THE SUPREME COURT

S:AP:IE:2020:000095

Clarke C.J.

MacMenamin J.

Dunne J.

Charleton J.

Baker J.

BETWEEN/

BRIGID WILTON MCDONAGH

Appellant

AND

THE CHIEF APPEALS OFFICER

AND

THE MINISTER FOR SOCIAL PROTECTION

Respondent

Judgment of Ms. Justice Dunne delivered on the 21st May 2021

1. In a judgment delivered on the 22nd January, 2020, ([2020] IECA 5), the Court of Appeal, (Birmingham P., McCarthy, Kennedy, JJ.), upheld a decision of Coffey J. in the High Court ([2018] IEHC 407), to refuse the appellant's application to quash the decision of the Chief Appeals Officer (the first-named Respondent) refusing to grant an appeal to the appellant pursuant to s. 311(1) of the Social Welfare Consolidation Act 2005, as amended ("the 2005 Act").

2. These proceedings arise in relation to the procedures available to an applicant claiming a social welfare payment pursuant to the 2005 Act and who is dissatisfied with the outcome of a decision by a deciding officer. There are two distinct processes that applicants can seek:

(1) A revision of a decision by a deciding officer where there has been a material change in the circumstances of the applicant or where there has been an error of law or fact (s. 301 of the 2005 Act). This is a process that can be accessed without limitation.

(2) Alternatively, dissatisfied applicants can, within 21 days of the issuing of the decision made pursuant to s. 300(2), bring an appeal of the decision to the Chief Appeals Officer (s. 311(1) of the 2005 Act).

3. The controversy in this case arises out of the availability of the right to appeal under s. 311(1) of the 2005 Act, and the central question for the purpose of these proceedings is this: in circumstances where a decision is not appealed, and where a deciding officer, pursuant to s. 301 of the 2005 Act, subsequently refuses to revise a decision of a deciding officer, does this refusal to revise constitute a new "decision" or a "revised decision", thus giving rise to the right of the applicant to appeal to the Chief Appeals Officer under s. 311(1)? The appellant contends that the refusal of a deciding officer to revise a decision constitutes either a new "decision" or

"a revised decision", and therefore is appealable under s. 311(1) of the 2005 Act. On this point, the appellant further argues that to deny the appellant the right to appeal a refusal to revise would be to undermine and frustrate the purpose of the 2005 Act. The appellant argues that the 2005 Act should be interpreted purposively, rather than in an overly literal way that reduces the flexibility of the application of the Act.

4. The respondents say that the judgments of the lower courts involve the application of well-established principles of statutory interpretation to the legislation in question. They submit that the provisions of Part 10 of the 2005 Act only provide for an appeal pursuant to s. 311(1) where the outcome of a s. 301 review has resulted in a revision of the decision, and not where there has been a refusal to revise the decision. The revision may be a complete reversal of the decision, or an amendment to the original decision, but the essence of the respondents' argument is that the original decision must be altered as to the outcome in order for the decision to be appealable under s. 311(1).

Background

5. There is no dispute in relation to the facts of this case. The appellant is the primary carer of her child who has a diagnosis of learning/developmental difficulties. On or around the 10 June 2011, when the Appellant's child was four years old, the appellant applied, pursuant to s. 186C of the 2005 Act, to become a recipient of Domiciliary Care Allowance (DCA). The allowance is a benefit payable, according to s. 186C(1) of the 2005 Act, in circumstances where *"the child has 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."*

Sequence of Events following the Application

6. On 21st September 2011, a deciding officer refused the appellant's application pursuant to s. 300(2)(b) of the 2005 Act. The appellant was informed of her right to seek a

review/revision of this decision pursuant to s. 301(1) of the 2005 Act and her right to seek an appeal of the decision pursuant to s.311(1) of the 2005 Act.

7. The appellant did not seek an appeal of the decision. However, after an interval of four and half years, the appellant sought a revision of the decision by the deciding officer refusing to grant her the allowance, pursuant to s. 301(1) of the 2005 Act, on three separate occasions. Correspondence was sent on 31st March 2016, 9th August 2016, and 20th December 2016 seeking a revision of the decision, along with further medical evidence to support her position. On each of these occasions, the application for a review was refused, the last of these refusals being issued on 23rd May 2017.

8. On 12th July 2017, the appellant's solicitor wrote to the first-named respondent seeking an appeal of the decisions to refuse a revision of the decision. On 17th July 2017, the first-named respondent wrote to the appellant and informed her that there was no avenue to appeal to the first-named respondent where a deciding officer reviewed a decision but refused to revise that decision.

9. On the 9th October 2017, the appellant applied for and was granted leave to seek judicial review of the decision of the first-named respondent, seeking a number of declaratory reliefs, including an order of *certiorari* quashing the decision of the first-named respondent and an order of *mandamus* compelling the first-named respondent to determine the appellant's appeal. The appellant does not challenge the substance of the refusal to revise the original decision, but rather the refusal of an appeal pursuant to s. 311 itself.

The Statutory Provisions

10. For ease of reference, the relevant statutory provisions which were important to the conclusion reached by both the High Court and the Court of Appeal will be set out.

11. Chapter 1 of Part 10 of the Act is titled *"Deciding Officers and Decisions by Deciding Officers."*

12. Section 300(1) provides:-

> "Subject to this Act, every question to which this section applies shall, save where the context otherwise requires, be decided by a deciding officer."

Section 300(2) details the various decisions that a deciding officer is authorised to make under the Act, and it provides that deciding officers can decide questions arising under Part 3 (social assistance), which includes the allocation of Domiciliary Care Allowance under s. 300(2)(b).

