# THE HIGH COURT
## JUDICIAL REVIEW

**[2023] IEHC 109**
**[Record No. 2022/136 JR]**

**BETWEEN:**

**N.T. AND J.H. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, N.T.)**

**APPLICANTS**

**AND**

**HEALTH SERVICE EXECUTIVE**

**RESPONDENT**

**JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 6th day of March 2023.**

### INTRODUCTION

**1.** This case concerns the assessment of need [hereinafter "AON"] process enacted under the Disability Act, 2005 [hereinafter "the 2005 Act"] which is the subject of a separate judgment delivered by me today in *M.B. v. HSE* [2023] IEHC 99.

**2.** The AON process results in the preparation of two documents: an assessment report and a service statement. While the issues in this case and *M.B.* are not identical, both cases concern the proper exercise of the HSE's power to review assessment reports prepared under Part 2 of the 2005 Act. In this case the Second Applicant was assessed as having a disability within the meaning of the 2005 Act during an assessment of need conducted under the Act and this finding was recorded in the assessment report which issued. Following a review of the assessment, however, the assessment officer concluded that the Second Applicant no longer had restrictions such as would qualify him as having a "*disability*" as defined under the 2005 Act.

**3.** While it is accepted by the HSE that there is an ongoing obligation to review service statements in accordance with the requirements of Disability Regulations 2007 (S.I. No. 263/2007) [hereinafter "the 2007 Regulations"] promulgated pursuant to s. 21 of the 2005 Act, the nature and extent of the duty to review assessments of need has proven more controversial.

**4.** As apparent from my judgment, the primary issue in *M.B.* was whether there is an entitlement, enforceable by order of mandamus or declaratory relief in judicial review proceedings, to compel the carrying out of more than one review of an assessment carried out under the 2005 Act, it being accepted in that case that a first review of the assessment had taken place.

**5.** In this case the parties have joined issue on the pleadings and in argument before me on the even more fundamental question of whether there is a duty, enforceable by way of relief in judicial review proceedings, to review an assessment report at all. In *MB*, I found that there is no entitlement to a second or subsequent review of an assessment report under Part 2 of the 2005 Act but instead the option to seek a new assessment of needs. I did not determine the more fundamental question of whether there is any duty enforceable by way of judicial review to carry out a first review of the assessment of needs. For reasons set out below, I do not consider it appropriate or necessary for me to do so in these proceedings either.

**6.** What is incongruous about this case is that on the one hand the Applicant seeks relief by way of mandamus compelling a review of assessment on the apparent premise that no review has taken place, whilst on the other hand seeking to quash a decision of the HSE has taken following a review of the assessment of needs. There is an obvious contradiction in the Applicant's position: the case is either that there is a duty to conduct a review but no review has taken place or that a review has taken place but the finding made in that review process is unsustainable as legally flawed.

**7.** No real explanation was forthcoming during the hearing before me for the inherent contradiction between the two premises on which the case was advanced in pleadings but the

case was opened before me on the basis that the primary issue in the proceedings (although pleaded as secondary) related to the adequacy of the review which was carried out and the lawfulness of the decision taken on review that the Second Applicant no longer has a disability within the meaning of the 2005 Act. For its part, the HSE was anxious to establish that it was not under an obligation to conduct a review of an assessment of needs, even though it had done so in this case, seemingly because this question is arising in other cases and will need to be determined.

**FACTUAL BACKGROUND AND CHRONOLOGY**

**8.** The Second Applicant is a child (hereinafter "the Child") born in July, 2007 who has special needs. Various private assessments were sought by the Child's parents and a clinical psychologist's report was obtained in February, 2014 and subsequently updated in which a diagnosis of Autism Spectrum Disorder [hereinafter "ASD"] was made. A report was also obtained privately from an occupational therapist who found difficulties which it was said would not be unusual for a person on the autistic spectrum, Swan Neck Deformity, Dyspraxia and Sensory Processing Disorder.

**9.** The Child's mother, the First Applicant, applied for an AON pursuant to s. 9 of the 2005 Act in March, 2019 when the Second Applicant was eleven years old. She submitted the privately obtained assessments to the Assessment Officer. In the report from the private occupational therapist it was stated that:

> *"should it transpire that [name] does not meet the diagnostic criteria for ASD; he meets the criteria for a diagnosis of Developmental Coordination Disorder (DCD)/Dyspraxia according to the DSM-V. His difficulties with sensory processing, most notably in the areas of tactile, proprioceptive auditory and vestibular processing, are consistent with a diagnosis of Sensory Processing Disorder (SPD). It is important to note that Developmental Coordination Disorder (DCD)/Dyspraxia and Sensory Processing Disorder (SPD) are developmental conditions that endure across the life span. While his motor coordination and sensory processing deficits may cease to impact him in such a pervasive manner as he grows and matures into adulthood and should he score in the*

*average range on future motor proficiency tests, it will not negate the fact that he has these diagnoses."*

**10.** The First Applicant maintains on affidavit that the HSE did not initially accept that the Child was autistic (reference is made in the Occupation Therapy Report exhibited by the First Applicant to interaction with the HSE in 2015 to this effect and it is stated "*assessment by disability services in the HSE did not confirm this*"). From the reports exhibited it appears that the Child was re-assessed in the HSE local Disability Services by a senior clinical psychologist and a senior speech and language therapist who concluded that the Child did not meet the diagnostic criteria for ASD at that time. He was referred to Child and Adolescent Mental Health Service [hereinafter the "CAMHS"] to rule out ADHD-type difficulties. Onward referral was also made at that time (2015) for occupational therapy and speech and language therapy review. Subsequent assessment indicated that the Child appeared to meet the diagnostic criteria for Development Coordination Disorder but an onward referred to a Paediatrician was made for confirmation of same (2016). He was discharged from physiotherapy as no concerns were reported regarding his physical status and in a physiotherapy report dating to October, 2019 it was noted that the Child was not willing to attend group therapy and will not adhere to a home exercise programme.

