THE COURT OF APPEAL

Record No. 2022 216

Donnelly J. **Neutral Citation Number [2023] IECA 123**

Ní Raifeartaigh J.

Binchy J.

FD

APPELLANT

-V-

CHIEF APPEALS OFFICER,

SOCIAL WELFARE APPEALS OFFICE,

MINISTER FOR SOCIAL PROTECTION

RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered this 24th day of May, 2023

1. The High Court (Hyland J.), in a judgment delivered on 18 July 2022, refused to quash the decision of the chief appeals officer (hereinafter "the respondent") to determine the appellant's social welfare appeal on a summary basis. The appellant maintains that she was entitled to have the appeal of the decision concerning her entitlement to carer's allowance, in particular the decision to order repayment of her allowance, determined by way of oral hearing.

2. Pursuant to the Social Welfare (Consolidation) Act 2005 (the "2005 Act"), the deciding officer held that the appellant was required to repay the sum of €54,184.10 in circumstances where the appellant had an entitlement to a lower rate of carer's allowance from 2014 to 2018, and no entitlement to carer's allowance from 2018 to

2019. The appeals officer, after a summary consideration of the appeal, upheld that decision.

3. The judicial review proceedings claimed that the appeals officer acted without due regard to fair procedures, natural and constitutional justice and contrary to the provisions of the 2005 Act and the Social Welfare (Appeals) Regulations, 1998 (as amended by Article 5 Social Welfare (Appeals) (Amendment) Regulations, 2011. The respondents' opposition included a claim that the appellant had failed to exhaust the alternative remedy of seeking a revision under the scheme of appeals/revision set out in the 2005 Act.

Background

4. The background to the case is set out in the decision of the High Court as follows:

> *"4. The applicant was receiving a carer's allowance in respect of her daughter, who has special needs. By way of a decision of 9 January 2020, the deciding officer directed the applicant to repay the sum of €54,184.10, on the basis that the applicant had an entitlement to a lower rate of carer's allowance from 2014 to 2018 and no entitlement to carer's allowance from 2018 to 2019. The decision was stated to be made under sections 179, 181 and 302(b) of the 2005 Act. The applicant was informed that she had either a right to request a review of the decision by a deciding officer or a right to appeal the decision to the Chief Appeals Officer.*
>
> *5. On 30 January 2020 the applicant wrote to the Chief Appeals Officer indicating that she wished to appeal the decision and that she would write shortly to "comprehensively outline [her] case".*
>
> *6. On 5 March 2021 (*sic*) she wrote identifying her grounds of appeal in respect of the correspondence of 9 January 2020 as follows:*

> "Carers Allowance Payment is made in respect of the care of a special needs child
>
> The Department has incorrectly calculated the means of my family
>
> The means of my husband should not be counted
>
> The Department never reviewed my entitlement/payment
>
> The decision is contrary to EU law
>
> The decision is contrary to the ECHR Act 2003
>
> The provision of the Act governing means is unconstitutional
>
> The Deciding officer accepts that any alleged overpayment arose out of a mistake and not by deliberate acts or omissions, thus the Appeals Officer has a discretion as to the date from which an alleged overpayment is sought.
>
> I am seeking an oral hearing.
>
> Further grounds and submissions to follow (either before or during an oral hearing)"

No further submissions or material were provided by the applicant.

*7. On 14 October 2020, she received a letter from the second respondent in the following terms: "*The Appeals Officer dealing with this case has asked that I write to you. He refers to your appeal, and in particular to a number of contentions you raised in your notification of appeal, dated 5 March 2020. In this notification letter you stated that further grounds and submissions would follow. It is now seven months since this correspondence, which is deemed sufficient time in order to have gathered such grounds. Please forward any evidence or information which you wish to be taken into account to this office.

Your appeal file, along with any new evidence provided, will be reviewed again on 2 November.*"*

*8. The last paragraph of the letter addressed the question of an oral hearing and was in the following terms; "*It is noted that you requested an oral hearing. Regulation 13 of Statutory Instrument 108/1998 (Social Welfare (Appeals) Regulations 1998) provides that where an Appeals Officer is of the opinion that the case is of such a nature that it can be properly determined without a hearing, he or she may determine the appeal summarily. The Appeals Officer feels this to be the position here."

9. (…)

10. The applicant could at that point have submitted material that might have raised the necessity for an oral hearing. Instead, she replied on 22 October 2021 as follows:

> "Further to your letter dated 14/10/2020 I wish to rely upon my letter dated 05/03/2020 and look forward to the opportunity to present my case and answer any questions an appeals officer may have at an oral hearing.*"*

11. The above recitation of the correspondence constitutes the totality of the interactions between the applicant and the appeals officer."

5. The appeals officer gave his decision on 26 November 2020. He described the background to the appeal saying that the appellant was interviewed in June 2019 by a Social Welfare Inspector during which it became apparent that the family means had changed from the start date of the payment. The appellant had been written to on 19 August 2019 and was given an opportunity to challenge or comment on the findings. The appellant did not do so, and the overpayment was assessed. The appeals officer

referred to various evidence on file supporting the view that the appellant had been advised of the importance to notify changes in circumstances to the department, and said he was satisfied that she was aware of the need to notify changes, and that for whatever reasons she failed to do so.

