THE HIGH COURT

[2023] IEHC 709
Record No.: 2022/44 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 20 OF THE DISABILITY ACT, 2005

BETWEEN

E.L. (A MINOR), SUING BY HIS MOTHER AND NEXT FRIEND M.L.
APPELLANT

AND

THE OFFICE OF THE DISABILITY APPEALS OFFICER
RESPONDENT

AND

HEALTH SERVICE EXECUTIVE
NOTICE PARTY

JUDGMENT of Mr. Justice Oisín Quinn delivered on the 14th day of December 2023

Introduction

1. This case concerns a statutory appeal pursuant to section 20 of the Disability Act, 2005 (the '2005 Act') on a point of law from a decision of the Disability Appeals Officer (the 'DAO') made on the 26 January 2022.

2. The appeal is brought on behalf of a young boy, E.L., who was born in January 2018. E.L. was diagnosed as suffering from autism, a disability under the 2005 Act in October 2020. The Assessment Report of 8 October 2020 prepared under Section 8 of the 2005 Act recommended speech and language therapy, occupational therapy, psychology, and physiotherapy services and that these be commenced in October 2020. A Service Statement of 13 October 2020 prepared under section 11 of the 2005 Act specified that E.L. would be provided with the following services "Development of Individual Family Service Plan (IFSP)" starting in November 2023.

3. E.L., through his mother, complained to the Disability Complaints Officer ("DCO") under section 14 of the 2005 Act about the contents of the Service Statement and in particular about the start date of November 2023 for services.

4. The DCO decided that the services could not be provided any sooner and rejected the complaint on 24 February 2021. E.L. then appealed to the DAO who rejected the appeal in a decision of 26 January 2022. The substance of that decision has given rise to this 'point of law' appeal which was heard by the Court on Tuesday 14 November 2023.

5. The Appellant claims that the decision of the DAO should be set aside on the following grounds:

   (i) the DAO failed to distinguish between the section 11(7)(d) ground of 'practicality' and the separate provision in section 11(7)(e) concerning 'budget' and incorrectly appeared to conflate these two separate considerations together as a general issue of 'resources';
   (ii) the DAO accordingly failed to properly interrogate whether or not the provision by or on behalf of the HSE of the specified services at any earlier point than November 2023 would have been possible;
   (iii) there was an absence of any or any proper reasons for the decision of the DAO;
   (iv) the reasoning of the DAO in coming to his decision was deficient or unclear;
   (v) the DAO erred in approaching the appeal as one where the Appellant carried an 'onus of proof' rather that viewing his role as investigative; and
   (vi) in general, the decision of the DAO was vitiated by a serious and significant error or a series of such errors.

Background

6. E.L.'s mother made an application for an assessment of needs for E.L. on 7 June 2019. E.L. was 17 months old at that time. The initial reason for the application was stated to be:-

> *"[E.L.] has no speech, he babbles, he doesn't point, so communication is screaming, whinging etc. [E.L.] has lots of sensory difficulties, shakes and bangs head, dislikes noise, walks on toes etc. also red flags Autism. [E.L.] has had issues since birth. [E.L.] regulates himself everyday multiple times."*

7. The 2005 Act provides that the assessment of needs should commence no later than 3 months after the request is made, per section 9(5), and be finalised within 3 months of being commenced, save in exceptional circumstances when it should be finalised without undue delay, per Regulation 10 of the Disability (Assessment of Needs, Service Statements and Redress) Regulations of 2007, contained in S.I. 263 of 2007.

8. In other words, the Assessment Report should be finalised within a total maximum time of 6 months from the request being received. Here the Assessment Report was produced on 8 October 2020, some 16 months after the request was received.

9. The Assessment Report indicates that E.L. had a number of assessments carried out. These were done by a multidisciplinary team involving a senior clinical psychologist, a senior speech and language therapist and a senior occupational therapist. As a result of these assessments, the assessment officer determined that E.L. had a disability as defined by the 2005 Act. This finding

is a requirement necessitated by section 8(7) of the 2005 Act. The assessment officer is also required to indicate the nature and extent of the disability and he stated that the assessments showed that "[E.L.] is currently presenting with Autistic Spectrum Disorder based on DSM V diagnostic criteria".

10. The Assessment Report then sets out the health and education needs of E.L. and specifies the interventions and services required as being speech and language therapy, occupational therapy, psychology, and physiotherapy services and the timescale for commencing each of the services is specified to be October 2020. In other words, the assessment officer specified that these particular services were required and that they were essentially required to be commenced immediately.

11. During submissions, counsel for the Appellant drew the Court's attention to the dicta of Faherty J. in *JF v HSE* [2018] IEHC 294 who in turn adopted the statements of Peart J. in *OC V Minister for Education* [2007] IEHC 170 where he addressed the importance of early intervention in cases where autism was diagnosed. In that regard Peart J held as follows:-

> *"That duty extended at that stage to completing a diagnosis within a time-frame which was reasonable given his age and the recognised importance of early intervention should a positive diagnosis be made in due course. The fact that diagnosis was not completed until the end of November 2002 and reported on the 9th December 2002 means a delay from referral to diagnosis of about seven months. That is a long time in the plaintiff's life at that stage. It follows in my view that a delay of seven months in formal diagnosis is an unreasonable delay, and does not adequately address the duty of care owed.*
>
> *...The diagnosis is the only key which has the potential to unlock the package of ameliorating measures to which the plaintiff would be entitled after diagnosis. In my view it was foreseeable by them that delay in diagnosis would as a matter of probability impact adversely on the rate at which any deficits would be reduced, and that his progress would be delayed as a result.*
>
> *... It was known by all concerned from that point onwards that early intervention was essential. It was known that lack of early intervention at that sort of age has adverse implications for deficit reduction. While accepting the reality facing the HSE personnel that they did not have sufficient resources to address adequately the demand on services, this alone is insufficient in my view to reduce the scope of the duty of care given the extreme vulnerability of the children with whom they are dealing. The duty of care in relation to such vulnerable and dependent children who are in need of urgent attention places a particular onus upon those with responsibility, to provide relevant assistance within reasonable timeframes. It is just and reasonable that this be so given the nature of autism." (underlined for emphasis).*

12. There was no dispute as between the parties about the known critical importance of early intervention in case such as that of E.L. when he was diagnosed with Autism Spectrum Disorder ("ASD") at the age of 2 years and 9 months old.

13. Accordingly, as of 8 October 2020 and after a 19-month delay, E.L. and his parents had been provided with the diagnosis that he was suffering from a disability in the nature of ASD and they had been provided with an Assessment Report indicating that a number of therapeutic services

should be provided on an immediate basis, namely, to commence in October 2020. This much was contained in the Assessment Report of 8 October 2020.