**11.** On foot of the AON process an assessment report was completed in November, 2019. The assessment report refers under the heading of assessment of the nature and extent of the Child's needs to the fact that he "*has a private diagnosis of ASD (Autism Spectrum Disorder)*" and "*has a diagnosis of DCD/Dyspraxia*". The assessment report accepted that the Child had a disability within the meaning of the 2005 Act.

**12.** It is noted in the assessment report that the Child's parents "*want him to remain with the Children's Disability Service*" through which he was said to have "*access to occupation therapy, speech therapy physiotherapy, psychology, nursing, social work and behaviour therapy if and when required. Parents to contact the team when the need arises*." Reference is made to attendance for occupational therapy in 2016 and 2018. Additional education needs identified in the assessment report were a requirement to access extra support hours in school based on diagnoses of ASD and access to a laptop.

**13.** The assessment report records on its final page that it is to be reviewed in November, 2020 "*on request*". The assessment officer explains on affidavit in opposing the relief sought in these proceedings that the inclusion of "*on request*" occurred because she prioritises the preparation of assessment reports over the review of existing reports noting that there is a statutory obligation to complete assessment reports within a prescribed time-frame.

**14.** In arriving at her determinations and findings as recorded in the assessment report the assessment officer had the benefit the detailed application form and additional information form completed by the First Applicant and of existing reports (including those furnished by the First Applicant) as follows:

- Occupational therapy assessment report prepared on the basis of assessments carried out in September, 2018 and April, 2019 (private);
- Psychology reports prepared on the basis of assessments carried out in May, 2019 and February 2014 (private);
- CAMHS (Child and Adolescent Mental Health Service) assessment report prepared by a clinical psychologist dating to November, 2016;
- Physiotherapy report dating to October, 2019.

**15.** The corresponding service statement issued in December, 2019 and records that the Child was receiving group interventions in relation to school transition and had been referred to a paediatrician and was due to be seen in February, 2020.

**16.** By letter dated the 12th of February, 2020 a consultant paediatrician reported on the DCD screening carried out on the Second Applicant as follows:

> *"[Child] was seen in the paediatric clinic. I gather he was referred for a DCD screen. He is currently in first year in [Secondary school]. He has no academic exemption and transition to secondary school has gone well for him.*

*[Child] is quite independent in terms of his daily living skills but requires supervision for showering and washing his hair. He has no issues with sleep. He is generally healthy and his vaccinations are up to date. He has no known allergies.*

*Clinically, [Child] presents as a boy who is quite overweight for his height. He has no visible striation and general examination of his chest and abdomen was unremarkable. Neurologically, he has features of a developmental co-ordination disorder, but as he has been attending Occupational Therapy for some time, I suspect his signs are not as florid as what they may have been 6 months ago.*

*I am referring [Child] to the Paediatric day ward for a number of investigations around his obesity, and will see him here again in 6 months or thereabouts. I will probably discharge him back to GP care following a baseline level of investigations."*

**17.** In April, 2021, the Second Applicant was advised by letter that as he had not been in receipt of services from the Children's Disability Team for some years, he was being discharged.

**18.** Seemingly prompted by this letter, the Applicants' solicitor wrote by letter dated the 11th of May, 2021 referring to the assessment report and pointing out that it had issued on the basis of historic assessments. It was pointed out that the assessment report was to be reviewed on request in November, 2020. It was stated:

*"The purpose of this correspondence is to seek a review of the Assessment of Need which will require an updated OT assessment. The OT assessment which was considered as part of the original process is historic in nature and our clients are of the view that his needs have changed since that report issued and therefore as part o the review an updated OT assessment is required.*

*After that, an updated Service Statement is going to be required that conforms fully with the regulations under the Act. From our client's perspective he needs assistance with social skills and an OT service. He also requires the identification of a new service team. If this cannot be delivered without your own resources, it will then need to be*

*outsourced privately. It should be noted that the child has not availed of any service since the Assessment of Need was done and this is urgently required.*

*In the absence of a commitment to an updated OT assessment, a review of the Assessment of Need and an updated Service Statement within 21 days from the date of this letter we shall have no option but to institute judicial review proceedings in a bid to compel same."*

**19.** By letter dated 18th of May, 2021, the Applicants' solicitor was advised by the original assessment officer that the review of the assessment report had been commenced. As part of the review process and as requested, the Second Applicant was assessed by an occupational therapist in July, 2021. In an undated report headed "*assessment of need review"* following assessment in July, 2021, the local Disability Occupational Therapy Service reported, *inter alia,* the Child's fine motor skills had improved (including his handwriting) and he was independent in all areas of daily living. No parental concerns were reported regarding gross motor skills. His attention and organisational skills were such that he could sit and attend well for homework, was able to organise his bag for school and keep his room tidy while relying on his mother for organising his clothes. He scored in the low range on assessment regarding visual motor integration and average in motor coordination. He scored in the low range regarding visual perception. It was concluded that there were no major OT concerns following assessment review with the main reported concern being a lack of motivation to engage in activities such as going for walks to the beach.

