



THE COURT OF APPEAL

Civil

Court of Appeal Record Number: 2023/92
Neutral Citation Number [2023] IECA 286

Noonan J.
Meenan J.
O'Moore J.

BETWEEN/

MB (AB, A MINOR SUING BY HIS MOTHER AND NEXT FRIEND MB)

APPLICANT

- AND -

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Mr. Justice Charles Meenan delivered on the 21st day of November 2023

Introduction: -

1. This is an appeal from the judgment and order of the High Court (Phelan J.) that concerns the interpretation of certain sections of the Disability Act 2005 (the Act of 2005) and the regulations made thereunder, the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263/2007) (the “Regulations”). The Act of 2005 and the Regulations provide a statutory framework for the purposes of providing various services for persons who have a “disability” as defined in the said Act.

2. In general terms, where a person is found to have a disability, it is clearly necessary that the needs of that person be identified, so provision is made for the production of a document referred to as an “*assessment report*”. Unfortunately, the respondent, given its resources, does not have a service available for every need that is identified in the “*assessment report*”. The services that can actually be provided are set out in a “*service statement*”, as defined in the Act of 2005.

3. Over time, disabilities may develop and change so the Act of 2005 and the Regulations make provision for a review and/or an application for a further “*assessment report*”. Also, provision is made for the “*service statement*” to be reviewed on a regular basis. The central issue in these proceedings is whether the Act of 2005 and the Regulations provide for an ongoing review, that is more than one review, of an “*assessment report*”.

4. The appellants were unsuccessful in the High Court but sought their costs, or a contribution to same. The respondent did not seek its costs. In the circumstances, the trial judge made no order for costs. The issue of costs is also part of this appeal.

Background: -

5. The background to this application is set out in a grounding affidavit sworn by the first named appellant. The second named appellant (AB) has a disability, namely Autism Spectrum Disorder. The first named appellant applied for an “*assessment report*” in respect of her son in March 2018. This report was furnished by the respondent on 30 August 2019 and was followed by a “*service statement*” on 2 September 2019. In October 2019 a complaint was lodged in respect of non-compliance with the “*service statement*” and there followed an application before the Disability Complaints Officer and subsequently, proceedings in the Circuit Court. This resulted in an updated “*service statement*” dated 30 July 2020.

6. The “*assessment report*” was reviewed, and a reviewed report issued on 4 September 2020 followed by a reviewed “*service statement*” on 28 October 2020. On 24 September 2021, the appellants solicitors wrote to the respondent seeking a review of the “*assessment report*”. This would have been a second review. It was accepted that AB’s circumstances had changed in that what was required was “*a particular focus on the issue of an assessment of Dysgraphia and Dyspraxia.*” as was set out in the said letter.

7. Initially, the first named appellant was asked by the respondent to fill out an “*assessment of need review form*” in order for the review to commence. However, subsequently, the respondent took the position that there was statutory provision for only one review and that AB’s changed circumstances ought to be the subject of a new “*assessment report*” application.

Application for Judicial Review: -

8. On 31 January 2022, the High Court granted leave to the appellants to seek certain reliefs by way of judicial review. These reliefs included: -

- (i) A declaration that every assessment report, including an assessment report issued pursuant to a review of the first assessment report, is subject to a further review within 12 months, in the premises that *inter alia* s. 21 of the Disability Act 2005 and Art. 11 of S.I. 263 provides so.
- (ii) An order of *mandamus* compelling the respondent to commence and complete a review of the second named appellant’s assessment of need pursuant to the Disability Act 2005 and the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263/2007), to include any necessary assessments/reassessments, within six weeks or other such period considered reasonable by the Honourable Court.

Judgment of the High Court: -

9. In a detailed judgment the High Court (Phelan J.) refused the reliefs sought. I will be referring to the judgment in some detail later but, in summary, Phelan J. held *“having regard to the clear language of the statutory provisions ... I am satisfied that the carrying out of a review of the original assessment does not result in a statutory obligation to generate a new assessment report with a consequential ongoing duty of periodic and automatic review of the assessment of need ..”*

10. In a subsequent *ex tempore* ruling, the trial judge directed that there be no order as to costs. The respondent, though successful, did not seek any order for costs. The appellants, on grounds which I shall refer to later, sought their costs or a portion of them.

