Domiciliary care allowance: decision-making under Irish social welfare law – M.D. v Minister for Social Protection

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This note looks at the latest in an ongoing series of cases concerning the decision-making process for claims for domiciliary care allowance. The ruling highlights, yet again, the flaws in the current adjudication system although there is little indication that legal challenges alone can lead to improvements in the overall process which would require more fundamental reforms of the system. In this case, a claim for DCA was refused by a deciding officer despite the fact that the claimant had submitted ‘a large body of supportive medical reports in support of the application’. Apart from this, the main evidence before the deciding officer was two reports of desk reviews by the Department of Social Protection’s medical assessors which shortly concluded that the medical evidence did not indicate that the young boy needed substantially more care and attention than that required by a child of his age without a disability. Baker J. rejected the argument that the decision was irrational but concluded that the deciding officer had ‘failed to properly consider all of the evidence’. The Court’s decision appears to be clearly correct on the facts (although there are a number of aspects to the judgment which are open to some question). However, it begs the question as to how a deciding officer is supposed to consider properly all the evidence under the current statutory system. This is discussed in the conclusion to this note.

**Context**

Domiciliary care allowance is a social welfare payment in respect of children, who 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.

Initial decisions in relation to claims for social welfare benefits (including DCA) are made by deciding officers (DOs) appointed by the Minister for Social Protection. These decisions

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1 [2016] IEHC 70. Note that the version of the judgement on the Courts website (courts.ie) appears to contain a number of inaccuracies and gaps. For example, the reference to Hogan J. in para 19 should be to Dunne J while para 31 appears to end in mid-air.


4 M.D. at [8]-[11]. These included reports from a physiotherapist, speech therapist, an occupational therapist, and a psychologist; a report from a consultant child and adult psychiatrist, from an occupational therapist, a psychotherapist, a speech and language therapist and a psychologist as well as a general report of an assessment carried out by the HSE which had used a wide range of assessment tools by experts in five discreet areas and which came to the determination that the young boy did have a disability ‘as defined by the Disability Act, 2005’; two reports from the child’s GP; and extracts from the mother’s personal diaries from February 2013 to September 2014, showing more than 50 hospital and related appointments with her son.

5 At [58].


7 S. 300 of the Social Welfare (Consolidation) Act, 2005 [the Act].
may be appealed to appeals officers also appointed by the Minister. It is long-standing law that both deciding officers and appeals officers are ‘required to be free and unrestricted in discharging their functions’. The appeals officers operate as part of the Social Welfare Appeals Office (SWAO), although this body has no formal statutory status. At the relevant time, section 186 provided that

(2) A medical assessor shall—

(a) assess all information provided to him or her in respect of an application for domiciliary care allowance, and

(b) provide an opinion as to whether the child satisfies [the care conditions].

S. 186 (3) further provided that in determining whether a child satisfied the qualification conditions, a deciding officer should have regard to the opinion of the medical assessor.

Facts

As noted above, the applicant applied for DCA in respect of her child. Details of the child’s circumstances are not contained in the judgement but, as noted above, a considerable volume of evidence was submitted in support of the claim. However, the claim was rejected by a deciding officer on the basis that the evidence submitted did not indicate the need for ‘substantially more care and attention’. Following a requested review, this decision was not altered. The applicant subsequently requested that an ‘independent physical assessment’ be conducted in order to resolve the ‘conflict of medical evidence’. In what is referred to in the judgement as a ‘third decision’ the Department replied that

a physical examination would not assist the decision maker in that it might ‘only provide a limited indication of the child’s care needs at that point in time and not the complete picture’, and that the daily and ongoing care needs would more properly be looked at in the context of the details provided by his parents and other care professionals.

These decisions were challenged by way of judicial review.

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8 S. 311 of the Act.


10 Substituted by s.26 (2) SW(MP)A 2010. Subsections (2) and (3) were repealed by s. 3 of the Social Welfare (Miscellaneous Provisions) Act, 2015 which came into force on 6 May 2015. The purpose of the amendment was described by the Minister of State as being to ‘clarify the role of the medical assessor in the social welfare decision-making process’ (Dáil Debates, 25 March 2015). It is rather debateable whether this amendment did so or indeed how it was intended to contribute to any clarification. The medical assessors draw on the ‘Medical (sic) Eligibility Guidelines for Domiciliary Care Allowance’ available at http://www.welfare.ie/en/downloads/DCA%20Medical%20Guidelines.pdf

11 At [18]. It is not clear that this is technically a deciding officer’s ‘decision’ under the Social Welfare Acts but nothing much turns on this.
The issues

The issues involved is the case (in the order considered by the Court) were:

1) Whether relief should be denied on the basis that the applicant had failed to exhaust her legal remedies?

