AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE 2022:000103
[2023] IESC 9

O'Donnell C.J.
Dunne J.
Charleton J.
Woulfe J.
Hogan J.

Between

JN and TM (A Minor Suing by His Mother and Next Friend JN)

Respondents

AND

John Harraghy

Appellant

AND

Health Service Executive

Notice Party

Judgment of Ms Justice Elizabeth Dunne delivered on the 27th day of April 2023

Introduction

1. TM is a child who satisfies the disability criteria under the Disability Act 2005 ("the 2005 Act"). His mother, JN, applied for an assessment of the child's needs in June 2018.

On 27th January 2020, an assessment report was issued stating that TM requires occupational therapy, psychology, physiotherapy and speech and language therapy. The assessment report underlined that these services were needed as soon as possible, or as was stated in the assessment report, "ASAP" for the child. A service statement was issued on 18th August, 2020, which gave the date of March 2023 for the provision of the above services to TM. JN then submitted a complaint to the Disability Complaints Officer in September 2020, with supplemental details added in April 2021, taking issue with the content of the service statement and particularly the start date of March 2023 given to the family for provision of the services. She pointed to the fact the assessment report confirmed that TM needed the services as soon as possible and asserted that the HSE was failing to provide the service specified.

2. The Complaints Officer dismissed these complaints in a report issued on 3rd August 2021. The report stated that the service statement was correct, accurate and was compliant with the 2005 Act and that the start date given for the services to be commenced was within the realms of the Act. JN appealed this decision to John Harraghy ("the Appeals Officer"). In detailed submissions she criticised the Complaints Officer's findings that the provision of services to TM would result in cost over-run and that there were not adequate resources to provide the required services at a closer date. The Appeals Officer dismissed the appeal by determination on 25th November 2021, against which a statutory appeal was taken to the High Court by JN. The Appeals Officer stated in his determination that neither the Complaints Officer nor the Appeals Officer have the jurisdiction to alter any aspect of the services to be provided nor the time at which they are to commence and this part of his determination forms the basis of the present appeal.

Appeals Officer's Findings

3. Part 10 of the Appeals Officer's determination sets out his findings in respect of the issues raised by the appeal:

> *"10.4 In consideration of the argument that staff shortages or lack of resources are not a defence to the appellant's complaint I find that the complaints officer is obligated by virtue of the provisions of s 15(7) of the Act to give due consideration to the resources available in preparing his or her report.*
>
> > *(a) The complaints officer must also take account of all the matters referred to in s 11(7) of the Act. In particular sections (d) which make specific reference to the 'practicability of providing the services identified in the assessment report' and in the case of (e) 'the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the Executive for the relevant financial year.*
> >
> > *(b) I find that the complaints officer took account of the provisions outlined and issued his report in accordance with the provisions of the Act.*
>
> *10.5 Section 18(20) of the Act outlines the considerations which the Appeals* [Officers] *must have regard to, and these are included in s 11(7) of the Act. The express provision of a reference to resources is a significant stipulation."*

4. The Appeals Officer's determination made two findings in relation to his jurisdiction and that of the Complaints Officer at [10.7] and [10.8]:

> *"10.7 I find that the complaints officer did not have the prerogative to make provision for the delivery of services earlier than outlined in the Service Statement.*

10.8 I find that the jurisdiction of the Appeals Officer is outlined in the Disability Act and in that context the Appeals Officer does not have jurisdiction to make a determination in relation to the dates for provision of any services that are outlined in a service statement."

5. This appeal arises from a High Court decision of Bolger J. [2022] IEHC 407 dated 4th July 2022, finding in favour of JN and TM against the Appeals Officer. The application for leave to appeal submitted by the HSE seeking to appeal the ruling of the Bolger J. related to a finding in respect of the operation of ss. 15 and 18 of the 2005 Act. It is noted in both the application for leave and the respondent's notice that the case at hand is a test case, with some 20 other appeals on similar grounds awaiting the conclusion of these proceedings. The appeal was held by this Court in its determination ([2022] IESCDET 118) to meet the threshold of general public importance under Article 34.5.4° of the Constitution, finding that there was a need for clarity on the provision of services for young people qualifying under the disability criteria under the 2005 Act, in this case TM, and the entitlement of a Complaints Officer and/or a Disability Appeals Officer, where there is a refusal or a limited grant of services by the HSE, within the statutory appeals process, to alter the services initially proposed and when same are to be afforded the child.

Legislative Overview

6. The statutory mechanism begins with the Liaison Officer at s. 11 of the 2005 Act. The Liaison Officer is charged with the preparation of a service statement specifying the services which will be provided to an applicant and the time period within which such services are to be provided. The Liaison Officer may also amend service statements. The relevant parts of s. 11 set out the following:

"(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.

(3) A liaison officer may request such persons as he or she considers appropriate (including the Council) to assist in the preparation of a service statement.

…

(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…

…

(9) A liaison officer may, if he or she considers it proper to do so having regard to any change in the circumstances of the applicant concerned or to any change in respect of the matters referred to in subsection (7), amend a service statement and shall furnish a copy of the amended statement to the applicant, to the Executive, and, if appropriate, to the chief executive officer of the Council and the head of the education service provider concerned.

(10) A service statement amended under subsection (9) shall take effect on such date as may be specified in the statement by the liaison officer concerned.

(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.

(12) A liaison officer shall arrange with the person or persons charged with delivering the services specified in the service statement for the delivery of the services at such times and in such manner as he or she may determine."

7. The most relevant sections of the 2005 Act for this appeal are ss. 15 and 18, the former of which requires a Complaints Officer to investigate a complaint from a parent regarding a wide range of issues stemming from an assessment report and to make findings and recommendations in relation to it, which, in turn, can be appealed to an Appeals Officer pursuant to s. 18. Under this latter section, the Appeals Officer can affirm or vary the findings of a Complaints Officer or set them aside. Complaints must be brought as soon as reasonably possible after the cause of the complaint has arisen. Appeals against recommendations of the Complaints Officer must be brought within

six weeks of the date on which the recommendation was communicated to the person. Section 15(8) of the 2005 Act provides:

> *"15.—(8) A report of a complaints officer may contain one or more of the following:*
>
> *(a) a finding that the complaint was or, as the case may be, was not well founded whether in part or in whole;*
>
> *(b) if the report contains a finding that the Executive failed to commence an assessment within the period specified in section 9 (5) or to complete an assessment without undue delay, a recommendation that the assessment be provided and completed within the period specified in the recommendation;*
>
> *(c) if the report contains a finding that the person may have a disability, a recommendation that the person be the subject of a further assessment under section 9 within the period specified in the recommendation;*
>
> *(d) if the report contains a finding that the Executive failed to carry out an assessment under section 9 in conformity with the standards referred to in section 10, a recommendation that the Executive cause the assessment or a specified part of it to be carried out in conformity with those standards within the period specified in the recommendation;*
>
> *(e) if the report contains a finding that the contents of the service statement concerned are inaccurate or incorrect, a recommendation that the statement be amended, varied or added to by the liaison officer concerned within the period specified in the recommendation;*
>
> *(f) if the report contains a finding that the Executive or an education service provider failed to provide or to fully provide a service specified in the service statement, a recommendation that the service be provided in full by*

the Executive or the education service provider or both as may be appropriate within the period specified in the recommendation."