6. With respect to the question of an oral hearing, the appeals officer stated:

> *"I note the appellant's grounds for appeal, and the fact that she stated she would provide further evidence to counter the Department's position. Seven months have passed since she stated she would provide this evidence. In order to give the appellant further opportunity to provide this evidence the Appeals Officer contacted her by letter, dated 13/10/20, requesting any further evidence she wished to proffer. The appellant replied in a letter dated 22/10/20 stating she wished to rely upon her letter of 05/03/20 and looked forward to the opportunity to present her case and answer any questions at oral hearing. In light of the current coronavirus restrictions, and based on the information available, the Appeals Officer feels that this case can be dealt with summarily without need for recourse to an oral hearing."*

7. The appeals officer concluded that he was satisfied that the appellant's means appear to have been assessed in line with governing legislation but "as they are quite detailed calculations", he "would urge the Department to once again review the figures simply in order to ensure they are correct, as the overpayment is considerable."

High Court Proceedings

8. The statement grounding the application for judicial review recited in very brief terms the legal basis upon which the orders of judicial review were sought. The pleaded grounds were as follows:

> "The discretion afforded to appeals officers must be exercised with due regard to fair procedures, natural and constitutional justice, which pursuant to [the 2005 Act and the 1998 Regulations as amended] requires a mandatory oral hearing where there are unresolved conflicts in the documentary evidence. Further the Act of 2005 and the said statutory instruments are intended to provide for an oral hearing where such conflicts arise. Further, complex issues arose in the within proceedings, requiring legal representation. Contrary to the foregoing, and in circumstances where inter-alia there was a clear conflict between the applicant and the deciding officer as to entitlement, the appeal was determined on a summary basis and was unsuccessful.
>
> The applicant sent a further letter dated 22 October 2020, relying on an earlier letter of 5 March 2020 which requested an oral hearing due to inter-alia the clear conflict between the parties involved. This letter elicited no acknowledgement, and no further correspondence was received, except the summary decision. Despite significant ongoing prejudice, pertaining to an inability to access carers allowance, the applicant has not been afforded the opportunity of an oral hearing."

9. In oral submission to the High Court, despite having made written submissions on the issue of failure to give reasons, the appellant accepted that the judicial review grounds did not include a failure to give reasons point. The appellant maintained in the High Court that there were unresolved conflicts between the parties, that there was a right to cross examine the deciding officer, and that an oral hearing was required. The appellant submitted that, having regard to the determination by the deciding officer that this was a case that fell within section 302(b) of the 2005 Act rather than section 302(a) (that the alleged overpayment arose out of mistake and not any deliberate act or omission), in

those circumstances, as there was a discretion as to the date from which any alleged overpayment would be sought, an oral hearing was essential. The existence of this discretion formed the main focus of oral submissions by the appellant in High Court and again in this appeal.

High Court Judgment

10. The trial judge considered the case law well settled in respect of when an oral hearing is required in a social welfare context. She referred to *Kiely v Minister for Social Welfare* [1977] IR 267, *Galvin v Chief Appeals Officer* [1997] 3 IR 240, and *LD v Chief Appeals Officer* [2014] IEHC 641. She specifically cited Henchy J. in *Kiely v Minister for Social Welfare*, who said, with respect to earlier similar provisions of the Social Welfare regulations, that "... an oral hearing is mandatory unless the case is of such a nature that it can be determined without an oral hearing, that is to say, summarily."

11. She identified the question in the present appeal as to whether an oral hearing was necessary to fairly dispose of the appeal. According to the appellant, there were two areas of conflicts necessitating such a hearing. The first were matters relating to queries about how the respondents concluded her husband's earnings had increased substantially, the use of the system utilised by the deciding officer, her personal circumstances, and the state of her mortgage. The trial judge considered that none of those matters had been raised as issues with the respondents in the only substantive appeal document submitted which was the letter of 5 March 2020.

12. The second area of alleged conflict related to grounds outlined in that letter of 5 March 2020. The trial judge took the view that none of the grounds identified in that letter required an oral hearing. She said that there had merely been an assertion that the calculation of means was incorrect but no detail was provided. There was no conflict which required an oral hearing. She addressed each issue in turn.

13. No basis was provided for the claim that the means of her husband should not be counted. The trial judge stated as this was a means-assessed payment, the means of both the appellant and her husband are counted. The claim that there was no review as to her entitlement *prima facie* appeared incorrect and, without further detail, could not give rise to the need for an oral hearing. Without any particulars of her claims that the decision was contrary to EU law, contrary to the European Convention on Human Rights Act, 2003, and unconstitutional, the appeals officer was correct to decide this did not give rise to an oral hearing.

