APPROVED

AN ARD-CHÚIRT
THE HIGH COURT

[2024] IEHC 621

Record No. 2022/775JR

BETWEEN/

HM AND AM (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND HM)
APPLICANTS

-AND-

HEALTH SERVICE EXECUTIVE
RESPONDENT

AN ARD-CHÚIRT
THE HIGH COURT

Record No. 2022/717JR

BETWEEN/

AB AND CM (A MINOR SUING BY HER MOTHER AND NEXT FRIEND AB)

APPLICANTS

-AND-

HEALTH SERVICE EXECUTIVE
RESPONDENT

JUDGMENT of Mr. Justice Conleth Bradley, delivered on the 24th day of October 2024

INTRODUCTION

Preliminary

1. These applications for judicial review concern a discrete question of statutory interpretation in relation to Part 2 of the Disability Act 2005 ("DA 2005") which deals with the assessment of need, services statements and redress and, in particular, the consequences of an independent assessment of need carried out under section 8 of the DA 2005.

2. The applicable regulatory regime is the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263 of 2007) ("the 2007 Regulations").

3. Whereas Part 2 of the DA 2005 establishes a legally enforceable framework for the assessment of the needs of, and the delivery of services to, persons with a disability, the applicants' arguments in these judicial review applications go further. They seek an interpretation of section 8(7)(iv) of the DA 2005 to the effect (i) that there is an enforceable statutory right of '*review*' of the assessment contained in respective Assessment Reports carried out on the second named applicant children in both cases, and that this determination will have the consequence of (ii) requiring the Health Service Executive ("HSE") to commence (in one case) and conclude (in both cases) that statutory '*review*'.

4. In addition to its procedural objection that the applicants' case is limited to that for which 'leave' for judicial review was granted, the HSE's response, in brief, is that the

proper interpretation of the DA 2005, (i) does not establish any such enforceable right of '*review*'; and (ii) offers, rather, the applicant children, in each case, a more suitable remedy through the provision of a new assessment (as per section 9 of the DA 2005), rather than a review (as per section 8 of the DA 2005).

5. Whilst broadly similar arguments arise in each case, there are some important factual differences (and developments) which impact on the precise nature of the arguments made and reliefs sought in each case.

6. In *HM & AM (a minor) v HSE* (Record Number 2022/775 JR), for example, in circumstances where a review *has commenced*, it is argued on behalf of the applicants that section 8(7)(iv) of the DA 2005 (which provides that an 'Assessment Report' shall set out the findings of the Assessment Officer concerned together with determinations in relation to a statement of the period within which a review of the assessment should be carried out) encompasses an enforceable right to have the review completed, *i.e.*, the corollary of that right being an obligation on the HSE to *conclude* or *complete* a review within a reasonable period of time after 15th September 2021 (being the review date referred to in the Assessment Report).

7. In *AB & CM (a minor) v HSE* (2022/775 JR), it is argued on behalf of the applicants that section 8(7)(iv) of the DA 2005 (again, which provides that an 'Assessment Report' shall set out the findings of the Assessment Officer concerned together with determinations in relation to a statement of the period within which a review of the assessment should be carried out) encompasses an enforceable right of review, *i.e.*, the corollary of that right being an obligation on the HSE to *conduct* (*i.e.*, commence

and complete) a review by in or around 17th December 2021 (*i.e.*, within a 12 month period from 17th December 2020 which was the date that the Assessment Report issued) or within a reasonable period of time after 17th December 2021.

8. Derek Shortall SC and Leanora Frawley BL appeared for the applicants; David Leahy SC and Cormac J Hynes BL appeared for the HSE.

Background facts: HM & AM (a minor) v HSE **(Record No. 2022/775 JR)**

9. The relevant facts, insofar as the issues which I have to consider are concerned, are as follows: AM is 9 years old. An Assessment Report dated 15th September 2020 indicated a review date of 15th September 2021.

10. The (first) service statement dated 23rd October 2020 specified referral to the local school-age disability team for multi-disciplinary supports and indicated a review date, for that purpose, in October 2021. This was subsequently reviewed and amended on 6th October 2021, with a new review date of 15th October 2022 being specified.

11. By letter dated 1st March 2022, the applicants' solicitor sought a review of the Assessment Report, with specific requests for assessment for ADHD, Genetic Testing, Tourette's and Dyslexia being made.

12. The Assessment Officer liaised with HM and with other clinical services and the National Council for Special Education and engaged a private provider to assist in assessing AM's health needs. The Service Statement was further reviewed on 9th June 2023 and, following completion of an Individual Family Support Plan on 23rd August

2023, a further review of the service statement was carried out on 20th October 2023 which specified a follow-up with the Child and Adolescent Mental Health Services (CAMHS) on the question of ADHD.

13. The parties accept that, in this case, a review was commenced and was, at the time of the hearing of this application in June 2024, close to completion. The change of circumstances relates to an outstanding psychiatric report being fed into the reporting process.

***Background facts: AB & CM (a minor) v HSE* (2022/775 JR)**

14. In this case, CM is 12 years old and was determined to have a disability in an Assessment Report dated 17th December 2020, which was prepared during the COVID-19 pandemic and indicated a review date of 17th December 2021.

15. The (first) service statement dated 13th April 2021 specified referral to Primary Care Occupational Therapy, Speech and Language Therapy and Dietician Services in Kildare and West Wicklow and indicated a review date of 12 months from its date of issue.

16. By letter dated 16th February 2022, the applicant's solicitors sought a review of the Assessment Report and stated that there was limited engagement by Child and Adolescent Mental Health Services ("CAMHS"), dietetics and OT services.

17. By letter dated 22nd February 2022, the Assessment Officer enclosed a template application for a review which was completed by AB. The parties agree that the point

of difference in this case (from *HM & AM (a minor) v HSE* (2022/775 JR)) is that the matter has not proceeded any further and there has not been, for example, in this case, extensive engagement with the other agencies.