The relevant subsection of Section 18 of the 2005 Act provides:

"18.—(5) The appeals officer shall make a determination in writing in relation to the appeal affirming, varying or setting aside the finding or recommendation concerned and shall communicate the determination (including the reasons therefor) to the applicant, the Executive and, if appropriate, the head of the education service provider concerned who shall comply with the determination."

8. Section 22 of the 2005 Act is also relevant as it provides the enforcement mechanism for recommendations issued by the Complaints Officer and determinations of the Appeals Officer if these are not complied with. These are binding on the service provider, usually the HSE and are enforceable in the Circuit Court after a period of three months has elapsed.

Judgment of the High Court

9. In the High Court, Bolger J. found in favour of JN and TM, ruling firstly that proceeding by way of the default remedy of a statutory appeal rather than an application for leave for judicial review was the correct approach. Secondly, it was found that the Appeals Officer's determination was lacking on a number of points, most notably a basis for his findings at [10.4] and reasoning as to how or why the Complaints Officer and the Appeals Officer did not have the power to make provision for the delivery of services earlier than outlined in the service statement. This, on the analysis of the High Court judge, was contrary to his obligation pursuant to s. 18(5) of the 2005 Act to include the reasons for his determination. Thirdly, Bolger J. addressed the jurisdiction of the Complaints Officer and the Appeals Officer. It was held that the jurisdiction of

the Complaints Officer is to amend, vary or add to a service statement, as found in s. 15(8)(e) and the jurisdiction of the Appeals Officer is to affirm, vary or set aside the Complaints Officer's finding or recommendation, per s. 18(5), allow both of them to change the contents of a service statement, including any date for the provision of a service that is set out in such a statement. Bolger J. cited the findings of Faherty J. in *JF v HSE* [2018] IEHC 294 at [82] in support of her conclusion on this point. It is also reasoned by Bolger J. that if an alternative interpretation of the 2005 Act was accepted, there would be no remedy for a child whose service statement contained an error, which, on her analysis, cannot have been the intention of the Oireachtas in implementing the remedial legislation.

10. The High Court judgment further held that the Appeals Officer had erred in his findings at [10.7] and [10.8] of his determination. It was found that where a service statement identifies a date by which the service is to be provided, such a date comes within the jurisdiction of the Complaints Officer and the Appeals Officer. Bolger J. also concluded that the Appeals Officer did not properly consider the matters set out at s. 11(7) of the 2005 Act and that the information that was at his disposal was insufficient to allow him to consider how the earlier provision of the service for which JN contended would result in expenditure in excess of the amount allocated in the service plan. Bolger J. remitted the matter to an Appeals Officer for fresh investigation and determination and stated that no assessment was made of the HSE's decision to identify a waiting time in a service statement. It was held that this matter would be more appropriately addressed by the Appeals Officer, along with any other aspect of JN's complaint.

11. Paragraphs [45] and [46] of Bolger J.'s decision are particularly significant to this appeal, and are set out in full below:

"45. I note the wide scope of the complaints which a parent can make pursuant to s.14 including about the "contents" of the service statement (i.e. contents plural thereby confirming the parent's right to complain about a number of elements of the service statement) and/or the HSE's failure to provide a service specified therein. I am satisfied that s.14 is wide enough to allow a parent to complain about the date on which the service statement says the service will be provided as that date must be part of the contents of the service statement. If a parent is permitted to complain about that date, then the Complaints Officer and the appeals officer must have jurisdiction to address it.

46. The jurisdiction of the Complaints Officer to amend, vary or add to a service statement (as per s. 15(8)(e)) and the jurisdiction of the Appeals Officer to affirm, vary or set aside the complaint officer's finding or recommendation (as per s. 18(5)) allow them both to change the contents of a service statement, including any date for the provision of a service that is set out in the service statement. This jurisdiction can be exercised if the Complaints Officer or Appeals Officer considers it appropriate to do so, having had regard to or having considered all the matters they were obliged to have regard to or consider including those set out in s. 11(7)."

Issues

12. As stated in the determination of this Court, there are two grounds on which leave was granted. Submissions and the hearing were to focus on these issues, which are as follows:

a) Whether under the Disability Act 2005, as amended, where an appeal is taken following initial assessment, does the officer reviewing the initial recommendation, the Complaints Officer, and following on, the Appeals

Officer, have legal power to alter both the nature of the services to be provided and the time at which they are to commence?

b) What is the proper approach to construing a social welfare statute and whether plain words may be interpreted in the light of the purpose of the legislation?

Submissions of the Appeals Officer

13. It is submitted by counsel on behalf of the Appeals Officer that the interpretation of s. 15(8)(e) in the High Court decision was erroneous and that the ability to vary a service statement and particularly to alter the date at which a service is due to be performed under the 2005 Act falls under the jurisdiction of the Liaison Officer and not the Complaint or the Appeals Officer, as the Liaison Officer has the duty of preparing the service statement. The relevant duties of the Liaison Officer for this appeal are found at s. 11 of the 2005 Act and are included above. It is submitted that s. 15(8)(e) does not, contrary to the High Court's decision, permit a Complaints Officer to change a service statement, but rather only permits a recommendation that a Liaison Officer make such a change.

14. The Appeals Officer submits that several factors must be taken into account when interpreting the provisions of the 2005 Act: it must be read as a whole, there must be proper consideration of the long title when interpreting specific provisions, ss. 11, 15 and 18 must all be considered together in terms of their functions and their purpose, and the intention of the Oireachtas must also be weighted in interpreting each section of the Act.

15. It is submitted by the Appeals Officer that it was the intention of the Oireachtas that the Liaison Officers alone would prepare and amend service statements. This is made clear, on his analysis, through an examination of the role of the Complaints Officer and

the Appeals Officer, as the 2005 Act makes no specific reference to amending service statements.

