2015

Social welfare appeals, appeal revisions and oral hearings

Mel Cousins, *Trinity College Dublin*

Social welfare appeals, appeal revisions and oral hearings

This note discusses two recent High Court decisions which concern when an appeals decision can be revised and when an oral hearing may be held as part of the social welfare appeals process.[1] It would appear that the claimants (or their legal teams) were seeking to establish when an oral hearing *should* be held. However, the Social Welfare Appeals Office (SWAO) – having originally decided both cases without an oral hearing – proposed to reconsider the appeals *with* an oral hearing after judicial review proceedings were initiated. Thereafter the cases took on a somewhat artificial aspect with the claimants' lawyers arguing that the appeals officer was now *functus officio* and that the SWAO had no power to hold an oral hearing in such circumstances while the respondents argued for a flexible approach to when an oral hearing may be held. Ultimately Peart J ruled that oral hearings could be held and, understandably in the circumstances, he did not address the issue of when an oral hearing *should* be held.

In part 1, we outline briefly the relevant legal provisions. Part 2 sets out the basic facts while part 3 explains the approach taken by the High Court. Part 4 concludes with a discussion of the issues raised in these interesting cases.

1. The law

Decisions relating to entitlement to social welfare payments are made by 'deciding officers' appointed by the Minister.[2] Any person who is dissatisfied with a decision given by the deciding officer may appeal to an appeals officer by giving notice of appeal to the chief appeals officer (CAO), within the time laid down.[3]

The Social Welfare Appeals Office (SWAO) was established in 1990 as an independent office with its own separate premises and staff. The chief appeals officer is responsible for the distribution of appeals to the appeals officer and, ultimately, for the overall operation of the Social Welfare Appeals Office. All appeals officers are appointed by the Minister.[4] Appeals officers are quasi-judicial officers and are 'required to be free and unrestricted in discharging their functions'.[5] However, the Supreme Court has also held that decisions by appeals officers (and deciding officers) are 'inherently administrative' and that the fact that such

[1] *L.D. v Chief Appeals Officer,* [2014] IEHC 641 and *Smith v Chief Appeals Officer,* [2014] IEHC633. Both rulings were handed down by Peart J. on 19 December 2014.

[2] Sections 299 and 300 of the Social Welfare (Consolidation) Act, 2005 (as amended), hereafter 'the Act'. See Annex 1 for the historical development of the law.

[3] Section 311.

[4] It is submitted that this is not necessarily inconsistent with the appeals officers constituting an 'independent and impartial' tribunal for the purposes of Art. 6(1) of the European Convention on Human Rights. See *Ettl v. Austria*, [1988] 10 EHRR 255 and the UK case of *R. (Hamid Ali Hussain) v. Secretary of State for the Home Department* [2001] EWHC Admin 852.

[5] *McLoughlin v. Minister for Social Welfare* [1958] IR 1.

officers are bound to act judicially does not alter the character of their functions.[6]

The Social Welfare (Appeals) Regulations 1998[7] (hereafter the Appeals Regulations) provide:

> Where, in the opinion of the appeals officer, a hearing is required he or she shall, as soon as may be, fix a date and place for the hearing, and give reasonable notice of the said hearing to the appellant, the deciding officer … and any other person appearing to the appeals officer to be concerned in the appeal.[8]

Thus, an appeals officer has discretion as to whether to grant an oral hearing or not, but this is not an unlimited discretion.[9] The basic rule is that the claimant should be given an oral hearing unless the case can properly be determined without one. The Supreme Court, in interpreting the relevant provisions, has stated that:

> An oral hearing is mandatory unless the case is of such a nature that it can be determined without an oral hearing, that is, summarily. An appeal is of such a nature that it can be determined summarily if a determination of the claim can fairly be made on a consideration of the documentary evidence. If however, there are unresolved conflicts in the documentary evidence, as to any matter essential to a ruling of the claim, the intention of the Regulations is that those conflicts shall be resolved by an oral hearing.[10]

In *Galvin v. Chief Appeals Officer*,[11] a case concerning a dispute as to whether social insurance contributions had been paid in the past by the applicant, Costello P held that:

> There are no hard and fast rules to guide an Appeals Officer . . . as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested.

