 2007 Regulations for the commencement and/or completion of an assessment of need, and the fact that any such recommendation is being made against the backdrop of an already established delay, in circumstances where the assessment of need is subject to mandatory timeframes as a matter of first principle.”

13. In its approach to this case, and other similar cases, the HSE accepts that the current delays in relation to the processing of complaints – in this case over 11 months – are unlawful given the nature of the statutory scheme in which the complaint procedure is situated.

Current litigation in respect of failure to determine complaints under 2005 Act

14. In recent months, there has been a very significant increase in the number of judicial review applications being brought in respect of delay in the complaints process, whereby applicants are seeking orders of mandamus compelling the HSE to process complaints made under s.14 of the 2005 Act. Given the increase in these applications, when the within proceedings came before me with a view to a consent order being made agreeing to relief in the terms sought in the proceedings, i.e. an order of mandamus directing the complaint be heard within eight weeks, I asked the HSE to explain the context of the application and proposed consent order. In response, the HSE filed an affidavit of Ms. Ahern, Senior Manager for assessment of needs complaints, National Complaints Governance and Learning team, HSE, sworn on 15 March 2024. Ms. Ahern explained the position as follows:

“4. To date, Comyn Kelleher Tobin (the HSE' solicitors) have received 44 sets of judicial reviews proceedings since January 2023 relating to the delays in the complaints system.

5. As of 13th March 2024, there were 1,177 complaints which had yet to be assigned to a DCO.

6. In July 2019, Olive Hanley, Head of Disability Services in CH09, swore Affidavits in the High Court case of CM HSE, a case dealing with the obligation of Assessment Officers to make referrals to the NCSE pursuant to section 8(3) of the 2005 Act. In that affidavit, Ms Hanley confirmed that for the period between January and April 2019, complaints were taking an average of 22 days to resolve at that point in time...

7. The reasons that the delay has grown so significantly since then are as follows:

i) Complaints increased by 67% in 2023 and are up a further 28% in 2024 (year to date). The Disability Complaints Office has received 366 complaints in 2024 so far.

ii) The number of DCOs has remained unchanged since 2022.

iii) In May 2022, the Disability Complaints Office started to track the duration of the wait time for a DCO to commence an investigation. At that point, the relevant wait time was 2 months. It increased steadily to eight months by the end of June 2023. The Office stemmed further increase until mid-December 2023, at which point it started to increase steadily again to the present day — the wait time is currently nine and-a-half months.

iv) Once a DCO commences an investigation, the average maximum wait time for completion is two months. Therefore, the current maximum wait time from receipt to completion is 11.5 months.

8. There is a multitude of reasons for the increase in the backlog, including

i) During Covid- 19, staff were re-assigned to unrelated duties.

ii) In 2021, whilst the Office had a relatively low number of complaints, it also had its lowest staffing level since 2017. In addition, multiple-issue complex complaints increased by 120%. Only 62% of all complaints are straight-forward timeframe related complaints. There was a 100% increase in Service Statement related complaints and a 200% increase in complaints made under section 14(1)(a) 14(1)(c) of the 2005 Act, which are significantly more time consuming.

iii) In 2022 the complexity of Service Statement related complaints increased following the High Court's decision in JN & TM v. Harraghy [2022] IEHC 407. In the same year, the complexity of assessment-related complaints also increased due to the decision of the High Court in CTM v. HSE [2022] IEHC 131, which affected 10,000 families and led to a further increase in time-consuming section 14(1)(a) and section 14 (1)(c) complaints.

iv) Complaints involving legal representation spiked from 2022 onwards, with increasingly detailed complaints. The proportion of cases with legal representation has continued to increase in 2024.

v) The volume of court cases unrelated to the backlog is taking a toll, as legal scrutiny intensifies, leading to:

a) An increased administrative burden to a delegated lead DCO to ensure all DCOs are up to speed on new legislation, case law and advice.

b) Court ordered re-investigations of complaints, in some cases due to judgements that supersede previous judgements.

c) More lengthy and detailed investigations, specifically in relation to section 14(1)(d) of the 2005 Act.

vi) The legal protocol is an additional administrative burden.

vii) The volume of complaints continues to rise significantly.

viii) Judicial Reviews arising from the delays lead to an increased administrative burden on the DCOs.

ix) As amendment to the Disability Regulation by way of Statutory Instrument 704 of 2021 and changes to Regulation 16A regarding eligibility for services has led to increased scope of complaints and investigation by DCOs.”