14. The trial judge considered in detail the submission that the fact that the deciding officer exercised *a discretion* necessitated an oral hearing. The judge looked at the meaning of the last ground of appeal referred to in the letter of 5 March 2020: "The Deciding officer accepts that any alleged overpayment arose out of a mistake and not by deliberate acts or omissions, thus the Appeals Officer has a discretion as to the date from which and alleged overpayment is sought." The trial judge said this sentence reflects the fact that the decision was made under s. 302(b) and that there is a distinction in the legislation between a situation where repayment is required because of false or misleading statements or wilful concealment, and where repayment is required in the absence of any such finding being made. She said that the latter subsection does not refer to "mistake"; it captures the situation where new facts or new evidence exist that necessitate a revised decision.

15. The trial judge agreed with the appellant's statement of the legal position that because this was not a case of a "deliberate act or omission", there is a discretion as to how much of the overpayment found by the Department should be directed to be refunded. The trial judge said that the sentence in the letter of the 5 March 2020 could be read as an application that the appeals officer would consider directing repayment of less than

the full amount, given the undoubted jurisdiction to do so. She said, however, that any such argument was implicit rather than explicit. The trial judge held that if the appellant had wished to explain why, she ought to have done so with documentation.

16. The trial judge rejected the argument that an oral hearing was necessary because it was required to test the appellant's understanding of her obligations to tell of her change in circumstances. This argument had been advanced on the basis of the appeals officer's reference to the knowledge of the appellant's obligations. The trial judge said that even if one accepted that such an argument came within the general pleas in the grounding statement, it must be rejected. The appellant had never made a case with respect to her understanding of her obligations. The trial judge held that on the basis of an examination of all the facts, it was uncontroversial to say that the respondents had ample material to conclude that the appellant was aware of her obligations. The Department, in letters and on affidavit, had disputed that the deciding officer had made the decision on the basis that there was a "mistake". That was not the type of conflict that required an oral hearing. What had been identified, since 19 August 2019 in a letter to the appellant, was the material which justified the finding that the appellant was aware that earnings and changes in circumstances had a direct effect on the rate of carer's allowance payable. The trial judge referred to the contents of the letter of 19 August 2019 provided to her prior to the decision of the deciding officer on 9 January 2020 which states:

> *"The information available to the Deciding Officer is as follows:*
>
> *- You had means from employment that you failed to disclose to the Department*
>
> *- Your Spouse's means from employment increased substantially and you failed to notify the Department*

- You signed the Carers Allowance application declaration on the 12/02/2013 this stated 'I will tell the Department when my means or circumstances change'.

- A completed Continuing Eligibility Certificate was received in the Department on the 05/08/2014. This gave a list of changes in circumstances that the Department must be notified of, this included 'Change in your means/means of your Spouse/Civil Partner/Cohabitant (weekly household income). On the form it asked 'Has there been a change in any of the above circumstances since your last contact with the Department', you ticked the box for the answer No."

17. The trial judge referred to the number of times that the appellant had failed to respond to any letter or invitation to do so in the course of the proceedings before the Department. In those circumstances, the trial judge was satisfied that the appeals officer was entitled to rely upon the material provided by the deciding officer and to conclude that she had been aware that earnings and changes in circumstances had a direct effect on the rate of allowance. The appeals officer's statement that the appellant failed to inform the Department of those relevant changes was not controversial in circumstances where no assertion is made by her that any such changes were notified. Therefore, there was nothing precluding the appeals officer from including this conclusion without an oral hearing. She rejected, therefore, that the decision not to direct repayment of a lesser sum could be used as the basis to argue for an oral hearing in circumstances where no evidence was put before the appeals officer as to why a lesser amount should be imposed.

18. The trial judge noted that the appellant resiled from the breadth of the proposition that an oral hearing was essential where there is a discretion pursuant to s. 302(b) as to the date from which the overpayment is sought. Counsel maintained the argument that, where the appellant had sought an oral hearing and indicated that she would present her

case and provide additional information at the hearing, the appeal could not be determined summarily. The trial judge said that such an approach was inconsistent with the case law which made clear that an oral hearing is only required if the case cannot be determined without an oral hearing. She rejected the appellant's analysis of *L.D. v Chief Appeals Officer* which was that Peart J. was of the view that an oral hearing would be an entitlement if an applicant so required.

19. The trial judge also agreed with the respondent's submission that the appellant was not entitled to maintain or succeed in the proceedings on the basis of the availability of the alternative remedy of seeking a revision, which is contained in s. 317 of the 2005 Act. The trial judge said the decision in *L.D. v Chief Appeals Officer* strongly suggests that the appellant, on receiving the appeal decision, could have sought a revision under s. 317 in which she could have put the new material she put before the Court by way of affidavit before the appeals officer.

20. The trial judge also referred to the letter from the respondents, post leave, confirming that if there were any new facts or evidence to be considered the appeals officer would consider those under s. 317. That was refused by the appellant's solicitors on the basis that, in the circumstances, an oral hearing was necessary and s. 317 could not remedy the unfairness visited upon her by virtue of the unlawful decision.