An appeals officer's decision is stated to be final and conclusive.[12] Nonetheless, an appeals officer may, at any time and from time to time, revise any decision of an appeals officer if the original decision appears to be wrong in light of new evidence or new facts that came to light since the original decision was made or if there has been a relevant change of circumstances.[13] In addition, the chief appeals officer may, at any time and from time to time,

---

[6] *Minister for Social, Community and Family Affairs v. Scanlon* [2001] 1 IR 64 at 87.

[7] S.I. 108 of 1998 as amended.

[8] Article 14.

[9] S. 326 gives the Minister the power to direct that an oral hearing be held in a particular case. The policy objective of this section is unclear and it does not appear to be used in practice.

[10] *Kiely v. Minister for Social Welfare* (No. 2) [1977] IR 267 at 278.

[11] [1997] 3 IR 240.

[12] Section 320.

[13] Section 317 provides: (1) an appeals officer may at any time revise any decision of an appeals officer (a) where it appears to him or her that the decision was erroneous in the light of new evidence or new facts which have been brought to his or her notice since the date on which it was given … .' Issues concerning 'change of circumstances' did not arise in the instant cases and are not discussed further here.

revise the decision of an appeals officer if it appears that the decision was wrong because of a mistake in relation to the law or to the facts.[14] In *Castleisland v. Minister for Social and Family Affairs,* the Supreme Court commented that this provision did not confer a 'double appeal'.[15] Rather, what is envisaged is that the chief appeals officer would review the materials before the appeals officer to establish whether there was any error of fact or law. It is essentially 'a revising rather than an appellate procedure'.[16]

2. The facts

L.D.

In the L.D. case, the applicant was the mother and carer of her son (J.) who had been diagnosed with Asperger's Syndrome. She applied to the Department of Social Protection for domiciliary care allowance (DCA). The conditions of eligibility require that the child must have a severe disability requiring continual or continuous care and attention substantially in excess of the care and attention normally required by a child of the same age (the disability must be such that the child is likely to require full-time care and attention for at least 12 consecutive months).[17] It would appear that limited information was provided in support of the initial application which was refused by a deciding officer on the basis that the evidence did not indicate that the extra care and attention required by J. was substantially in excess of that required for a child of the same age who does not suffer from Asperger's Syndrome.[18] The applicant appealed to an appeal officer and provided considerable additional evidence including a detailed letter from the Mater Hospital (from a Consultant Child and Adolescent Psychiatrist and a Senior Speech and Language Therapist) and her own 7 page memorandum which set out in a very detailed way her own experience of her child at home and the difficulties which she encounters on a daily basis resulting from his disability.

However, the appeals officer rejected the appeal summarily, i.e. without holding an oral hearing.[19] The reasons for this decision were stated to be that

> having examined the evidence available to me in this case, I have concluded that while [J] with his condition, Asperger's, does require extra support [it] has not been

[14] Section 318.

[15] [2004] IESC 40.

[16] Insofar as anything in the judgment in *Maher v. Minister for Social Welfare* [2008] IESC 15 might appear inconsistent with this, it is submitted that the fully reasoned decision in *Castleisland* is to be preferred.

[17] Section 186C. The *Social Welfare Appeal Office Report 2010* sets out a number of decisions as to how appeals officers are interpreting the care requirement (though the issues are of a factual rather than legal nature).

[18] L.D. at paras 2-3. This highlights one of the issues concerning the adjudication of DCA claims in that claimants do not always appreciate the precise evidence required and it is (perhaps understandably) not obvious that decision makers adopt a proactive approach to collecting evidence.

[19] In line with the practice initiated by the CAO following the ruling in *B v Minister for Social Protection* [2014] IEHC 186, the appeals officer did not have to regard to the reports of the Departmental medical assessors. See M. Cousins. 2014. 'Decisions and appeals in Irish social welfare law: recent case law' at: http://works.bepress.com/mel_cousins/73

> established with the evidence provided that he requires substantially more care on a continuous basis, as provided for in Domiciliary Care Legislation.