18. The parties agree that a further point of distinction, therefore, is that the question of an enforceable entitlement to conduct (*i.e.*, commence and complete) a review are issues to be addressed in *AB & CM (a minor) v HSE* (2022/775 JR). In contrast, because of the factual differences in *HM & AM (a minor) v HSE* (2022/775 JR), the issue which the parties submit remains in that case is whether there is a compellable obligation to conclude a review.

THE ISSUES

19. In all applications for judicial review, the order granting leave to apply for judicial review (unless amended), pursuant to Order 84 of the Rules of the Superior Courts, 1986, as amended ("RSC 1986") sets the parameters of the challenge and, importantly, defines the issues which a court must consider and exercise its discretionary jurisdiction when reviewing the manner in which a decision or determination, which an applicant seeks to impugn, was reached: *AP v DPP* [2011] IESC 2; [2011] 1 I.R. 729; *Concerned Residents of Treascon & Clondoolusk v An Bord Pleanála & Ors* [2024] IESC 28; *Reid v An Bord Pleanála (No. 7)* [2024] IEHC 27; and *Environmental Trust Ireland v An Bord Pleanála & Others* [2022] IEHC 540.

20. O. 84, r. 20(1) RSC 1986 provides that no application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule; O.

84, r. 20(3) RSC 1986 provides that it shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs O. 84, r. 20(2)(a) (ii) or (iii) RSC 1986, an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground. O. 84, r. 23(1) RSC 1986 provides *inter alia* that no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the Statement of Grounds.

21. Accordingly, an applicant in a judicial review application can only argue at a hearing a point that is acceptably clear from the express terms of the Statement of Grounds (unless amended by the court) and is, therefore, required to: (i) state precisely each ground of challenge; (ii) particularise the ground, where appropriate; and, (iii) identify in respect of each ground the facts or matters relied upon as supporting that ground.

22. In *AB & CM (a minor) v HSE* (2022/717 JR), leave was granted by order of the High Court (Meenan J.) on 14th November 2022; in *HM & AM (a minor) v HSE* (2022/775 JR) leave was granted by order of the High Court (Meenan J.) on 14th December 2022.

23. In *AB & CM (a minor) v HSE* (2022/717 JR) the reliefs sought are: first, an order of *mandamus* compelling the HSE to commence and complete a *Review* of CM's assessment of need, pursuant to the DA 2005 and the 2007 Regulations, to include any necessary assessments/re-assessments within six weeks or other such period considered by the court to be reasonable; second, a declaration that the HSE has failed

to comply with its statutory obligations to the applicants pursuant to the DA 2005 and the 2007 Regulations (in particular Article 11), in the premises that having completed an Assessment of Need in respect of CM on 17th December 2020 and having stated, in compliance with Article 11 of S.I. 263/2007 in the Assessment Report that the said assessment was to be *reviewed* on 17th December 2021, the HSE was obligated to commence and complete the *Review* on that date or within a reasonable period of time after that date, whether by virtue of a general statutory obligation, in particular under section 8(7)(iv) of the DA 2005, or specifically in the circumstances prevailing in the within proceedings.

24. During the hearing of these applications for judicial review, given the updated facts in *HM & AM (a minor) v HSE* (2022/775 JR), the relief claimed (including a summary of the basis upon which that relief was sought) was indicated to be as follows:

> "[A] *declaration that the HSE has failed to comply with its statutory obligations to the applicants, pursuant to the Disability Act 2005 and the Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (S.I. No. 263/2007), in particular Article 11 thereof, in the premises that having completed an Assessment of Need in respect of the Second Named Applicant on 15th September, 2020 and having stated, in compliance with Article 11 of S.I. 263/2007, in the Assessment Report that the said Assessment was to be reviewed on 15th September 2021, and having commenced the Review, the HSE was obligated to complete the Review within a reasonable period of time after that date, whether by virtue of a general statutory obligation, in particular under section 8(7)(iv) of the Disability Act, 2005, or specifically in the circumstances prevailing in the within proceedings.*"

25. It is contended on behalf of the HSE that the reference in the last line of paragraph 3 in each of the Statement of Grounds to – "*The Oireachtas also intended that any necessary assessments/re-assessments would be carried out within a reasonable period of time*" – fails to meet the requirements of O. 84 RSC 1986 in relation to *particularisation of pleadings* and was characterised in oral argument on behalf of the applicants to the effect that "*these issues arose approximately three years ago*."

26. In addition to paragraph 3 of the Statement of Grounds, there is a reference by the applicants to "*within a reasonable period*" rolled up in the 'declaratory reliefs' which are sought.

27. For example, in *AB & CM (a minor) v HSE* (2022/717 JR), the declaration sought is in fact bifurcated and in addition to reliance on the statutory provisions it is pleaded that the HSE was obligated to *commence and complete* the review on that date (*i.e.*, 17th December 2021) or within a reasonable period of time after that date, whether by virtue of a general statutory obligation, in particular under section 8(7)(iv) of the DA 2005, "*or specifically in the circumstances prevailing in the within proceedings*."

28. Similarly, in *HM & AM (a minor) v HSE* (2022/775 JR) a similar structure of declaration is pleaded, stating that having commenced the review, the HSE was obligated *to complete* the review within a reasonable period of time after that date, whether by virtue of a general statutory obligation, in particular under section 8(7)(iv) of the DA 2005, *or specifically in the circumstances prevailing in the within proceedings*."