21. The trial judge held that where:

a) The only complaint made by the appellant was that she should have an oral hearing,

b) She was offered an opportunity to submit new material and seek an oral hearing on the basis of same, and

c) The decision not to grant an oral hearing was because she raised no conflicts or issues necessitating an oral hearing,

the alternative remedy was far more suitable to her situation than bringing proceedings. She had sought to ask the court to step into the shoes of the appeals officer by producing material she said warranted an oral hearing, but the trial judge said it was not the role of the court to act as an appeals officer.

22. The trial judge also rejected, as inadmissible, the bulk of the averments in an affidavit filed by the appellant's own solicitor. She did so on the basis that, as a solicitor, he could not act as an expert witness in his own client's case. What he could put forward as a witness was limited only to evidence as to fact. No appeal was taken against that finding of the trial judge.

Appeal

23. The parties viewed the substantive issues of the appeal slightly differently. The appellant focused on whether the determination of the social welfare appeal on a summary basis was lawful. I am satisfied however that the two substantive issues identified by counsel for the respondent are those that arise in this appeal. These are as follows:

1) Did the High Court err in relation to its finding that there existed an alternative appeal remedy namely s. 317 of the 2006 Act?
2) If necessary, did the High Court err in holding that an oral hearing was not required?

Alternative Remedy

24. Counsel for the respondents submitted that the appeal ought properly to be dealt with under this heading first, because, if successful, there would be no need to proceed to determine the second matter. Counsel relied upon the findings of the High Court that "the applicant ought not to have proceeded by way of judicial review where she had an alternative appeal mechanism open to her under s.317 of the 2005 Act."

25. Section 317(1)(a) of the 2005 Act provides:

"An appeals officer may at any time revise any decision of an appeals officer - where (a) it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given".

26. Counsel also referred to the evidence in the present case which demonstrated that the appellant had repeatedly been told of her right to place information before the decision makers, whether that was in August 2019 regarding the assessment of means at €617.63 and on the same date, that her carer's allowance was being reconsidered. She was told of her right of review or her right of appeal. He reminded the Court that the evidence from the appellant was that she did not engage at that time because she was stressed because of the amount of the overpayment claimed by the Department but she had not been told of that amount until months later. Even when she appealed, she failed to engage with the letters regarding her appeal other than to repeat the statements set out in the letter of 5 March 2020.

27. Counsel for the respondent relied upon the decision of the High Court in *LD v Chief Appeals Offic*er and the decision of the Supreme Court in *Petecel v Minister for Social Protection* [2020] IESC 5. Counsel submitted that following the appeal decision, the appellant could and should have sought a revision. She could and should have deployed new evidence. There was clear evidence before the High Court that the appeals officer will review the appeal in the event of any additional information being provided. Mr. Jennings said in his affidavit "[i]t also remains a possibility that on receipt of any new facts or evidence, I would consider that the matter could not be properly determined on a summary basis and an oral hearing would be convened."

28. Both parties relied upon aspects of the High Court decision in *LD v Chief Appeals Officer* which examined the provisions of s. 317 of the 2005 Act. Counsel for the appellant submitted that it supported his contention that there was a distinction between a revision under s. 317 and an appeal. Counsel for the respondents submitted that it supported the view that a revision could amount, in an appropriate case, to a full rehearing.

29. In *LD v Chief Appeals Officer*, the applicant was denied a domiciliary care allowance in respect of her son who had a diagnosis of Asperger's Syndrome. She had appealed and provided a seven-page memorandum of the difficulties she encountered on a daily basis with aspects of her son's behaviour. She also supplied a letter from the hospital signed by the consultant psychiatrist and the senior speech and language therapist saying they supported her appeal. Her appeal was dismissed on a summary basis. The appellant claimed she was entitled to an oral hearing. The first time the respondents became aware of her desire to have an oral hearing was when the judicial review papers were served upon them after leave had been granted. The Chief State Solicitor wrote to offer an oral hearing. The applicant rejected that offer on the basis that the appeals office was *functus officio* but for the power to revise. That had been pleaded in the judicial review. The first issue was therefore whether that was correct.

30. Peart J. analysed the statutory and regulatory provisions. He commented that the new facts or new evidence referred to in s. 317(1)(a) were not confined to matters that may have happened or been generated since the decision, but may consist of material or evidence which, though it existed prior to the appeal, was not made known to the appeals officer. The power was said to be quite a broad power conferred upon the appeals officer. Peart J. said that the Act should be interpreted as widely as the words reasonably permit in order to reflect the permissive nature of the legislation and the

detailed procedures set out therein. This characterisation of the 2005 Act was endorsed by the Supreme Court in *McDonagh v Chief Appeals Officer* [2021] 1 ILRM 385. In that case the Supreme Court held that a decision not to revise a decision was a decision which could be appealed, rejecting *obiter dicta* to the contrary from the decision in *Castleisland Cattle Breeding Society v Minister for Social and Family Affairs* [2004] 4 IR 150. Peart J. had distinguished that case.