Peart J explained that the decision must be taken as meaning that the appeals officer was satisfied that even though J required some extra support because of his diagnosed condition, it was not of a level *substantially* above the level of care and attention usually required by a child of the same age who did not have that diagnosis.[20]

Smith

Mr. Smith was in receipt of Illness Benefit for most of the period from January 2012 until March 2014. In April 2013 he applied to the Minister for Social Protection for an invalidity pension.[21] That application was refused as was a subsequent application for a revision of the decision under s. 301. His appeal was also rejected without an oral hearing on the basis that the appeals officer held that

> whilst the evidence indicates that the appellant experiences restriction and is unable for his usual work I am not satisfied that it has been established that he is incapable of work for life in line with the qualifying conditions for receipt of Invalidity Pension.[22]

The applicant's legal team then wrote to the SWAO seeking an oral hearing and threatening judicial review proceedings if this was not granted. However, although the appeal was being reviewed by the SWAO, the legal team later argued that the appeals officer, having made a decision on a summary basis, was thereafter *functus officio*, and could not re-open the appeal by way of oral hearing and initiated judicial review proceedings. They sought, inter alia, a declaration that the CAO was obliged to grant the applicant an oral hearing on the basis that the Appeals Regulations are intended to provide for an oral hearing where there are unresolved conflicts of evidence, and that such conflicts arose in the applicant's appeal; a declaration that the CAO breached the applicant's right to fair procedures, natural and constitutional justice, in failing to provide an oral hearing; a declaration that the CAO, although having reached a decision which was contrary to statute, regulation and fair procedures, is now *functus officio* and cannot re-open the matter by way of an oral hearing in the absence of an order of the High Court since, inter alia, section 320 of the Social Welfare Consolidation Act 2005 provides that the decision is final and conclusive but for the power to revise; and finally, an order of Mandamus compelling the CAO to provide the applicant with an oral hearing within 30 days.

The chief appeals officer then proposed to exercise the powers under s. 318 of the Act of 2005 to revise the decision of the appeals officer and to reschedule an oral hearing before a different appeals officer. She referred to what she describes as her 'general policy to hold oral appeals where an appellant so requests, save where such a hearing is manifestly unnecessary and unwarranted' and stated that it appeared to her that 'in error the appeals

---

[20] At para 9.

[21] To be entitled to invalidity pension, a person must be permanently 'incapable of work' (s. 118).

[22] Quoted in Smith at para 5.

officer did not have regard to this policy consideration in this case'. In addition, she identified possible further errors in the appeals officer's approach.

3. The rulings

L.D.

In *L.D.* the High Court addressed a number of different issues:

The holding or an oral hearing in this case

The judgement turned on whether or not an oral hearing before a new appeals officer could be held in the circumstances of this case. Thus, the more interesting issues discussed below were only addressed in passing (if at all). As noted above, once the proceedings commenced the CAO proposed to hold an oral hearing before a different appeals officer to hear the additional evidence which the appellant wished to adduce and to consider whether this evidence would warrant a revision of the decision under section 317 of the Act. However, the applicant's legal team argued that was no statutory basis for this approach, as the 'appeals office' was now functus officio. They argued that the only legal basis upon which that decision could be set aside and an oral hearing granted was if the original decision were to be quashed by the High Court. Peart J deduced that they applicants' lawyers were anticipating (based on previous experience) that, subsequent to the commencement of judicial review proceedings, the applicant might be offered an oral hearing. They, therefore, sought clarification as to whether there was any lawful basis for such an offer post the determination of the appeal not just for this applicant's case but for future cases. They argued that there were no new facts or new evidence and that it must follow from the plain and ordinary words in section 317 that the appeals officer has no jurisdiction to re-open the appeal

The respondents argued that the case was moot since the applicant had now been offered the oral hearing she sought. In addition, they argued that section 317 of the Act contained an implied power to hold an oral hearing after the decision on the appeal has been made because that section enables an appeals officer to revise any decision of an appeals officer in certain circumstances. It was argued that they were entitled to presume that the appellant would have wished to adduce orally some additional evidence. Finally, they argued that an appeals officer must be entitled to hold an oral hearing, if only to decide whether or not there is any new facts or evidence. One might simply pause here to note the rather artificial nature of the arguments adduced on both sides.[23]

Peart J accepted that counsel for the applicant was correct when he said that under the scheme of the Act, there is no possibility of a second appeal as such, and that once an appeal has been determined by an appeals officer, the appeal decision is final and conclusive and the appeals officer is *functus officio*, subject only to, inter alia, any revision of

[23] With the applicant suggesting that she had sought an oral hearing in order *not* to adduce any new facts or evidence while the respondents who had not held an oral hearing (when one was arguably clearly required) now pending over backwards to 'presume' that there was basis for doing so.

the appeal decision under section 317 of the Act. Nonetheless, he was satisfied that where a s. 317 revision was being held it was possible to hold an oral hearing as part of this review. His comments on this issue are worth quoting *in extemso*. The Court stated that it was important to keep in mind the scheme of the Act.