29. The basis or grounds upon which leave was granted to the applicants in each of these cases are broadly similar and, in summary, are as follows: the Assessment Reports in each case, in accordance with section 8(7)(b)(iv) of the DA 2005 and Article 11 of the 2007 Regulations, specified dates when the assessment of need was to be reviewed for each child and these were not complied with, in particular:

(i) in *HM & AM (a minor) v HSE* (2022/775 JR), the Assessment Report was dated 15th September 2020 and provided that the assessment of need was to be reviewed on 15th September 2021; it is contended that the HSE failed to carry out the review of the Assessment of Need, and necessary assessments/re-assessments contrary to its statutory obligations and despite a request to carry out and complete the review from the Applicants' solicitor dated 1st March 2022, the HSE has not indicated a willingness to carry out the completion of the reviewal and has subsequently failed or refused to do so; it is further contended that the updating of the Assessment Report and Service Statement is particularly important insofar as needs and services have changed in relation to AM and further that AM requires up-to-date reports which are critical for education supports; (under the subheading of alternative remedies) it is further contended, by reference to section 14 of the DA 2005 and Article 24 of the 2007 Regulations that there is no provision in section 14 of the DA 2005 which gives the Disability Complaints Officer jurisdiction to process a complaint concerning the alleged failure of the HSE to carry out a review;

(ii) in *AB & CM (a minor) v HSE* (2022/717 JR), the Assessment Report was dated 17th December 2020 and provided that the assessment of need was to be reviewed on 17th December 2021; it is contended that the HSE failed to carry out the review of the Assessment of Need, and necessary assessments/re-assessments contrary to its statutory obligations and despite requests to carry out the review from the applicants' solicitors on 16th February 2022. The HSE indicated a willingness to carry out the review by letter dated 22nd February 2022 but has failed or refused to do so; it is further contended that the updating of the Assessment Report and Service Statement is particularly important insofar as needs and services have changed in relation to CM; (under the subheading of alternative remedies) it is further contended, by reference to section 14 of the DA 2005 and Article 24 of the 2007 Regulations that there is no provision in section 14 of the DA 2005 which gives the Disability Complaints Officer jurisdiction to process a complaint concerning the alleged failure of the HSE to carry out a review.

30. The Statements of Opposition on behalf of the HSE raise similar grounds of response in relation to each of the applications.

31. The Statement of Opposition in the case of *HM & AM (a minor) v HSE* (2022/775 JR) is dated 13th December 2023; the Statement of Opposition in the case of *AB & CM (a minor) v HSE* (2022/775 JR) is dated 19th December 2023.

32. One of the main grounds of opposition posited by the HSE in *HM & AM (a minor) v HSE* (2022/775 JR) and in *AB & CM (a minor) v HSE* (2022/775 JR) is that the DA

2005 provides for an adequate alternative remedy and reference is made to *inter alia* the complaints process under section 14 of the DA 2005 and the fact that subsequent applications for assessment of need can be made pursuant to section 9 of the DA 2005. The point is also made that the applicable statutory and regulatory regime differ in their treatment of an Assessment Report and a Service Statement: Regulation 22 of the 2007 Regulations requires, for example, a Service Statement to be reviewed annually, whereas no such requirement is made of an Assessment Report.

33. In *HM & AM (a minor) v HSE* (2022/775 JR), the Statement of Opposition states that whilst the HSE has not carried out a review of the second named applicant's Assessment of Need, it has not refused to carry out a review and that it has sought to engage with the substance of the applicants' concerns.

34. The Statements of Opposition deny that there is a statutory obligation, or personally enforceable entitlement, to carry out a review or that the HSE is in breach of its statutory obligation in adopting that position (pleading, effectively in the alternative), that if such an obligation does exist, "*the Statutory Provisions do not require the carrying out of further assessments or reassessments by review*" but rather are met "*by way of request to carry out a new assessment*".

35. The Statements of Opposition state that section 9 of the DA 2005 provides for a more suitable process for proceeding via the applicants' entitlement to apply for a new assessment (referencing the judgment of the Court of Appeal in *MB v HSE* [2023] IECA 286) and it is denied that, had the applicants availed themselves of seeking a further assessment, there would have been inevitable delay.

36. In this regard, in the case of *HM & AM (a minor) v HSE* (2022/775 JR) the Statement of Opposition states that had such an application been made for a new or further assessment on 1st March, 2022 (the date that litigation was indicated), the relevant assessment would have required to (i) commence within 3 months, *i.e.*, on or before 1st June 2022, and, (ii) be completed within a further 3 months, *i.e.*, on or before 1st September 2022.

37. The Statement of Opposition pleads that had the applicants chosen the route of a new or further assessment, they "*would have had an enforceable entitlement – in line with the timelines expressly enacted in the Statutory Provisions – to receive an assessment report on foot of that application within six months of that date, i.e. on or before 22nd September, 2022*" and had they done so at the elapse of 12 months after the assessment report had been issued, *i.e.*, on 15th September, 2021, "*they would, pursuant to the statutory timeframes, have been entitled to receive a new assessment report within six months of that date i.e. on or before 15th March 2022*" and reference is made to correspondence and the institution of the judicial review proceedings.

38. Similar pleas are made *mutatis mutandis* in the context of the applicable time in *AB & CM (a minor) v HSE* (2022/775 JR).

39. The central issues, therefore, to be determined as a matter of *statutory interpretation*, are as follows:

    (i) in *HM & AM (a minor) v HSE* (2022/775 JR), does Part 2 of the DA 2005 (in particular section 8(7)(iv)) and the 2007 Regulations (in particular Regulation

11) provide for an enforceable right in the applicants to seek a court order directing the HSE to *complete* a review within a reasonable period of time after 15th September 2021 (being the *review date* referred to in the Assessment Report) in circumstances where a review *has commenced* and if so, in the event that the HSE has failed to comply with that obligation, should a declaration be issued to that effect.