31. Counsel for the appellant submitted that the following passage supports his contention that there is a difference between an appeal and a revision. Peart J. stated as follows:

> "I am satisfied that Mr Shortall is correct when he says that under the scheme of the Act, there is no possibility of a second appeal as such, and that once an appeal has been determined by an appeals officer, the appeal decision is final and conclusive and the appeals officer is *functus officio*, subject only to, inter alia, any revision of the appeal decision under section 317 of the Act of 2005. I can accept also the distinctions between an appeal and a revision which have been helpfully set out in a schedule within his written submissions. There is no need to go through the various distinctions which he makes between those two provisions. I accept that they are different procedures, or at least that they are two stages of an appeals procedure – i.e. the appeal and the revision of the appeal. I can accept also that an applicant for DCA whose appeal against a refusal has been dealt with summarily, and who either wished at that time or, as in this case subsequently, to have an oral hearing as part of an appeal against that refusal, and who did not have an oral appeal, may feel that the power of revision under section 317 of the Act is not an adequate substitute for an appeal by way of oral hearing". (para 37)

32. On the other hand, the respondents relied upon the remainder of para 37 and para 38 and part of para 40 in the decision. In para 37, Peart J. went on to say:

> "But there is no absolute entitlement to an oral hearing at the appeal. One can be requested, but it does not follow that it must be permitted. The appeals officer has a clear discretion to decide whether an oral hearing is necessary in the light of the materials which formed the basis of the appeal. Nevertheless, if it is permissible within the Act of 2005 to have an oral hearing as part of the re-examination of the appeal by way of the revision procedure permitted under section 317, in the light of any new facts or new evidence which the applicant may wish to adduce at such a hearing, there is in reality very little distinction between an oral hearing for the appeal itself and the oral hearing the purpose of any possible revision of that appeal decision since the latter gives the applicant an opportunity to have the appeal re-examined in the light of those new facts and new evidence which he/she adduces at such an oral hearing."

33. In para 38, Peart J. outlined the scheme or architecture of the 2005 Act and noted that Part 10 thereof was headed "Decisions, Appeals and Social Welfare Tribunal". He noted that if a decision or an appeal is revised, it remains a decision or an appeal decision following that revision, albeit one that has been revised. He then stated:

> "It seems clear therefore that the Act contemplates that a hearing can take place in relation to a revision so that any new facts and new evidence can be adduced and considered. It is certainly arguable that a request for an oral hearing itself constitutes a new fact, even if it does not constitute new evidence, and that the appeals officer could proprio moto decide to hold an oral hearing once asked to do so, and to hold it for the purpose of a s. 317 revision. The Act should in my view be interpreted as widely as the words reasonably permit in order to reflect

the permissive nature of the legislation, and the very detailed procedures laid down for decision-making, and the procedures provided for revision at any time of decisions. It seems to be the clear intention that applicants for DCA and other benefits are provided with different opportunities to reasonably put their case, and to do so in a fair manner and comprehensively."

34. At para 39, Peart J. said that the power to revise under section 317 is clearly a broad and flexible one which permits any particular decision of an appeals officer to be revised "at any time. At para 40 he stated:

> "I consider that the provisions and procedures under scrutiny in this case should be given a purposive interpretation, yet one that is fully consistent with the clear words used by the Oireachtas. This is not a penal statute. It is one which provides for certain benefits which can be claimed by qualifying applicants, and provides for procedures and criteria in order to decide who qualifies for benefit and who does not. There are clear safeguards built into the scheme for decision-making such as the appeals procedure and revision procedure. These enable a fair opportunity to be provided to ensure as far as practicable that (a) a person who is entitled to a benefit receives that benefit, and (b) a person who is not entitled benefit does not. It stands to reason that somewhere within these procedures there is the possibility of an applicant being heard in person, not because there may be a better chance of succeeding in the application if one has the opportunity of putting one's case face to face with the decision-maker, but rather because there may be reasons identified and put forward either by the applicant or the decision-maker which make it desirable that an oral hearing should take place. An obvious example of where an oral hearing is considered essential from a fair procedures point of view is where there are disputes of fact,

> or differing professional opinions, which bear upon the question of entitlement. There will be other examples of disputes, doubts or controversy which could benefit from an airing at an oral hearing. Such matters may arise at the appeal stage, in which case an oral hearing can be requested. Such a request may or may [not] be granted by the appeals officer, who is clearly given discretion – a discretion which must of course be exercised fairly and in accordance with law. Alternatively the appeals officer can himself/herself decide that there should be an oral hearing even where one has not been requested. Specific provision is made in Regulation 14."