> Part 10 thereof is headed 'Decisions, Appeals and Social Welfare Tribunal'. There is no distinct heading called 'Revisions'. Revisions take place within the context of a decision by a deciding officer, or within the context of an appeal decision by the appeal officer (or under s. 318 by the Chief Appeals Officer). If a decision or an appeal is revised, it remains a decision or an appeal decision following that revision, albeit one that has been revised. Chapter 1 of Part 10 deals with deciding officers and decisions by deciding officers including any revision of such decisions. Chapter 2 deals with appeals officers, the Chief Appeals Officer and decisions by appeals officers. There is no separate chapter dealing with revisions. In my view it follows that when an appeals officer is dealing [with] a revision of a decision of an appeals officer he/she is nevertheless dealing with the appeal that was lodged by the applicant by virtue of the revision power contained in section 317 of the Act. The revision is a matter arising in the context of such an appeal, and is a 'matter' arising in relation to the appeal. It is a 'matter' arising in relation to something which was referred to the appeals officer under that Part (i.e. an appeal), and is in my view a 'matter' therefore for the purpose of section 313 of the Act, and one therefore in respect of which an appeals officer has the power to take evidence on oath 'at that hearing'. It seems clear therefore that the Act contemplates that a hearing can take place in relation to a revision so that any new facts and new evidence can be adduced and considered.[24]

Rather questionably, Peart J suggested they it was arguable that a request for an oral hearing could itself constitutes a new fact, even if it could not constitute new evidence. Rather more cogently he argued that the appeals officer could *proprio moto* decide to hold an oral hearing once asked to do so, and to hold it for the purpose of a s. 317 revision.[25]

The Act, he stated, should 'be interpreted as widely as the words reasonably permit in order to reflect the permissive nature of the legislation, and the very detailed procedures laid down for decision-making, and the procedures provided for revision at any time of decisions.' It appeared to the Court that the clear intention of the Act was that social welfare claimants are provided with different opportunities to reasonably put their case, and to do so in a fair manner and comprehensively.[26] Peart J was satisfied that section 313 of the Act (which allows for hearing evidence on oath), given the breadth of its terms, provides the necessary power to enable an appeals officer to direct an oral hearing for the

[24] Para 38. Section 313 provides that 'An appeals officer shall, on the hearing of any matter referred to him or her under this Part have power to take evidence on oath and for that purpose may administer oaths to persons attending as witnesses at that hearing'.

[25] Ibid.

[26] Ibid.

purpose, inter alia, of a section 317 revision procedure, whether or not a hearing is requested by the applicant.[27]

He concluded that the applicant's request for an oral hearing was responded to appropriately by the appeals officer offering to hold an oral hearing in order to see whether, in the light of whatever it is that the applicant wishes to say, a revision of the appeal decision is warranted.[28]

Information concerning an oral hearing

In this case, the applicants had not requested an oral hearing. Given his approach to the case, Peart J did not have to decide if this was significant. However, he noted that the letter from the Department to the applicant notifying her of the refusal of her claim for DCA and of her entitlement to seek a review of that decision, or to appeal to the chief appeals officer, did not refer to the possibility of an oral hearing. He felt that that 'must dilute the significance if any of the fact that the applicant never sought to have an oral hearing'.[29] He did not consider that the applicant should be seen as having acquiesced in a summary decision by not having requested an oral hearing. Peart J suggested that it would be helpful to claimants, and might avoid unnecessary judicial review proceedings, if the letter informing them of the decision to refuse their claim went on to ask them whether or not they wish to request an oral hearing, and, if so, to state why they considered that an oral hearing should be held.[30] Indeed the standard Notice of Appeal Form (available on the SWAO website) also makes no reference of an oral hearing although the possibility of an oral hearing is mentioned elsewhere on the site.[31]

The comparative likelihood of success

The applicants argued that in an oral hearing she would have had a significantly better chance of being successful. In support, she referred to the Social Welfare Appeals Office Annual Report 2012, which showed that 53% of appeals in oral hearings were allowed as compared to 30% in appeals decided on a summary basis. However, this was clearly a case of *not* comparing like with like. As the respondents argued, cases which are considered by an appeals officer not to warrant an oral appeal are ones where the grounds of appeal are, generally, weaker and/or more straightforward than cases where an oral hearing was granted. Peart J did not consider that the statistics were relevant and this issues was ultimately a matter of statutory interpretation.