**20.** The occupational therapist completed a summary report headed "*Independent Assessment of Need*" in which she confirmed her opinion that the child did not have a disability or delay which had the potential to substantially restrict his ability to take part in appropriate activities such as gave rise to a need for services. She found no restriction causing significant difficulty with regard to communication, learning, mobility or significantly disordered cognitive processes. She did not identify any required interventions or services.

**21.** A follow-up letter was written by the Applicants' solicitor in December, 2021 without reference to the fact that further occupational therapy assessment had occurred in July, 2021. The letter stated:

> *"in the absence of a commitment to an updated OT assessment, a review of the Assessment of Need and an updated Service Statement without 14 days from the date of this letter we shall have no option but to institute judicial review proceedings without further notice to you…."*

**22.** Under cover of letter dated the 11th of January, 2022 from the assessment officer the Applicants were provided with a review report (entitled "*Review Assessment Report*") and were advised:

> *"…based on the information available to me following review I have determined that the definition of disability as defined in the Act has not been met in this case at this time. I am enclosing a report that outlines the reasons for this decision. This decision does not affect your right to apply to the HSE for services to address [Child's] health needs. [Child] remains with the Children's Disability Network Team. You have a right to complain under the Disability Act 2005 if you disagree with the findings of this report, this may be done within three months."*

**23.** The review report referred to the up-to-date occupational therapy assessment report before recording the following determination:

> *"I have determined that the applicant does not have a disability as defined by the Disability Act 2005".*

**24.** The assessment officer further confirmed through a tick box exercise that she had found that a substantial restriction which was permanent or likely to be permanent which results in significant difficulty in communication, learning or mobility or in significantly disordered cognitive processes was not present. Similarly, she found that the Child did not have a

substantial restriction which gives rise to the need for services to be provided continually to the person, or if the person is a child, to the need for services to be provided early in life to ameliorate the disability. Likewise, she confirmed that she had found that the restriction suffered by the Child did not result in significant difficulty in one of the four areas of functioning listed in the Act i.e. communication, learning, mobility or significantly disorder cognitive process.

**25.** The Child's mother then instituted these judicial review proceedings in February, 2022.

**26.** The First Applicant describes the review report in her affidavit grounding the within proceedings as (para. 11):

> "*a purported reviewed assessment report dated 11 January 2022*".

**27.** The First Applicant says that she does not believe the report is compliant as:

> *"it finds that there was no disability and does not take account of the private assessment or undertake the appropriate assessments."*

**28.** She then continues (para. 12):

> *"I have been patient but there must be some deadline placed upon the completion of the review and the provision of a reviewed assessment report and service statement."*

**PROCEEDINGS**

**29.** In the proceedings for which leave was granted, the Applicants seek the following relief:

> *"1. An order of Mandamus compelling the Respondent to commence and complete a Review of the second named Applicant'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/re-assessments, within six weeks or other such period considered reasonable by this Honourable Court.*

*2. A Declaration that the Respondent has failed to comply with its statutory obligations to the Applicant's pursuant to the Disability Act 2005 and the Disability (Assessment Of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263/2007), in particular Art. 11 of the said regulations, in the premises that having completed an Assessment of Need review in respect of the second named Applicant on 13 November 2019 and having stated, in compliance with Art. 11 of S.I. 263/2007, in the Assessment Report that the said Assessment was to be reviewed on 13 November 2020, the Respondent was obligated to commence and complete the Review on that date or within a reasonable period of time after that date, whether by virtue of a general statutory obligation, in particular under s. 8(7)(iv) of the Disability Act 2005, or specifically in the circumstances prevailing in the within proceedings.*

*3. If necessary, a Declaration that the purported review was wholly inadequate, prepared without regard to relevant material, and irrational and unreasonable.*

*4. If necessary, an order of certiorari quashing the Assessment Report of the Respondent of 11 January 2022."*

**30.** The Applicants relied on s.9, s. 8(7), s. 8(7)(iv) and 14 of the Disability Act 2005 and Article 11 and Article 24 of the Disability (Assessment Of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263/2007) as mandating a review of the original assessment. The Applicants further maintain that the revised assessment report which issued and which recorded a determination of no disability within the meaning of the 2005 Act was deficient in that it failed to reflect consideration of the earlier report identifying ASD which had been considered as part of the original assessment.

**31.** In a Statement of Opposition filed in June, 2022 the Respondent contended that the statutory provisions urge and recommend that a review be carried out but do not require it. It was contended that if there was a requirement for further assessment, this requirement was met

by the assessment carried out in July, 2021 by a named senior occupational therapist. Reliance was placed on the fact that the assessment report under review expressly recorded and took account of the private report identifying ASD. It was contended that there was an alternative remedy under the statutory redress mechanism in respect of the determination of no disability and while there was no mechanism to enforce the carrying out of a review of an assessment report, this was not a lacuna but rather reflected an express choice made by the Oireachtas not to enact an enforceable obligation to provide a review. It was further contended that insofar as it was contended that the Second Applicant's needs had changed, the remedy was not to seek a review but to apply for a further assessment under s. 9 of the 2005 Act.

**STATUTORY FRAMEWORK**

**32.** As is clear from the long title to the 2005 Act, one of the central purposes of the Act is to make provision for "*the assessment of the health and education needs occasioned to persons with disabilities by their disabilities*." There is, however, a specific statutory definition of disability for the purpose a Part 2 assessment and consequential entitlements under Part 2 (including entitlement to a service statement containing enforceable service commitments and the redress machinery established under the 2005 Act). In conducting an assessment under the 2005 Act, the Assessment Officer is required firstly to determine whether an applicant has a disability within the meaning of that Act, and if so, the health and education needs occasioned by the disability, and (in the case of children) the health services required to meet those needs. To this end, Part 2 of the 2005 Act makes provision for the Assessment of Need (s. 8), Service Statements (s. 11) and Redress (s. 14) for persons whose disability comes within the definition under the Act.