2) If not, whether the decisions should be quashed?

3) Whether the Department was obliged by statute and/or by reasons of fair procedure, and natural and constitutional justice, to carry out a physical examination of the child when there is a conflict of medical evidence;

4) Whether the decisions were irrational?

5) Whether the decisions were unlawful, invalid and vitiated for want of proper reasons?

6) Whether the deciding officer erred in law in failing to properly consider all of the evidence?

Failure to exhaust remedies and whether the decision should be quashed

As noted above, the Act provides for an appeal to an independent appeals officer. The applicant did appeal, but subsequently withdrew that appeal. The state argued that the judicial review proceedings were an impermissible attempt to circumvent the appeals process. They relied on the decision of Hannah J. in A.M. v. Minister for Social Protection13 in which the learned judge held that

... the legislative framework provides for a comprehensive mechanism for a claimant to challenge the refusal of the DCA. The statutory appeals mechanism is the appropriate route for the applicant to take. The statutory appeals process still remains open to the applicant. It provides an efficacious procedure whereby the applicant can ventilate and, perhaps, remedy her complaints and concerns. ... .This is the proper and appropriate route to follow.

Having reviewed the relevant authorities, Baker J. concluded that

Judicial review is available when it is clear on the arguments or evidence before the High Court that an available statutory appeal cannot remedy the identified defect or error.14

The Court accepted that the decision in A.M. was binding and that it could not be distinguished on the facts. On this basis she consider the application to quash the decisions to be premature and refuse to grant a decree of certiorari. Nonetheless, without any explanation, she proceeded to consider the other judicial review applications.

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12 Baker J also shortly dismissed the respondent’s arguments that the case be dismissed due to delay at [19].
14 At [26].
**Physical examination**

The Court rejected the argument that there was any obligation to carry out a physical examination. Baker J did not accept the applicant’s argument that the only means by which the deciding officer could resolve the claim was to require a physical examination of the child. Rather she took the view that

> how a decision maker is to resolve to his or her satisfaction a factual matter, and the means by which a decision maker is to come to a determination, is not one that can be preordained by any declaration of this Court, or indeed by any preordained formula.\(^{15}\)

She also accepted the respondent’s argument that there is no statutory basis on which the medical assessment can be carried out. The respondent had apparently relied on s. 186G(1) of the Act which states that

> a qualified child in respect of whom domiciliary care allowance is in payment shall attend for or submit to such medical or other examination as are required in accordance with Regulations.

As the Court pointed out, this was not relevant to the case as the child was not in receipt of DCA. The Court does not seem to have considered whether the deciding officer might have any inherent jurisdiction as to procedures which could have allowed him/her to require a physical examination (as might be implied by her earlier statement quoted above).

**Irrationality**

Baker J recalled that the Supreme Court had ruled in *State (Keegan) v. Stardust Victims’ Compensation Tribunal*\(^{16}\) that a decision would be considered irrational only if it flew in the face of common sense and fundamental reason or that it was a conclusion ‘so unreasonable that no reasonable authority could ever have come to it’. While she accepted that there was ‘a weighty portfolio of documents and reports’ in support of the claim, she did not feel that she could conclude that

> the decision of the deciding officer, an expert body with particular knowledge of the questions that arise in the context of an application for domiciliary care allowance, is irrational and fundamentally at variance with common sense or good reason.\(^{17}\)

This was not to say that she considered the decision to be correct but rather that she could not determine that the decision was incapable of being supported on any rational basis.

**Failure to give reasons**

Here Baker J (at least initially) appeared to follow the approach of Hanna J in *A.M.* in which the Court had ruled that a bald recital of the statutory language (or something broadly

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\(^{15}\) At [37].