(ii) in *AB & CM (a minor) v HSE* (2022/775 JR), does Part 2 of the DA 2005 (in particular section 8(7)(iv)) and the 2007 Regulations (in particular Regulation 11) provide for an enforceable right in the applicants to seek a court order directing the HSE to *conduct* a review, *i.e.*, to *commence and complete* a review by (in or around) 17th December 2021 (being approximately a 12 month period from 17th December 2020 which was the date of the Assessment Report) or within a reasonable period of time after 17th December 2021, and if so, in the event that the HSE has failed to comply with that obligation, should a declaration be issued to that effect.

STATUTORY INTERPRETATION: THE DISABILITY ACT 2005

40. The correct approach to the interpretation of the DA 2005 and the 2007 Regulations have been the subject of recent analysis by the Superior Courts.

41. In *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IECA 286, the Court of Appeal (Noonan, Meenan and O'Moore JJ.), in the judgment of Meenan J. endorsed the approach of the High Court (Phelan J.) in *MB (AB a minor suing by*

his mother and next friend MB) v HSE [2023] IEHC 99, having first referred to the following extract of the judgment of the Supreme Court (Murray J.)[1] *Heather Hill v An Bord Pleanála* [2022] 2 ILRM 313 at paragraph 214:

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

42. Similar views were expressed by the Supreme Court in *ELG v HSE (No.2)* [2022] IESC 14 where Baker J. *inter alia* observed at paragraph 109 that "[t]*he 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*".

43. In a similar vein, the Court of Appeal in *AB v HSE & Ors* [2023] IECA 275 per Collins J. at paragraph 6, by reference to the Supreme Court's review of the jurisprudence as to the proper approach to the exercise of statutory interpretation in the recent judgment of Murray J. in *A, B & C v Minister for Foreign Affairs* [2023] IESC 10, [2023] 1 ILRM 335, stated that the case law made clear that "*language, context and purpose are potentially at play in every exercise in statutory interpretation, with no element ever operating to the complete exclusion of the other*."

[1] Mr. Justice Brian Murray.

44. Accordingly, the correct approach when interpreting the relevant provisions of the DA 2005 and the 2007 Regulations is to have regard to the clear language of the statutory provisions which are not ambiguous.

45. Previous practices adopted by the HSE, including those which are inconsistent, do not detract from the fact that the question of entitlement as framed in these applications for judicial review is one which falls to be determined, as a matter of statutory interpretation.

46. In her judgment in *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IEHC 99, at paragraph 42, Phelan J. referred to the inconsistent practices and uncertainty which arose from the terms of the HSE's Standard Operating Procedure ("SOP") and the fact that the HSE had accepted in that case – where rather than applying for a new assessment under section 9(8) of the DA 2005, the applicant sought a further review of the original assessment the basis that there had been a change in his circumstances – that there have been occasions where, contrary to the position contended for by the HSE in that case as to its legal obligations, *more than one review* of an assessment had been carried out by it.

47. The HSE's SOPs which applied in 2019 to these cases (and the more recent version from 2023) were referred to in both the applicants' written and oral submissions, as to their specific terms, and also in pointing to the suggested incongruity of the Assessment Officer in the case of *HM & AM (a minor) v HSE* (2022/775 JR) in giving effect to the SOP and having brought a review process almost to the point of finalisation, in contrast to the posture adopted by the HSE, in its response to the

judicial review application, where it suggested that an application should be made for a new assessment. Ultimately, however, these documents (*i.e.*, the HSE's SOPs) do not have the force of law and insofar as they inform what might be described as a contrary, or inconsistent, practice, they do not impact on the question of statutory interpretation which requires to be addressed.

48. Additionally, a core theme of the response of the HSE in these applications for judicial review arguably goes further than treating of the question of statutory interpretation. The gravamen of the HSE's response to both judicial review applications, for example, is to suggest that the applicants *should have* invoked the process of a *further assessment* pursuant to section 9(7) and 9(8) of the DA 2005 rather than seeking a review of the Assessment Report.

49. Whilst the preference being suggested in these cases is for a further assessment rather than a review, whereas in *MB & AB v HSE* [2023] IECA 286, the court was considering effectively the opposite sugegstion, *i.e.*, an "*ongoing review*" or "*repeated reviews*" rather than a "*further*" or "*new assessment report*", the Court of Appeal, at paragraph 22 of the judgment of Meenan J. in *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IECA 286, indicated that role of the court was "*not to devise better management and administrative systems*" but was, rather, "*to interpret the statutory provisions*":

> "*the appellants submitted that a system whereby an "assessment report" was reviewed on an ongoing basis rather than a new "assessment report" being furnished when circumstances changed would make more management and administrative sense. There may*

well be some merit in this, but the role of the court is to interpret the statutory provisions and not devise better management and administrative systems".

50. Notwithstanding that the DA 2005 is a *remedial statute* and was enacted to offer, for example, enforcement mechanisms designed to assist persons with disability in the accessing of public services to meet the needs occasioned by that disability, its proper interpretation is focused on applying the axioms of statutory interpretation and not to seek to interpret (let alone rewrite) that language in the name of giving effect to that remedial purpose: *AB v HSE & Ors* [2023] IECA 275 per Collins J. at paragraph 7 applying *G v HSE* [2022] IESC 14 per Baker J. at paragraph 111 and *G v Health Service Executive* [2021] IECA 101 at 49, per Ní Raifeartaigh J. at paragraph 49.

51. Similarly, echoing the observations of the Court of Appeal in *AB v HSE & Ors* [2023] IECA 275 and *MB & AB v HSE* [2023] IECA 286, the indication of a preference for a further or new Assessment Report rather than the review of an extant Assessment Report approximates to interpreting the DA 2005 for a remedial purpose, which should not be done.