**33.** The machinery of Part 2 of the 2005 Act is only available to qualifying persons (with the single exception of a right to challenge a finding of no disability under the statutory redress mechanism). Fundamental to an understanding of how rights vest under the 2005 Act is an appreciation of the fact that not every diagnosis of a disability constitutes a qualifying disability for the purposes of the Act. Thus, by way of example, a child may have diagnosis of ASD and undoubtedly have a disability as generally understood or as defined for other purposes without necessarily being disabled within the meaning of the 2005 Act. Not only is not every disability a qualifying disability under the 2005 Act but the qualifying conditions as prescribed in the

definition of disability contained in sections 2 and 7 of the 2005 Act set the threshold for disabled status and consequential entitlement under Part 2 of the Act at a relatively high level. Section 2 provides:

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

**34.** Section 7(2) further provides that for the purpose of Part 2 of the 2005 Act "*substantial restriction*" within the meaning of the s. 2 definition of disability shall be construed for the purposes of this Part as meaning a restriction which—

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

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

**35.** An "*assessment*" as defined under s. 7 of the 2005 Act, means an assessment undertaken or arranged by the HSE to determine, in respect of a person with a disability, the health and education needs (if any) occasioned by the disability and the health services or education services (if any) required to meet those needs.

**36.** Section 8 of the 2005 Act provides for the preparation of "*assessment reports*" on what the Court of Appeal has described as a "*utopian*" basis, setting out independently the assessed health needs of children with disabilities and the services which they require to meet those needs, together with the timeframe for delivery of those services. An assessment report is described in s. 8(6) as "*a report in writing of the results of the assessment*". Section 8(7)

prescribes the detailed content of the assessment report, which includes in relation to reviews that it shall set out the period within which a review should be carried out:

> *"A report … shall set out the findings of the assessment officer concerned together with determinations in relation to the following— ….*
>
> *(b) in case the determination is that the applicant has a disability*
>
> *(i) a statement of the nature and extent of the disability,*
>
> *(ii) a statement of the health and education needs (if any) occasioned to the person by the disability,*
>
> *(iii) a statement of the services considered appropriate by the person or persons referred to in subsection (2) to meet the needs of the applicant and the period of time ideally required by the person or persons for the provision of those services and the order of such provision,*
>
> *(iv) a statement of the period within which a review of the assessment should be carried out."*

**37.** From the foregoing it appears that if an assessment officer determines that a person does not have a qualifying disability following assessment, there is no entitlement to an assessment report addressed to the requirements of s. 8(7)(b) of the 2005 Act in which the nature and extent of the disability, the health and education needs (if any) occasioned to the person by the disability, the services considered appropriate to meet the needs of the applicant and the period of time ideally required by the person or persons for the provision of those services and the order of such provision or the period within which a review of the assessment should be carried out are specified.

**38.** As explained in the jurisprudence, the "*utopian*" aspect of this report comes from the statutory requirement that the report be prepared "*without regard to the cost of, or the capacity to provide*" those services (s. 8(5) of the Act). Where a qualifying disability is found to exist, and an assessment report is duly completed, the services which will be provided are then recorded in a service statement prepared by a liaison officer employed by the HSE in

accordance with the requirements of s. 11 of the 2005 Act. Section 11(2) of the Act provides for the creation of service statements as follows:

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

**39.** Section 11(7) further provides for matters to be considered in the preparation of the service statement 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."*

**40.** Section 11(11) provides for a review of the service statement in the following terms:

*"(11) A liaison officer shall invite the applicant or a person referred to in section 9 (2) to meet with him or her for the purpose of reviewing the provision of services specified in the applicant's service statement."*

**41.** Unlike s. 8(7) which expressly provides that a date for review shall be fixed, s. 11 is silent with regard to the timing of reviews of service statements.

**42.** While the 2005 Act does not provide details as to how service statements are to be reviewed, it creates a regulatory power vesting in the Minister to do so pursuant to the terms of s.21 of the 2005 Act which provides:

*"21.—The Minister may make regulations for the purpose of enabling this Part to have full effect and, in particular, but without prejudice to the generality of the foregoing, regulations under this section may make provision in relation to any or all of the following:*

*(a) 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,*

*(ii) different such periods in respect of—*

*(I) different categories of disability, or*

*(II) persons of different ages,*

*(iii) the categories of skills and expertise required to carry out an assessment,*

*(iv) matters relating to the determination and approval of standards to be applied in relation to the carrying out of an assessment,*

*(v) matters relating to the nomination by the Council of a person or persons with appropriate expertise to assist in carrying out an assessment in relation to educational services,*

*(b) in relation to a service statement—*

*(i) the form of the statement and any matter to be contained in it,*

*(ii) matters relating to the determination of eligibility under the Health Acts 1947 to 2004,*

*(iii) any other matters referred to in section 11 (7),*

*(iv) matters relating to the amendment of a service statement,*

*(v) the procedures for and in relation to the review with the applicant or a person referred to in section 9 (2) by liaison officers of the provision of services specified in service statements, including the intervals at which such reviews shall be undertaken either generally or with reference to—*

*(I) a particular category or categories of disability, or*

*(II) categories of persons of a particular age,*

*……"*

**43.** It is clear that s. 21 permits the exercise of a regulatory power both with regard to the conduct of a review of assessments and of service statements. In exercise of this regulatory power, the Minister introduced the 2007 Regulations. As regards the review of assessments, the Regulations repeats the terms of s. 8(7) adding that the review date shall be no later than 12 months from the date on which the assessment report is issued as follows (Regulation 11):

*"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."*

**44.** Section 9(8) of the 2005 Act provides for the making of a further application for an assessment of need as follows:

> *"(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 of 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."*

**45.** Section 9(7) provides for a power to refuse an application for a fresh assessment if an assessment has already been carried out 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.