14. The next stage under the 2005 Act is that the Assessment Report is provided to a liaison officer who has a particular statutory function under Section 11 of the 2005 Act to prepare a service statement which will specify *inter alia* the health services which will be provided to the child "*by or on behalf of*" the HSE. During the course of this hearing, counsel for the HSE did not disagree that this provision entitled the liaison officer to specify that the services could be provided by persons or entities other than the HSE, otherwise there would have been no need for the words *"... or on behalf of*" contained in section 11(2). The service statement must also specify "the period of time within which such services would be provided"; see section 11(2) of the 2005 Act.

15. A review of the caselaw indicates that in many cases the services are to be provided by third party entities such as for example Enable Ireland. These voluntary organisations are often companies, sometimes charities, operated through a company limited by guarantee and on occasion they are provided with funding by the HSE through Section 39 of Health Act 2004. These companies are separate and independent of the HSE, and their employees are not considered public servants. However, Section 11(2) does not limit the provision of services to organisations that receive grants or funding from the HSE. In that regard, counsel for the HSE informed the Court that shortly prior to the hearing in November 2023, the HSE had set up a Children's Disability Service Grant fund through which it is proposed to provide grants to any number of organisations that provide services to children on a waiting list for children's disability network team services. These would therefore include not just organisations with an existing service arrangement or grant agreement with the HSE but also community groups, voluntary groups and indeed any number of private service providers.

16. From the foregoing it can be seen that the task of a liaison officer in drawing up the service statement pursuant to section 11(2) of the 2005 Act clearly requires consideration to be given to whether any of the services specified in an assessment report can be provided not just directly by the HSE but also by for example private service providers. Clearly whether those service providers would be specified in the service statement would depend on how quickly the services could be provided. This is because, presumably, the liaison officer would endeavour to ensure that the services specified in the assessment report will be provided within a timescale as close as possible to that specified in the assessment report.

17. The liaison officer in drawing up the service statement must also have regard to particular matters specified in section 11(7) which provides as follows:-

> *"(7) Without prejudice to the generality of subsection (2), in preparing a service statement the liaison officer concerned shall have regard to the following—*
>
> *(a) the assessment report concerned,*
>
> *(b) the eligibility of the applicant for services under the Health Acts 1947 to 2004,*

(c) approved standards and codes of practice (if any) in place in the State in relation to the services identified in the assessment report,

(d) the practicability of providing the services identified in the assessment report,

(e) in the case of a service to be provided by or on behalf of the Executive, the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive for the relevant financial year,

(f) the advice of the Council, in the case of a service provided by an education service provider, in relation to the capacity of the provider to provide the service within the financial resources allocated to it for the relevant financial year."

18. As can be seen the above provision is expressly without prejudice to the generality of the obligations imposed on the liaison officer in 11(2). In addition, it is clear that the requirement in section 11(7)(d) to have regard to the practicality of providing the services identified in the assessment report is a different and separate matter from that contained in section 11(7)(e) to ensure that the provision of the services specified in the service statement would not result in expenditure in excess of the amount allocated to implement the approved service plan of the HSE for the relevant financial year. Each of these are separate matters that need to be considered separately.

19. In other words, the liaison officer cannot rely on the budget that has been allocated for 2020 to say that a particular service cannot be paid for by the HSE in 2021 if, at the time the service statement has been drawn up, no budget has been allocated for 2021. On the other hand if a liaison officer contacts amongst others, for example, a private service provider to provide therapeutic services specified in an Assessment Report for a young child with a diagnosis of autism and that private service provider is simply not in a position to provide, for example, speech and language therapy until a particular date that could inform the drawing up of the service statement and the date could (assuming nobody else could provide the therapeutic service earlier) be justified on the grounds of practicability under section 11(7)(d).

20. The service statement in this case issued on the 13 October 2020, five days after the Assessment Report. The service statement specified that the "Service Type" to be provided to E.L. was the "Development of an Individual Family Service Plan (IFSP)". It then stated that the "start date" for this "service" would be November 2023.

21. In addition, it is to be observed that the service statement did not provide that any actual therapy for E.L. would commence in November 2023. Rather, what appears to be envisaged was a meeting or meetings involving a process whereby "goals" would be developed through what is described "the Individual Family Service Plan process" and that this would lead to the identification of the "specific interventions needed to support this". Accordingly, even as of October 2020, E.L.'s parents had no indication as to when actual therapeutic services would be provided. Even if they started reasonably promptly after the development of the IFSP it appears that at a minimum E.L. will have reached the age of six before receiving any actual therapeutic intervention of any sort. At the hearing of this case in November 2023 nothing had happened at

all, bar apparently 'a phone call' to E.L.'s mother. This is despite the fact that the HSE is aware of the importance of urgent intervention in cases of diagnosed autism for the reasons spelt out in the earlier cases referred to above.

22. A complaint was then made on 23 December 2020 on behalf of E.L. in relation to this service statement and in particular that it did not reflect the timescale identified in the Assessment Report. Section 14(1)(d) of the 2005 Act is very broadly drawn and entitles a complaint to be made to the HSE in relation simply to "the contents of a service statement".

23. Section 15 of the 2005 Act provides that a DCO may have regard to any matter that they think appropriate, and they shall have regard to the matters referred to in section 11(7) referred to above.

24. In addition, if the DCO is satisfied that the contents of the service statement concerned are 'inaccurate or incorrect' then the DCO can make a recommendation that the service statement be amended or varied or added to by the liaison officer; see section 15(8)(e).

25. The DCO's report was issued under cover of a letter of 24 February 2021 and in this report, it was indicated that the complaint had been supplied to the liaison officer and that the liaison officer had replied as follows: -

> *"The service statement is a document which informed the parents/guardians what health service a child will receive, the location where the health service will be provided and the timeframe for the provision of the health service. There is no obligation on the Liaison Officer to provide reasons for the level of service provision in the Service Statement. This was reiterated by Justice Barr in a recent judicial review.*
>
> *The service statement issued for this child detailed the specific clinical supports that were required within the Team. When a child commences with the Team I understand that the first step is the development of an Individual Family Service Plan. The service statement reflects this information. If the service is not available at a particular time, all the Liaison Officer can do is state that fact and state when such services may become available in the future. This has also been upheld in Judicial Review.*
>
> *The Service Statement issued contained a start date based on the information provided by the Team at that time and will be reviewed in 12 months or if further information is received from Team. At that time the start date may be changed."*

26. The DCO then confirmed that the liaison officer was asked if there was any other provider that could provide earlier intervention and it is stated that the following reply was received:

> *"No. Each service have their own criteria and speciality. As liaison officer I make a referral based on the recommendations of the Assessment Report and the supporting documentation to the service which is the most appropriate for the child. The service then screen the documentation to ensure they can provide the supports needed by that child. If deemed suitable by that service they are waitlisted and this is reflected on the Service Statement".*

27. The DCO then concludes having referred to Regulation 18 of the Disability Regulations 2007 and section 11(7) of the 2005 Act that:

> *"It is most unfortunate that services cannot be provided any sooner than the date provided in the service statement, however, I find that the contents of the service statement are correct and accurate and compliant with section 18 of the Regulations and Section 11(7) of the Act … I regret therefore that I am unable to uphold this portion of the complaint … [w]hilst it is most unfortunate that services cannot be provided any sooner than the date advised by the Children's Early Years Disability Service; the service provider has given a start date for services to be commenced which is within the realms of the Disability Act (2005) and so I do not find that the [HSE] has failed to provide or fully provide a service specified in the service statement."*

28. From this it can be gleaned that the DCO was of the opinion that the Children's Early Years Disability Service by giving a start date for services to be commenced (which in fact was merely the commencement of the process to develop an IFSP) more than three years later in November 2023 was considered to be "within the realms of the Disability Act".