52. Further, the fact that section 9(7) of the DA 2005 which provides that where an Assessment Report has been furnished but the period for carrying out a review has not expired (or, in the case of a child, the assessment has been carried out within the period of 12 months before the date of the application), then it is not permissible to make a further application for an "Assessment Report" (subject, of course, to a material change of circumstances, further information or a material mistake of fact in

the Assessment Report as per section 9(8) of the DA 2005) (having regard to the period of 12 months prescribed in Regulation 11 of the 2007 Regulations) simply means that there is a period of one year during which a new assessment cannot be applied for, but it does not, in my view, (as submitted on behalf of the HSE) necessarily 'encourage' the carrying out of a review or systematise the provisions in section 9(4) of the DA 2005 which provide that "[w]*here it appears to an employee of the Executive that a person may have a disability or where a person is in receipt of a health service provided by the Executive or both, he or she may arrange for an application* [for an assessment] *under* [section 9(1)] *to be made by or on behalf of the person or may request the Executive to carry out or cause to be carried out an assessment of the person.*"

53. In considering, therefore, this central question of statutory interpretation, the relevant provisions are those set out in Part 2 of the DA 2005 (sections 7 to 23) which provide for the '*assessment*' of needs.

54. Accordingly, on the condition that the person in question is deemed to be a 'person with a disability', an Assessment Report is prepared pursuant to section 8 of the DA 2005 and this sets out, in a comprehensive fashion, the health and education needs and the services which *would* be provided to the person on '*an ideal*' or what has been described as '*a utopian'* basis; simultaneously, in the case of children, such as AM and CM (the second named applicants in each case), section 11 of the DA 2005 provides that a *Service Statement* sets out the health services which will "*in fact*" be provided.

55. Section 8 of the DA 2005 provides for the independent assessment of need.

56. Section 8(6) of the DA 2005 provides for "an Assessment Report", *i.e.*, where an Assessment Officer carries out or arranges for the carrying out of an assessment under Part 2 (Assessment of Need, Service Statements and Redress), they are required to prepare a report in writing of the results of the assessment and to furnish a copy of the report to the applicant, the Executive, and, if appropriate, a person referred to in section 9(2) and the chief executive officer of the Council.

57. Specifically, section 8(7)(b)(iv) of the DA 2005 requires this Assessment Report to *set out* the findings of the Assessment Officer concerned together with determinations in relation to, in case the determination is that the applicant has a disability, *a statement of the period within which a review of the assessment should be carried out*.

58. Even though it follows section 8 of the DA 2005, the application for an assessment is in fact set out in section 9 of the DA 2005.

59. Section 9(5) of the DA 2005 provides that "[w]*here an application under section 9(1) or a request under subsection (4) is made, the Executive shall cause an assessment of the applicant to be commenced within 3 months of the date of the receipt of the application or request and to be completed without undue delay.*"

60. As mentioned earlier, section 9(8) of the DA 2005 provides that a 'further' application for an assessment may be made if the person who made the previous application is of opinion that since the date of the assessment (a) there has been a material change of

circumstances, (b) further information has become available which either relates to the personal circumstances of the applicant or to the services available to meet the needs of the applicant, or (c) a material mistake of fact is identified in the assessment report. Section 9(7) of the DA 2005 outlines the circumstances of when an application for an assessment may be refused subject to the provisions of section 9(8) of the DA 2005.

61. Section 14(1)(b) of the DA 2005 provides that an applicant may make a complaint to the Executive in relation to the fact, if it be the case, that the assessment under section 9 of the DA 2005 was not commenced within the time specified in section 9(5) or was not completed without undue delay.

62. Section 15(8)(b) of the DA 2005 provides that a report of a complaints officer may contain, 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.

63. Section 22 of the DA 2005 provides for the enforcement of determinations.

64. Section 22(1)(a)(iii) of the DA 2005 provides that if the Executive or the head of the education service provider concerned fails to implement in full a recommendation of a complaints officer within 3 months from the date on which the determination, resolution or recommendation is communicated to him or her or, where the determination, resolution or recommendation specifies a date for the provision of a

service, within 3 months from the date specified in the determination, resolution or recommendation for such provision, then, the applicant concerned, a person referred to in section 9(2) or the appeals officer may apply to the Circuit Court on notice to the Executive or the head of the education service provider concerned for an order directing him or her to implement the determination or recommendation in accordance with its terms or to give effect to the resolution, as the case may be.

65. When read together, therefore, Part 2 of the DA 2005 provides a self-contained legally enforceable "*framework*" for the assessment of the needs of, and the delivery of services to, persons with a disability.

THE DISABILITY (ASSESSMENT OF NEEDS, SERVICE STATEMENTS AND REDRESS) REGULATIONS 2007

66. Regulations 9 to 12 of the 2007 Regulations provide for the timescale for the completion of the assessment of needs as follows:

> "*(9) The Executive shall commence the assessment process as soon as possible after the completed application form has been received but not later than three months after that date.*
>
> *(10) The Executive shall complete the assessment and forward the assessment report to the Liaison Officer within a further three months from the date on which the assessment commenced, save for in exceptional circumstances, when the assessment will be completed without undue delay. In circumstances where the assessment will not be completed within three months of the commencement of the*

assessment, the Executive shall specify in writing, before the three month deadline has expired, to the individual concerned the reasons why it will not be completed within the three month period and shall specify a timeframe within which it is expected the assessment will be completed.

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

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

67. Therefore, Regulations 9 and 10 of the 2007 Regulations together provide an obligation to commence the assessment process as soon as possible after the form has been received but not later than three months and then to complete the assessment report within a further three months from the date on which the assessment commenced except in exceptional circumstances, when the assessment will be completed without undue delay.

68. Regulation 11 of the 2007 Regulations requires that a date be specified for a review which must be no later than 12 months from the date on which the assessment report was issued. Similarly, in circumstances where there is a further application for assessment in accordance with section 9(8) of the Act of 2005, the review date must be no later than 12 months from when the report on the further assessment was issued.

69. The 2007 Regulations treat the timescale for the completion of the assessment of needs differently from Service Statements.