**46.** Regulation 12 confirms that the obligation to provide a review date on the new assessment report applies equally in the case of subsequent assessments carried out on foot of further applications (i.e. the s.9(8) procedure) as follows:

> *"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."*

**47.** The 2005 Act and Regulations are otherwise silent in relation to review of assessment reports. As more fully set out in *MB*, the position as regards the review of assessment contrasts with that of the review of service statements because specific provision is made for the annual

review of a service statement under the 2007 Regulations. This provision is not replicated with regard to the review of assessment reports.

**48.** The 2005 Act imposes a recording and reporting function on the HSE under the terms of s. 13 of the Act. As made clear from the terms of s. 13, a purpose of the two separate reports – service statement and assessment report - is to appraise the relevant Minister, by means of annual "*aggregate*" reports provided by the HSE, of the gap between how needs should be met and how they are, in fact, being met.

**49.** Separately, the 2005 Act establishes a redress mechanism by providing for complaints as follows:

> *"14.—(1) An applicant may, either by himself or herself or through a person referred to in section 9 (2), make a complaint to the Executive in relation to one or more of the following:*
>
> *(a) a determination by the assessment officer concerned that he or she does not have a disability;*
>
> *(b) the fact, if it be the case, that the assessment under section 9 was not commenced within the time specified in section 9 (5) or was not completed without undue delay;*
>
> *(c) the fact, if it be the case, that the assessment under section 9 was not conducted in a manner that conforms to the standards determined by a body referred to in section 10;*
>
> *(d) the contents of the service statement provided to the applicant;*
>
> *(e) the fact, if it be the case, that the Executive or the education service provider, as the case may be, failed to provide or to fully provide a service specified in the service statement.*
>
> *(2) A complaint under subsection (1) shall be made by the applicant concerned or a person referred to in section 9 (2) as soon as reasonably may be after the cause of the*

*complaint has arisen and in any case within such time (if any) as may be prescribed under section 21."*

**50.** The complaint process is reinforced by a separate appeals' process with the right to apply to the Circuit Court for enforcement orders or to appeal to the High Court on a point of law.

**DISCUSSION AND DECISION**

**51.** In this case, the Second Applicant was provided with an assessment report, which was reviewed once. He was also provided with a service statement. The Applicants sought a further review of the original assessment report and complain in these proceedings both that a review was not carried out in breach of statutory duty and simultaneously that such review as did take place is unsustainable as legally flawed. As both complaints were pursued in argument, I propose to address them in turn before finally addressing the question of alternative remedy.

*The Duty to Review an Assessment Report*

**52.** There was some focus in submissions before me on the difference in the statutory language pertaining to the review of assessment of need when compared with review of service statements. This difference was relied upon to make the case that there is no obligation to carry out a review of an assessment at all. It seems to me, however, that in circumstances where a review was in fact carried out in this case, there is no requirement for me to determine whether there is a statutory obligation on the HSE to conduct a review of an assessment arising from s.8(7)(b)(iv) of the 2005 Act as this is a moot question in this case. Interesting arguments based, *inter alia*, on:

I. the fact that s. 8(7)(b)(iv) of the 2005 Act requires inclusion of a statement of the period within which a review of the assessment should be carried out without express provision then being made for an obligation to carry out the contemplated review within the time-frame indicated, the use of the words "*should be*" instead

of "*shall be*" suggesting exhortation rather than duty (*Dundon v. Governor of Cloverhill Prison* [2006] 1 IR 518);

II. the omission from the integral and extensive redress procedure of a means of enforcing a review of assessment of need;

III. the existence of a power to carry out a review by necessary implication; and

IV. the duty to exercise discretionary powers in a reasonable manner and within a reasonable time.

must therefore await full consideration in a case in which they necessarily arise.

**53.** As a review was conducted in this case I consider that the real issue in these proceedings is whether the results of that review are amenable to challenge in judicial review proceedings on the grounds advanced.

*Whether Review of the Assessment Report and its Outcome Amenable to Challenge in Judicial Review Proceedings*

**54.** The assessment officer who wrote the original assessment report carried out the assessment review in this case. For the purpose of the assessment review, she sought an up-to-date assessment by an occupational therapist, in line with the request made on behalf of the Applicants'. When identifying assessments considered in the assessment review she referred to the new report without separately listing the reports which were identified in her original assessment. The Applicants complain that by failing to refer to the earlier assessments in arriving at the finding recorded in the review report that the Second Applicant does not have a disability within the meaning of the 2005 Act, the HSE failed to conduct a meaningful review. It is the Applicants' case that the reference in the review report to only one report, the new report from an occupational therapist, is evidence of a failure to consider all relevant reports before the decision-maker. The case made is that in conducting an assessment review on the basis of a single report, without express regard to other reports on the file, the decision arrived at is unreasonable in law.