13. Section 301 sets out the circumstances in which a decision by a deciding officer can be revised. The section sets out that a deciding officer may revise a decision of another deciding officer or of an appeals officer where there has been a change in the circumstances of the applicant: –

> "**301**.—(1) A deciding officer may at any time –
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> (a) revise any decision of a deciding officer –
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> (i) where it appears to him or her that the decision was erroneous –
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> (I) in the light of new evidence or new facts which have been brought to his or her notice since the date on which the decision was given, or
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> (II) by reason of some mistake having been made in relation to the law or the facts,
>
> or
>
> (ii) where –

(I) the effect of the decision was to entitle a person to any benefit within the meaning of section 240, and

(II) it appears to the deciding officer that there has been any relevant change of circumstances which has come to notice since that decision was given,

or

(b) revise any decision of an appeals officer where –

(i) the effect of the decision of the appeals officer was to entitle a person to any benefit within the meaning of section 240, and

(ii) it appears to the deciding officer that there has been any relevant change of circumstances which has come to notice since the decision of the appeals officer was given,

and the provisions of this Part as to appeals apply to a revised decision under this subsection in the same manner as they apply to an original decision of a deciding officer.

…

(3) Subsection (1)(a) shall not apply to a decision relating to a matter which is on appeal or reference under section 303 or 311 unless the revised decision would be in favour of a claimant.

(4) Subsection (2) shall not apply to a determination relating to a matter which is on appeal under section 312 or 323, as the case may require, unless the revised decision would be in favour of the claimant.

(2A) A deciding officer may at any time revise any determination of a designated person —

(a) where it appears to him or her that the determination was erroneous—

(i) in the light of new evidence or new facts which have been brought to his or her notice since the date on which the determination was made, or

(ii) by reason of some mistake having been made in relation to the law or the facts,

or

(b) where –

(i) the effect of the determination was to entitle a person to supplementary welfare allowance, and

(ii) it appears to the deciding officer that there has been any relevant change of circumstances since the determination was made,

and the provisions of this Part as to appeals shall apply to a decision of a deciding officer under this subsection in the same manner as they apply to an original decision of a deciding officer."

14. Chapter 2 deals with *"Appeals Officers, Chief Appeals Officer and Decisions by Appeals Officers"*, and includes the provision dealing with appealing a revised decision.

15. Section 311 of the 2005 Act deals with the right of a person to appeal to an appeals officer where they are dissatisfied with the decision of a deciding officer:

"(1) Subject to subsection (4), where any person is dissatisfied with the decision given by a deciding officer or the determination of a designated person in

relation to a claim under section 196, 197 or 198, the question shall, on notice of appeal being given to the Chief Appeals Officer within the prescribed time, be referred to an appeals officer."

The statutory time limit for making an appeal under s. 311(1) is 21 days from the decision of the deciding officer (Social Welfare (Appeals) Regulations, 1998, S.I. No. 108 of 1998.) Section 320 of the Act also states that the decision of an Appeals Officer shall be final and conclusive.

16. Section 318 states as follows:

"The Chief Appeals Officer may, at any time, revise any decision of an appeals officer, where it appears to the Chief Appeals Officer that the decision was erroneous by reason of some mistake having been made in relation to the law or the facts."

17. Chapter 4 of Part 10 of the 2005 Act deals with *"General Provisions Relating to Decisions and Appeals".* Section 327 states as follows:

"327 Any person who is dissatisfied with –

(a) the decision of an appeals officer, or

(b) the revised decision of the Chief Appeals Officer

may appeal that decision or revised decision, as the case may be, to the High Court on any question of law.

'Appeal to High Court by Minister'

327A – (1) Where pursuant to section 318 the Chief Appeals Officer –

(a) revises a decision of an appeals officer, the Minister may appeal that revised decision to the High Court on any question of law, or

(b) does not revise a decision of an appeals officer, the Minister may appeal the decision of the Chief Appeals Officer not to revise the first mentioned decision to the High Court on any question of law.

18. Section 329 of the 2005 Act states:

"A reference in this Part to a revised decision given by a deciding officer or an appeals officer or a revised determination given by a designated person includes a reference to a revised decision or determination which reverses the original decision or determination."

Judgment of the High Court [2018] IEHC 407

Claims

19. The appellant sought the following reliefs from the High Court:

(1) an order of *certiorari* quashing the decision of the first-named respondent of 17th July 2017;

(2) a declaration that the first-named respondent erred in law, thereby rendering the decision unlawful for the purposes of judicial review in determining by the decision of 17th July 2017 that an unrevised decision of the second-named respondent cannot be subject to an appeal, on the premise that *inter alia* s. 311 of the Social Welfare Consolidation Act 2005, as amended, provides that any person who is dissatisfied with the decision given by a deciding officer, the

question shall on notice of appeal being given to the Chief Appeals Officer within the prescribed period of time, be referred to an appeals officer;

(3) a declaration that the first-named respondent's interpretation is contrary to the general scheme of the Social Welfare Consolidation Act 2005, in particular, Chapters 1, 2, 3, and 4 of Part 10 which are intended to ensure as far as practicable, on an open ended basis, that a person who is entitled to a benefit receives that benefit;

(4) an order of *mandamus* compelling the first-named respondent to determine the applicant's appeal.

20. Coffey J. set out the statutory scheme relevant to the case, as set out above.

Submissions of the Parties

21. The applicant submitted that the decision of the deciding officer on 23rd May 2017 refusing to revise the original decision of the deciding officer of 21st September 2011 is subject to an appeal under the statutory scheme of the 2005 Act, either as a "decision" made by a deciding officer within the meaning of s. 311(1) of the Act, or alternatively, as a "revised decision" within the meaning of s. 301 of the Act. It was the applicant's case that the decision of 23rd May 2017 was not a refusal to revise but rather a new decision pursuant to s. 300(2)(b) of the 2005 Act, thereby refreshing the applicant's right to appeal the decision pursuant to s. 311(1). Alternatively, the applicant argued that the 23rd May 2017 decision was a "revised decision" within the meaning of s. 301 of the 2005 Act. The applicant placed particular emphasis on the wording of s. 327 of the 2005 Act and contended that this section contains a non-exhaustive definition of "a revised decision", as is indicated by its use of the word "includes". The applicant further argued that to exclude a refusal to revise from the broader definition of either "a decision" or "a revised decision" would defy the legislative purpose of

the statutory scheme, which it was submitted is designed to ensure that all decisions regarding entitlement of social welfare benefit are subject to unlimited review and revision. The applicant relied on s. 301(2A) in this regard and referred to the entitlement of an applicant under this section to seek an appeal in respect of "a decision of a deciding officer" without any reference to "a revised decision."