70. Regulations 17 to 22 of the 2007 Regulations deals with Service Statements.

71. Whereas Regulation 18(e) of the 2007 Regulations requires the Service Statement to specify 'the date for review of the provision of services specified in the Service Statement', significantly Regulation 22 of the 2007 Regulations provides that "*the service statement shall be reviewed no later than 12 months after the statement was drawn up or no later than 12 months from when the statement was either last reviewed or amended*."

72. This distinction was recognised by Phelan J. in *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IEHC 99, where at paragraph 39 of her judgment, a detailed tabular comparison of the separate provisions governing assessments and Service Statements is provided. Accordingly, the review of "service statement" is every 12 months but there is no similar provision in relation to the review of an "Assessment Report."

DISCUSSION & DECISION

73. Having regard to the principles of interpretation, an enforceable right of review cannot, in my view, be extrapolated from the provisions of section 8(7)(iv) of the DA 2005 or the use of the word "*should*". Rather, under the statutory scheme, an

Assessment Officer makes a determination in relation to a statement of the period within which a review of the assessment should be carried out and *the statutory obligation* is that this is one of the matters which must then be *set out* in the Assessment Report.

74. The regulatory requirement treats of a different matter: that refers to *specifying* in the Assessment Report *a date* for the review of the assessment; that *review date* is then required to be no later than 12 months from the date on which the Assessment Report was issued.

75. The statutory obligation of stating in the Assessment Report the time period within which a review of the assessment should be carried out involves the Assessment Officer initially addressing their mind to the period of time within which a review of the assessment should be carried out. That could be done by reference, for example, to the date within which a review of the assessment should be carried out or by referring to the time period, *i.e.*, days, months, etc., within which a review of the period should be carried out.

76. The ordinary, plain and natural meaning of section 8(7)(b)(iv) of the DA 2005 is that an Assessment Officer is required to use their best endeavours to indicate or estimate the time period when a review "should be" commenced and "should be" concluded or completed, *i.e.*, "should be carried out". The use of the words "should be" in section 8(7)(b)(iv) of the DA 2005 is *aspirational* rather than *mandatory* as Phelan J. observed in *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023]

IEHC 99 at paragraphs 62 and 63, applying the decision of Denham J. (as she then was) in *Dundon v Governor of Cloverhill Prison* [2006] 1 I.R. 518 at page 523.

77. This interpretation is, I believe, fortified when the *contextual setting* of section 8(7)(b)(iv) of the DA 2005 within Part 2 of that Act is examined (including *inter alia* the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the mischief which the DA 2005 sought to remedy "*bearing in mind that the Oireachtas usually enacts a composite statute and not a collection of disassociated provisions*" and other aspects of the statutory scheme in Part 2 of the DA 2005 dealing, for example, with complaints and enforcement mechanisms.

78. The following also addresses the specific grounds in both of the Statement of Grounds in these cases, where the applicants were given leave to apply for judicial review, by reference to section 14 of the DA 2005 and Regulation 24 of the 2007 Regulations, where it is contended that "[t]*here appears to be no provision contained within section 14 of the Act of 2005 which gives the Disability Complaints Officer jurisdiction to process a complaint concerning the failure of the* [HSE] *to carry out a review*."

79. In *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IEHC 99, at paragraph 63, Phelan J. observed that "[w]*here the aspirational element is understood as referring to delivery within the specified time-frame rather than the duty to carry out a review, however, it does not necessarily follow that a court would not vindicate the right to a review within a reasonable time through an appropriate*

order. In this regard, however, it must be borne in mind that in enacting the 2005 Act, the Oireachtas enacted a detailed statutory redress mechanism under s. 14 of the Act covering e.g. delay, challenges to findings of no disability, quality of assessment, contents of service statements and provision of services. Complaints arising from a failure to carry out a review of an assessment were not among the statutory grounds enacted. The HSE pleaded in the Opposition papers that in enacting such a detailed statutory redress procedure for the enforcement of the obligations created under the 2005 Act, the Oireachtas intended that the mechanism provided would be available in respect of any failure to give effect to a disabled person's rights".

80. A similar view was also set out earlier at paragraph 50 of her judgment in *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IEHC 99 where Phelan J. also referred to the provisions of the DA 2005 which address the circumstances when obligations in Part 2 of the DA 2005 are breached (which extract also referred to the oft-quoted observations of the High Court (Faherty J.) in *JF v HSE* [2018] IEHC 294:

> "*Further, in enacting the 2005 Act, the Oireachtas enacted a detailed statutory redress mechanism under s. 14 of the Act covering e.g. delay, challenges to findings of no disability, quality of assessment, contents of service statements and provision of services. <u>Complaints as to failure to carry out reviews of assessment reports or provide new assessment reports following review were not among the statutory grounds enacted</u>.*[2] *The HSE pleaded in the Opposition papers filed that in enacting such a detailed statutory redress*

[2] Underlining added.

procedure for the enforcement of the obligations created under the 2005 Act, the Oireachtas intended that the mechanism provided would be available in respect of any failure to give effect to a disabled person's rights. I find the HSE's position in this regard to be compelling. In JF v HSE [2018] IEHC 294, Faherty J. states (at paragraph 16) "...the Oireachtas, having enacted the system of assessments of need with associated timeframes, has also enacted an integral statutory system of redress for complaints about breaches of those timelines, together with an inbuilt mechanism for judicial enforcement".