**55.** While it is true that the only report referred to in the review report is the new occupational therapist's report and the assessment officer accepts on affidavit that she did not re-iterate in her review report that she had considered the earlier reports, it is not accepted by her that she did not consider the earlier reports. She says that "*as the author of both reports*", the fact that she had also considered the earlier reports in conducting her assessment was "*apparent*". Accordingly, the HSE maintain that there has been no failure to properly consider all of the medical evidence or that the decision taken following review is not adequately supported by the evidence.

**56.** The Applicants contend that for the decision-making process to be lawful it is necessary that a party considering a challenge and the court in the event of a challenge being brought must have access to sufficient information to enable an assessment as to lawfulness to be made and that the review report is deficient in this regard because it does not demonstrate consideration of all of the evidence on file. In this regard the Applicants rely on the dicta of Mr. Justice Clarke in *Christian v. Dublin City Council* [2012] 2 I.R. 506 where he said:

> *" The underlying rationale of cases such as Meadows (in that respect) and Mulholland is that decisions which affect a person's rights and obligations must be lawfully made. In order to assess whether a relevant decision is lawful, a party considering a challenge, and the court in the event of a challenge being brought, must have access to a sufficient amount of information to enable an assessment as to lawfulness to be made. What that information may be, may vary enormously depending on the facts under consideration or the nature of the decision under challenge. However, the broad and underlying principle is that the court must have access to sufficient information to enable the lawfulness of the relevant measure to be assessed."*

**57.** The Applicant places particular reliance on the decision of Kelly J. in *Mulholland v. An Bod Pleanála (No. 2)* [2006] 1 IR 253 (para. 34) where it was indicated in the planning context that a statement of considerations (which was legislatively mandated in that case) was required so that parties could know if the decision maker had directed his or her mind adequately to the issues which were required to be considered. The Applicants maintain that while a statement of considerations was included in the original assessment report, there is nothing in the review report to evidence whether the assessment officer adequately directed her mind to the issue

which she was obligated to consider. The Applicants maintain that they are in dark as to why in 2019 the Child was deemed to have a disability but not in 2022. It is the Applicants' case that if the assessment officer did not direct her mind adequately to all of the material, then the decision is irrational in the *O'Keeffe/Keegan* sense.

**58.** To properly consider the case made it seems to me that it is important to situate the review, and any report generated in a review, within the AON process. The AON process results in an assessment report as defined under the 2005 Act. Both the "*assessment*" and the "*assessment report*" are terms of art when used in the statutory scheme (see Baker J. in *E.L.G. v. HSE* [2022] IESC 14, at para. 72). The assessment report is produced at the conclusion of the original assessment of need mandated under s. 8 of the 2005 Act. There is a statutory obligation to provide for a period of time within which a review of the assessment should occur in the assessment report. No provision has been made for a further report and the Act is silent as to what should be included in any further report created, in complete contrast to the level of prescription which exists in respect of the original assessment report.

**59.** The review of the assessment envisaged under s. 8(7)((b)(iv) of the 2005 Act does not give rise to a duty to provide a new assessment report and if this were the legislative intention such further report would be expressly provided for, in a like manner to the original report and as it has been in the case of a new or further assessment under s. 9(8) of the 2005 Act. I am satisfied that a report following review is not required to be in a form which qualifies as a new assessment report or otherwise meets the requirements of s. 8(7)(b) for an assessment report. Furthermore, where the determination is that the applicant does not have a qualifying disability, no further obligation to assess needs arises under Part 2 of the 2005 Act and the Applicant is no longer entitled to receive a s. 11 service statement. Rather, what is required is an intelligible record of such further assessment as occurred at the time of the review, a statement of such fresh findings or determinations which may be made in consequence of the reviewed assessment together with a discernible basis or reasons for such fresh findings or determinations. Most importantly, the review report is not a standalone report.

**60.** I have been referred to the decision of Baker J. in *M.D. v. Minister for Social Protection* [2016] IEHC 70 where the learned judge refused an order of *certiorari* because she determined

that an appeal under the social welfare code was an appropriate remedy in that instance but nevertheless granted declaratory relief where the decision making process as presented by the respondent and the evidence which formed the basis of those decisions did not show a decision making process that engaged with the evidence in a meaningful way.

**61.** While not strictly speaking a reasons case, Baker J.'s decision in *M.D.* was informed by the common rationale for the duty to give reasons and the statutory requirement to provide a statement of considerations considered in *Mulholland*. Just as there was no statutory duty in *M.D.,* there is no statutory duty to provide a statement of considerations under the Disability Act, 2005 and the basis for the requirement to provide a statement of considerations as part of the requirements of fairness which was found in *M.D.* was squarely based on the principle which equally underpins the duty to give reasons, namely that the affected person should know if the decision maker had directed his or her mind adequately to the issues which were required to be considered in arriving at the decision which impacted on their interests. *M.D.* has some parallel with this case. Similarly, this case is not a reasons' case but the argument has been made that the review report is flawed because of the absence of a statement of considerations.