22. It was the case of the respondents that "the decision" referred to in s. 311 can only be the original decision of a deciding officer, in this case, the decision of 21st September 2011. It was further submitted by the respondents that a refusal to revise a decision similarly could not constitute "a revised decision" within the meaning of s. 301 of the Act, as it does not alter the original decision. The respondents submitted that the wording of the 2005 Act is clear and unambiguous, and that no special statutory interpretation ought to be used when construing the meaning of the provisions in question. The respondents relied on the decision of this Court in *Castleisland Cattle Breeding Society Limited v Minister for Social Welfare* [2004] 4 I.R. 150, where Geoghegan J. stated at paragraph 14 of his judgment that a decision not to revise a decision was not a revised decision (in relation to s. 271 of the Social Welfare Consolidation Act 1993). The respondents submitted that no absurdity arose from excluding a refusal to revise a decision from the meaning of either a "decision" or "a revised decision", and that it was not absurd for the legislature to put in place an open-ended statutory review procedure without recourse to an appeal where the outcome of that review remains unchanged.

Decision

23. Coffey J. embarked on a survey of a number of seminal judgments relating to statutory interpretation. The High Court referred to the decision of this Court in *East Donegal Co-operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317, where Walsh J. explained that words and phrases must be construed by reference to the Act as a whole and that the words

of the Act cannot be read in isolation and their content is to be derive from their context. Coffey J. also referred to the decision of this Court in *Castleisland Breeding Society Limited v. Minister for Social Welfare* [2004] 4 I.R. 150, and the decision of Peart J. in *LD v, Chief Appeals Officer* [2014] IEHC 641. Coffey J. concluded that Part 10 of the 2005 Act differentiates between three types of decision which may be subject to an appeal: -

(1) "the decision" which is subject to an appeal pursuant to s. 311(1) of the Act;

(2) "a revised decision" which is subject to an appeal;

(3) a decision of the Chief Appeals Officer "not to revise" a decision of an appeals officer which is subject to an appeal pursuant to s. 327A(1)(b) of the Act.

24. Coffey J. held that the appeal and the revision procedures provided for in Part 10 of the 2005 Act operate in relation to the existence of an original decision. He was satisfied that the original decision is the decision made at first instance by a deciding officer pursuant to s. 300(1) of the 2005 Act. Coffey J. held that the reference to the "decision" in s. 311(1) of the 2005 Act referred to the original decision from which all rights of review flowed. Coffey J. was satisfied that this interpretation was consistent with the wording of s. 301 of the 2005 Act, which affords the same rights of appeal to "a revised decision" as it does to "an original decision of a deciding officer". It follows from this that "the decision" in s . 311, when analysed in the context of the Act as a whole, refers to the original decision of the deciding officer pursuant to s. 300 of the 2005 Act. Thus, the High Court rejected the applicant's argument that the decision of 23rd May 2017 to refuse to revise constituted a fresh "decision" that was appealable under s. 311.

25. In relation to the applicant's submission that the 23rd May 2017 decision constituted "a revised decision" within the meaning of s. 301 of the 2005 Act, Coffey J. held that this overlooked s. 327A of the Act in which the Oireachtas explicitly distinguished between "a revised decision" and "a decision not to revise". S. 327A empowers the Minister to seek an

appeal in the High Court in respect of "a revised decision" or the decision of the first-named respondent "not to revise" a decision. Coffey J. held that clearly the 2005 Act did not envisage that a decision not to revise is included in the definition of "a revised decision". Coffey J. held that this interpretation of the Act was also consistent with the decision if this Court in *Castleisland Breeding Society Limited v. Minister for Social Welfare* [2004] 4 I.R. 150, where Geoghegan J. explicitly stated that a decision of an appeals officer not to revise a decision was not "a revised decision" in the context of s. 271 of the Social Welfare Consolidation Act 1993. Coffey J. also reasoned that it was self-evident that the Act did not permit a decision not to revise pursuant to s. 301 to be within the remit of "a revised decision", and that a revised decision is one that is limited to an alteration or amendment as to the outcome of the decision, and not merely the reasons for the decision. Therefore, the High Court also rejected the applicant's argument that the decision of 23rd May 2017 constituted "a revised decision" within the meaning of s. 301 of the 2005 Act and was therefore subject to an appeal pursuant to s. 311 of the Act.

26. In relation to the applicant's argument that reading a right to appeal a decision not to revise a decision into the Act was necessary in order to avoid absurdity, Coffey J. noted that no absurdity arose from a position whereby an applicant under the Act could, without time limits, seek a revision of a decision, a process which he described as complementary to the time-limited right of appeal under the statute. He concluded that there was no absurdity in providing for a system of appeal whereby the right of appeal was limited to the original decision and to all revisions of that decision which affect the legal consequences that flow from that original decision.

Conclusions

27. Coffey J. rejected the applicant's case that a decision to refuse to revise an original decision under the 2005 Act constituted either a fresh "decision" pursuant to s. 311 of the Act, or "a revised decision" pursuant to s. 301 of the Act. He therefore refused the reliefs sought.