Notice of Appeal: -

11. There are some fourteen grounds set out in the Notice of Appeal. However, the issues to be determined by this court are best summarised in the appellant’s written submissions as follows: -

- (i) Was the High Court correct in finding that AB was not entitled to a second and subsequent review of his original assessment of needs?
- (ii) Was the High Court correct in refusing the applicant’s costs?

Consideration of issues: -

12. At the outset, I will set out the relevant provisions of the Act of 2005 and the Regulations.

13. Section 8 provides for the provision of an assessment report. Section 8(5) provides: -
“An assessment under this section shall be carried out without regard to the cost of, or the capacity to provide, any service identified in the assessment as being appropriate to meet the needs of the applicant concerned.”

This provision has given rise to the characterisation of an *“assessment report”* being *“Utopian”*.

Section 8(7) concerns the contents of an “*assessment report*”. It should contain determinations in relation to the following: -

- (a) *Whether the applicant has a disability.*
- (b) *In case the determination is that the applicant has a disability -*
 - “(i) a statement of the nature and extent of the disability;*
 - (ii) ---*
 - (iii) ---*
 - (iv) a statement of the period within which a review of the assessment should be carried out.”*

This is the statutory provision that gives rise to a review of the “*assessment report*”.

14. Section 9 makes provision for the application of an “*assessment report*”. Section 9(1) sets out who may apply for an “*assessment report*” and the basis for such an application. Section 9(5) provides a time frame for the provision of an “*assessment report*”, namely that the respondent “*shall cause an assessment of the applicant to be commenced within three months of the date of the receipt of the application or request and to be completed without undue delay.*”

15. Section 9(7) and (8) are central to these proceedings: -

“(7) The Executive may refuse an application under subsection 1(1) if, subject to subsection (8), an assessment has been carried out pursuant to an application under subsection (1) and the period specified in the assessment report in respect of the carrying out of a review of the assessment has not expired or, in the case of a child, the assessment has been carried out within the period of 12 months before the date of the application.

(8) *A person who has previously made an application under subsection (1) may make a further application if he or she is of opinion that since the date of the assessment -*

- (a) there has been a material change in the circumstances,*
- (b) further information has become available which either relates to the personal circumstances of the applicant or to the services available to meet the needs of the applicant, or*
- (c) a material mistake of fact is identified in the assessment report.”*

16. Section 11 concerns the provision of a “*service statement*”. What is to be required for the service statement is set out in s. 11(7) which provides: -

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

- (a) the assessment report concerned;*
- (b) ---*
- (c) ---*
- (d) the practicality of providing services identified in the assessment report;*
- (e) in the case of a service to be provided by or on behalf of the Executive, the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive for the relevant financial year;*
- (f) ---”*

Subsection (9) provides: -

“A liaison officer may, if he or she considers it proper to do so having regard to any change in the circumstances of the applicant concerned or to any change in respect of the matters referred to in subsection (7), amend a service statement ---”

17. Section 21 provides that the Minister for Justice and Law Reform may make regulations for the purposes of enabling Part 2 of the Act of 2005 “to have full effect”.

Section 21(a) provides: -

“Applications for assessments and the procedure for and in relation to such assessments including -

(i) different periods within which an assessment is to be carried out or subsequently reviewed,”

As will be seen later in this judgment, the appellants put some emphasis on this provision.

18. The Regulations are set out in S.I. 263 of 2007 “Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007. Of relevance to this application are the following Regulations: -

“11. Each assessment report shall specify a date for the review of the assessment and that review date shall be no later than 12 months from the date on which the assessment report is issued.”

“12. Where a person makes a further application for assessment in accordance with section 9(8) of the Act of 2005, the review date shall be no later than 12 months from when the report on the further assessment is issued,”

and: -

“22. The service statement shall be reviewed no later than 12 months after the statement was drawn up or no later than 12 months from when the statement was either last reviewed or amended.”

19. How the Act of 2005 and the Regulations are to be interpreted is the central issue in this application. The various rules and canons of interpretation have been considered in numerous decisions of the Superior Courts and legal textbooks. Most recently, in *Heather Hill v An Bord Pleanála* [2022] 2 ILRM 313 Murray J., giving the judgment of the Supreme

Court, having carried out a detailed and extensive analysis of various authorities, a report from the Law Reform Commission and textbooks, concluded: -

“214. The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to the context of the section, of the Act in which the section appears, the pre-existing relevant legal framework and the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this.”