15. Ms Ahern provides some statistics, which showed that the number of complaints had risen from 734 in 2017 to 1506 in 2023. She averred that 366 complaints had been received in 2024 at the date of swearing of her affidavit and the projected number of complaints was 1936. She noted that in 2019, the average number of days required to complete a complaint was 33 days and in 2023 it was 172 days. At paragraph 14 Ms. Ahern avers as follows:

“14. The Disability Complaints Office is currently staffed with three permanent full-time DCOs and one part-time DCO that has been re-assigned temporarily from another role within National Complaints Governance & Learning Team due to the increasing pressures from the backlog. There is approval to fill an additional four posts however, all administration related recruitment in the HSE has been frozen and the Disability Complaints Office is currently trying to fill posts through internal EOI.

15. The Disability Complaints Office receives letters before action under the pre-action protocol, threatening litigation on foot of the delay in the complaints system. In this case, the pre-action letter was sent on 29th November 2023. The Disability Complaints Office has taken a decision that to prioritise complaints upon receipt of the letter before action under the pre-action protocol, would be inequitable and lead to inherent unfairness to other complainants who are not in a position to litigate, or face barriers to litigation for various reasons, or choose not to litigate.

16. In the present case, the complaint was made on 15th August 2023, and acknowledged by the HSE on 25th August 2023. The HSE's

acknowledgement observed that there were delays in processing complaints due to a significant increase in the volume of complaints. On 7th December 2023, the HSE (in response to the Applicant's pre-action letter) stated that the matter was not capable of being resolved at that time, that it was likely to be five months before the matter was assigned to a DCO, and that the matter would be resolved within a further two months.

17. I say that the Judicial Reviews that have come before the Court regarding the delays are resolved on the first return date and the HSE consent to an Order of Mandamus to determine the complaint within a period of eight weeks.

18. In all Judicial Reviews relating to the delays in the complaints system to date, costs have been awarded to the Applicants. I say that such costs are negotiated and resolved by the Legal Costs Unit on behalf of the HSE and on average the Applicants costs are measured at approximately €20,000 for Judicial Reviews where leave is granted and the matter is resolved at an early stage. The Respondent's legal fees average €7,500 per set of proceedings.”

16. It is clear from those averments that the HSE accepts that it has a legal obligation to determine complaints within a reasonable time frame having regard to the time limits set out elsewhere in the 2005 Act, as per the decision of Faherty J. in *J.F.* All the judicial review leave applications that are coming into the judicial review list are being settled by the HSE. Nonetheless, there is no averment in Ms. Ahern’s affidavit identifying how the HSE intend to comply with their legal obligation to address complaints under the scheme identified in the 2005 Act within a timely fashion in the future. Indeed, the volume of that litigation has increased since the affidavit of Ms. Ahern was sworn. At present, leave applications relating to a failure to process complaints under the Disability

Act are making up between 30% and 50% of the leave matters listed, i.e. between 5 and 8 matters each week.

17. It is obvious from the affidavit of Ms. Ahern that the HSE is incurring considerable legal costs in settling these cases. It is also clear that the HSE is prioritising the complaints of parents and guardians of children who have issued proceedings over those that have not, since the order consented to is an order agreeing that the complaint will be processed within 8 weeks from the date of the order. This is significantly shorter than the number of days taken to process a complaint in 2023 i.e. 172 days. By not addressing the underlying problem, and by settling claims by agreeing to process the complaint in an expedited manner, the HSE is incentivising parties to issue proceedings. That has an impact upon this Court since it means that court resources are being diverted from other litigants, and are required to be expended on managing cases where there is an admitted breach by the HSE but no proposal to remediate that breach. As identified above, applications relating to a failure to process complaints within a timely manner currently form a significant percentage of the judicial review leave applications.
18. Viewed through these perspectives, it is clear that the approach of the HSE to complaints under s. 14 of the 2005 Act is adversely impacting upon the resources of the Court insofar as judicial review is concerned and that significant legal costs are being incurred.
19. It is in this context that I am asked to make the consent Order sought. The young person in question is entitled to have his complaint about a failure to commence and/or complete an assessment of need dealt with in a period that complies with the law. The HSE is complying in his case with its obligations by way of this consent order. Therefore, despite the unsatisfactory approach of the HSE to compliance with their obligations in relation to resolving complaints under the 2005 Act generally, and the impact this is having on the judicial review list, this is not a basis for refusing to make this Order on

consent. I am satisfied that making the consent order is a lawful exercise of my supervisory functions.

20. I will therefore make the order in the terms sought i.e. an order of mandamus directing the HSE to process the complaint within 8 weeks from the date of the order, and an order for the costs of the applicant to be adjudicated in default of agreement.