Judgment of the Court of Appeal [2020] IECA 5

28. The appellant then appealed the decision of Coffey J. to the Court of Appeal. Kennedy J., giving judgment for the Court, set out the facts of the case, and the statutory scheme relevant to determining the issues raised by the parties. The issues to be determined by the Court of Appeal were:

> (1) In circumstances where a first instance decision is not appealed and where a revision is sought and the earlier decision, by virtue of the fresh decision, is deemed unrevised, is the fresh (unrevised) decision a decision for the purposes of s. 311 of the Social Welfare Consolidation Act, 2005 and therefore appealable or;
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> (2) Is treating an unrevised decision as unappealable contrary to the Social Welfare Consolidation Act, 2005 (as amended)?

29. To a large extent, the submissions of the parties reflected those made in the High Court.

30. Kennedy J. noted that s. 301(1) clearly envisages that both a revised decision and an original decision are appealable pursuant to s. 311. The Court referred to *McGrath v McDermott* [1988] I.R. 258 regarding the approach that ought to be taken where the Court has determined that provisions of a statute are unambiguous or unclear. However, she concluded that it was unnecessary in this case, as no ambiguity arises from the wording of s. 301 or s. 311, therefore the provisions must be given their ordinary and natural meaning. She acknowledged that there is no statutory definition of either a "decision" or "a revised decision" in the 2005 Act. She concluded that in such circumstances, it was necessary to look at the 2005 Act as a whole to construe both terms as used in s. 301 and s.311.

What Decision is 'the decision'?

31. Kennedy J. concluded that it is clear from the wording of s. 311 that the "decision" was a reference to a decision made pursuant to s. 300 of the 2005 Act. She noted that s. 311 does not refer to "any" decision but specifically refers to "the decision" of the deciding officer. The Court of Appeal held that use of the definite article here is indicative that s. 311 can only refer to the original decision of the deciding officer. In this case, the original decision was that which was made on 21st September 2011. Therefore, the Court of Appeal rejected the appellant's submission that the decision of 23rd May 2017 was a decision for the purposes of s. 311 of the 2005 Act.

What is 'the revised decision'?

32. Kennedy J. also rejected the appellant's submission that the decision of 23rd May 2017 could be "a revised decision" pursuant to s. 301 of the 2005 Act. She was of the view that if a decision is revised, it will amount to an amendment or, as envisaged by s. 329, a complete reversal of the decision. Part 10 provides that where a decision is revised, including where it is reversed, it may then be subject to an appeal pursuant to s. 311. Kennedy J. noted that the purpose of s. 311 is a right to appeal where a person is dissatisfied with the decision given by the deciding officer. Section 301(1)(b) states that the provisions of Part 10 as to appeals apply also to the revised decision. Thus, it followed that the decision not to revise cannot be said to be a revised decision (see *Castleisland Breeding Society Limited v. Minister for Social Welfare* [2004] 4 I.R. 150). Kennedy J. also referred to the wording of s. 327A of the Act. She noted that section 327A of the Act confers a right on the Minister to appeal to the High Court on any question of law concerning a decision of the Chief Appeals Officer. Section 327A(1)(a) permits an appeal in the case of a "revised decision", whereas section 327A(1)(b) permits an appeal in the case of a decision " not to revise" the original decision. She observed that there was a clear

distinction drawn between a "revised decision" and the decision "not to revise" a decision. She concluded therefore that a decision "not to revise" a decision is not a revised decision. She went on to note that section 327 provided a right of appeal to the High Court on any question of law to a person dissatisfied with the decision of an appeals officer or the revised decision of the Chief Appeals Officer and that section 327A(1) placed the Minister in the same position as everyone else in that the Minister could appeal a revised decision by the Chief Appeals Officer to the High Court on any question of law. However, she pointed out that section 327A(1)(b) conferred a unique right to the Minister to appeal a decision of the Chief Appeals Officer "not to revise" the first mentioned decision to the High Court on a question of law. Thus, she noted that an express right was conferred by the section on the Minister to appeal against such a decision but that right is not conferred on any other party thereby excluding any other party from such an appeal. Therefore, she concluded that there is a distinction between a "revised decision" and a "decision not to revise" a decision. Accordingly, she came to the conclusion that a refusal to revise a decision does not amount to a revision of the decision made by the deciding officer. That being so, she concluded that the decisions to refuse to revise the original decision culminating in the refusal to revise of 23rd May 2017 was not a revised decision within the meaning of s. 301 and therefore could not be appealed under s. 311 of the Act.

Absurdity

33. Kennedy J. rejected the argument as to absurdity. She concluded that there was nothing absurd, unfair or arbitrary about the fact that the Act permits a right to appeal a "revised decision" and not a decision "not to revise". She noted in this regard that the appeal procedure leads to an appeal against the original decision and in respect of a revised decision. She stated that a revision must mean an alteration or a reversal but it could not mean a decision which was simply one not to revise at all.

Conclusions

34. The Court of Appeal concluded that the interpretation of "decision" and "a revised decision" do not include a situation such as the decision of 23rd May 2017, where there is a refusal to revise a decision. Finally, Kennedy J. rejected the appellant's argument that the interpretation of s. 301 proposed by the respondent raised the presumption against doubtful penalisation. She held that question did not arise in circumstances where she had concluded that there is no ambiguity in the section. She also rejected the appellant's argument that this interpretation amounted to an ouster of an appellate jurisdiction. Thus, the Court of Appeal affirmed the decision of Coffey J. in the High Court.

The Grant of Leave

35. In a determination dated the 14th of October 2020, this Court granted leave to appeal the decision of the Court of Appeal. The Court considered that the case raised issues of law of general public importance. These issues of public importance relate to the proper statutory interpretation of the 2005 Act, which can impact on entitlement to social welfare benefit.

Issues

36. The parties in the course of case management prepared issue papers. The appellant identified the following issue arising out of the determination of this court, namely:

"In circumstances where a first instance decision is not appealed and where a revision is sought and the earlier decision is, by virtue of the fresh decision, deemed unrevised, is the fresh (unrevised) decision a *decision* for the purpose of section 311 of the Social Welfare Consolidation Act 2005 and therefore appealable?"