**62.** Since the decision in *M.D.,* the Supreme Court has pronounced authoritatively on the requirement to provide reasons for a decision, including for the purpose of demonstrating that proper regard has been had to relevant matters. The clear principle identified by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] 2 I.L.R.M. 453 [hereinafter referred to as "*Connelly*"] is that it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents, from the context of the decision, or in some other fashion. This is subject to the requirement that the reasons must actually be ascertainable and capable of being determined. In that regard, context is important, and the nature of the inquiry will depend on the decision-making process. As the Supreme Court stated in *Connelly* (p. 778):

> *"a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision. However, it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters*

*contended actually formed part of the reasoning. If the search required were to be excessive then the reasons could not be said to be reasonably clear."*

**63.** The test set in *Connelly* is met where the reasons can be identified, following a reasonable inquiry. It would appear to follow that where it is possible following reasonable inquiry to be satisfied as to matters which inform a decision of the considerations which led to the decision, there is no need to address each document sequentially at each stage of the process or in the final record of the decision. In my view a reasonable inquiry in the present context must encompass both the original assessment report which details the materials and documents referred to in that report and any further assessments carried out since and considered in a review of the original decision. It is relevant that the Applicants have been involved at all stages of the process and were aware of the findings made in each assessment. Much of the documentation submitted for the purpose of the original assessment was documentation provided by the Applicants themselves. They were also parties to and participants in the further assessment by an occupational therapist and the paediatrician who reviewed the Second Applicant in February, 2020 on referral from the HSE. The occupational therapist's up to date assessment was pivotal to the finding that the criteria for disability under the 2005 Act were not met. Both the contents of the report of the occupational assessment and the findings made on the basis of that report were communicated to the Applicants.

**64.** The Supreme Court decision in *Connelly* establishes that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion provided that the reasons are ascertainable. It seems to me that knowledge of the matters considered in a decision-making process can also be derived from participation in the assessment processes carried out and being a party to the reports submitted to the decision maker. In circumstances where the Applicants not only participated in the up-to-date occupational therapy assessment but have also been provided with the updated occupational therapist's report, a report they advocated for, they can be in no doubt as to the information relied upon by the assessment officer in changing her mind as to whether the criteria for disability within the meaning of the 2005 Act were present. The assessment officer expressly identifies the new report in communicating her decision and confirms that on the

basis of the evidence she determines that the level of restriction required to qualify as disabled under the 2005 is no longer present.

**65.** By analogous reasoning, it follows from *Connelly* that where matters are not expressly stated in the decision, they can be inferred or implied so long as they are ascertainable elsewhere on reasonable enquiry. It is clear from *Connelly* that where the reasons are not included in the text of the decision itself and are inferred or implied, they must be capable of being readily determined. It must equally follow with regard to materials considered that where a decision changes based on new information or evidence, it is because the new information weighs more heavily in a different direction than earlier information and it is not necessary to repeat a second time all of the information already considered and documented on file. Here the new report is expressly referenced in the review decision. Whereas the earlier reports were clearly identified in the original decision, the logical and clear position post-review is that these earlier reports have been supplemented by more up to date information and the question of whether a disability within the meaning of the 2005 Act exists falls to be decided in the light of the more up to date information.

**66.** I have not been persuaded that the decision following review in this case is flawed for failure to demonstrate that relevant matters were considered given the nature of the process where a review is built upon an original assessment the findings of which are recorded in an assessment report and where the original assessment report and the review were carried out by the same assessment officer. In my view both reports should be read together. When both reports are read together one can be in no doubt but that the assessment officer had considered all reports before coming to the decision communicated post-review.

**67.** Manifestly this is a case in which the more up to date report from the occupational therapist shows apparent improvement in areas of functioning of the Second Applicant following his transition to secondary school. The issue before me is not whether I agree with the assessment officer's decision following review but rather whether the basis for the decision is discernible in a manner which shows that all relevant evidence was considered. I consider that it is.

**68.** In this case, it is quite clear that the decision that the Second Applicant no longer meets the criteria for disability under the 2005 Act is based on the up-to-date report of an occupational therapist following a recent assessment in which his current level of functioning is assessed as better than it had been previously. Just as needs change as children grow, so too impairment of functioning may improve. Indeed, the definition of disability in s. 7(2)(b) expressly reflects that there may be a particular need for services to be provided early in life in the case of a child but such needs may not be continual or remain present as the child grows and reaches different stages of development and adulthood. There will also be cases where a child assessed with a disability will improve such that the impact of the disabling condition is reduced or managed in a way which means that they no longer qualify as suffering from a disability within the meaning of the 2005 Act. Whether this is such a case is not a matter for me but for the statutory decision makers upon consideration of the evidence in accordance with law.

**69.** On the separate or further issue of the reasonableness of the decision and whether a finding that the Second Applicant no longer qualifies as disabled for the purposes of the 2005 is adequately supported by evidence, my function in judicial review proceedings is confined to being satisfied as to whether an evidential basis which is capable of fairly supporting the decision exists. I am satisfied that such evidential basis manifestly exists in this case and the high threshold for a claim of unreasonableness is not met. Again, whether I agree with the decision of the Assessment Officer is irrelevant once I am satisfied that it was a decision which it was open to the Assessment Officer to make.

**70.** The existence of an alternative remedy where a finding of no disability is not considered to be sound on the merits having regard to the weight and balance of the evidence is also material to the approach of a court in judicial review proceedings where a decision is challenged, as here, on the basis that it is not supported by the evidence. While I have concluded that the case made does not reach the high threshold of unreasonableness or irrationality required to warrant a court interfering in judicial review proceedings, I would hesitate to exercise a discretion to intervene by way of judicial review were the threshold met where satisfied of the existence of an alternative and an appropriate statutory remedy.