16. Beginning at [24] of his submissions, the Appeals Officer outlines the correct approach to interpreting a remedial social statute. The discussion of remedial statutes by Dunne J. in *McDonagh v Chief Appeals Officer* [2021] IESC 33 is highlighted as being of particular importance. The Appeals Officer cites two paragraphs of note from Dunne J.'s judgment. At [77] it was found that the legislative intention of a social remedial act is to be *"generous and flexible"* and at [57] Dunne J., quoting from Dodd on *Statutory Interpretation in Ireland* (Tottel, Dublin, 2008) said:

> *"Remedial social statutes and legislation of a paternal character favour a purposive interpretation and are said to be construed as widely and liberally as can fairly be done within the constitutional limits of the courts' interpretative role. This formula has been repeated in a number of cases. It has been codified to some extent in some jurisdictions. Remedial social statutes are enactments which seek to put right a social wrong and provide some means to achieve a particular social result. The interpretative approach to remedial enactments can be related to the mischief rules and purposive approach, in that interpretations that promote the remedy that the legislature has appointed are preferred..."*

17. The case of *ELG v HSE* [2022] IESC 14 is also relied upon in the Appeal Officer's submissions, particularly Baker J.'s interpretation of the 2005 Act. The net question before the Court in that matter was whether an applicant child was entitled to a service statement in circumstances where her assessment officer had found that, while she had certain health needs, she did not have a disability. Both the Court of Appeal ([2021] IECA 101) and the Supreme Court held against the applicant child, finding that there

was no such entitlement. The Court took cognisance of the jurisprudence governing how courts should approach remedial statutes, but Baker J. proceeded to hold that, while there was authority for the proposition that such statutes warranted a purposive interpretation and should be construed as widely and as liberally as could fairly be done, the interpretation contended for on behalf of the applicants exceeded the bounds of the permissible. Baker J.'s judgment is referred to extensively and [59-60], [93-96] and [105-117] are quoted *in extenso*.

18. It may be that the point that is being asserted here relates to s. 11(7)(d) and (e) of the 2005 Act whereby services must be limited both by the practicality of providing the service and the funds available for providing the service. In this context it may be argued that where funds or practicability do not allow for a service to be given in a specific year it may be deferred to another year and that the limitations within the statute do not permit for a change on appeal.

Submissions of the HSE (Notice Party)

19. The HSE submits that the issue in this appeal is very net and centres on the question of whether the High Court was correct in its decision regarding the jurisdiction of the statutory officers under the 2005 Act. It is submitted by the HSE that the High Court gave excessive weight to the social and remedial nature of the 2005 Act, which led to an interpretation of the powers of the statutory officers that is erroneous. The HSE further contends that the Oireachtas has enacted precise legislation that specifically allocates jurisdiction to each of the statutory officers relevant to this appeal.

20. The submissions of the HSE set out, on the analysis of the notice party, the roles of each statutory officer under the 2005 Act. The Liaison Officer's duties are set out in s. 11 of the 2005 Act and include the duty to prepare the service statement, liaise with the person charged with delivery of such services, review the service statement regularly

and amend the service statement if there is a change of circumstance. The Complaints Officer's duties are set out in s. 15 and are specifically stated to include making a recommendation that the service statement be *"amended, varied or added to"* by a Liaison Officer. It is submitted that there is no basis in the 2005 Act allowing the Complaints Officer to amend the service statement themselves. The Appeals Officer's duties are found in s. 18. It is noted that the Appeals Officer is not an employee of the HSE unlike the two other statutory officers mentioned above. According to the 2005 Act the Appeals Officer only has power to *"affirm, vary or set aside"* findings and recommendations in the Complaints Officer's report. This, it is submitted, does not extend to a power to directly amend dates or any other matters contained in the service statement.

21. The HSE notes that recommendations from the Complaints Officer and determinations from the Appeals Officer are both enforceable in the Circuit Court if not complied with after a specified period of time. The 2005 Act's judicial enforcement mechanism is found under s. 22 and is linked very closely to the terms of the recommendations and determinations that are issued. Therefore, it is submitted, precision and strict compliance with the statutory terms for the issuing of both is vital.

22. It is also submitted that, had the Oireachtas intended to give the Complaints Officer and the Appeals Officer the power to directly amend service statements, this would have been expressly provided for: the wording of the statute is sufficiently clear. The Oireachtas's intention as to the jurisdiction of the statutory officers, per the HSE, must have been to exclude them from the power to directly amend service statements. Therefore, this responsibility lies with the Liaison Officer.

23. On the question of how a remedial social statute should be interpreted, the HSE submits that this Court has cautioned against adopting extreme positions of statutory

interpretation in which, at one end, words and text are of lesser importance than the apparent objective of the legislation and, at the other, microscopic analysis of words set upon a transparent slide and stripped of all their context lead to unrealistic interpretation. The HSE argued that the High Court went too far in the application of a generous and purposive approach to interpreting the provisions of the 2005 Act.

24. It is also submitted by the HSE that the judgment in *McDonagh* has led to two classes of remedial statute being given a generous interpretation. These two classes are social reforming statutes and redress/compensation statutes, per [57] of the judgment: *"Remedial social statutes are enactments which seek to put right a social wrong and provide some means to achieve a particular social result".* It is submitted that both these classes of remedial statute being encompassed in this description is not entirely helpful. The rationale for allowing redress/compensation legislation to benefit from a generous interpretation is clear. However, it is submitted that the rationale for allowing the same approach for social reforming statutes is less so. The latter of these two requires a complex allocation of limited resources for which there are competing interests. This task is for the Oireachtas, and it has enacted detailed statutes on this issue in the form of the 2005 Act. The generous approach to interpretation of this scheme as applied in the High Court was inspired by the approaches adopted in compensation-type remedial statutes and is not appropriate for the relevant provisions of the 2005 Act.

Submissions of TM and JN

25. On the question of the correct approach to interpreting remedial statutes JN submitted that from the recent case law from this Court in *McDonagh* and *ELG*, and the decision of *CM v HSE* [2021] IECA 283 in the Court of Appeal, six principles may be drawn:

a. Where possible words will be given their plain and ordinary meaning.

b. One must consider if legislation is ambiguous or if literal interpretation fails to reflect the intention of the Oireachtas.
c. Provisions must be viewed by reference to surrounding provisions.
d. If the result of a provision is absurd or anomalous, it is permissible to consider the underlying rationale of the legislation.
e. If the rationale is remedial, provisions must be interpreted as widely as is permissible.
f. A purposive approach to interpreting remedial statutes cannot mean drawing conclusions contrary to the words of the legislation.

26. JN states that while she agrees with the HSE that there are different types of remedial statutes, she submitted that they cannot be neatly divided into two classes as the HSE suggests. It is instead submitted that some statutes such as the 2005 Act can be described as 'doubly remedial' in that they seek to right a social wrong and contain a number of remedies to address problems in the implementation of their substantive measures. The 2005 Act should be considered as both substantively and procedurally remedial. When it comes to interpreting the provisions at issue JN argues that it is not a question of a 'generous' approach but whether the provisions should be interpreted as widely as the words reasonably permit?

27. JN likens this case to *McDonagh* in her submissions and states that in both cases the Court must interpret procedurally remedial provisions of a substantively remedial statute. It is also submitted that the Oireachtas' intention in enacting the 2005 Act was clearly that the enforcement mechanisms would be effective. This can be deduced from the extensive powers of the statutory officer under ss. 15 and 18 and the enforceability of recommendations and determinations through the courts under s. 22. A literal interpretation would, in effect, render the complaints mechanism under the 2005 Act

ineffective and leave dissatisfied parents no choice but to resort to judicial review. Applying *McDonagh*, provisions of the Act relating to 'innovative and far reaching' remedial procedures should be interpreted as widely as words reasonably permit. This, it is submitted, is the proper approach to construing these provisions.