A similar issue was identified on behalf of the respondents in the following terms:

"Where a revision of the decision of a Deciding Officer made under s. 300 of the Social Welfare Consolidation Act 2005 (as amended) ("the Act") disallowing a claim is sought from the Deciding Officer pursuant to s. 301 of the Act and where the Deciding Officer does not revise the decision; is that "unrevised" decision a decision under s. 300 and therefore an appealable decision for the purposes of s. 311 of the Act?"

The remaining issues as identified by the parties were not in dispute and are as follows:

"What is the correct interpretive approach to be applied to the Social Welfare Consolidation Act 2005? Is the Social Welfare Consolidation Act 2005 a remedial social statute and, if so, subject to a purposive approach?

Is s. 301 of the Social Welfare Consolidation Act 2005, insofar as it refers to appeals, obscure or ambiguous or, on a literal interpretation, absurd or, failed to reflect the plain intention of the Act?

Does s. 311 of the Social Welfare Consolidation Act 2005, insofar as it refers to appeals, lead to a detriment, such as would raise the presumption against doubtful penalisation?"

37. The appellant argues that the High Court and the Court of Appeal erred in their interpretation of the 2005 Act. They contend that both judgments fail to address and follow the judgment of Peart J. in *LD v. Chief Appeals Officer* [2014] IEHC 641, insofar as both courts did not adopt a purposive approach when interpreting the relevant statutory provisions and did not adopt an interpretative approach "as widely as the words reasonably permit in order to reflect the permissive nature of the legislation". The appellant submits that the 2005 Act is a remedial social statute i.e. a statute that purports to right a social wrong, and submits that the Act intends to protect vulnerable categories of persons, in this case, children who suffer from disabilities and their families through the distribution of DCA. It is submitted that other similar child protection statutory schemes have been held by the court to be remedial social statutes,

for example, the Family Home Protection Act 1976 and the Child Care Act 1991, (see *Bank of Ireland v. Purcell* [1989] IR 327, *Western Health Board v. KM* [2002] 2 IR 493 respectively), and that the recognition of these Act as social remedial statutes resulted in them being interpreted in a purposive manner. It is submitted by the appellant that, similarly, the Social Welfare Consolidation Act 2005 should be considered a remedial social statute. The respondents submit that no special statutory construction has ever applied to the 2005 Act, and that the words should be given their plain and ordinary meaning, and thus the High Court and the Court of Appeal were correct in their interpretation of the Act.

Is s. 301 of the Social Welfare Consolidation Act 2005, insofar as it refers to appeals, obscure or ambiguous or, on a literal interpretation, absurd or, failed to reflect the plain intention of the Act?

Obscurity and Ambiguity

38. The appellant submits the High Court and the Court of Appeal erred in finding that s. 301 of the 2005 is both clear and unambiguous in its use of the word "decision". It is submitted by the appellant that the Court has recognised that statutory provisions limiting the right to appeal must be clear and unambiguous (*Stokes v. Christian Brothers High School Clonmel & Anor.* [2015] IESC 13). It is further submitted that in *Kinghan v. Minister for Social Welfare* [1985] (Unreported, HC, Lynch J., 25 November 1985.) it was held that any provision that purports to oust an appellate jurisdiction is to be interpreted narrowly. The respondents argue that, even if the Court decides that a purposive approach is to be taken in interpreting the 2005 Act, the Court must have regard to the decision in *McGrath v. McDermott* [1988] IR 258, and the limits of statutory interpretation described by Finlay C.J. at page 276. The respondents further submit that the meaning of the words used is clear, unambiguous and straightforward.

The statute allows for appeals of decisions and of revised decisions, but no appeal of unrevised decisions.

Absurdity and Unfairness

39. The appellant submits that that interpretation of s. 301 and s. 311 of the 2005 Act asserted by the respondent, and the interpretation applied in the High Court and the Court of Appeal, leads to an absurd and unfair result for the appellant and others in her position. The appellant submits that it is a remarkable position that, using the respondent's logic, that a revised decision is only one that has been changed as to its outcome, a recipient of social welfare benefit who, on a revised decision, loses their entitlement has renewed recourse under s. 311, whereas one who applies for the same social welfare benefit, but is considered ineligible for that payment, and continues to be considered ineligible for that payment even after new evidence has been submitted, does not benefit from the same renewed recourse under s. 311. The appellant places particular emphasis on the use of the word 'includes' in s. 329 of the 2005 Act, which stipulates that a reversal of a decision is to be considered a revised decision. It is submitted the use of 'includes' in this section suggests that there must be other situations arising which are "decisions" for the purposes of the Act, for example, where new evidence is submitted for consideration of a previously rejected application and the application is again rejected notwithstanding this new evidence. It is submitted that the use of the word 'includes' in s. 329 defeats the maxim *expressio unius est exclusion alterius.*

40. The appellant alternatively submits that an unrevised decision in light of new evidence must be considered a decision for the purposes of s. 300 of the 2005 Act and is thus appealable under s. 311. In other words, when a decision is made not to revise the original decision, s. 301 is not engaged by the deciding officer, and therefore the decision not to revise becomes a decision pursuant to s. 300 of the 2005 Act. In this regard, the appellants rely on judgments of

the superior courts in the context of judicial review that an unrevised decision is, in effect, a new decision which is justiciable (see *Tarola v. Minister for Social Protection* [2016] IEHC 206, White J., at para 29 and *Castleisland Cattle Breeding Society v. Minister for Social Welfare* [2004] 4 I.R. 150, per Geoghegan J.).

41. The appellant finally argues in this regard that it is anomalous to suggest, as the respondents do, that the 2005 Act could be interpreted in such a way as to exclude the appellant and others like her from a statutory appeal but allow her to challenge a decision not to revise through judicial review. It is said that this could never have been the intention of the Oireachtas, leaving aside the question of the suitability of judicial review as a remedy in such circumstances.