81. The applicants' arguments in relation to alternative remedies, which are set out in identical terms in each of the Statements of Grounds, are fully addressed in the following observations in *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IEHC 99 by Phelan J. at paragraph 51 of her judgment, which referred to the consequential enforcement process provided for in the DA 2005 as follows:

"*It seems to me that in enacting an integral and extensive statutory system of redress (including a right of appeal to an appeals officer and to seek enforcement under s. 18 in respect of the recommendations of the Disability Complaints Officer and a further right under s. 22 to seek enforcement of determinations of the Appeals Officer by the Circuit Court or to appeal to the High Court on a point of law under s. 20), the Oireachtas created what it intended would be the means of enforcing rights created under the 2005 Act. The omission of redress in respect of a failure to carry out… the review of*

an assessment report is telling as it would appear to reflect a deliberate choice by the Oireachtas not to enact an enforceable obligation either to an assessment report follow[ing] review or to a review itself, let alone an ongoing periodic review".

82. Part 2 of the DA 2005 seeks to provide those persons, who are designated with a disability, access to a quick and comprehensive assessment which identifies the range of services that are best suited to address that disability. The parties submit that these judicial review applications are selected as 'test cases'.

83. Each case appears to 'book-end' the operation of the scheme of Part2 of the DA 2005, in that in *HM & AM (a minor) v HSE* (2022/775 JR) a review has commenced and appears to be on the cusp of concluding, whereas in *AB & CM (a minor) v HSE* (2022/717 JR) the review has not commenced.

84. The parties seek to have the question of whether the applicants have an enforceable right of 'review' determined as a matter of principle. As set out in this judgment, whilst the entire of Part 2 together prescribes a legally enforceable *framework* for the assessment of the needs of, and the delivery of services to, persons with a disability, the scheme of Part 2 of the DA 2005, including section 8(7)(iv), or the 2007 Regulations, including Regulation 11, when properly construed, do not provide a legally enforceable right of 'review' of the assessment contained in an Assessment Report.

85. Separate from this question, the corollary of the presumption of constitutionality which applies to decisions of statutory authorities, means that determinations made by the HSE under Part 2 of the DA 2005 may include "*proceedings, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas … to be conducted in accordance with the principles of constitutional justice*" and "[i]*n such a case any departure from those principles would be restrained and corrected by the courts*": *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] I.R. 317 at page 341 per Walsh J.

86. As observed *obiter* by Phelan J. in *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IEHC 99 in paragraphs 69-72, whilst expressing no concluded view in that case on whether there is an enforceable obligation to conduct a first review arising under s. 8(7)(b)((iv) of the DA 2005, judicial intervention could arise in "*sufficiently egregious instances*" and in *JF v HSE* [2018] IEHC 294 the High Court (Faherty J.) found, on the facts of that case, that a failure to perform a statutory function within a reasonable time was found to be unlawful notwithstanding that there was no statutorily mandated time-frame.

87. The issue before the High Court in *JF, AF (a minor suing by his mother and next friend, JF) v HSE and KK, FC (a minor suing by her mother and next friend KK) v HSE* [2018] IEHC 294, concerned the manner of the discharge by the HSE of its statutory duties in relation to the completion of assessments of need and its management/implementation of the statutory complaints process. Faherty J. described the DA 2005 as the Oireachtas, "*having enacted the system of assessments of need with associated timeframes, has also enacted an integral statutory system of redress*

for complaints about breaches of those timelines, together with an in built mechanism for judicial enforcement."

88. On the facts of that case, Faherty J. was satisfied, given the delays in the complaints process of nine months or more, to make an order directing the assessments of need in respect of the minor applicants to be completed within a number of weeks. Faherty J. was not, however, persuaded that the applicants were entitled to the declaratory relief sought, observing that no challenge had been brought against the DA 2005 or the 2007 Regulations and there was nothing inherently wrong with the remedy provided in the 2005 Act to address a failure on the part of the HSE either to commence or complete an assessment of need and held as follows at paragraphs 82 and 83:

> "*(82) While there is no statutory provision, where a complaint has been upheld, directing the complaints officer to specify a particular timeframe for the commencement or completion of the assessment of need, as the case may be, it seems to me that any such recommendation would have to take cognisance of the timeframes set out in s.9(5) of the 2005 Act and the 2007 Regulations for the commencement and/or completion of an assessment of need, and the fact that any such recommendation is being made against the backdrop of an already established delay, in circumstances where the assessment of need is subject to mandatory timeframes as a matter of first principle.*
>
> *(83) Much is made by counsel for the applicants about the fact that albeit a person may be the recipient of a recommendation from a complaints officer, he or she must await the expiry of three months*

from the date specified in the recommendation before seeking enforcement in the Circuit Court where there is non-compliance by the respondent with the recommendation. Given that I have already found that it behoves a complaints officer to act expeditiously in dealing with a complaint, and to set a deadline for the commencement or completion of an assessment of need that reflects the fact that the statutory imperatives in s.9(5) and the 2007 Regulations have not been respected in the first place, I do not therefore perceive that having to wait three months before seeking enforcement in the Circuit Court, pursuant to s. 22(1)(a)(iii) of the 2005 Act, necessarily undermines the statutory imperatives pertaining to the commencement or completion of an assessment of need".

89. The decision of the High Court (Faherty J.) in *JF v HSE* therefore established the principle that complaints require to be completed in a period of time proportionate to the statutory and regulatory prescribed time-frames, within which an assessment of need was required to be commenced and/or completed (as per section section 9(5) of the DA 2005 and the 2007 Regulations).

90. In *KR & LR v HSE* [2024] IEHC 255, the High Court (Hyland J.) referred to these observations of Faherty J. in proceedings where the court received statistical information in relation to, for example – what was accepted by the HSE to be – unlawful delays in relation to the processing of complaints given the nature of the statutory scheme.

91. As set out in this judgment, similar observations have been expressed by Phelan J. in *MB (AB a minor suing by his mother and next friend MB) v HSE* [2023] IEHC 99.

92. Further, in *CTM (a minor) v The Assessment Officer and HSE* [2022] IEHC 131, the High Court (Phelan J.) determined that the SOP in that case was unlawful insofar as it referred to a preliminary assessment rather than a full and comprehensive assessment of a disability as provided in Part 2 of the DA 2005 which identified needs and the services appropriate to address those needs within a time-frame.