---

[27] He noted that s. 313 referred to '*the hearing of any matter referred to him or her under [Part 1] so that* the section covered any appeal provided for in Part 10 of the Act including a revised appeal.

[28] Para 46.

[29] Para 14.

[30] Ibid.

[31] http://www.socialwelfareappeals.ie/appeal/Appealprocess.html

Right to an oral hearing

The applicant argued that she was entitled to an oral hearing prior to the determination of her appeal and that to have decided the case on a summary basis was unlawful. However, having regard to his findings, Peart J did not formally consider this issue. However, it is rather unclear from the judgement whether the Court would have been of the view that such a hearing should have been held had it been necessary to decide the issue.

On the one hand, Peart J stated that

> since no contrary evidence [to that of the applicant] was considered for the purpose of the appeal, it is no doubt incomprehensible to the applicant how she was deemed ineligible for DCA, and impossible to accept the written submission made in the present proceedings that 'the evidence submitted by the applicant did not establish that her son had a severe disability requiring continual care and attention significantly in excess of that required by a child without that disability'.

This might appear to suggest that the appeal officer should have upheld the appeal, although Peart J correctly noted this was not a merits appeal and it did not matter whether the court would have come to a different view to the appeals officer.

However, in concluding his judgment, he stated that

> in so far as it has been asserted that there were clear conflicts arising on the materials put before the appeals officer which needed an oral hearing, I have struggled to identify what those conflicts are, even in the light of the contents of the Medical Assessor's opinions which the appeals officer has stated that she did not have any regard to. I accept that there is a divergence of views as between the applicant on the one hand, and the Assessor, the deciding officer and the appeals officer on the other as to whether her son qualifies for DCA. But that will arise in every case where a negative decision is arrived at by a deciding officer. That is not the sort of conflict or divergence of view that requires an oral hearing, otherwise any appeal which is being refused could not be refused without holding an oral hearing. That is not what is provided by the Act. While the letters from the Mater Hospital and the applicant's GP support the applicant's application, those do not amount to medical evidence as such. They are supportive but do not constitute medical evidence in the sense of stating that her son meets the criteria for DCA (and explaining why) … .[32]

This, on the other hand, would suggest that not only was the appeals officer entitled to reject the appeal but that she was entitled not to consider an oral hearing necessary.

'New facts' and 'new evidence'

Peart J. commented 'in passing' that the new facts or new evidence referred to in section 317 (1) (a) of the Act

> are not confined to matters that may have happened or been generated since the decision, but may consist of material or evidence which, though it existed before the

[32] At para 47.

> appeal decision was made, was not before the appeals officer at the time the appeal decision was made.[33]

This statement is clearly obiter and Peart J did not consider whether there were any restrictions on what could be considered to be 'new'. In *R. v. Medical Appeal Tribunal (North Midland Region), ex parte Hubble*,[34] the English court of appeal considered the meaning of 'fresh evidence' in the light of which a decision could be revised. It ruled that this meant

> some evidence which the claimant was unable to produce before the decision was given or which he could not reasonably be expected to have produced in the circumstances of the case.[35]

The court rejected the argument that 'fresh evidence' simply meant some further or additional evidence not presented at the original hearing.[36] In *Iarnród Éireann v Social Welfare Tribunal*, Murphy J. (again obiter) followed this approach stating that

> If new evidence is to be construed as 'fresh evidence' then such a reference in an enactment imports the usual legal meaning of this phrase as evidence which is not merely additional to that adduced on the former occasion but could not be [sic.] reasonably have been expected to be produced then.[37]

---

[33] At para 32. Indeed it is arguable that the new facts or evidence *must* relate to the initial claim and not to subsequent events (an issue discussed further in annex 2).

[34] [1959] 2 Q.B. 408; [1959] 2 All ER 40.

[35] This approach was followed in *Saker v Secretary of State for Social Services*, reported in R(I) 2/88. See also *R. v. National Insurance Commissioner, ex parte Viscusi* [1974] 1 W.L.R. 646.

[36] The tribunal had ruled that the evidence put forward (which was an expanded version of earlier medical evidence) was not 'fresh'.