42. It is the respondents' case that there is no absurdity in the lack of an appeal from an unrevised decision. The respondents note that an applicant has an unlimited right to request a revision of a decision under s. 301, and where such a decision is revised, payments can be backdated, and furthermore, that the applicant also has the right to make a fresh application under the 2005 Act, which would give rise to a new, time-limited right of appeal under s. 311. A decision, and the review of that decision, are objectively different, and the legislature is entitled to treat them differently. The respondents argue that the appellant misunderstands the meaning of absurdity as it is used in statutory interpretation. In contrast, the respondent submits that it is the appellant's proposed interpretation that would create an absurdity, as it would render the 21-day time-limit sanctioned under s.3 11 meaningless. It would allow for an appeal to the first-named respondent at any time, while simultaneously providing for a time-limited right of appeal.

43. The appellant argues that the High Court and the Court of Appeal erred in finding that where an applicant seeks to review a s. 300 decision pursuant to s. 301 with the support of new

evidence, and the deciding officer then refuses to revise the decision, that this decision is neither a "decision" or a "revised decision" and therefore appealable under s. 311. The appellant relies on the aforementioned jurisprudence regarding the need for the court to take a purposive interpretation of the 2005 Act, and that it needs to be interpreted as widely as possible. The appellant argues that, according to this reasoning, she is disadvantaged in following the unlimited review and revision procedure pursuant to s. 301 of the Act, rather than by submitting a fresh application under the 2005 Act which would allow her a renewed, time-limited appeal pursuant to s. 311, notwithstanding that the exact same evidence would be proffered in both cases. It is submitted that this anomaly demonstrates that it could not have been the legislative intention to interpret "decision" or "revised decision" as having such narrow scope, as it frustrates the flexibility of the purpose of revised decision making, and the application of the statutory appeals procedure.

44. The appellant also submits that, even if the respondent's interpretation of the Act is correct, that the 2005 Act seems to envisage circumstances where a so-called unrevised decision is appealable and points to s. 302(2A) of the Act where the wording of the provision allows for a revision of "a decision" in respect of Supplementary Welfare Allowance, rather than "a revised decision", in support of this argument. The appellant further relies on her previous submissions that the legislation is a social remedial statute, and that it is to be interpreted purposively, accounting for the paternal and permissive nature of the statute, and accordingly, that a decision to review and not revise should be interpreted as either a "decision" or a "revised decision".

45. The respondents submit that the clear and unambiguous wording of the 2005 Act clearly excludes the possibility that a decision not to review an application following a s. 301 review is either a "decision" or a "revised decision" for the purposes of access to a s. 311 appeal, and that the first-named respondent has no authority to hear such an appeal from a decision not to

revise under the statutory scheme. The respondents rely heavily on s. 327A of the 2005 Act, which empowers the Minister to appeal a revised decision of the Chief Appeals Officer to the High Court and "a decision of the Chief Appeals Officer not to revise". The respondents submit that this section places the two distinct outcomes of a review in contradistinction to each other, and invokes the maxim *expressio unius est exclusion alterius*, and that the interpretation proffered by the appellant is incompatible with the distinction made in s. 327A. It is submitted by the respondents that if the legislature intended for a refusal to revise to be defined as either a "decision" or an "original decision" that it would be unnecessary to explicitly include a reference to "a decision not to revise" in s. 327A. It is also the respondents' case that this definition is incompatible with the wording of s. 302 of the 2005 Act, which states that a revised decision "takes effect". The respondents argue that these words denote that a revised decision must have some material impact as to the outcome in order for it to "take effect." The respondents also submit that the interpretation proposed by the appellant is inconsistent with s. 329 of the 2005 Act, which states that a revision is to include a reversal of a decision as well as an amendment of that decision.

46. The respondents further rely on a number of decisions of this Court that explicitly differentiate between a revised decision and a decision not to revise. The respondents cite the judgment of Geoghegan J. in this Court *in Castleisland Cattle Breeding Society Limited v. Minister for Social Welfare* [2004] 4 I.R. 150 where at paragraph 14 he states that there is no right to appeal where an appeals officer reviews but refuses to revise a decision. While the respondent accepts that this decision was made in relation to section 271 of the Social Welfare Consolidation Act 1993, it is submitted that this provision is the same as the schema under consideration by this Court here. The respondent submits that this Court should follow the decision in *Cattle Breeding Society Limited v. Minister for Social Welfare.*

47. The respondents submit that Section 301(2A) does not provide a right to appeal a refusal by a deciding officer to revise a determination. It does not provide a right to appeal the outcome of a review. It simply provides a right to appeal when a decision is made to revise a determination. Thus, it is argued that the interpretation of the appellant in respect of s. 302(2A) is erroneous. The respondents argue that even if this Court accepts that the appellant's interpterion of s. 302(2A) is correct, that it does not follow that this impacts the position of a decision under s. 301. It is submitted that this approach is not absurd or inconsistent in a legal sense. It is submitted that even if the appellant's interpretation of section 301(2A) was correct, which, it is submitted, it is not, then that has no bearing on section 301; the legislature is entitled to address different allowances differently, especially when the original decision is made by a different class of persons.

Does s. 311 of the Social Welfare Consolidation Act 2005, insofar as it refers to appeals, lead to a detriment, such as would raise the presumption against doubtful penalisation?

48. The appellant submits that the ambiguity of the provisions of the 2005 Act raises the presumption against doubtful penalisation. The presumption against doubtful penalisation stipulates that no one shall be put at peril except under a clear law. The appellant argues that she should not suffer a detriment (i.e. no recourse to an appeal pursuant to s. 311) as a result of the ambiguity in the legislation. While the principle against doubtful penalisation is usually applied in the interpretation of penal statutes, the appellant in this regard relies on the judgment of O'Higgins J. in *Mullins v Harnett* [1998] 4 I.R. 426 where at page 434, he stated that the principle against doubtful penalisation applies not just to criminal offences but to any detriment. It is the respondent's position that the question of the principles of doubtful penalisation does not arise as the statutory provisions are clear and unambiguous.