93. In *RC, DR (a minor suing by his mother and next friend, RC) v HSE* [2022] IEHC 652, the High Court (Meenan J.) noted the radically changed position adopted by the HSE in its defence to these type of cases.

94. The prior, or earlier position, for example, which had been adopted by the HSE in a large number of cases was described as follows:

> "*This AON Report stated that it was to be reviewed on 19 January 2019. This did not occur and the Applicant issued proceedings compelling the Respondent to do so. These were the first Judicial Review proceedings. The first Judicial Review proceedings were compromised, resulting in a Court order made on consent on 18 December 2019 stating: "The Court doth grant an Order of Mandamus compelling the Respondent to commence and complete a Review of the second named Applicant's Assessment of Need, pursuant to the Disability Act 2005…<u>to include any necessary assessments/re-assessments within 9 weeks</u>…" (emphasis added). I*

have added emphasis to this part of the agreed Court order and it should be looked at in the context of the stance taken by the respondent in these proceedings."

95. However, the HSE then sought to amend its Statement of Opposition some days prior to the date fixed for the hearing of the application in order to 'plead' that "[n]*either the Disability Act 2005 nor any regulations made thereunder creates an obligation enforceable by way of judicial review to compel the carrying out of a review of an assessment report*" and "[i]*f necessary and appropriate a review of an assessment report may incorporate fresh assessments. Where a parent wishes to cause a new assessment to be carried out, the Act makes express provision for the carrying out of a new assessment at s.9, including the circumstances asserted here, during the currency of an existing assessment report(s. 9 (8))*" and "[t]*he assessment of need process does not require attaching of a specific diagnosis to a child, or the carrying out of diagnostic in examinations to attach such diagnosis every case. Such steps are, however, required where necessary to establish the cause, nature and extent of an applicant's disability*."

96. The High Court (Meenan J.) observed that these proposed amendments presented "*a remarkable about turn*" for the HSE "*from its earlier position*":

"*Indeed, the new position on whether or not there was an enforceable statutory duty to carry out a review was a radical departure from the position taken by the Respondent in many previous actions.*"

97. The High Court (Meenan J.) refused the application to amend on the issue concerning statutory obligation to carry out a review but permitted the other amendments given the decision by the High Court (Phelan J.) in *CTM (a minor) v The Assessment Officer and HSE* [2022] IEHC 131.

98. However, as stated, these are separate matters to the question of principle raised in these applications for judicial review, as to whether the scheme of Part 2 of the DA 2005, including section 8(7)(iv), or the 2007 Regulations, including Regulation 11, when properly construed, provide a legally enforceable right of 'review' of the assessment contained in an Assessment Report. In my view, they do not.

CONCLUSION

99. In considering the detailed and comprehensive arguments in the cases before me, it does appear, as referred to earlier in this judgment, that the central dispute between the parties comes down to a straightforward difference of opinion as to the choice of two statutory roads the applicants should travel in the period after their respective initial assessments: the applicants prefer a *review of the assessment* (as contemplated by section 8(7)(iv) of the DA 2005); whereas, the HSE suggest that a *further assessment* may be carried out (as per section 9(7) and 9(8) of the DA 2005).

100. This difference is unfortunate, especially when one has regard to the observations of the Court of Appeal (Collins, Whelan and Pilkington JJ.) in *AB v HSE & Ors* [2023] IECA 275 (per Collins J. at paragraph 10), to the effect that the provisions in Part 2 of the DA 2005 providing for (a) *the review of assessments* or (b) *the carrying out of*

further assessments, only serve to emphasise, particularly where children are concerned, first, the paramountcy of the (initial) assessment carried out by Assessment Officer in clearly and comprehensively identifying (i) the nature and extent of the relevant disability and (ii) the needs and services required and, second, the fluidity of these matters and the fact that disability and diagnosis may develop with consequences for the provision of services (including new services) to meet those changing needs.

101. Further, as mentioned earlier, the correct approach to interpretation eschews any suggestion that the DA 2005 and the 2007 Regulations are interpreted in order to give effect to a *remedial* purpose.

102. Having regard to the principles of interpretation set out in this judgment, in the case of *HM & AM (a minor) v HSE* (2022/775 JR), I do not consider that the applicants have an enforceable right pursuant to Part 2 of the Disability Act 2005, including section 8(7)(iv), and the 2007 Regulations, to obtain an order, by way of an application for judicial review, obliging the HSE to *conclude* or *complete* a review within a reasonable period of time after 15th September 2021 (being the review date referred to in the Assessment Report) in the circumstances of where a review *has* commenced.

103. In the case of *AB & CM (a minor) v HSE* (2022/775 JR), I do not consider that the applicants have an enforceable right, pursuant to Part 2 of the Disability Act 2005, including section 8(7)(iv), and the 2007 Regulations, to obtain an order, by way of an application for judicial review, obliging the HSE to *conduct* (*i.e.*, commence and complete) a review by in or around 17th December 2021 (*i.e.*, within a 12 month

period from 17th December 2020 which was the date that the Assessment Report issued) or within a reasonable period of time after 17th December 2021.

104. In the circumstances, therefore, I refuse the orders of mandamus and declaratory relief sought by the applicants in *AB & CM (a minor) v HSE* (2022/717JR) and I refuse the declaration sought by the applicants in *HM & AM (a minor) v HSE* (2022/775 JR) *AB & CM (a minor) v HSE* (2022/717JR).

PROPOSED ORDERS

105. I shall make Orders refusing the reliefs sought in both judicial review applications in the manner outlined.

106. I shall put both matters in for mention on Thursday 31st October 2024 at 10:30 to address the question of costs and any ancillary or consequential matters that arise.

CONLETH BRADLEY

24th October 2024