[37] [2007] IEHC 406, para 8.2. The case concerned the Social Welfare Tribunal but the terms 'new facts' and 'new evidence' should be interpreted in the same manner throughout the Act. In addition, the phrase 'new evidence' has been considered in a number of decisions of the Irish higher courts and always in a restrictive manner. For example, in *Murphy v. Minister for Defence* [1991] 2 IR 161 the Supreme Court ruled that in relation to submission of new evidence on appeal (i) the evidence must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial; (ii) the evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive; and (iii) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible. Although these cases (concerning appeal to the higher courts) are in a different legal context, they do indicate that the term 'new evidence' is one which has a long-established legal meaning.

The power to revise decisions in the light of new facts also exists under Canadian law concerning employment insurance and the Canadian federal court of appeal (*Canada (Attorney General) v. Chan*, (1994), 178 N.R. 372; *Mansour v. Canada (Attorney General)*, 2001 FCA 328) has, first, pointed out that 'new' facts must be 'new', i.e. if the fact has been raised previously in relation to the claim it cannot be 'new'. Second, it has defined 'new facts' as

> facts that either happened after the decision was rendered or had happened prior to the decision but could not have been discovered by a claimant acting diligently and in both cases the facts alleged must have been decisive of the issue put to the umpire.

Smith

Peart J. identified the issue in the *Smith* case as being

> whether for the purposes of a revision being considered under s. 318 of the Act of 2005 the Chief Appeals Officer may hold an oral hearing where one is considered necessary for the purpose of resolving conflicts of evidence.[38]

He noted that the chief appeals officer had identified errors in the manner in which the appeals officer dealt with the appeal. Therefore Peart J held that there was no doubt that s. 318 provided the necessary jurisdiction for the CAO to consider revising the decision. He also pointed out that s. 320 of the Act of 2005, under which the decision of an appeals officer on any question is to be final and conclusive, is subject to a section 318 revision.

Peart J referred to and followed the approach he had set out in relation to s. 317 in *L.D.* (discussed above). In particular he referred to s.313 of the Act (quoted above) which provides an appeals officer has power to take evidence on oath. He pointed out that the chief appeals officer is an appeals officer. Therefore, s. 313 empowers the CAO to take evidence on oath on the hearing of any matter referred to her under Part 10 of the Act. A revision is part of the appeals process contained within Chapter 2 of Part 10 of the Act, and an appeal is a 'matter referred to … her under this Part'. As he had stated in *L.D.,* Peart J. held that the power to take evidence on oath at a hearing implies that a hearing can be directed, even though s. 318 does not specifically say so. Peart J held that given that the applicant had been offered an oral hearing for the purpose of a revision, there was no need to quash the initial appeal decision nor to grant any of the declarations sought nor the order of mandamus to direct such a hearing.

4. Discussion

Although not determined in these cases, for the reasons discussed above, the basic issue was whether an oral hearing should have been held. In *L.D* it was understandable, based on the very limited evidence submitted, that the original deciding officer had rejected the claim for DCA.[39] More significant evidence was submitted in support of the appeal. While the full evidence is not set out, it is arguably sufficient (if found to be credible and in the absence of countervailing evidence) to justify granting DCA. Unfortunately, the judgement does not record the reasons (if any) given by the appeals officer for refusing the decision other than the bald statement that the child did not 'require substantially more care on a continuous basis'. This emphasises once again the importance of appeals officers (and, indeed, deciding officers) giving clear (if concise) reasons for their decisions.[40] Thus we do not know why the evidence submitted was considered to be insufficient, what (if any) countervailing evidence existed and/or whether the appeals officer did not (for some reason) accept the evidence proffered.

---

[38] At para 15.

[39] Indeed, this highlights one of the weaknesses in the DCA adjudication process: see the discussion in M. Cousins, '

[40] An issue (unsatisfactorily) discussed in **A.M. v. Minister for Social Protection** [2013] **IEHC** 524. See M. Cousins, "Decisions and Appeals' op. cit.