29. An appeal was filed from this decision with the DAO on 16 April 2021. These appeals are dealt with pursuant to the provisions of Section 18 of the 2005 Act. Essentially the appeal reiterated the complaint that the start date of November 2023 was 'not in line with what was provided in the assessment report'. In addition, it was stated that 'staff shortages or lack of resources are not a defence to the Appellant's complaint' and that 'the complaint should have been upheld and a prompt date given for the provision of services'.

30. The DAO Determination issued on 26 January 2022. This Determination indicates that by letter of 20 April 2021 the HSE was requested to respond to the appeal. The DAO states that 'there were significant delays in obtaining a response from the HSE in relation to this appeal. Further reminders were issued to the HSE on 19 August 2021, 5 October 2021, 10 November 2021, 30 November 2021 and 20 December 2021'. The HSE finally replied on 23 December 2021 but gave no explanation for the delay. In relation to the appeal and the complaint on behalf of E.L. the HSE's letter simply observed that:

> *"The basis of the appeal is that the DCO did not uphold the complaint made on behalf of the appellant. I note that in not upholding the complaint the DCO cited Section 11(7) of the Disability Act with the qualification that a start date for services to be commenced had been provided and was therefore within the realms of the Disability Act (2005)".*

31. Thereafter the letter provided generic information on a national programme called Progressing Disability Services (PDS) for Children & Young People stating that this programme 'is changing the way services are provided across the country to make it equitable and consistent' and pointing out that 'further information on PDS can be found on: [the website address was set out].' The letter explained that this program 'will have a significant impact on services' ability to meet the needs of children and young people in a more efficient, effective and equitable manner'. It explained that the services were now 'reconfigured into their Children's Disability Network Teams (CDNTs)' and that this had happened on 20 September 2021. It explained that these teams were aligned with HSE community healthcare networks to facilitate integrated care in line with the *Sláinte Care* strategy. The letter continued by explaining that 'Children's Disability Services are provided through Children's Disability Network Teams (CDNTs) based on the child's home address and that in E.L.'s case his CDNT was HSE, CDNT 3 and the address was given.

32. During the period of time that the HSE had delayed replying to the queries of the DAO the Court of Appeal judgment in *CM v HSE* [2021] IECA 283 was awaited and came out on 27 October 2021. In that case the Court of Appeal found that the HSE's operational practise of carrying out assessments of needs otherwise than in chronological order but rather based on geographic area was *ultra vires*. A response to this judgment occurred with the introduction of the Disability (Assessment of Needs, Service Statements and Redress)(Amendment) Regulations of 2021 contained in S.I. 704 of 2021 which was introduced on 13 December 2021. This sought to give a legal underpinning to this operational practise not just in relation to providing clinical experts to conduct assessments of needs but also in relation to the provision of services. The HSE's response to the repeated letters from the DAO came 10 days after the introduction of these Regulations. These Regulations were accordingly a response to the judgment of the Court of Appeal of 27 October 2021 and, as counsel for the HSE reasonably confirmed, these Regulations were not designed to expand or enhance the entitlements of a disabled person seeking access to services but rather sought to provide legislative underpinning to the administrative practices that otherwise appeared to be unlawful.

33. In relation to the IFSP, the letter explained that:-

> *'[t]he national guidance for Children's Disability Network Teams affirms that the Individual Family Service Plan (IFSP) sets out the goals for the child and how the family and team are going to work towards them. The IFSP is an opportunity to allow parents the opportunity to describe in their own words and in their own time their perception of their child's needs, strengths, goals, and any concerns they may have, in accordance with the principles of family centred practice.'*

34. The letter then continued by saying that:

> *'St Columba's Children's Disability Network Team 3 is a service for children presenting with complex disability needs. All referrals on our waiting list are prioritised in line with National Prioritisation Policy. There are 120 children on our open caseload, and 185 children on the waiting list. There 185 children on the waiting list and 128 children ahead of E.L. Every effort is being made in this CDNT 3 to minimise the waiting time for services for children like E.L. who present with a complex disability and the PDS programme is a key factor in achieving this. There have been significant disruptions to Children's Disability Services through the COVID-19 waves which has resulted in increased waiting times on our open and waiting lists. Of the 11.7 WTE allocation of staff to CDNT 3 there are 6.8 clinical staff in position. Recruitment of staff is ongoing and is a key priority. I wish to reassure you that CDNT 3 staff are working hard to reduce the waiting lists. Waiting list initiatives include:*
> - *The provision of postural and orthotics clinic-sharing with CDNT 1 to maximise resources*
> - *The use of telehealth media such as Attend Anywhere and other virtual platforms*
> - *Provision of universal supports*
> - *Provision of virtual therapy groups where appropriate, to maximise efficiency while maintaining quality of service*
> - *Continuing to manage open waiting lists within existing pressures*
> - *Provision of workshops and therapy groups to maximise resources'*

35. The letter concluded by saying that 'I fully appreciate E.L.'s family's frustration with the waiting time to access services. Please do not hesitate contact me if you require any further information'.

36. The DAO's Determination, having provided a short summary of the HSE's position (drawn from the above mentioned letter of 21 December, 2021) then turns to set out what are described as the 'Relevant legal principles applied'. Here it states as follows:-

> *7.1 I have approached my determination upon the basis that the Appellant bears the onus of proof in respect of any disputed matters which were material or relevant to this appeal. The standard of proof which I have applied is the civil standard on the balance of probabilities.*
>
> *7.2 All documents and other material obtained during the course of investigation were furnished to both the Appellant and the HSE.*

37. At paragraph 8 the DAO then sets out what are described as 'Matters required to be taken into account' stating:-

> *8.1 In accordance with the obligations imposed by section 18(20) of the Act, I have considered the following matters before making my determination with respect of (sic) this appeal:*
>
> *8.1.1 The notice of appeal and supporting materials submitted by the Appellant as referred to above;*
>
> *8.1.2 I have considered each of the matters prescribed by section 11 (7) of the Act where relevant including:*
>
> *(a) the Assessment Report dated 8 October 2020;*
>
> *(b) E.L.'s eligibility for services under the Health Acts 1947 to 2004;*
>
> *(c) The approved standards in relation to the provision of services identified in the Assessment Report as being appropriate for E.L.'s needs;*
>
> *(d) The practicality of providing the relevant services;*
>
> *(e) The need to ensure that the provision of such services to E.L. will not result in any expenditure in excess of the amount allocated to implement the approved service plan of the HSE for the present financial year.'*