35. It is necessary to consider in more detail the case of *Petecel v Minister for Social Welfare.* The High Court's refusal of relief by way of judicial review - because no good reason had been put forward by that applicant as to why he had elected to ignore the appeal framework established by the 2005 Act - was upheld by the Court of Appeal. The Supreme Court allowed the appeal. The grounds upon which it did were that this was a case which came within the exception, discussed in the *Koczan v Financial Services Ombudsman* [2010] IEHC 407 and in *EMI Records (Ireland) Ltd v The Data Protection Commissioner* [2014] 1 ILRM 225, that applies where, for jurisdiction reasons, the statutory appeal process cannot provide the remedy sought. That case involved a particular question of whether the appeals officer could make a decision which resulted in a ruling as to the invalidity of part of an EU Regulation. In my view, that was an issue of jurisdiction which is not directly relevant to the determination of the present issue. The present issue is not one of jurisdiction although this case raises the question of whether an application to revise under s. 317 is an alternative remedy that must be exhausted prior to seeking judicial review.

36. Counsel for the appellant correctly points to the cases of *Koczan* and *EMI Records* in support of the proposition that the issue is one of fair procedures. As Clarke J. said in *EMI Records*, it is important to recall that an appeal mechanism, in and of itself, does not operate as a bar to relief in judicial review proceedings. Clarke J. cited the dictum of Denham J. in *Stefan v Minister for Justice* [2001] 4 IR 203 that "[i]t is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution." There is also support for the appellant's contention that an absence of fair procedures at an initial stage may mean that an appeal cannot suffice as an alternative remedy because it does not restore an applicant to the same position. A recent restatement of this proposition is to be found in the judgment of Murray J. in *Habte v Minister for Justice and Equality* [2020] IECA 22 as follows: "This requirement may be met where the ground of challenge includes a case based on fair procedures: in that circumstance an appeal or review of a procedurally unfair process may not reinstate the applicant to the position he would have been in had the process been conducted regularly in the first instance (*Stefan v. Minister for Justice* [2001] 4 IR 203)."

37. Returning to *LD v Chief Appeals Officer*, Peart J. stated that the terms of the 2005 Act, provide the necessary power to enable an appeals officer as part of the revision exercise to permit and/or direct an oral hearing whether or not such a hearing has been requested by an applicant (para 43). In a relevant passage in para 46, Peart J. addressed the argument of that applicant that there were no new facts or new evidence being offered for the purpose of a revision and, therefore, whatever the appeals officer had in mind in that case (bearing in mind the offer of an oral hearing) could not be in the nature of a s. 317 revision. While Peart J. said that was a superficially attractive argument, he went on to say as follows:

"…it neglects the point that if the applicant is seeking a new appeal with an oral hearing, it can be assumed by the appeals officer that she wishes to put forward something at that hearing that was not put forward or offered in the materials which were considered on the summary disposal of the appeal. It is hard to see what the point of an oral hearing is if there is going to be nothing offered by way of some new facts or new evidence that has not already been considered. The Act contemplates one appeal only, either a summary appeal or an appeal with an oral hearing. The applicant got a summary appeal decision, and she sought nothing different. Now she seeks to have the existing appeal decision quashed on the basis that she was entitled to be offered an oral hearing even though she did not request one, and then a fresh appeal with an oral hearing. In my view her request for an oral hearing made in these proceedings was appropriately responded to by the appeals officer offering to hold an oral hearing in order to see whether, in the light of whatever it is that the applicant wishes to say, a revision of the appeal decision is warranted. Section 313 contemplates that there will be matters besides an appeal that may require evidence to be taken on oath, and it seems perfectly sensible to me, and within section 313 that an appeals officer who is being criticised by the applicant for not having held an oral appeal should consider that the matter has been referred back to her, and that in such circumstances she should hold a hearing in order to see what it is that the applicant wishes to say or what evidence she wishes to adduce, and to give her every chance to make her case if that is what she now wants to do. It is reasonable that section 313 should be seen as providing a jurisdiction for this to be done. There is certainly nothing absurd about permitting the applicant an opportunity to put her best foot forward in this way.

> She has the opportunity to have the refusal reversed in the light of what she wishes to say or in the light of what evidence or new facts she wishes to adduce. While that takes place within the revision jurisdiction, it must be borne in mind that it is a revision of the appeal, and not some free-standing procedure labelled 'revision'.

38. That passage from the judgment of Peart J. clearly relates to the facts of *LD v Chief Appeals Officer* and a court must be mindful of not adopting a "one size fits all" approach to all exercises of discretion as to relief by way of judicial review where issues of fair procedures are at stake. The dictum of Barron J. in *McGoldrick v An Bord Pleanála* [1997] 1 IR 497, which was cited with implicit approval by Clarke J. in *EMI Records*, is valuable. Barron J. said:

> "The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind."

39. The remedy which this appellant sought was an oral hearing. After the decision of Peart J. in *LD v Chief Appeals Officer*, the position is crystal clear, an appellant is entitled to seek a revision of the substantive determination of the appeals officer as well as the decision not to grant an oral hearing. The appellant's submission in this case is somewhat different than that submitted, and rejected, by Peart J. in *LD v Chief Appeals Officer*. In this case, the submission is that the provision of the revision procedure

cannot cure the deficiency in failing to have an oral hearing of the appeal. It is said that a) the appellant will have been deprived of an "appeal" and b) that it would be a "review" process where she would be trying to argue that the appeals officer was wrong and this would not be fair. All of these submissions are made in the context of the argument that once a discretionary power is at stake there has to be an oral hearing. This submission was based on the claim that the appeals officer had been wrong on the basis of the material before him in deciding the matter summarily. In other words, the appellant continues to maintain that she ought never to have been required to place more material before the appeals officer.