Discussion

49. It is important to bear in mind the relevant sequence of events in this matter. Domiciliary Care Allowance, ("DCA"), was first applied for on the 20th June, 2011. It was refused by a decision dated the 21st September, 2011. The appellant, having been notified of the decision, was told she had a right to seek a statutory review/revision, as provided for in s.301 of the 2005 Act, and/or an appeal pursuant to s.311 of the Act. Thus, at first glance, it would appear that a disappointed applicant had two options to avail of in seeking to bring about a different outcome to an unsuccessful application for an allowance. As is clear from s.301(1) of the 2005 Act, the basis of an application for revision is twofold – in the first instance, the decision can be revised where it appears to a deciding officer that the decision was erroneous in the light of new evidence or facts, or, alternatively, where it appears that there has been some mistake made in the original decision as to the law or facts. Thus, an unsuccessful applicant for an allowance under the 2005 Act will either have to bring forward new evidence of facts, or demonstrate that a mistake was made as to the law or facts applicable to the application.

50. The alternative approach for an unsuccessful applicant is to appeal the decision pursuant to s. 311 of the 2005 Act, by notice to the Chief Appeals Officer, who refers the matter to an appeals officer. The basis on which an appeal can be brought is that the person appealing is "dissatisfied" with the decision. There is a time limit on bringing an appeal, whereas there is no time limit on bringing an application for a revision of a decision. Put very simply, an appeal has to be brought within a prescribed time limit, and a revision will require new facts or evidence or for it to be demonstrated that there was a mistake as to law or facts.

51. On one view, it could be said that the Act of 2005 is flexible when it comes to providing remedies for those dissatisfied with the decision of the deciding officer. It might be asked why any dissatisfied applicant would seek to have a decision revised, rather than appealing the decision which is said to be wrong. There is a practical benefit in having a decision revised, as opposed to appealed. Section 302(c) provides that a revised decision "*shall take effect as from*

the date considered appropriate by the deciding officer having regard to all the circumstances of the case." The procedure for an appeal under s.311 does not contain a similar provision. Thus, it appears to be the case that a successful application for a revision of a decision can result in the payment concerned being backdated to the date of the original decision, whereas the extent of backdating following an appeal is less generous.

Statutory Interpretation

52. I now turn to a consideration of the proper approach to the interpretation of the statutory provisions at issue, as this will be of relevance to a consideration of the primary issue between the parties.

53. The point is made on behalf of the appellant that the 2005 Act is a remedial statute, and should be interpreted "*as widely as the words reasonably permit in order to reflect the permissive nature of the legislation*". (Peart J. in *LD v. Chief Appeals Officer* [2014] IEHC 641, at para. 38). Accordingly, it is contended that the Act should be given a purposive, as opposed to a literal, interpretation. By contrast, it is submitted on behalf of the respondents that, where the words of a statute "*are clear, with a plain meaning, they should be so construed*". (See Hogan J.'s reliance in *CP v. Chief Appeals Officer* [2013] IEHC 512 on the decision of Denham J. in *Board of Management of St. Magola's National School v. Minister for Education* [2010] IESC 57). Hogan J. was addressing the interpretation of s. 317 of the 2005 Act, and he observed, at para. 17, as follows:

> *"The language is unambiguous and there is nothing absurd in giving an Appeals Officer an open-ended power to re-open cases in the light of the emergence of new facts or new evidence or changed circumstances. This conclusion is, moreover, re-inforced by the language of the remainder of the section."*

54. Therefore, it is contended by the respondents, that the legislation at issue should be given a literal interpretation, albeit that it is conceded that, in the event that an ambiguity arises, the court should take a purposive approach.

55. It would be helpful to consider in more detail some of the authorities relied on by the parties in arguing for a literal approach to the interpretation of the legislation, on the one hand, and a purposive approach, on the other hand. In this context, the starting point must be s. 5 of the Interpretation Act, 2005, which provides at s.5(1) as follows:

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of -*
>
> > *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or*
> >
> > *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

56. Therefore, it is necessary to consider whether the legislation at issue is (a) obscure or ambiguous, or (b) that, on a literal interpretation, it would be absurd, or would fail to reflect the plain intention of the Oireachtas. If so, the Court should give the legislation a construction

that reflects the intention of the Oireachtas, assuming that intention can be ascertained from the Act as a whole.

57. One of the questions that arises in this case, in order to assist in the interpretation of the Act, is whether or not the legislation can be properly described as a remedial statute. Dodd, in *Statutory Interpretation in Ireland* (1st Edn, Bloomsbury Professional 2008), commencing at para. 6.51, makes some observations about remedial statutes:

> *"The case law reveals that the courts are more disposed to the purposive approach in respect of particular types of enactments. Remedial social statutes, enactments relating to international or European law and paternal legislation, such as enactments relating to child welfare, are more readily interpreted in light of their purpose. In respect of such enactments, the courts are concerned with ensuring that the purpose or aim of a provision or Act is achieved. In contrast, other types of statutes and instruments favour a literal approach – criminal, taxation and conveyancing enactments dispose themselves to a strict literal approach. In respect of such statutes, what is typically valued is certainty and allowing those affected to rely on the ordinary and plain meaning.*
>
> *'Remedial social statutes' and legislation of a paternal character favour a purposive interpretation and are said to be construed as widely and liberally as can fairly be done within the constitutional limits of the courts' interpretative role. This formula has been repeated in a number of cases. It has been codified to some extent in some jurisdictions. Remedial social statutes are enactments which seek to put right a social wrong and provide some means to achieve a particular social result. The interpretative approach to remedial enactments can be related to the mischief rules and purposive approach, in*

that interpretations that promote the remedy that the legislature has appointed are preferred. …".