38. Then at paragraph 9 of the Determination the DAO sets out the 'Findings of the Investigation' as follows:

> *"9.1 The following facts relevant to the appeal are not the subject of any dispute between the parties:*
>
> *(a) The assessment report in relation to E.L.*
> *(b) E.L.'s entitlement to a service statement*
> *(c) The appellant's entitlement to make a complaint to the DCO*
> *(d) The appellant's entitlement to submit an appeal to the Appeals Officer."*

39. In next section the DAO sets out what are described as the "Findings in respect of the issues raised by the Appeal". This section states as follows:-

"10.1 As a consequence of the investigation findings set out above [this refers to the 'findings' above from section 9 of the Determination], I make the following findings in respect of the issues raised by this appeal:

(a) I find that the Complaint Officer is obligated by virtue of the provisions of section 15(6) [sic] of the Act to give due consideration to the resources available in preparing his report;
(b) The Complaint's Officer must also take account of all the matters referred to in section 11(7) of the Act. In particular sections (d) which makes specific reference to the "practicability of providing the services identified in the assessment report" and in the case of (e) "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 [HSE] for the relevant financial year"
(c) I find that the Complaint Officer took account of the provisions outlined and issued his report in accordance with the provisions of the Act.
(d) I find that the reconfiguration of services as part of the national programme called Progressing Disabilities for Children and Young People is underway and I accept that the Disability Network Team 3 is working to reduce the waiting lists for services in their area.

10.1[sic] Section 18(2) [sic] of the Act outlines the considerations which the Appeals Officer's must have regard to, these are included in section 11(7) of the Act. The express provision of a reference to resources is a significant stipulation.

10.2 In view of the foregoing, and based on the evidence provided to me I find no basis on which the delivery of services can be provided any earlier than outlined in the Service Statement."

40. Accordingly, the DAO then set out his determination in section 11 as follows:

"11.1 As a consequence of the above findings, I have determined that the appeal is not allowed and that the findings of the DCO in this case are affirmed".

41. By originating notice of motion E.L., through his mother and next friend M.L. appealed the aforementioned Determination of the DAO pursuant to Section 20 of the 2005 Act on a point of law. That appeal was heard by this Court on 14 November 2023. Both the DAO and the HSE stood over the lawfulness of the Determination in full.

Relevant legal principles

42. Due to the range of issues arising in this appeal it is necessary to look at the relevant legal principles under a number of headings.

Statutory Appeals on a 'point of law'.

43. There was no dispute of significance between the parties in relation to the legal principles that apply to a statutory appeal on a point of law.

44. A helpful starting point is the Supreme Court decision in *Fitzgibbon v. Law Society* [2014] IESC 48, [2015] 1 I.R. 516 where it is stated by Clarke J at paragraphs 127 and 128 of the reported judgment:-

> *"[127] The applicable principles were helpfully summarised by McKechnie J. in Deely v. Information Commissioner [2001] 3 I.R. 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 I.R. 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 decisionmaker 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)."*

45. In addition to the foregoing, account must be taken of the Supreme Court decision in *AG v Davis* [2018] 2 IR 357 where McKechnie J states, having cited the foregoing, the following at para.s 53 & 54:-

> "53. … I am satisfied that, subject to context, a statutory right of appeal on a point of *law will, if its wording does not otherwise prescribe, include the following:*
>
> *• Errors of law as generally understood, to include those mentioned in Fitzgibbon;*
>
> *• Errors such as would give rise to judicial review including illegality, irrationality, defective or no reasoning, procedural errors of some significance, etc.;*
>
> *• Errors in the exercise of discretion which are plainly wrong, notwithstanding the latitude inherent in such exercise; and*

• Errors of fact next referred to.

54. Drawing on what was said in both judgments in Fitzgibbon v. The Law Society of Ireland and on the authorities cited therein, including my own judgment in Deely v. Information Commissioner [2001] 3 I.R. 439, the following principles may be extracted when considering what issues of fact 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 any 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.

As with the matters listed in para. 53, above, this enumeration is not intended to be exhaustive."

46. In summary therefore, it can be said that the relevant legal principles governing a 'point of law' appeal under Section 20 of the 2005 Act are as follows:-

(i) Errors of law can occur where the statutory decision maker has misinterpreted or misapplied relevant legislation or applicable administrative policies.
(ii) An error of law can be found in respect of an error of fact as encompassed by the categories and type described in para.s 127 and 128 of *Fitzgibbon v Law Society* and in para 54 of *AG v Davis*.
(iii) Errors of law can also include any error that would give rise a finding of illegality in a judicial review hearing, such as on the grounds of irrationality, illegality, defective or no reasoning or procedural errors of some significance as described in para 53 of *AG v Davis.*
(iv) Finally, errors in the exercise of discretion which are plainly wrong can also amount to an error of law in this context, see para 53 of *AG v Davis.*

The Legal Principles underpinning the requirement for a statutory decision maker to give reasons.

47. As one of the significant grounds of appeal here concerns the assertion that the DAO failed to give any or any sufficient reasons it is necessary to set out the applicable legal principles governing challenges to statutory decision makers under this heading.

48. The principles are usefully summarised in the judgment of MacMenamin J. for the Supreme Court in *NECI v Labour Court* [2021] IESC 36 where he states as follows from para 147 to 157:-

"147 In Connolly v. An Bord Pleanala [2018] ILRM 453, this Court held that it was possible to identify two separate, but closely related, requirements regarding the adequacy of any reasons given by a decision-maker. First, any person

affected by a decision should at least be entitled to know, in general terms, why the decision was made. Second, a person was entitled to have enough information to consider whether they can or should seek to avail of any appeal, or to bring a judicial review of a decision. The court held that the reasons provided must be such as to allow a court hearing an appeal, or reviewing a decision, to actually engage properly in such an appeal or review. The court went on to explain that it may be possible that the reasons for a decision might be derived in a variety of ways, either from a range of documents, or from the context of the decision, or some other fashion. But this was subject to the overall concern that the reasons must actually be ascertainable and capable of being determined (see Connolly, para. 7.1 to 7.6).