40. The appellant submitted that an application for revision would not put her in the same position because she had lost her original right to an appeal with "fair procedures". In effect, she is applying the dicta of Denham J. in *Stefan* that "a fair appeal does not cure an unfair hearing", by modifying it to say that "a fair revision hearing does not cure an unfair appeal". In the sphere of criminal law there are similar statements. One example of which is *Sweeney v Brophy* [1993] 2 IR 202 at p. 211, where Hederman J. observed in addressing the issue of a whether an appeal was an appropriate remedy: "In my judgment certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the *proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law"*. (*Emphasis added*).

41. The present case involves the application of public funds by the Oireachtas to provide for a carer's allowance. The Supreme Court held, in *Petecel*, that in those type of situations "the approach to the interpretation of the legislation at issue in these proceedings should be informed by the fact that the statutory provisions at issue are remedial, and accordingly the principles identified by Peart in *LD* and of Clarke CJ. in

JGH, should provide the backdrop against which the 2005 Act should be interpreted". This case does not directly turn on the interpretation of the statute, instead it turns on the exercise of the court's discretion. Nonetheless the ethos of the legislation as a remedial statute and an understanding of its intention to provide applicants with different opportunities to reasonably present their case, and to do so in a fair and comprehensive manner, is important to how that discretion ought to be exercised.

42. The breadth of the revision provisions is, possibly, unique in the field of the administration of public law. The Act provides extensive rights to seek to revise the decisions of both the deciding officers and the appeals officers. It is noted that s. 301 provides the deciding officer with not only the jurisdiction to, *inter alia*, revise on new facts or new evidence, but also to revise by reason of some mistake having been made in relation to the law or the facts. Section 317 only provides jurisdiction to the appeals officers to revise where new facts or new evidence are put before him or her. Lest it be thought that there was no power to revise an appeal decision for a mistake of law or facts, s. 318 provides that the Chief Appeals Officer has that jurisdiction. The respondents also pleaded the availability of the s. 318 mechanism in their statement of opposition but, in the High Court as in the appeal, they focused on s. 317. It also bears repetition that the power of revision includes the power to hold an oral hearing and the right to review a decision not to grant an oral hearing.

43. The extent of the powers of revision and the remedial intent behind those powers distinguish these social welfare appeals from those concerning immigration, criminal procedures, and other areas of law. What is envisaged in the 2005 Act is as broad a scheme of review as possible of assessments and the entitlement to allowances/benefits. The point raised by the appellant that she has lost her opportunity to have an "appeal" is not the same loss of an appeal in other areas of administrative law or in the course of

a criminal prosecution. In effect, borrowing from Barron J, common sense must be applied to this issue in combination with a consideration of the ability of the appellant to deal with the questions raised in the review and in accordance with the principles of fairness.

44. Common sense dictates that applicants for social benefits/allowances ought to use the very wide provisions in the Act which are intended to ensure that potentially qualifying applicants would not be excluded on narrow or technical grounds. The power of revision is as broad as it could possibly be. In an appropriate case, it will permit a decision not to provide for an oral hearing to be reversed and it can accommodate an oral hearing itself. All matters that could be raised on appeal can be dealt with there. This is not the same as a loss of the possibility of first instance fair procedures. In effect this is a continuation of the entire process which is designed to be fair to applicants. The appellant's submission that there would be an unfairness in returning to the same appeals officer is not borne out. In terms of the loss of a chance to have a fair "appeal" the scheme has fairness at its core; unlike other areas of law there is express power to seek revision with a full hearing. It is an important factor that the only issue raised in relation to fair procedures is the right to have an oral hearing. There is nothing "lost" in not having an oral hearing of a social welfare appeal where the decision not to be permitted to have such an appeal is permitted to be the subject matter of an appeal.

45. Peart J. opined that it was arguable that a request for an oral hearing itself constitutes a new fact and thus could itself give rise to a revised decision to provide an oral hearing. Counsel for the appellant submits that this was said in relation to the facts of that case where no appeal had been sought. That may be true but in the overall assessment by this Court of whether there was an error in the trial judge's decision, I would observe that s. 318 would not be subject to such a restriction and a revision could be sought on