\(^{17}\) At [43].
similar) was ‘sufficiently detailed and adequate’ to explain the decision. Once again, however, Baker J took a second bite of this cherry

**Failure to consider the evidence**

The Court went on to consider the duty to give reasons in the context of the argument that the deciding officer had failed to consider all the evidence. She considered that, in addition to assisting the claimant in deciding whether to seek and appeal or review, one of the purposes of giving reasons was to allow the claimant to ‘know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider’. She stated that this requirement had not been considered by Hanna J. in *A.M.*

The applicant argued that the deciding officer had totally failed ‘to engage with the evidence actually presented’ and had failed to carry out a ‘balancing exercise’ between the internal medical assessors and the substantial medical and other evidence furnished by the applicant. Baker J felt that this approach reflected the findings of Barrett J. in *B v. Minister for Social Protection*, where he took the view that the practice of a deciding officer in deferring to the opinions of Departmental medical assessors did not represent ‘a proper exercise of her decision making powers’ and was a derogation of statutory duty.

In the instant case, the Court pointed out, two short and general desktop reviews from the medical assessors of the Department were available, neither of which expressly dealt with the details of the assessments submitted by the applicant, nor identified the factors they found relevant, nor the elements of the evidence available which were considered as insufficient to support the application. The reports, Baker J. concluded, were in identical, or almost identical, terms, and followed almost exactly the formula contained in the legislation, were devoid of factual content or analysis, and expressed a view that the legislative test was not met, using the precise language of the section.

Baker J concluded that the material before the deciding body did not make available a factual basis on which the deciding officer could engage the full decision making process, and compare or weigh the factors supportive of each position. The assessment being carried out by the deciding officer could not be conducted in the absence of a useful basis on which he or she could judge the factual question before her, and any determination on an application for the allowance is to be decided by testing the evidence actually presented.

Baker J held that the ‘reasons given by the deciding officer, and on the review, followed the language of the section, and show no analysis of the evidence and no consideration of the individual factors’. The general reports from the medical assessor ‘gave no useful analysis or comment on the evidence submitted ... in support of her application’. She considered that

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18 At [45].
19 Citing *Mulholland v An Bord Pleanala (No. 2) 2006 1 I.R. 453* at [34].
21 At [55].
the medical assessors’ reports did ‘not enable the decision maker to employ a coherent or objectively ascertainable engagement with the facts’.

In conclusion, the Court ruled that the decision maker had failed to properly consider all of the evidence furnished by the applicant and made a declaration that the deciding officer erred in law and breached fair procedures, natural and constitutional justice, by failing to properly consider all of the evidence. Thus, while the decision was not quashed, it appears that it must be revised under s. 301 of the Act by reason of a mistake having been made in relation to the law.

Conclusion

We know almost nothing about the specific facts of this case. However, accepting Baker J’s assessment of the evidence, the outcome of the case would appear to be correct. However, some criticisms of the detail of the ruling may be made (in the order considered above).

The case does highlight the fact that Hogan J’s statement, in relation to judicial review and alternative remedies, that ‘few topics have proved to be more vexed and uncertain’ remains entirely true of current High Court practice. At present, the approach a Court will take to this issue is entirely unpredictable.

The main focus of the Court’s criticism of the procedures in this case appears to be on the medical assessors’ reports. As outlined above, while in general the onus is on the claimant to show that she satisfies the qualification conditions, in this particular benefit, there was a (now repealed) statutory requirement to provide a medical assessor’s report which assessed the evidence and provided an opinion as to whether the claimant satisfied the conditions. However, if the evidence submitted was sufficient to show that the conditions were met, it might be argued that the Court could have decided the case on the basis that the rejection was irrational. Perhaps the Court felt that judicial restraint was a better approach in this case.

In relation to the level of detail provided in decisions, it is unfortunate (if understandable) that the Court (at least initially) followed A.M. In that case, Hanna J. upheld a very minimalist approach to the provision of reasons in relation to initial decisions. While we could all agree that such decisions should not be excessively complicated, one might expect more than a simple quoting back of the relevant legislation. Some attempt to explain why a deciding officer has come to a particular decision should be required. Indeed, Baker J’s further consideration of the issue and her pointing to the need to allow the claimant to ‘know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider’ suggest that she does not agree with the approach in A.M. One might hope that future decisions will clarify this issue and will opt for a higher standard in this regard and, indeed, that the Department of Social Protection might, in any case, feel that this is appropriate.