148 *In Meadows v. Minister for Justice [2010] 2 I.R. 701, Murray C.J. stated:-*

> *"An administrative decision affecting the rights and obligations of persons should at least disclose* ***the essential rationale on foot of which the decision is taken****. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*
>
> *Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective." (para 93–94)*

149 *In Rawson v. Minister for Defence [2012] IESC 26 Clarke J. (as he then was) stated, on behalf of this Court, that:-*

> *"How that general principle may impact on the facts of an individual case can be dependent on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned … the particular basis of challenge." (para 6.8)*

150 *In EMI Records (Ireland) v. Data Protection Commissioner [2013] IESC 34, Clarke J. (as he then was) concluded that a party was entitled to sufficient information to enable it to assess whether the decision was lawful and, if there be a right of appeal, to enable it to assess the chances of success, and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends.*

151 *In Oates v. Browne [2016] 1 I.R. 481, Hardiman J., in this Court, stated that it was a practical necessity that reasons be stated with sufficient clarity so that, if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. But to this he added:-*

> *"Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must "satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it". (para 47.)*

152 *Finally, the judgment of this Court in Balz & Anor. v. An Bord Pleanála [2019] IESC 90 contains a number of observations which strike home in this case. Balz concerned a decision on a planning application. The judgment makes the point that the imbalance of resources and potential outcomes between developers, on the one hand, and objectors, on the other, means that an independent expert body, carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function.*

153 *Having pointed out that the Board and its inspector had carried out their functions with a high degree of technical expertise, the judgment went on to describe that, on the facts of that case, it was nonetheless unsettling that there should be an absence of direct information on one of the central planning issues which arose. O'Donnell J. stated that this might have occurred as a result of an unfortunate misunderstanding at the time of the appeal, and the Board's decision might have become entrenched in the defence of these proceedings. He allowed that there might be valid reasons why a board, or other decision-making body, might draft its decisions in a particularly formal way, and that, in most cases, interested parties would be able to consult an inspector's report to deduce the reasons behind the Board's decision. But, on the facts before the court, he observed:-*

> *"However, some aspects of the decision give the impression of being drafted with defence in mind, and to best repel any assault by way of judicial review, rather than to explain to interested parties, and members of the public, the reasons for a particular decision." (para. 45)"*

154 *But the judgment in Balz made clear that when an issue had arisen where it was suggested that the Inspector, and the Board, had not given consideration to a particular matter, it was also unsettling that the issue raised should be met by the bare response that such consideration was given (for a limited purpose) and nothing had been proven to the contrary. Similarly, while an introductory statement in a decision that the Board had considered everything it was obliged to consider, and nothing it was not permitted to consider, might:-*

> *"... charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision." (para. 46)*

155 *This last passage has a particular resonance in this case. Balz makes clear that a decision-maker must engage with significant submissions. The judgment emphasises that it is a basic element of any decision-making affecting the public that relevant submissions should be addressed, and an explanation given why they are not accepted, if indeed that was the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision-making institutions, if the individuals concerned, and the public more generally, are to be expected to accept*

decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live. (Para. 57 et seq of the judgment.)

The Duty to Give Reasons: Summary of Principles Applicable

156 The questions applicable in this case are, therefore:

a. Could the parties know, in general terms, why the recommendation was made?

b. Did the parties have enough information to consider whether they could, or should, seek to avail of judicial review?

c. Were the reasons provided in the recommendation and report such as to allow a court hearing a decision to actually engage properly in such an appeal, or review?

d. Could other persons or bodies concerned, or potentially affected by the matters in issue, know the reasons why the Labour Court reached its conclusions on the contents of a projected SEO, bearing in mind that it would foreseeably have the force of law, and be applicable across the electrical contracting sector?

157 Obviously, the test must be an objective one. The views of an aggrieved party having recourse to a tribunal may be a consideration. But, when determining whether the reasons given were sufficient, the test must be more dispassionate and detached. In this case, the potential audience is relevant. The Labour Court was engaged in a statutory role, involving compliance with statutory duties to protect rights, where public interest required transparency. The reasons had to be sufficient, therefore, not just to satisfy the participants in the process, but also the Minister, the Oireachtas, other affected persons or bodies, and the public at large, that the Labour Court had truly engaged with the issues which were raised, so as to accord with its duties under the statute."

49. The foregoing very comprehensive review of the authorities indicates that the following general principles in relation to the requirement to give reasons can be said to apply to the decision of the DAO under the 2005 Act:-

(a) Can the parties (in this case the family of E.L. and the HSE) be said, on an objective basis, to know, in general terms, why the decision was made? This can include knowledge arising from both the Determination itself and documents referred to in the Determination or in possession of both sides as part of the process.
(b) Do the parties have enough information to consider whether they could, or should, seek to avail of judicial review or appeal on a point of law under the 2005 Act?
(c) Are the reasons provided in the Determination of the DAO such as to allow a Court to engage properly in such an appeal, or judicial review?

Legal Principles emerging from an analysis of the 2005 Act.

50. Turning now to the 2005 Act itself, Part 2 thereof has been the subject of detailed analysis in a considerable number of Superior Court judgments including by the Supreme Court in

the judgment of Dunne J. in *JN v Harraghy & HSE* [2023] IESC 9. In addition, many of the provisions in Part 2 are discussed in detail by the Court of Appeal in several judgments from that Court including *CM v HSE* [2021] IECA 283, *J O'SS v HSE* [2021] IECA 285, *AB v HSE* [2023] IECA 275, and *MB v HSE* [2023] IECA 286.

51. It is clear from the wording of the Act that the criteria in section 11(7)(d) and (e) are two separate criteria and this is recognised in the judgments in *JN* of Bolger J. [2022] IEHC 407 at para.s 55-57 and then by Dunne J. in the Supreme Court. Bolger J. in *JN* at para.s 55-57 states as follows in this regard:-

> *55. There are two points, in particular, in the Appeals Officer's determination that show his misunderstanding of the matters set out in s. 11(7) which he is required to consider:*
>
> > *(i) The Appeals Officer seemed to conflate the matters set out at 11(7)(d) and 11(7)I into a single purported consideration at 8(1)(d)(iv) of his determination, rather than a consideration of the two separate matters that they are. The practicality of providing the service is different and is a separately identified matter to 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 to the relevant financial year. Support for that conclusion can be found in the similarly separately identified issues in s.27(2) firstly of what is practicable and secondly of cost. The matter identified at s.11(7)(e) certainly involves money but ss. (d) may or may not. For example, recruitment is identified in the HSE's letter as something due to happen which, they anticipate, will increase capacity. There is no explanation for why that recruitment has not yet happened. That may be an issue of practicality or a separate issue around expenditure in excess of the monies allocated in the approved service plan. It is speculative to say which it is, if either or any. I find that the information furnished by the HSE in response to the appeal officer's specific request was not sufficient to enable the Appeals Officer to consider the matters set out at s. 11(7) and, in particular, s. 11(7)(e).*
> >
> > *(ii) The Appeals Officer's finding at 10.5 in referring to s.11(7) that "The express provision of a reference to resources is a significant stipulation". The phrase "resources" does not appear in s. 11(7). I find that the Appeals Officer is incorrect in claiming that the subsection expressly refers to resources.*
>
> *56. I was not satisfied by the attempts of the Appeals Officer or the HSE to demonstrate how the Appeals Officer determination (or to the extent that the argument was made, the DCO decision) considered (or in relation to the DCO had regard to) the matters set out in s. 11(7) and, in particular, subs. (e). The Appeals Officer's consideration does not have to be done by way of a detailed narrative, but it has to be done in a way that complies with the Appeals Officer's statutory duty pursuant to s. 18(20) and given what was required by the High Court in McEvoy v. Meath County Council and the Supreme Court in Glencar Explorations v. Mayo County Council to satisfy the court that consideration had been given to the necessary matters. The Appeals Officer simply stating that he has considered all the documentation (implicitly including the HSE's service plan of 2020) cannot evidence a consideration of the matter set out in s. 11(7)(e)*