the basis that the failure to provide an oral hearing was wrong in law or on the facts. In any event, relying solely on the provisions of s. 317, the remedy here is sufficient to cover the issue. The threshold for requiring an appeals officer to *consider* the request for a revision could be easily reached. I make that statement not merely in reliance on the affidavit of Mr. Jennings to say that he will consider new facts and new evidence that are submitted and therefore there is a possibility of an oral hearing. Common sense dictates that a person seeking a revision will put forward some reason for that. All this appellant would have to do is to put forward some reason as to why the decision not to hold an oral hearing was wrong to engage further consideration of whether such an oral hearing was required. The appellant never engaged with that process at all during the administrative stage of her appeal. She only expanded on those grounds in the course of the High Court judicial review. On the specific point of the oral hearing, as the facts set out by the High Court and quoted above demonstrate, not only did she fail to provide any further evidence or information, but she failed to address the clear indication that had been given to her that she would not be given an oral hearing. It is not appropriate to seek to persuade a court that it ought to exercise its discretion to grant relief by way of judicial review where the applicant has failed to engage with the very issue of fair procedures during the administrative process prior to the final administrative decision. It is not appropriate to simply maintain that the appeal (revision) provision would not provide an alternative remedy and that the applicant ought not to be required to engage with that process. There must be active engagement with that process.

46. I also reject the submission that there would be an unfairness because the appellant would be on the back foot as a result of the previous decision. There is no evidence that this appeals officer would approach a revision in such a manner and indeed no evidence that appeals officers in general would do so. The revision scheme is broad

and it is to be presumed that appeals officers will conduct the hearings and make the decisions in accordance with the rules of constitutional and natural justice.

47. The appellant also raised the fact that because the matter was dealt with summarily, she was not permitted to see the submission of the deciding officer which is made to the appeals officer. It was submitted that this document usually became available in the appeals hearing. Curiously, this was not mentioned in the affidavit of the appellant's solicitor (in any event most of the contents of that affidavit were rejected by the trial judge). The respondent says that there was nothing raised there that was not already known to the appellant and which could have been addressed by her. If this were a point that the appellant wished to make it was clearly a matter which could have been raised at the time of the request for an oral hearing. It does not, in any event, affect the possibility of an alternative remedy under s. 317.

48. For the sake of completeness, I make the following observations. The trial judge addressed the issue of whether there ought to have been an oral hearing before she addressed the issue of alternative remedy. Hyland J. concluded where a) the appellant's only complaint was that she ought to have had an oral hearing b) she was offered an opportunity to submit new material and seek an oral hearing on the basis of same and c) the decision not to grant an oral hearing was because she had raised no conflicts or issues necessitating an oral hearing, the alternative remedy would have been far more suitable.

49. In her reference at (c) to "the decision" not to grant an oral hearing, clearly the trial judge was referring to the decision of the appeals officer not to grant the oral hearing. The trial judge had already reached her own conclusion on the substantive aspect of the appellant's claim in the judicial review to relief based upon the failure to grant her an oral hearing. Naturally, a decision to refuse relief because an alternative remedy exists

does not require the court to reach a prior conclusion on the merits. The reasons for imposing a requirement to exhaust alternative (adequate) remedies include that a statutory system of appeals will be more effective and convenient than an application for certiorari, that the Oireachtas has provided specialist bodies with specialist expertise and that issues of judicial resources may arise. For these reasons, it would not usually be appropriate for the court to engage in deciding the substantive issue as a precursor to deciding an alternative remedy exists.

50. That said however, a court must have some regard to the underlying grounds upon which the substantive claim for relief is made. That may be the only way the court can assess whether the issue is one which would bring it within the exception to the rule of exhausting alternative remedies. For example, the court would have to assess whether the claim amounted to a fundamental denial of fair procedures or is one that is based on a lack of jurisdiction. If that were the case, then the discretion to refuse jurisdiction may not be exercised by the court hearing the application. As stated above however, the exercise of the court's discretion must be dependent on a wide range of factors. In the present case, the decision was made by the appeals officer on the basis that he was fully satisfied that he could properly determine and make a fair decision in the appeal summarily based upon the available evidence. The appellant had the opportunity, both before the appeal decision itself and after the decision by way of application for a revision, to put forward any further evidence that would support her contention that an appeal was required. The fact that she possessed the opportunity to request a revision so that she could have an oral hearing was, on the facts of this case and in the context of the scheme of the 2005 Act, an alternative remedy to which she ought to have had recourse.

51. On the basis of the foregoing, I conclude that the High Court judge did not err in finding that the appellant had available to her a remedy under s. 317 in which she could have deployed the material she brought to court to argue that she had been entitled to an oral hearing. That remedy was suited to her concerns; it could have addressed her entitlement to an oral hearing, and it could have provided her with such an oral hearing if deemed necessary.

A right to an oral hearing?

52. In view of the above, it is not necessary to engage with the second issue on this appeal as to whether the trial judge erred in holding that the appeals officer was entitled to proceed to deal with the matter summarily. In due course, the appeals officer will have to consider an application for a revision and will do so on the merits of the application. It will be for the appellant to decide the basis on which she will make that application.

Conclusion

53. The trial judge did not err in deciding that there was an alternative remedy available to the appellant which she failed to exhaust. In the circumstances of the case, that failure disentitled the appellant to the relief she sought by way of judicial review.

54. The court will arrange for a short hearing to deal with the issue of costs unless costs can otherwise be agreed between the parties.