20. In the court below, Phelan J. reached her conclusions on the proper interpretation of the Act of 2005 and the Regulations *“having regard to the clear language of the statutory provisions ...”* (para. 60). This was clearly the correct approach. The trial judge was of the view that the wording of the relevant sections and regulations were not ambiguous, as contended for by the appellants.

21. Before considering the statutory provisions and the Regulations there are two issues which should be addressed. Firstly, it appears to be the case that in the past, the respondent has carried out more than one review of an *“assessment report”*. Such an action by the respondent is clearly at odds with the interpretation of the Act of 2005 and the Regulations, contended for by the respondent. However, the trial judge correctly stated: -

“42. ... the fact that the HSE accepts that there have been occasions where, contrary to the position contended for in these proceedings as to the legal obligations on the HSE, more than one review of an assessment has been carried out. Inconsistent practices do not retract from the fact that the question of entitlement as framed in these proceedings is one which falls to be determined as a matter of statutory interpretation.”

22. Secondly, the appellants submitted that a system whereby an “*assessment report*” was reviewed on an ongoing basis rather than a new “*assessment report*” being furnished when circumstances changed would make more management and administrative sense. There may well be some merit in this, but the role of the court is to interpret the statutory provisions and not devise better management and administrative systems.

23. In this case the “*assessment report*” was furnished on 30 August 2019 and reviewed on 4 September 2020. By letter dated 24 September 2021, the appellant sought a review of the “*assessment report*” with “*a particular focus on the issue of an assessment of Dysgraphia and Dyspraxia.*” It was accepted that the development of these two conditions was a change in circumstances for AB and so would appear to come within the provisions of s. 9(8)(a) of the Act of 2005 which allows for a further application for an assessment report where there has been a material change in circumstances. However, the appellant submits that such a change in circumstances should be the subject of a further review of the “*assessment report*” which was last reviewed on 4 September 2020 rather than an application for a further assessment report. The appellant submits that this is what is provided for in the Act of 2005 and the Regulations.

24. In support of their submission, the appellants relied on s. 21 (a) set out above at para. 17 which seems to indicate, given that the reference to “*different periods*” that there may be subsequent reviews after the first review of an “*assessment report*”.

25. The court below, correctly, rejected the appellant’s interpretation of the legislative provisions. Of particular significance is the interplay between s. 9(7) and (8). Section 9 covers the circumstances under which a person can apply for an “*assessment report*”. Section 9(8) provides that a person who has previously made an application may make a further application if he or she is of the opinion that since the date of the previous assessment there has been a material change in circumstances or further information has become

available or a material mistake of fact has been identified in the “*assessment report*”. It is clear that the provision to make an application for a further assessment report is broadly based and covers the case of AB as it has been accepted that there was a material change in his circumstances.

26. However, the entitlement to make a further application for an “*assessment report*” is limited by s.9(7). This subsection provides that where an assessment report has been furnished but the period for carrying out a review has not expired then it is not permissible to make a further application for an “*assessment report*”. If the appellant’s interpretation is correct, it would mean that s. 9(8) could almost never be availed of, as the “*assessment report*” would be subject to repeated reviews so the time for carrying out the review would never expire. This would effectively render s. 9(8) redundant.

27. Faced with this obstacle, the appellant submitted that s. 9(8) would operate in circumstances where an application for an assessment report had been refused on the ground that there was no disability within the meaning of the Act of 2005. If this were the case, it would require a significant rewording of s. 9(8) to reflect this. There is no such wording, so it would be impermissible to interpret s. 9(8) in such a restrictive manner. As was stated correctly by the trial judge: -

“49. --- The HSE is permitted to refuse applications under s. 9(8) only in narrow circumstances as set out in s. 9(7) including where an assessment report is within its review period. This provision makes little sense, on the interpretation contended for by the applicants: under the system of ongoing reviews which they contend for, the ‘period for carrying out a review’ would never expire. Even accepting that the purpose of the review is to identify whether any changes have occurred which might impact on service need or give rise to a requirement for a further assessment than a whole new assessment of need, s. 9(8) would be largely redundant if there were

simultaneously an ongoing duty to review the assessment and a requirement to generate an annual assessment report. As an annual assessment report would in turn trigger a fresh obligation to specify a further review date, the requirement for an annual review would never end for so long as the disability persisted even in circumstances where the needs arising from a disability are static and unchanging for long periods of time.”