when there was no evidence put before the Appeals Officer of how the provision of services to the appellant by the date specified in the service statement ensured expenditure within the amount allocated to implement the approved service plan of executive for the relevant financial year, or the converse, i.e. that the provision of the service on an earlier date would result in such expenditure. To the extent that the Appeals Officer says he did consider the matter set out in s.11(7)(e), it can only have been speculative in the absence of that evidence or anything akin to it.

57. I see no basis in either the Appeals Officer's determination or in the limited information and documentation on which the Appeals Officer based his findings, that satisfies me either that he had sufficient information to allow him to consider the matters set out in s.11(7) or that he complied with his statutory duty to do so. The low bar identified by the High Court in McEvoy v. Meath County Council and by the Supreme Court in Glencar Explorations v. Mayo County Council was not passed here, such that this court could be satisfied that the Appeals Officer did give the consideration to the s.11(7) matters as he was required to do.

52. In that regard, in terms of the statutory requirement on liaison officers and, subsequently the DCOs and the DAO, to have specific regard to the HSE's annual allocation as required by section 11(7)(e), Dunne J. in *JN* states at para 61 that:-

"Undoubtedly, what is required is that regard be had to the overall position of the HSE and to its funding, and to the manner in which those funds are allocated. In this regard, the provisions of s. 5 of the 2005 Act are of relevance, in that it provides, inter alia, at sub-section 3, that where a specified body provides or arranges for the provision of services, that body shall allocate out of the moneys available to it for that year such amount as it considers appropriate for the provision of those services. I accept that a matter that is required to be taken into account in preparing a service statement is the need to ensure that the provision of services does not result in an excess of expenditure in relation to the amount allocated in any given year. That is expressly provided for in the 2005 Act, and therefore is a factor to be borne in mind." (underlined for emphasis)

53. In relation to the nature of the DAO's role, Dunne J. in JN states as follows at para. 71:-

"71. It does have to be said that there was some acceptance in the course of argument on behalf of the Appeals Officer that circumstances could arise which might result in the view being taken that the dates provided for in a service statement were inaccurate or incorrect. Thus, it was not disputed that in circumstances where, for example, more resources became available to the HSE which would enable the services at issue to be provided at an earlier date that the timeline provided for in a service statement could no longer be regarded as accurate or correct. It is undoubtedly the case that the Appeals Officer took a narrow view of the powers of an Appeals Officer in relation to the service statement when dealing with the complaint. Such a narrow view seems to me to be inappropriate having regard to the nature of the legislation and the remedies provided for someone to make a complaint in relation to the provision or lack of provision of services to an individual. As has been set out above, an elaborate process

has been set up to allow persons in the position of the mother of the child in this case to make a complaint where services are not being provided, or perhaps not being provided in as timely a manner as might be appropriate. It should be borne in mind that the process is not an adversarial process and is one which has been designed to give an appeals officer considerable powers to enquire into the issues arising in any given case, as I have described above. There is no doubt in my mind that an appeals officer is entitled to interrogate issues such as the date when a particular service could be provided and, equally, is entitled to interrogate the question as to whether or not those services could be provided elsewhere in the relevant functional area of the HSE. That did not happen here". (underlined for emphasis).

54. In *AB v HSE* [2023] IECA 275 Whelan J. discusses the 2005 Act in its wider legal context. At para 18, Whelan J. refers to the Convention on the Rights of Person with Disabilities (CRPD) which was ratified by the State in March, 2018 stating as follows:-

"It is appropriate to consider key provisions within the said CRPD which, it was argued, may operate as an aid to construction of the statutory provisions. In the CRPD Preamble, recital (e) provides that the States Parties "[recognise] that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others". Recital (h) states " discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person". Recital (r) "children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children… recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child". (underlined for emphasis).

55. Further at para 110 of her judgment in *AB*, Whelan J. observes:-

"110. I am satisfied that this court is entitled to have regard to the fact that the CRPD was ratified by the State in 2018. It is an ancillary factor to be taken into account in approaching the construction of s. 8. Whilst there are certain similarities between the language contained in the CRPD and the statute, I do not find it necessary to resort to the CRPD in this instance to be satisfied as to the true ambit and extent of the assessment of disability required by s. 8 of the 2005 Act."

56. During submissions in this case, Counsel for the Appellant referenced Article 42A of the Constitution. Whelan J. also refer to Article 42A in *AB* at para. 23 *et seq.* as follows:-

"Article 42A.1 of the Constitution provides: - "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights." Article 42A ultimately became law on the 28th April 2015. Article 42A(1) is self-executing as the authors of Kelly: The Irish Constitutional (5th ed., Bloomsbury Professional, 2018) observe at para. 7.7.205."

57. As pointed out in *Kelly* and referenced above, Article 42A.1 has been described as self-executing. Humphreys J. in *O'T v Child and Family Agency* [2016] IEHC 101 states at para 28:-

"28. Article 42A of the Constitution is also relevant in this context, and in my view imposes an autonomous duty on the court to uphold the natural and imprescriptible rights of the child independently of any positions adopted by the parties (see e.g., Sivsivadze v. Minister for Justice and Equality [2015] IESC 53)".

58. In terms of the importance of the Assessment Report (which feeds into the Service Statement) Collins J. states the following in *AB* at para.s 8-10:-

8. Here, the language and scheme of Part 2 appear to me to be clear. The provisions of Part 2 relating to assessment, and in particular the definition of "assessment" in section 7 and the provisions of section 8(7) which prescribe the output of such an assessment, make it clear that the focus is on the identification of the health and/or education needs of the person concerned and the health and/or education services required to meet those needs.

...

the focus of Part 2 is on the identification of needs and appropriate services, even if, as a matter of practicality and/or resources, it may not be possible to deliver all those services and/or deliver them within the "ideal" timeframe identified in the relevant assessment report.

9. Thus, the assessment must go beyond confirming that the person concerned has a disability and must identify "the nature and extent of the disability" so that any "health and education needs ... occasioned to the person by the disability" may be identified, which will in turn enable the identification of "the services considered appropriate ... to meet the needs of [that person] and the period of time ideally required ... for the provision of such services and the order of such provision."