28. In responding to the Appeal Officer's submission that the reasoning of the High Court at para. 46 was incorrect, JN submits that it should be read in context of the judgment and in light of what was of issue between the parties. She never suggested in the High Court that Complaints Officers or Appeals Officers had a power to amend service statements directly and it is clear that the High Court fully understood the statute and the Appeal Officer's place in it from [17-36] of its judgment. JN was in fact looking for a recommendation or determination stating that the dates on the service statement should be changed. Because these are enforceable and the HSE must comply with them, in effect, a determination which includes a recommendation that a date for the delivery of services be amended by a liaison officer is, unless it is challenged, an amendment of the service statement, albeit an indirect one.

29. It is submitted that although the framing of s. 15(8) of the 2005 Act suggests that complaint will only be upheld if the service statement contains inaccuracies or errors, JN affirms this should extend to a situation where the parent should be allowed to argue that the liaison officer has made a mistake in fixing the date for service provision, especially if the assessment report indicates that the need for services is urgent but the date fixed in the service statement is far off. Nothing suggests that interpreting these provisions widely would be absurd or would fail to reflect the intention of the Oireachtas. It is clear from the long title of the 2005 Act that while one of the objectives is to ensure that services are provided with regard to available resources it is also intended that people with disabilities may appeal against non-provision of services.

Where an assessment report records that a child urgently needs services, but the service statement makes clear that for resource reasons services will not be provided, it is consistent with the purposes of the Act that the child's parents should be able to appeal against the failure to provide the necessary service even before the time specified for their provision has elapsed.

30. On the issue of the jurisdiction of the Appeals Officer, JN submitted that where a complaint that the HSE has failed to provide a service is rejected by the Complaints Officer and appealed, the Appeals Officer must have jurisdiction to find that the services ought to have been provided and substitute the original findings for his own and recommend the service be provided in full within such a period as he may specify. In JN's submission this interpretation of the Appeals Officer's jurisdiction is required by the ordinary meaning of s. 18(5), which allows him to 'affirm, vary or set aside' findings of the Complaints Officer even though these words are not defined in the 2005 Act. The remedial nature of the 2005 Act must also be considered when interpreting these words as well as the statutory scheme as a whole and it is submitted that JN's interpretation is wholly consistent with both. If the Appeal Officer's interpretation were to prevail it would force dissatisfied parents away from the specialist statutory mechanism through which they may complain and into the unsuitable arena of judicial review.

The Scheme of the Act

31. The 2005 Act is a piece of legislation which contains what were at the time some novel features. As the Long Title of the Act makes clear, it is an Act "*to enable provision to be made for the assessment of health and education needs occasioned to persons with disabilities by their disabilities, to provide for appeals by those persons in relation to the non-provision of those services, to make further and better provision*

in respect of the use by those persons of public buildings and their employment in the public service … and to promote equality and social inclusion and to provide for related matters". Thus, in the first place, the 2005 Act was intended to provide for an assessment of the health and education needs of persons with disabilities. It provided for the provision of services to meet those needs, having regard to the resources available for them, and specifically it provided for appeals by persons in relation to the non-provision of services. Thus, a person dissatisfied with a decision in relation to the provision or non-provision of services, or indeed a finding that someone did not have a disability, had a right of appeal.

32. I have already set out some of the key provisions of the 2005 Act which are of relevance to these proceedings, such as s.11 of the Act which provides for the making of a service statement, and the role of the Liaison Officer in preparing the service statement in respect of that which will be provided to an individual person with disability, s.14 in relation to the assessments or service statements, s. 15 in relation to the role of complaints officers, ss. 16 and 18 in relation to appeals from a complaints officer. Also of interest is the provision to be found in s. 22 of the 2005 Act. It provides, *inter alia*, that:

> *"If the Executive or the head of the education service provider concerned fails -*
>
> *(i) to implement in accordance with its terms a determination of the appeals officer in relation to an appeal under section 18, or*
>
> *…*
>
> *(iii) to implement in full a recommendation of a complaints officer,*

within 3 months … the applicant concerned … may apply to the Circuit Court … for an order directing [the Executive of the head of the education service provider]"

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

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

35. It is not in dispute that the 2005 Act is a remedial statute. In the case of *McDonagh v. Chief Appeals Officer & the Minister for Social Protection* [2021] 1 ILRM 385, I

made some observations, at para. 57 of my judgment in that case which are set out above.

36. Further, reference was made in the course of that judgment to the decision of Clarke C.J. in *J.G.H. v. Residential Institutions Review Committee* [2018] 3 I.R. 68, at page 78, as follows:

> *"The underlying principle behind the proper approach to the interpretation of remedial legislation is that it must be assumed that the Oireachtas, having decided that it is appropriate to apply public funds to compensate a particular category of persons, did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation. On the other hand the Oireachtas is entitled, when deciding to apply public funds in a particular way, to define, within constitutional bounds, the limits of any scheme which it is decided should be put in place. Where that scheme is remedial, courts should not be narrow or technical in interpreting those bounds but they should not be ignored either. Against that backdrop I turn to the specific issues of interpretation which arise on this appeal."*

37. That passage was also relied on by Ní Raifeartaigh J. in the Court of Appeal in the case of *ELG (a minor suing by her mother and next friend SG) v. Health Service Executive (No. 2)* [2021] IECA 101. That was a case in which the issue was whether an applicant child was entitled to a service statement in circumstances where the assessment officer had found that while she had certain health needs, she did not have a disability. The applicant was unsuccessful. In the course of her judgment, Ní Raifeartaigh J. quoted at para. 51 from the judgment of O'Donnell J. (as he then was) in the case of *J.G.H.*, where he said:

"It is also said that the Court should adopt a broad purposive interpretation of a remedial statute, relying on Bank of Ireland v. Purcell [1989] I.R. 327 and Gooden v. St Otterans Hospital [2005]3 I.R. 617. This is of course a purposive approach. Even if this is so, the statute must still be interpreted. The process of statutory construction cannot be treated as an exercise where the words of the statute are fed into the magician's black box and words of incantation such as purposive, generous or literal or strict are spoken almost at random, before the desired result is extracted from the other side. As Hardiman J observed in Gooden, the limits of construction are reached when a court is asked to rewrite a statute or supplement it. This echoes the approach of Lord Wilberforce in Royal College of Nursing v. Secretary of State for Health [1981] AC 800:

> *"There is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question "what would Parliament have done in this current case – not being one in contemplation – if the facts had been before it?" attempt themselves to supply the answer , if the answer is not to be found in the terms of the Act itself.*

It is not permissible to extend the Act beyond its terms because a limitation deliberately included in the Act is now considered restrictive."