28. The appellants ought to rely on s. 21, which provides for “*different periods within which an assessment is to be carried out or subsequently reviewed*” (emphasis added). It was submitted that the wording here was ambiguous as it referred to “*different periods*” and subsequent reviews, which could mean more than one review for each “*assessment report*”. I do not think that there is any such ambiguity as, per s. 9(8), there may be a number of “*assessment reports*” for any one individual.

29. In any event, the Regulations made pursuant to s. 21 are perfectly clear. At para. 18 above I set out the relevant Regulations, being 11, 12 and 22. The wording that relates to the review of a “*service statement*” clearly indicates reviews every 12 months. There is no such wording concerning the review of an “*assessment report*”. In the course of her judgment, the trial judge reached the same conclusion, having set out in tabular form the statutory provisions that concern “*assessment reports*” and “*service statements*” including the review obligations.

30. The appellants submitted that if the respondent’s interpretation is correct, a situation could arise where there would be an “*assessment report*” some five or six years old so that subsequent “*service statements*” may not reflect the needs of the individual. This submission was made in the context that the assessment report was drawn up by an “*Assessment Officer*” whereas a “*service statement*” is drawn up by a “*Liaison Officer*” who has a less involved role than an “*Assessment Officer*”.

31. I do not believe this submission is correct as, firstly, s. 11(9) sets out the role of a “*Liaison Officer*”: -

“(9) A *Liaison Officer* may, if he or she considers it proper to do so having regard to any change in the circumstances of the applicant concerned ..., amend a service statement and shall furnish a copy of the amended statement to the applicant ...”

Secondly, as referred to previously, s. 9(8) provides for the various situations when a further “*assessment report*” may be applied for. A new “*assessment report*” generates a new “*service statement*”. Thus, the situation identified by the appellant of an “*assessment report*” that does not reflect any changed circumstances of an applicant does not arise.

32. In the course of her judgment, the trial judge considered the provisions of s. 14 of the Act of 2005 which deals with “*complaints in relation to assessments or service statements*” and also the nature and extent of relief of *mandamus* which was sought by the appellants. As I am clearly of the view that the interpretation advanced by the appellants of the Act of 2005 and the Regulations is incorrect, it is not necessary to consider these matters.

33. The appellant also appeals the trial judge’s order that there be no order for costs. This order was made in circumstances where the respondent, though “*entirely successful*” did not seek its costs. In the course of an “*ex tempore*” ruling the trial judge considered s. 169 of the Legal Services Regulation Act 2015 which makes provision for the award of costs. The appellant sought to rely on *ELG v HSE* [2022] IESC 14 where, though unsuccessful, an applicant in a case stated from the Circuit Court was awarded 40% of the costs of one day. The trial judge accepted that, like *ELG v HSE*, the instant case involved an issue which was capable of being resolved on an application of the ordinary canons of statutory interpretation. However, the instant proceedings did not raise any issue of any great complexity or novelty and: -

“-- The applicant in this case had the benefit of an assessment of needs which had been reviewed and continued to have the benefit of annual service statements. The applicant was entitled to apply for a further assessment of needs in view of changed circumstances. It was not inevitable in the same way as in ELG that there would be a need for engagement of the kind which led to these proceedings. In these ways, I consider that this case is different from ELG.”

The trial judge concluded, having also considered the decision of Simons J. in *Corcoran v Commissioner of An Garda Síochána* [2021] IEHC 11 that this was not an appropriate case where an unsuccessful party ought to be granted their costs or a portion of them.

34. I am satisfied that the trial judge, having considered the relevant statutory provision and authorities, correctly exercised her discretion. No grounds have been established by the appellant as to why the discretion of the trial judge ought to be interfered with.

Conclusion: -

35. By reason of the foregoing, the appeal is dismissed. The provisional view of the court is that, should the respondent seek its costs, an award of costs will be made against the appellant. Should the appellant wish to contest this, they may do so by furnishing written submissions (not in excess of 1,000 words) within 14 days of the date of delivery of this judgment and the respondent shall have a further 14 days thereafter to deliver its submissions (also not in excess of 1,000 words).

36. As this judgment is being delivered electronically, Noonan and O’Moore J.J. have authorised me to say that they agree with it.