10. The assessment must, accordingly, be such as to enable the assessment officer to identify the health and education needs of the person concerned and the services appropriate to meet those needs.

...

Disability and diagnosis may develop, needs may change and the services required to meet those needs may require adjustment (and new services may become available for existing conditions). That is particularly likely to be the case where children are involved".

59. Commenting on the 2005 Act from a broader perspective, Collins J. in *JN* then observes from para.s 17-18 as follows:-

17. The 2005 Act was unquestionably an important piece of law reform. Part 3 was significant in terms of providing for access to public buildings and services but Part 2 was particularly notable for the scale of its ambition, involving as it did the establishment of a legally enforceable framework for the assessment of the needs of, and the delivery of services to, persons with a disability. But it is often easier to legislate

on paper than it is to ensure that legislation functions as intended and actually achieves its policy objectives. In his stimulating book Making Laws that Work: How Law Fails and How We Can Do Better (2022), David Goddard, a Judge of the New Zealand Court of Appeal, observes that it is impossible to design effective laws without paying close attention to the institution(s) that will administer them (page 82). Where that is an existing institution, consideration must be given to whether it has the capacity and the resources needed to play its intended role. If the institution lacks the capacity to administer the law, then it is likely that the law will fail to achieve its policy goals (page 83).

18. That, evidently, is apt to describe the position here. Part 2 of the 2005 Act contemplates that persons with a disability (as defined) should have access to a speedy and comprehensive assessment to identify the nature and extent of that disability and the consequential health and education needs of the person concerned and the services appropriate to meet those needs. Such services would then be provided as far as practicable. In the real world, however, it seems clear that Part 2 has not operated as intended. As already noted, until January 2022 persons over the age of 5 were excluded entirely from the application of Part 2. As for the limited (but significant) cohorts to which Part 2 did apply, it is clear that many of the parents and children who were its intended beneficiaries - including C and the parents here - were left frustrated and disappointed, resulting in frequent litigation which inevitably consumed resources that might otherwise have been available for the delivery of services. While the HSE has now adopted a new SOP in respect of Part 2 assessments (in response to the decision of the High Court (Phelan J) in CTM (a minor) v Health Service Executive [2022] IEHC 131), the history thus far emphasises the need to match legislative ambition with adequate resourcing if the laudable policy objectives of Part 2 are to be achieved in practice".

60. Also, in the context of describing Part 2 of the 2005 Act from a wider perspective, Dunne J. in para.s 31-35 states as follows:-

"The Scheme of the Act

31. The 2005 Act is a piece of legislation which contains what were at the time some novel features. As the Long Title of the Act makes clear, it is an Act "to enable provision to be made for the assessment of health and education needs occasioned to persons with disabilities by their disabilities, to provide for appeals by those persons in relation to the non-provision of those services, to make further and better provision in respect of the use by those persons of public buildings and their employment in the public service … and to promote equality and social inclusion and to provide for related matters". Thus, in the first place, the 2005 Act was intended to provide for an assessment of the health and education needs of persons with disabilities. It provided for the provision of services to meet those needs, having regard to the resources available for them, and specifically it provided for appeals by persons in relation to the non-provision of services. Thus, a person dissatisfied with a decision in relation to the provision or non-provision of services, or indeed a finding that someone did not have a disability, had a right of appeal.

32. I have already set out some of the key provisions of the 2005 Act which are of relevance to these proceedings, such as s.11 of the Act which provides for the making of a service statement, and the role of the Liaison Officer in preparing the service statement in respect of that which will be provided to an individual person with disability, s.14 in relation to the assessments or service statements, s. 15 in relation to the role of DCOs, ss. 16 and 18 in relation to appeals from a DCO. Also of interest is the provision to be found in s. 22 of the 2005 Act. It provides, inter alia, that: "If the Executive or the head of the education service provider concerned fails - (i) to implement in accordance with its terms a determination of the appeals officer in relation to an appeal under section 18, or ... (iii) to implement in full a recommendation of a DCO, within 3 months ... the applicant concerned ... may apply to the Circuit Court ... for an order directing [the Executive of the head of the education service provider]"

33. Thus, one can see the various steps following on from an assessment, the preparation of a service statement, the possibility of a complaint being made, and a process for an appeal, culminating with the further possibility of enforcement proceedings in the Circuit Court where the terms of an assessment or recommendation have not been given effect to.

34. It is clear from the scheme of the Act that it is designed to enable assessments to be made of the health and educational needs of persons with disability, and to enable those persons to have a process to enable them to challenge either the assessment itself or the provision or non-provision made in relation to their needs through the process created by the Act. Quite elaborate and detailed procedures have thus been put in place to allow those who seek access to the relevant services to obtain what is appropriate for them and available from the resources allocated by the government. The objective of the legislation is, as the Long Title makes clear, to "facilitate generally access ... to certain such services and employment and to promote equality and social inclusion ...". One can safely say that the purpose of the 2005 Act is to provide assistance to persons with disabilities and to allow those with an issue as to the provision being made for them to challenge the decisions made concerning them with a complaint process, including an appeal, (together with a further appeal to the High Court on a point of law), and enforcement measures where appropriate.

35. It is not in dispute that the 2005 Act is a remedial statute. In the case of McDonagh v. Chief Appeals Officer & the Minister for Social Protection [2021] 1 ILRM 385, I made some observations, at para. 57 of my judgment in that case which are set out above".

61. From the foregoing cases and description of the relevant provisions of the 2005 Act, and as far as same relate to the issues arising in this case, the following principles emerge:-

    i. The 2005 Act is a novel piece of legislation as it established a legally enforceable framework for the assessment of the needs of, and the delivery of services to, persons with a disability (it is a rare example of the Oireachtas explicitly providing for a socio-economic right – the entitlement of a person with a disability to services – to be enforceable by the Courts);

ii. The 2005 Act in a case involving a child, should be interpretated in the context of Article 42A.1 of the Constitution which imposes an autonomous duty on the court to uphold the natural and imprescriptible rights of the child;
iii. Both the CRPD and, by virtue of Article 40.1, the Constitution, require so far is practicable, children with disabilities to have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children;
iv. The Assessment Report, when it contains a diagnosis of a disability, should set out with specificity the services that should, in an 'ideal world', be provided;
v. The cases confirm that early intervention in a young child diagnosed with Autism is essential;
vi. The general provisions of Part 2 of the 2005 Act make it clear that diagnosis and assessment of needs and provision of services should be carried out without undue delay (section 11(7) is expressly without prejudice to the generality of section 11(2));
vii. The purpose of a service statement is to specify when and where the actual services specified in the assessment of needs will be provided;
viii. Section 11(2) explicitly provides that the services can by provided by the HSE or on their behalf (ie by community organisations, voluntary groups or hospitals or care providers, charities or private service providers);
ix. The role of the DAO is investigative and the DAO has extensive legal powers to interrogate whether or not a complaint about the 'correctness' of a service statement should be upheld;
x. The requirement to have regard to section 11(7)(d) (the 'practicality' issue) and section 117(e) (the 'budget' issue) are separate and regard must be had to each.