In these circumstances, it is submitted that the appeals officer clearly should have held an oral hearing if she was minded not to uphold the appeal. It would be difficult to argue that a determination of the appeal could fairly be made on a consideration of the documentary evidence alone. Not to do so was arguably an error of law.[41]

Indeed, once the issue was raised in legal proceedings, the appropriate course might have been for the chief appeals officer to revise the decision under s. 318 as involving an error of law and to direct a new oral hearing (the course adopted in *Smith*).[42] Unfortunately in *L.D.* the respondents did not take this course. Rather they argued that the original decision was correct but, at the same time, proposed to hold an oral hearing. This (equally unfortunately) led to the claimants legal team arguing that there was no power to hold a new oral hearing in the absence of 'new facts or new evidence' – presumably in an attempt to get the High Court to rule on whether an oral hearing should have been held. While the approach adopted by the claimant appears to have some legal merit, it is rather incongruous to find a claimant's legal team arguing for an inflexible and legalistic approach to the social welfare appeals system. In the circumstances created by both sides, Peart J did the best he could and was clearly correct to hold that a purposive approach should be adopted to the interpretation of the legislation. However, the legal basis for holding that the original appeal could be reviewed (under s. 317)[43] is rather less clear. The judge suggested that the request for an oral hearing 'might' itself be considered a new fact but, with respect, this can hardly be correct. The new facts or evidence must relate to the original claim for benefit and a request for an oral hearing has nothing to do with this.[44] Likewise, the appeals officer might indeed be entitled to presume that the applicant would have wished to adduce some additional evidence but in this case, her counsel specifically stated that there were *no* such new facts or evidence.[45] Equally, Peart J's reliance on s. 313 of the Act is arguably misplaced as this section sets out *how* an appeal may be held not *whether* an appeals officer has jurisdiction to hear the appeal, i.e. it is procedural rather than jurisdictional.

Once an appeal is determined, the appeals officer's decision is, under s. 320, final and conclusive (subject to the possibilities of revision set out in s. 320 itself). In order to revise an appeal decision under s. 317 an appeals officer must find relevant new facts or evidence. Of course, an appeals officer is entitled to investigate whether such new facts or evidence exist (and, as found by Peart J, to hold an oral haring in order to determine this where appropriate). But there must be some threshold indication that such new facts or evidence exist. Otherwise, parties could seek endless reviews of decisions. In this case, it is arguable that there were no new facts or evidence and that a s. 317 review was not appropriate (although the same outcome could have been achieved under s. 318 had the respondents accepted that the failure to hold an oral hearing was an error).

---

[41] See *Kiely v*. *Minister for Social Welfare* (No. 2) [1977] IR 267.

[42] Indeed, s. 318 does not specifically provide how the CAO is to proceed when she revises an appeal this section but it is a longstanding practice to direct new oral hearings where this appears to be necessary and, in line with Peart J's judgement in *Smith*, one which should be allowed.

[43] And, therefore an oral hearing could be granted.

[44] See annex 2 for a more detailed discussion.

[45] One might speculate that, in reality, an appeals officer would only very exceptionally be prepared to make this kind of assumption.

In *Smith*, the CAO did propose to revise the initial appeal under s. 318. Although s. 318 does not specifically set out a power to direct a new hearing (oral or summary) by another appeals officer, this is clearly a sensible interpretation of the law and it is hard to see any basis for the applicant's opposition to this approach.

Although *L.D.* is an interesting case, ultimately because of the somewhat artificial arguments it did not decide very much. Peart J was certainly correct to adopt a broad and purposive approach to the legislation. It is less clear that he was strictly correct to hold that an appeal could be reopened in which there was (apparently) no error of law or fact (if one accepts the arguments of the respondents) and no new facts or evidence (if one accepts the arguments of the claimant).[46]

[46] In reality, it is arguable that there was an error of law (and possibly of fact) and that there may also be new evidence which could be adduced.

Annex: Historical development of the legislation

The current structure of deciding and appeal officers dates back to the Social Welfare Act, 1952, although similarities can be seen to the structures introduced for unemployment assistance and WOPS in 1935.[47]

From at least the National Insurance Act, 1911, authorities could explicitly revise decisions on the basis of 'new facts'.[48] The current terminology of 'new evidence or new facts' appears to have been first introduced in the National Health Insurance (Decisions and Appeals) Order, 1950 (art. 10).[49] The forerunner of the current provisions (including relevant change of circumstances) were, however, introduced in the Social Welfare Act, 1952. S. 46(3) of that Act provided that

> An appeals officer may, at any time and from time to time, revise any decision of an appeals officer, if it appears to him that the decision was erroneous in the light of new evidence or of new facts brought to his notice since the date on which it was given, or if it appears to him *in a case where a claim for benefit has been allowed* that there has been any relevant change of circumstances since the decision was given.