38 That matter was subsequently appealed to the Supreme Court, and in her judgment on behalf of the Court, Baker J. made the following observation, at para. 109:

"The first principle of statutory interpretation is that, insofar as may be, a court is to interpret a section in the light of its plain or ordinary meaning, that is by not giving any special or technical meaning or sense to a provision. If ambiguity is found, or if as discussed above, if certain words are defined in an Act or some

part of an Act, those words become words of art or technical words for the purposes of the legislation. The function of an interpretative or definition section is to add clarity, and sometimes to constrain the interpretation within a defined parameter.

Again, as well established in the authorities there may be circumstances where a reading of legislation reveals an ambiguity. This is what was contented for in Bookfinders v. Revenue Commissioners. The parties are agreed that in the event an ambiguity arises from a literal interpretation or a plain reading of the words in a section that the court is entitled to take a purposive approach, and I do not therefore need to spend much time in this judgment in considerations of the rationale that supports the purposive approach to legislation. The parties are also agreed that the legislation is to be read as if it were a remedial social statute and counsel for the appellants argues that a reading of s. 11(2), whether read in conjunction with or wholly separate from s. 8(7), must look at the purpose of the legislation as a whole which he argues is to offer support to, and enforcement mechanisms for, a person with disability so that that person may properly access services that meet their needs.

There can be no doubt in the light of the Long Title of the Act of 2005 that this legislation was enacted to offer additional support for, and to provide for the first time enforcement mechanisms designed to assist, persons with disability in the accessing of public services to meet the needs occasioned by that disability. The legislation had a particular social function and provided a mandatory

enforcement mechanism, even where the provision of those services involved a cost to the Exchequer."

39. She went on to say, at para. 117:

"A purposive approach in the context of a remedial social statute cannot mean drawing a conclusion that is plainly contrary to the legislation."

40. So far as the respondent is concerned, it is argued that the 2005 Act, being a remedial statute, should be interpreted as widely as the words reasonably permit.

41. It is clear from the above account of the case law that a purposive interpretation should be given to a remedial statute, where appropriate and necessary. That does not mean that the legislative limits in a remedial statute can be ignored, or as Clarke C.J. put it in *J.G.H.*, referred to above, "*Courts should not be narrow or technical in interpreting those bounds but they should not be ignored either*" In addition to the point, as was stated by Baker J., in the case of *E.L.G.*, referred to above, "*a purposive approach…cannot mean drawing a conclusion that is plainly contrary to the legislation*." Those comments are of assistance and in interpreting legislation such as that which is at issue in these proceedings, I shall bear in mind those comments in considering the issues in this case.

The Role of the Complaints Officer and the Disability Appeals Officer

42. Central to the issues in this case is the role and jurisdiction of the Complaints Officer and thereafter, in the event of an appeal, that of the Disability Appeals Officer. A key question is what these officers can do following a complaint or an appeal. However, before dealing with their jurisdiction, it would be helpful to look at the task of the Liaison Officer, for it is a complaint or an appeal in relation to what the Liaison Officer has said that arises under the Act. As we have seen before, the role of the Liaison Officer in relation to the preparation of service statements is to be found in s. 11 of the 2005

Act. Once an assessment report is made in relation to the needs of an applicant, the Liaison Officer is charged with the preparation of a service statement. A service statement is intended to specify the health services and/or education services which will be provided to the applicant by the HSE, or an education service provider, and the period of time within which such service will be provided. Section 11(7) goes on to provide that, in preparing the service statement, the Liaison Officer will have regard to a number of matters, *inter alia*, the assessment report concerned, the practicability of providing the services identified in the assessment report, and in the case of services to be provided by the HSE, 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. Provision is made in s. 11(9) for the possibility of an amendment being made to the service statement, if the Liaison Officer considers it proper to do so having regard to any change in the circumstances of the applicant concerned or to any change in respect of the matters referred to in subsection (7). Thereafter, they will provide a copy of the amended statement to the applicant, the HSE, or the Chief Executive Officer of the Council and head of the education service provider concerned. Thus, it can be seen that the Liaison Officer has to take into consideration in making a service statement a number of matters, including the time within which the services are to be provided and the practicability of providing the services identified in the assessment report.

43. Regulations made under the Act (S.I. No. 263 of 2007) provide, at Regulation 18, that the service statement shall be written in a clear and easily understood manner, and it goes on to provide certain matters which have to be specified in the service statement, namely:

> *"(a) the health services which will be provided to the applicant;*

(b) the location(s) where the health service will be provided;

(c) the timeframe for the provision of the health service;

(d) the date from which the statement will take effect;

(e) the date for review of the provision of services specified in the service statement;

(f) any other information that the Liaison Officer considers to be appropriate, including the name of any other public body that the assessment report may have been sent to under section 12 of the Act."

44. Thus, one can clearly see the task of the Liaison Officer and the matters that have to be dealt with by the Liaison Officer in completing the service statement. Key amongst those factors will be the location where the service will be provided and the timeframe for the provision of the health service at issue.

45. I now wish to deal with the role of a Complaints Officer. In the first place, a complaint can be made, *inter alia*, in respect of "*the contents of the service statement*" and the fact that either the HSE or the education service provider failed to provide, or to fully provide, a service specified in the service statement. Of particular relevance in the context of this case is that a complaint can be made about "*the contents of the service statement*" (see s. 14 of the 2005 Act).

46. When the matter comes to a Complaints Officer, and leaving aside those cases where the complaint is judged to be frivolous and vexatious, or one which is suitable for informal resolution, what does the Complaints Officer do? Section 15(6) of the Act sets out the manner in which the complaint is to be dealt with. It provides that the complaint shall be investigated by the Complaints Officer, and it further provides that, if it is appropriate, the Complaints Officer will give an opportunity to be heard to the complainant, the assessment officer concerned, the Liaison Officer concerned, the

education service provider concerned, and any other person having an interest in the matter. They are permitted to present any evidence relating to the complaint, and thereafter the Complaints Officer shall prepare a report in writing setting out findings and recommendations, and the Complaints Officer will then furnish a copy of the report to the complainant, the HSE, and to any other appropriate person concerned. I have already set out the provisions of s. 15(8) of the 2005 Act, which sets out what the report of a Complaints Officer may contain. Of particular relevance to the facts of this case is the provision contained at sub-para. (e) of s. 15(8), which is as follows:

> *"if the report contains a finding that the contents of the service statement concerned are inaccurate or incorrect, a recommendation that the statement be amended, varied or added to by the liaison officer concerned within the period specified in the recommendation;"*

47. There are a number of observations to make about this provision. It appears on the face of it that it is only if the Complaints Officer is satisfied that the statement is "*inaccurate or incorrect*" that the Complaints Officer can intervene. Then, if that is the appropriate course of action to take, the Complaints Officer makes a recommendation that the service statement be "*amended, varied or added to*" by the Liaison Officer. The point is that the Complaints Officer cannot him or herself amend, vary or add to the service statement. This is a significant point to which I will refer later. The second point to note is that the Complaints Officer has to be satisfied that there is something in the contents of the service statement which is "*inaccurate or incorrect*". There was some discussion as to the meaning of these two words in the course of the submissions before the Court. I am mindful of the need to give meaning to all the words used in a statute, as Dodd in *Statutory Interpretation in Ireland* said at para. 5.25:

"It follows from the pre-eminence of the text, that it is presumed that words are not used in a statute without a meaning and are not tautologous or superfluous, and that effect must be given, if possible, to all the words used. The legislature must be deemed not to waste its words or say anything in vain. In County Council of the County of Cork v. Whillock [1993] 1 I.R. 231, the principle was expressed in the following terms:

> *"There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain."*

48. Having said that, as a matter of practicality it seems that if the contents of the service statement are in some respect inaccurate then, presumably, it could also be said they are incorrect. Likewise, if something in the service statement is incorrect then, presumably, it is also inaccurate. In truth, it seems to me that the words "*inaccurate*" or "*incorrect*" as used in s. 15(8)(e) are, in practical terms, synonymous.