Submissions

62. Counsel for all parties provided very helpful submissions and took the Court through the significant number of recent Superior Court judgments that have arisen concerning Part 2 of the 2005 Act.

63. Counsel for the Appellant outlined the case for the various points summarised at paragraph five of this judgment.

64. On behalf of the DAO, counsel submitted that the Determination was properly reasoned and that regard could be had to the letter of 23 December 2021 which had been sent to the family without any further comment being received for the purposes of gleaning reasons for the decision. It was said that the 2005 Act by virtue of the wording in section 18 and section 18(3) in particular (which requires the Appellant to specify the grounds of appeal) placed the onus of proof on the Appellant. On behalf of the DAO it was submitted that the caselaw simply established an 'entitlement' of the DAO to interrogate whether the date specified in a service statement for the commencement of services was 'correct'. It was implied that in this case there was no obligation to do so. The other various 'errors' claimed on behalf of the Appellant were disputed or were not serious.

65. On behalf of the Notice Party, counsel helpfully took the Court through the various statutory provisions in a clear and helpful manner and addressed the Court on queries constructively. The considerable body of recent caselaw on Part 2 of the 2005 Act was also outlined in a

helpful and clear manner. It was correctly pointed out that, at least in one important respect, this was not a case where it was appropriate to claim that the Courts should enforce delivery of a service as there was no actual breach of any provision contained in the Service Statement issued in this case. This was not seriously disputed on behalf of the Appellant.

Decision and Application of the relevant Legal Principles to the Issues Arising

66. Firstly, as to the submission that the caselaw simply established an *entitlement* of the DAO to interrogate whether the date specified in a service statement for the commencement of services was 'correct' and that there was no *obligation* to do so, I am satisfied that, in the particular circumstances of this case, this submission is incorrect. In circumstances where the Appellant is a young child with a diagnosis of autism and a recommendation in the Assessment Report that services commence immediately, a proposed commencement date of more than 3 years later for work to begin on developing an IFSP should have raised a serious concern and interrogation along the lines identified by Dunne J. in *JN*.

67. I am also satisfied that it was a significant error of law on the part of the DAO to conflate section 11(7)(d) and 11(7)(e). Each of these considerations had to be assessed and interrogated separately and not just conflated together as 'resources'.

68. The letter of 23 December 2021 contained no reference to the HSE's budget for 2020, 2021 or indeed 2022. There was no explanation or apology for the delay it took to reply to the repeated letters from the DAO. There was no reference to the specific therapies specified in the Assessment Report. There was no discussion or mention as to whether or not they could be provided by any outside organisation, community group, voluntary group or indeed any private service provider. Whilst the letter stated that 'the HSE Dublin South West Early team was deemed the most appropriate service to meet E.L.'s needs' there was no indication of any consideration that delaying commencement of any therapy until after November, 2023 (when the formulation of an IFSP would only begin) might make earlier opportunities of providing E.L. with therapy more suitable.

69. Accordingly, I am satisfied that the letter of 23 December 2021 from the HSE was wholly inadequate and the extensive powers provided in the legislation to the DAO should have been triggered at an early stage.

70. Separate to the concerns relating to the letter of the 23 December, 2021, it was wholly unacceptable in a case of this sort that the appeal process itself became substantially delayed for reasons that were not explained and this delay in itself, in the particular circumstances of this case, should have led to the DAO utilising the powers provided for in section 18 of the 2005 Act.

71. In the circumstances of this case, the HSE should have been interrogated by the DAO as to what urgent therapeutic services could have been provided at an earlier stage, if necessary, from other providers and the separate issues of practicality and/or whether provision of such services might have led to costs that would push the HSE over its annual budget could then have been assessed with some rigour.

72. Subject to the budgetary issues required to be considered in section 11(7)(e), E.L. should have been in no different a position to any similar child with a similar disability but who

had, by stint of different family resources, access to private therapeutic services. If there were issues of practicality or otherwise under any other provision of section 11 then these required to be interrogated robustly by the DOA, if necessary, using the extensive powers described by Dunne J. in *JN* at para 51 of her judgment.

73. Applying the principles set out in *NECI* above as to the need for reasons I am also satisfied that the Determination of the DAO is seriously deficient. The sections of the report dealing with the 'Findings' are deficient. They do not make sense. The 'findings' in paragraph 10 do not in any sense flow or arise as claimed '[a]s a consequence of' the findings in paragraph 9.

74. In relation to the 'findings' in paragraph 9 of the Determination, as the Assessment Report was provided to E.L.'s mother by the HSE and as it contained a diagnosis of a disability and as the entitlements described thereafter at paragraphs (b), (c) and (d) are therefore legal entitlements under the 2005 Act it is difficult to understand how these matters are listed as the 'Findings of the Investigation' and are presented as the only such findings. These matters were never the matters in issue and no 'investigation' whatsoever could conceivably have been required to uncover these matters and thereby reduce them to 'Findings of the Investigation'.

75. Accordingly, the 'findings' in paragraph 9 are hardly, on any view, appropriate 'findings'. Three of them are simply legal entitlements that arise under the 2005 Act and were not in dispute.

76. In relation to paragraph 8.1.2 of the Determination, contrary to what is stated therein, there is no evidence that any consideration was given to the items at (b), (c) or (e) of the above paragraph and, to paraphrase O'Donnell J. (as he then was) in *Balz*, this paragraph appears to be little more than formulaic administrative throat clearing by the DAO.

77. Finally, the finding that the onus is on the Appellant in relation to 'any disputed matters' is also wrong. For example, how can the family of a young child prove that, for example, the services of a private speech and language therapist will or will not push the HSE over budget. The function of the DAO is *investigative* as explained by Dunne J. in *JN*. There was ample concern here raised by the summary nature of the service statement, produced within 5 days of the Assessment Report, and providing for an IFSP more than 3 years later to raise immediate and serious concern in the context of this young child and the disability that had been diagnosed.

78. Overall, therefore, I am satisfied that the Appellant has established multiple serious errors of law in this process as a whole and in the Determination. The approach of both the DAO and the HSE to this matter raises serious questions about their understanding of the rights of the Appellant and the need to respect and operate the law that has been set down by the Oireachtas and interpretated many times at this juncture by both the High Court and the Appellate Courts. The rule of law requires administrative and statutory bodies to respect the law and, particularly in the case of a vulnerable young child with a diagnosed disability, to comply with it earnestly.

79. I propose to hear the parties as to the precise form of the order and in relation to costs.