As can be seen, the 1952 wording specifically provided that a claim could only be revised for change of circumstances 'where a claim for benefit has been allowed'. S. 46(1) provided a similar provision in relation to revision of DO decisions.

The 1952 Act primarily related to social insurance benefits and separate legislation continued to exist in relation to schemes such as old age pension and unemployment assistance. The Social Welfare (Assistance Decisions and Appeals) Regulations, 1953 applied modified provisions of the 1952 Act to several such schemes, including the decision and appeals provisions. Art. 10(3) provided that

> An appeals officer may, at any time and from time to time, revise any decision of an appeals officer, if it appears to him that the decision was erroneous in the light of new evidence or of new facts brought to his notice since the date on which it was given, or if it appears to him that there has been any relevant change of circumstances since the decision was given.

For unknown reasons, this version does not explicitly confine revision on grounds of change of circumstances to 'live' cases (although as argued in annex 2 this is implicit in the scheme of decision-making).

When the provisions were consolidated in the first Consolidation Act in 1981, the wording without the phrase 'where a claim for benefit has been allowed' was used. Again it is not

---

[47] Indeed, some aspects of the structures can be traced back to the National Insurance Act, 1911 and the phrase 'final and conclusive' in relation to decisions appeared in the Old Age Pensions Act, 1908.

[48] There is case law as to whether authorities could revise decisions in the absence of an explicit power to do so but this is now of academic interest only and is not discussed here (see, e.g. *Murphy v The King*, [1911] 45 ILTR 161).

[49] This related to the transfer of responsibility of responsibility for health insurance matters from the National Health Insurance Society to the newly established Department of Social Welfare.

known why this was done. A Consolidation Act is not intended to change the law and it is arguably that the dropping of these words did not actually make such a change.[50]

Subsequently (until the recent amendment of the legislation in 2013) it appears that the 1981 wording was simply carried over into the new Consolidation Act (currently that of 2005).

Arising from the High Court ruling in C*.P. v*. *Chief Appeals Officer*,[51] a new s.317 was substituted by s.4 of the Social Welfare and Pensions (No.2) Act 2013 which restricts the appeals officer's power of review in light of change of circumstances to cases in which the decision being reviewed awarded benefit to the claimant. Where the claimant is refused benefit and there is a subsequent change of circumstances, a fresh claim must be lodged with a deciding officer. Arguably the new s. 317 only clarifies what has always been the case, i.e. an appeals officer could never have revised a refusal of benefit in the light of a change of circumstances *after* the initial decision.

Annex 2: Legal structure of decision and appeals

First, the Act provides that

> It shall be a condition of any person's right to any benefit that he or she makes a claim for that benefit in the prescribed manner.[52]

In addition, such claim must be made within a prescribed time if a person is not to be disqualified for benefit.[53]

Second, a decision in relation to a claim is made by a deciding officer under s. 300 of the Act. A decision is made in relation to a 'question' concerning a specific claim for a benefit and not, for example, in relation to a person's general (or future) entitlement to social welfare benefits. In *Murphy v Minister for Social Welfare*, for example, Blayney J. stated that

> In my opinion the only jurisdiction of the deciding officer was to determine the question that was submitted to him. It seems to me to be self-evident that a deciding officer has no power to decide any question unless it is submitted to him for decision … [54]

Therefore, a decision must relate to a specific claim concerning a specific time period.

Similarly, an appeal is heard in relation to a 'decision given by a deciding officer'.[55] Therefore an appeal, in turn, relates to a decision on a specific claim concerning a specific time period. Although s. 311(3) provides that in dealing with an appeal, the appeals officer is not confined to the grounds on which the deciding officer decided the case but may decide the question as if it were being decided for the first time, this clearly only applies to the *grounds* of the

---

[50] See *Bennion on Statutory Interpretation,* 5th. edition, pp. 606-607.

[51] [2013] IEHC 512.

[52] S. 241 (1).

[53] S. 241(2).

[54] [1987] IR 295 at 300.

[55] S. 312.

decision and does not extent the jurisdiction of the appeals officer beyond the question considered in the initial decision.[56]

Finally, a review under s. 317 (or s. 318) also relates to a specific decision in relation to a specific claim concerning a specific time period.[57] The same point applies to a review of a decision by a deciding officer under s. 301.

[56] S. 311(3).

[57] S. 320 of the Act provides that, subject to several exceptions including s. 37 and 318, the decision of an appeals officer on any question is 'final and conclusive'.