49. I will return later in the course of this judgment to discuss the question as to whether or not there was, in fact, any inaccuracy or incorrectness about any of the contents of the service statement in this case.

50. I now propose to look at the role of the Appeals Officer. The provisions of s. 18(5) have been set out previously, and it will be seen that the Appeals Officer makes a determination in "*affirming, varying or setting aside the finding or recommendation concerned*". The Officer is required to communicate the determination to the complainant, the HSE and, if appropriate, the head of the education service provider.

51. It is of interest to examine the powers of the Appeals Officer. They can require any person to provide information or records, and require attendance of the person concerned before them; they can examine and take copies of records; they may enter any premises occupied by a public body or the provider of a health or education service; they can examine and take copies of records found there; the person from whom information is required is entitled to the same immunities and privileges as a witness in a court; an oral hearing may be held; a person giving false evidence before the Appeals Officer is guilty of an offence. This is not an exhaustive list of the functions and powers of the Appeals Officer (which are set out in full in s.18), but it serves to illustrate the importance of the role of the Appeals Officer and the extent of the powers conferred on an Appeals Officer in carrying out their functions under the 2005 Act. It will be noted that, on completion of their task, they make a determination, and that determination is one, affirming, varying, or setting aside the finding/recommendation concerned. Thus, whilst the Appeals Officer makes a determination and the Complaints Officer makes a recommendation, it does appear that, insofar as the Appeals Officer is concerned, his/her function, being limited as it is to making a determination on foot of a recommendation, requires to be considered further. An argument made in the course of these proceedings is that the High Court was in error in its statement set out at para. 46 of the judgment. Therein it was said:

> *"The jurisdiction of the Complaints Officer to amend, vary or add to a service statement (as per s. 15(8)(e)) and the jurisdiction of the Appeals Officer to affirm, vary or set aside the complaint officer's finding or recommendation (as per s. 18(5)) allow them both to change the contents of a service statement, including any date for the provision of a service that is set out in the service statement. This jurisdiction can be exercised if the Complaints Officer or*

Appeals Officer considers it appropriate to do so, having had regard to or having considered all the matters they were obliged to have regard to or consider including those set out in s. 11(7).”

52. It has been argued vigorously on behalf of the Appeals Officer herein that neither the Complaints Officer nor the Appeals Officer on an appeal from an Appeals Officer have the power under the statutory provisions to “*change the contents of a service statement*”. Commenting on para. 46 of the judgment of the High Court, it was said on behalf of the appellant that what the High Court failed to note and make clear is that it is the Liaison Officer alone who can act upon the finding or recommendation in question and actually change the service statement. The HSE agreed with this proposition. It should be said that the arguments put forward in relation to this issue on behalf of the minor did not seriously take issue with this argument, but rather sought to suggest that the terms of para. 46 was simply a “*summary of the powers that complaints officers and the appellant can exercise to correct errors in service statements*”.

53. Strictly speaking, I think that it is apparent that, insofar as the judgment of the High Court suggested in para. 46 that the Complaints Officer and the Appeals Officer were empowered to change the contents of a service statement, this was a mistaken view of the legislation. What they can do is make a recommendation/determination directed to the Liaison Officer. (For ease of reference, I will refer to “a recommendation” although it is the Complaints Officer who makes a recommendation, and the Appeals Officer who makes a determination). It should be borne in mind that a recommendation is enforceable by the method referred to previously, but it is the Liaison Officer that actually carries out or gives effect to a recommendation by changing the contents of a service statement. In a way, this will be readily apparent when one considers the role of a Liaison Officer. Once the person has been found to have a disability, and is in need

of services, it is then for a Liaison Officer to engage with the appropriate provider, be it the HSE or an education service provider, to arrange for the necessary services to be provided in accordance with the recommendation. All in all, I am satisfied that, insofar as this aspect of the argument is concerned, it is clear from the terms of the legislation that neither the Complaints Officer nor the Appeals Officer have the power to change the contents of a service statement, albeit that it is quite clear that they are in a position to make recommendations, and the effect of a recommendation is such that it has to be given effect to, failing which an application can be made pursuant to the provisions of s. 22 of the Act to the Circuit Court for enforcement.

"The Contents of the Service Statement"

54. Although there was an error on the part of the trial judge in respect of the function of the Complaints Officer and/or the Appeals Officer *vis-á-vis* the service statement, that is not a matter of real significance in terms of the core matters at issue in these proceedings. It is necessary to consider whether the powers of the Complaints Officer, and on appeal those of the Appeals Officer, extend to a recommendation for the amendment of a service statement in respect of the date upon which it is anticipated that the services will be provided.

55. It will be recalled that in the Regulations made under the 2005 Act, and referred to previously, one of the matters to be included in the service statement is the timeframe for the provision of the health service identified in respect of the person with the disability. In this case, the child at the centre of these proceedings was assessed as needing a number of therapies, including physiotherapy and speech and language therapy, "*ASAP*". The service statement of the 18th August, 2020 identified a date of March 2023 for the provision of the services required, leading to the complaint by the

child's mother on the basis that this was far from adequate and certainly was not "*ASAP*".

56. The question of whether there was jurisdiction on the part of the Complaints Officer and thereafter the Appeals Officer to reconsider the time within which the services should be provided must be considered. The central complaint made on behalf of the child was as to the start date for the provision of the services identified as appropriate for him. The mother also complained in general terms that the HSE was failing to provide the service specified in the service statement but, in reality, the complaint was as to the start date. The report of the Complaints Officer rejected the complaint. He found, *inter alia*, that the contents of the service statement were correct, accurate and that they complied with Clause 18 of the Regulations, and s. 11(7) of the 2005 Act. He also found the start date for the services to be commenced was "*within the realms of the Act*".