*Alternative Remedy*

**71.** It is trite law that a court in judicial review proceedings should not be used as an appeal mechanism. Section 14 of the 2005 Act clearly provides that a complaint may be made under that section where a determination is made by an assessment officer that a person does not have a disability. The Applicants' complaint in this regard therefore comes squarely within the parameters of the Disability Complaint's Officer's competence under the Act. If the Disability Complaint's Officer concludes that the decision is flawed having regard to the totality of the evidence or such further inquiry or investigation as the Disability Complaints Officer conducts and decides that the Second Applicant may have a disability, then a power exists under s. 15(8)(c) of the 2005 Act for the Disability Complaints Officer to recommend that the Second Applicant be the subject of a further assessment under s. 9 within the period specified in the recommendation.

**72.** Recourse to statutory remedies should be availed of where appropriate not least because the effect of unnecessary judicial review proceedings is to put a strain on limited resources which would be better used in meeting the needs of disabled children and adults. Where the decision arrived at is considered to be wrong on its merits such as the finding that the Second Applicant does not have a disability as defined in the 2005 Act, a remedy is available to the Applicants under the 2005 Act. I consider that given the real issues in this case, at least as they appear to me, the redress mechanism under the 2005 Act ought to have been availed of.

**73.** It was urged on me that the fact that no remedy is available under the 2005 Act in respect of a failure to carry out a review of an assessment and no remedy is available under the process in respect of an asserted unfairness in the process, that it would nonetheless be appropriate for a court to intervene by way of judicial review even where there is a remedy in respect of the decision that the Second Applicant does not qualify as disabled. This was said to be justified, in reliance on the decision of the Supreme Court in *Petecel v. Minister for Social Protection & Ors.* [2020] IESC 20, to avoid a splitting of issues where several grounds of complaint are advanced some of which are matters for the High Court in judicial review whereas others could be advanced under the statutory redress mechanism.

**74.** It is recalled, however, that this case was advanced in the pleadings on the primary basis that there had been no review and a refusal to carry out a review. In fact, the Applicants had the benefit of the review they sought including the up to assessment by an occupational

therapist which had been specifically requested as part of that review. The case advanced that no review was carried out is not only not supported by the evidence but is also contradicted by the alternative case presented on behalf of the Applicants that the review (which they were claiming had not occurred) was flawed. No attempt was made in the pleadings or submissions to marry these conflicting premises for the proceedings. Instead, the Applicants maintained in their written submissions that the HSE's position that there was no entitlement to a review did not require to be determined in this case because there had in fact been a review in this case. The position adopted on behalf of the Applicants ignored the fact that their proceedings had been launched on the primary asserted basis that there had been a refusal to carry out a review for which failure relief by way of *mandamus* should lie.

**75.** As for the second complaint said to justify proceeding by way of judicial review, namely the failure to expressly refer to and reflect consideration of early reports in the review report, I have concluded that the Applicants have not demonstrated any unfairness in the decision-making process arising from this asserted failure. When one considers the decision in *M.D.* through the prism of the more recent decision of the Supreme Court in *Connelly* and with due regard to differences in the particular decision making process (here we are dealing with a review stage built upon an initial assessment where it is appropriate to treat the original assessment and the review together as reflecting the full consideration by the assessment officer) and the different redress mechanisms available (in this instance involving an inquiry and investigative process before a complaints officer with a full right of appeal to an independent appeals officer and recourse to the Circuit and High Courts), it is clear that the decision in *MD* does not provide a sound basis for intervening to provide relief by way of judicial review on the different facts and circumstances of this case.

**76.** The argument in reliance on the Supreme Court dicta in *Petecel* falls down, in my view, where the case in respect of those elements of the complaint which may not be pursued in reliance on s. 14 of the 2005 Act are not substantiated in judicial review proceedings taken in lieu of the alternative redress option and where all that really remains is the fact that the Applicants consider the finding that the Child does not have a disability to be wrong in law and in fact and where in real terms, the core issue is the fact that the Applicants do not agree with the decision following review that the Second Applicant is not suffering from a disability as defined under the 2005 Act. It is not disputed that this is a finding which may be challenged

by making a complaint under s. 14 of the Act. The fact that other issues which fall outside the ambit of the s. 14 process are unsuccessfully agitated in judicial review proceedings does not make it proper for me to embark on what is in essence a merits review of the decision dressed up as a reasonableness challenge, which is properly a matter for the statutory redress process and falls outside the scope of my competence in judicial review proceedings. Were it otherwise, parties could seek to avoid the statutory process by advancing unmeritorious claims in judicial review proceedings. As stated by the Supreme Court in *EMI Records (Ireland) Limited & Ors. v. Data Protection Commission & Anor* [2013] IESC 34:

> *"the default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan, that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned".*

**77.** While there will undoubtedly be exceptions to this general rule, this is not such a case. So long as I have not been persuaded that findings or determinations were legally flawed whether because arrived at using an unfair process or based on incorrect facts or tainted by conjecture or speculation or that the reasons drawn from such facts were not cogent or bore no legitimate connection to the adverse finding to such an extent as to vitiate the decision or was otherwise in excess of jurisdiction by reason of an error of law or the absence of evidence capable of supporting the decision such that it was not a decision which was open to the decision maker to reach, I should not intervene by way of relief in judicial review proceedings. I have not been persuaded that any grounds exist which would warrant the exercise of jurisdiction in judicial review proceedings. I am satisfied that the s. 14 mechanism is the appropriate remedy the real issue in these proceedings, namely, whether the finding of no disability within the meaning of Part 2 the 2005 Act is correct having regard to the factual position established on the evidence in this case.

**CONCLUSION**

**78.** For the reasons set out above, I refuse the relief sought and dismiss the application. I will hear the parties in regard to any consequential matters.