More broadly, however, it is difficult to see how (under current procedures) deciding officers are supposed to weigh a large volume of evidence which, while prepared by experts who have seen the child, may not perhaps be specifically addressed to the statutory

qualification criteria\textsuperscript{23} with the assessment of this evidence by medical assessors who have not seen the child but may be assumed to be very familiar with the qualification criteria. It is not clear from the judgement whether deciding officers currently have any specific training in disability issues or indeed in how to assess and weigh complex evidence. While an improvement in the level of detail provided in medical assessors’ report would be welcome, this, in itself, would not address the issue identified in the \textit{B} case of ensuring that the deciding officer rather than the medical assessor actually makes the decision in reality.

It is perhaps interesting to look at the considerable UK case law on the role of the medical assessor (or equivalent) and how their findings should be taken into account. The UK courts\textsuperscript{24} have accepted that the examining medical practitioner acting on behalf of the DWP is ‘independent’.\textsuperscript{25} However, the courts have also held that

\begin{quote}
there is no general rule that where there is a difference between the evidence of a medical professional producing reports for the use of the Department of Work and Pensions in making decisions as to social security benefits and the evidence of a claimant, the evidence of the medical professional should be preferred. It may be a legitimate conclusion in a particular case that a medical professional’s view is to be preferred because it is more objective and independent, but that is a conclusion only to be reached after a consideration of the particular evidence \ldots .\textsuperscript{26}
\end{quote}

In terms of balancing the evidence of the person’s doctor and an examining practitioner, the UK courts have stated that both the examining medical practitioner and the general practitioner should be assumed to be giving professional and independent evidence.\textsuperscript{27} The medical evidence provided by both (and any other relevant evidence including the claimant’s own evidence) should be evaluated and weighed on the issues in the case. For example, in a Disability Living Allowance case (a payment to persons with additional needs due to disability), the Upper Tribunal stated that

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the reports provided by GPs are [often] limited in the relevant information that they provide. That is not a criticism of GPs. It is simply a fact of life, even for diligent GPs, that they either do not have the information required or they have it but do not realise its relevance. Nevertheless, reports such as the ones provided in this case are often the only sort of evidence that is available or attainable from a claimant’s medical advisers. In that respect, they do not compare favourably with the reports of examining medical practitioners. That does not mean that they are valueless. Claimants are at a disadvantage compared to the Secretary of State when it comes to obtaining evidence in the form that will be of most value to the tribunal. Nevertheless, they have a statutory right of appeal and that right must be made effective. All too often, judges present the tribunal’s reasons as if the tribunal had a choice between accepting the evidence of the GP or of the examining medical
\end{quote}

\textsuperscript{23} It is clear, for example, that the assessment under the Disability Act is not directly related to the issues of qualification for a benefit under the Social Welfare Acts.

\textsuperscript{24} The specialist Upper Tribunal is equivalent to the High Court in its status in the judicial hierarchy.

\textsuperscript{25} See, for example, CIB 2308 2001.


\textsuperscript{27} CIB 2308 2001. The case involved Employment Support Allowance rather than a care-related payment but the legal issues are the same.
practitioner. There may be cases where that is so, but in many cases the reports each have their strengths and each their limitations as an assessment of the claimant’s disablement. In those cases, what a proper analysis usually requires is for the tribunal to show a balance between the value that can be distilled from each report and its limitations.\(^\text{28}\)

In conclusion, one might suggest that the careful balancing of the evidence required under UK law is also required in this jurisdiction. In order to allow the deciding officers to implement this in practice might require addition training on disability issues and on adjudication (if this is not already provided). Deciding officers, with appropriate training, could draw on data submitted by the claimant (including the type of evidence considered in \textit{M.D.}) and on information (such as that available on the Department of Work and Pensions’ Medical Guidance for Decision Makers) as to the details and impact of specific disabilities, with the ability to refer issues to the medical assessors where more detailed medical advice was required on a specific point.\(^\text{29}\) The ruling in \textit{M.D.} would also suggest that the medical assessor’s inputs need to be both more detailed, more balanced and to provide more specific reasoning to the deciding officer.

\(^{28}\) \textit{HL v Secretary of State for Work and Pensions} (DLA) [2011] UKUT 183.

\(^{29}\) See \url{https://www.gov.uk/government/publications/medical-guidance-for-dla-decision-makers-child-cases-staff-guide}