57. That led to the appeal to the Appeals Officer. I have already set out some of the key findings from the Appeals Officer's determination. In the course of that determination, the Appeals Officer set out details of the background and referred to correspondence received from the HSE of the 5th October, 2021, in relation to information which had been provided to the Appeals Officer. In the course of that correspondence, it was noted that changes had been made to the manner in which services were to be provided to children, and further that it was "the HSE's position that the court accepted that the function carried out by the Liaison Officer is a practical one and it depends on the number of places available at a given time. The court (this is a reference a judgment of the High Court in the case of *CM/JO'SS/DB v. Health Service Executive* [2020] IEHC 406) Barr J., reiterated at para. 129 that service statements fundamentally must furnish information to the applicant's parents: *"In essence, it provides that they must be told*

what health services the child will get, the location where the health service will be provided and the timeframe for the provision of the health service." The HSE also notes that Barr J. also added that if the best that can be done is that a child is put on a waiting list for a particular health service, then that is what the Liaison Officer can state in the service statement. The determination noted that the HSE was in the process of reorganising its children's disability network teams, and that it was anticipated that this would have a positive impact on waiting times and access to services.

58. The Appeals Officer then noted the issues before him as follows:

> *"(a) Did the Complaints Officer properly investigate the complaint in relation to resource provision?*
>
> *(b) Are staff shortages or lack of resources a defence to the appellant's complaint?*
>
> *(c) Should the complaint have been upheld and a prompt date given for the provision of service?"*

59. As mentioned previously, I have set out at para. 3 hereof certain of the findings made by the Appeals Officer, and it can be seen that it was the view of the Appeals Officer that the Complaints Officer was obliged to give due consideration to the resources available in preparing the report on foot of the complaint. It was also pointed out that the Complaints Officer had to have regard to the provisions of s. 11(7) of the 2005 Act, and in this regard he referred expressly to the provisions of s. 11(7)(d) and (e) in relation to the practicability of providing the services, and the need to ensure that the provision of the service would not result in any expenditure in excess of the amount allocated to implement the approved service plan of the HSE for the relevant financial year. The Appeals Officer concluded that the Complaints Officer took account of those provisions and accordingly issued his report having regard to the provisions of the Act.

The key findings of the Appeals Officer were then set out at paras. 10.7 and 10.8 of his determination which, in turn, is to be found at para. 4 above. He found that the Complaints Officer could not make provision for the delivery of services earlier than the date outlined in the service statement and went on to conclude that an Appeals Officer "*does not have jurisdiction to make a determination in relation to the dates for provision of any services that are outlined in a service statement*".

60. During the course of the hearing, there was a certain amount of discussion as to the provisions of s. 11(7)(d) and (e). Emphasis was placed in particular on the requirements in s. 11(7)(e) and the need to ensure that the provision of a service would not result in expenditure in excess of the amount allocated to implement the approved service plan for a relevant financial year. It has to be said that this is not a case in which it was argued that the HSE has not allocated sufficient funding to the provision of services of the kind at issue here by contrast with the funding allocated to the provision of any other form of service. Each year, the State provides funding to the HSE for the services it provides. Those funds are then allocated to the provision of the various services provided overall by the HSE.

61. There is no suggestion in this case that funds allocated to one area of care be reallocated to another to ensure that someone with a disability, such as the child in this case, should be provided with the service he requires at the expense of any other person dependent on services provided by the HSE. It is clear that the resources available to the HSE are not unlimited, and that the HSE has obligations to use its funding in a manner that is appropriate to the services it is required to provide overall. Equally, it is not a case about assessing whether or not the provision of the services required by the child in this case will cause the budget of the HSE to be exceeded. Undoubtedly, what is required is that regard be had to the overall position of the HSE and to its funding,

and to the manner in which those funds are allocated. In this regard, the provisions of s. 5 of the 2005 Act are of relevance, in that it provides, *inter alia*, at sub-section 3, that where a specified body provides or arranges for the provision of services, that body shall allocate out of the moneys available to it for that year such amount as it considers appropriate for the provision of those services. I accept that a matter that is required to be taken into account in preparing a service statement is the need to ensure that the provision of services does not result in an excess of expenditure in relation to the amount allocated in any given year. That is expressly provided for in the 2005 Act, and therefore is a factor to be borne in mind. Nevertheless, I feel that there is no real suggestion in this case that could have given rise to any concerns in relation to s. 11(7)(e).

Practicability

62. It will be recalled that s. 11(7)(d) requires the Complaints Officer to take account of the practicability of providing the services identified in the assessment report. It goes without saying that there are many calls upon the HSE for funding of different services across the wide range of services provided by the HSE. Each year, the HSE allocates such amount as is appropriate for the provision of the services it provides. Accordingly, funding will be allocated across the range of services provided by the HSE. It has to be said that it is no function of this Court to comment on the allocation of funding by the HSE to the various services. It is a matter for that body to identify the appropriate funding for the various services it provides in accordance with its statutory obligations. For example, it cannot be the case that the Court could intervene to direct the HSE to switch funding from the funding for hip operations to the funding for treatment of cancer patients. Those are matters within the expertise and management of the HSE and it is not for the courts to intervene in that regard.

63. It is interesting in this respect to have regard to the decision of the High Court in the case of *CM (a minor) suing by his mother and next friend SM v. The HSE* [2020] IEHC 406. That case concerned a number of issues arising under the 2005 Act and, in particular, looked at an issue in relation to the function of the Liaison Officer, and whether the Liaison Officer was obliged to give reasons as that requirement is understood in the context of judicial review proceedings. Barr J. in his judgment noted that the Liaison Officer is to state what services will actually be provided to an applicant in respect of the needs identified for that applicant in the assessment report. He went on to say, at para. 123, as follows:

> *"In carrying out this function, which must be done within the tight timeframe provided for under the Act of one month, the liaison officer is not adjudicating on any interests or rights of the applicant child, but is merely ascertaining whether any particular health services are available in the region and whether there are any places available within those services to cater for the applicant. The liaison officer is not adjudicating on the person's entitlement to receive the services, but is merely indicating what services are available to the applicant at that time."*

64. He continued at para. 124 as follows:

> *"The function carried out by the liaison officer in this regard is a very practical one. It depends on the number of places available at any given time. If there are no places available for a person of the applicant's age on a particular course or programme, the liaison officer cannot create extra places; he has to tell the applicant's parents that there are no places available at that time."*

65. Barr J. went on to comment, at para. 126, as follows:

"Whether places will become available within specialist health services in the future, may depend on whether existing service users move away from the area, or more likely, whether additional funding may become allocated to that service in that area in the future, which may allow for an expansion in numbers. Accordingly, it may not be possible for a liaison officer to give a firm time within which a particular service will or may, become available to an applicant.

If places are not available in particular health services, that is not the fault of the respondent, or of the liaison officer. If an applicant is dissatisfied with the level of funding for a particular disability in a particular area, that is something that they must take up with the Minister for Health, or with their local representatives."

66. He went on to say at para. 129:

"The regulations provide the information that must be furnished to the applicant's parents in the service statement. In essence, it provides that they must be told what health services the child will get, the location where the health service will be provided and the timeframe for the provision of the health service. However, if it is the case that the best that can be done for a particular child at a particular point in time is that they be put on to a waiting list for a particular health service, then that is all that the liaison officer can state in the service statement, together with furnishing an estimate of the timeframe within which they are likely to be seen by that service.

In the event that specific health services are either not available in the area, or not available at that particular time, all the liaison officer can do is state that fact and state when such services may become available in the future. If that

cannot be stated with accuracy, then so be it. If a service is unlikely to become available in the area in the future, the applicant should be told that and perhaps they should be told the nearest place where such health service may be available. However, the court cannot micromanage every aspect of the information that is given by a liaison officer in every case. All one can say in general terms, is that the content of the service statement must comply with the provisions of regulation 18 of the 2007 Regulations."

67. It is difficult to disagree with those observations. Therefore, it seems to me that it is clear that, so far as a Liaison Officer is concerned, they are obliged to indicate that, if services are not available at that time, to when such services will be available. The fact that a child is placed on a waiting list is not, *per se*, wrong and will inevitably be a reflection of the services that can be provided at any given time.

The Determination of the Appeals Officer

68. I have already set out some of the key findings of the Appeals Officer. Nevertheless, I think it would be helpful to refer to the precise terms of the determination once more. The following three issues were identified on which a finding had to be made:

"(a) Did the Complaints Officer properly investigate the complaint in relation to resource provision?

(b) Are staff shortages or lack of resources a defence to the appellant's complaint?

(c) Should the complaint have been upheld and a prompt date given for the provision of service?"

69. Insofar as the question of staff shortages or lack of resources are concerned, the Appeals Officer concluded that the Complaints Officer took account of the provisions and, in particular, the provisions of s. 11(7)(d) and (e), and therefore it was concluded

that the Complaints Officer's report was issued in accordance with the provisions of the Act. Further, it is clear from the determination that the Appeals Officer considered that the question of resources was an important consideration. In this context, see para. 10.5 of the determination. He went on to say that the Complaints Officer sought relevant updates from the Liaison Officer and that he reviewed the assessment report. It was found that the Complaints Officer carried out his investigation in accordance with the functions prescribed in s. 15(7) of the 2005 Act. He then concluded that the Complaints Officer "*did not have the prerogative to make provision for the delivery of services earlier than outlined in the service statement*". Finally, he concluded that "*The jurisdiction of the appeals officer is outlined in the Disability Act, and in that context the appeals officer can only perform his or her functions conferred by this Act. Therefore, the appeals officer does not have jurisdiction to make a determination in relation to the dates for provision of any services that are outlined in a service statement*".

70. During the course of the hearing, counsel on behalf of the Appeals Officer argued strongly that the Appeals Officer simply did not have jurisdiction to make any determination or recommendation in relation to the dates for provision of any services. In fairness, it has to be said that this was based on a narrow view of the interpretation of the provisions of the Act, and in particular the provisions of s. 11(7) and the provision contained in s. 15(8)(e) to the effect that it was only if the contents of the service statement were found to be inaccurate or incorrect that the Appeals Officer could intervene. The approach taken was that once there was a waiting list for the provision of a particular service, that could not be altered, as there was no power to change that. The approach of the Appeals Officer stood in contrast to that put forward on behalf of the HSE, as they agreed with the judgment of the High Court to the effect that the

various statutory officers were entitled to engage with the question of the dates within which services can be provided but emphasised the fact that the jurisdiction in this regard did not extend to amending the service statement directly. However, crucially, they agreed that the question of the provision of services by a particular date was something that could be scrutinised.

71. It does have to be said that there was some acceptance in the course of argument on behalf of the Appeals Officer that circumstances could arise which might result in the view being taken that the dates provided for in a service statement were inaccurate or incorrect. Thus, it was not disputed that in circumstances where, for example, more resources became available to the HSE which would enable the services at issue to be provided at an earlier date that the timeline provided for in a service statement could no longer be regarded as accurate or correct. It is undoubtedly the case that the Appeals Officer took a narrow view of the powers of an Appeals Officer in relation to the service statement when dealing with the complaint. Such a narrow view seems to me to be inappropriate having regard to the nature of the legislation and the remedies provided for someone to make a complaint in relation to the provision or lack of provision of services to an individual. As has been set out above, an elaborate process has been set up to allow persons in the position of the mother of the child in this case to make a complaint where services are not being provided, or perhaps not being provided in as timely a manner as might be appropriate. It should be borne in mind that the process is not an adversarial process and is one which has been designed to give an appeals officer considerable powers to enquire into the issues arising in any given case, as I have described above. There is no doubt in my mind that an appeals officer is entitled to interrogate issues such as the date when a particular service could be provided and, equally, is entitled to interrogate the question as to whether or not those services could

be provided elsewhere in the relevant functional area of the HSE. That did not happen here.

Conclusion

72. This case concerned the powers of an Appeals Officer under the 2005 Act. I am satisfied that the Appeals Officer in this case was wrong to conclude that he had no jurisdiction to consider the dates for provision of any services provided for in the service statement.

73. I accept that the Appeals Officer can only make a recommendation to amend, vary or add to the service statement, as opposed to directly altering the service statement itself, and that it is only the Liaison Officer who can alter, amend, or vary the service statement.

74. By way of addendum, I note from the submissions made on behalf of the HSE that a matter that can now be considered by the Appeals Officer is whether or not the services could be provided in a different functional area of the HSE to the one in which the applicant for services normally resides. As a general rule, services are supposed to be provided in a "*relevant, functional area*", which effectively means the area in which the applicant for services resides, but it is now provided for under regulations introduced after the determination was made in this case that in exceptional circumstances those services may be provided in a different functional area. In any event, it is open to an Appeals Officer to consider the location where services are to be provided so that, if there is availability in one place, as opposed to another, within the relevant functional area that can be considered. I am satisfied that, having regard to the circumstances of this case, that the Appeals Officer took an overly restrictive view of the powers contained in the Act, and that it was simply wrong to say that there was no jurisdiction to consider the dates by which the services were to be provided. If there

was an error in the service statement as to the date on which services could be provided, that must be corrected by means of a recommendation.

75. As I have set out above, the Appeals Officer has been given extensive powers to investigate complaints and it seems to me to be at odds with the overall scheme of the 2005 Act to take such a narrow view of the role of the Appeals Officer. I accept that the Appeals Officer also has to bear in mind the provisions of s. 11(7) and what is, in fact, the availability of the services required in any given case. Services cannot necessarily be provided as and when required if the resources necessary for the provision of those services are not available. That is not to say that an Appeals Officer should not use his or her extensive powers to ascertain whether the services required cannot be provided any sooner than indicated in the service statement, if necessary by considering the provision of the services in a different functional area.

76. In those circumstances, I would dismiss the appeal. It may be necessary to hear the parties in relation to the appropriate order to make given that it appears that the issues between the parties are largely resolved.