58. In the case of *LD v. Chief Appeals Officer* [2014] IEHC 641, which also concerned the domiciliary care allowance, Peart J. made the following observations, commencing at para. 38 of his judgment:

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

It is worth noting also that section 317 is silent as to who may initiate a revision procedure under that section. It is therefore clear that an appeals officer himself/herself may be in receipt of new evidence or new facts from any source, and may, proprio motu, decide that the decision of the appeals officer should be revised in the light of that new evidence and/or new facts. On the other hand, it may be the unsuccessful applicant for DCA himself/herself who might wish to bring new evidence or new facts to the attention of the appeals officer so that the appeal decision already made might be revised under the procedure in section 317. The power to revise under section 317 is clearly a broad and flexible one which permits any particular decision of an appeals officer to be revised "at any time". It should also be borne in mind that revision of a decision under section 317 is not confined to a reversal of the original appeal decision. It may consist simply of an adjustment of some kind to the original decision. This is made clear by section 329 of the Act of 2005, which provides:

'329. A reference in this Part to a revised decision given by a deciding officer or an appeals officer or a revised determination given by a designated person includes a reference to a revised decision or determination which reverses the original decision or determination.'

I consider that the provisions and procedures under scrutiny in this case should be given a purposive interpretation, yet one that is fully consistent with the clear words used by the Oireachtas. This is not a penal statute. It is one which provides for certain benefits which can be claimed by qualifying applicants, and provides for procedures and criteria in order to decide who qualifies for benefit and who does not. There are clear safeguards built into the scheme for decision-making such as the appeals procedure, and revision procedure. These enable a fair opportunity to be provided to ensure as far as practicable that (a) a person who is entitled to a benefit receives that benefit, and (b) a person who is not entitled to a benefit does not."

59. As can be seen, Peart J. was considering the provisions of s. 317 of the 2005 Act, which concern revision of a decision by an appeals officer of decisions of an appeals officer, whereas, as has been seen, s. 301 concerns revisions of decisions by deciding officers, but both ss. 301 and 317 provide for the possibility of revision where it appears that the decision sought to be revised was erroneous in the light of new evidence or new facts which have been brought to the attention of the appeals officer in the case of s. 317, or the deciding officer in the case of s. 301, since the date on which it was given. The only difference in the procedure provided for in s. 301, as opposed to s. 317, is that the reference in s. 301 to a revision of a deciding officer taking place by reason of a mistake having been made in relation to the law or facts is not included in s.317. The appellant relies heavily on the judgment of Peart J., referred to above, in support of the argument that the statute is a remedial statute, and thus that a purposive interpretation should be favoured, and that the legislation should be interpreted "*as widely and*

liberally" as can be, within the limits of statutory interpretation as provided for by statute and in the case law. As was pointed out by the appellant, the provisions of the Act in relation to domiciliary care allowance are designed to assist families who are caring for a child who has a severe disability requiring care over and above that of a child of the same age without a disability.

60. The respondents, for their part, did not address directly the question of whether or not the legislation at issue is remedial or not. Rather, it was said, that no special rules of construction apply to the interpretation of social welfare legislation. Therefore, it was argued that the legislation should be given its literal meaning.

61. The legislation at issue in these proceedings is designed to provide assistance to those who have a particular need for assistance over and above that of the average parent in circumstances such as these, by reason of having a child with a severe disability. Thus, it seems to me that, as Dodd put it, it is legislation which seeks to put right "*a social wrong and provide some means to achieve a particular social result*". Accordingly, it seems to me that the approach to interpretation of such legislation ought to be as set out by Clarke C.J. in *J.G.H. v. Residential Institutions Review Committee* [2017] IESC 69, at para. 4.5; [2018] 3 I.R. 68, at page 78):

> *"The underlying principle behind the proper approach to the interpretation of remedial legislation is that it must be assumed that the Oireachtas, having decided that it is appropriate to apply public funds to compensate a particular category of persons, did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation. On the other hand the Oireachtas is entitled, when deciding to apply public funds in a particular way, to define, within constitutional bounds, the limits of any*

scheme which it is decided should be put in place. Where that scheme is remedial, courts should not be narrow or technical in interpreting those bounds but they should not be ignored either. Against that backdrop I turn to the specific issues of interpretation which arise on this appeal."

62. There is no doubt that this is a situation in which the Oireachtas has decided to apply public funds to provide for those who are caring for a child with a severe disability. Therefore, it seems to me that the approach to the interpretation of the legislation at issue in these proceedings should be informed by the fact that the statutory provisions at issue are remedial, and accordingly the principles identified by Peart J. in *LD*, and of Clarke C.J. in *J.G.H.*, should provide the backdrop against which the 2005 Act should be interpreted.

A Consideration of the Statutory Provisions

63. The key issue is whether or not a "decision" not to revise a decision is a decision which can be appealed in accordance with the provisions of s. 311 of the 2005 Act. Put very simply, one might ask, when is a decision not a decision?

64. As we know, the appellant in this case first made an application for domiciliary care allowance in 2011 and this was refused by a decision of the 21st September 2011. She did not appeal then but subsequently sought to have the original decision revised on three further occasions in 2016, the last of those applications was refused in May 2017. That led to her request to appeal those refusals but she was told she could only appeal the original decision made in 2011 and not the decisions refusing to revise that decision and therefore, she was out of time to appeal. In practical terms, the view of the respondents is that a decision not to revise a decision is not a decision within the meaning of the Act and therefore cannot be appealed.

65. One observation that might be made at this stage is that the legislative provisions at issue in these proceedings were drafted in such a way as to ensure that a claimant for an

allowance has every possible opportunity to make their case to be entitled to the particular allowance. Not only is there an appeal procedure for a disappointed claimant but there is also a procedure to have an adverse decision revised. Admittedly, in such cases it will be necessary to provide new evidence or facts not before the original decision maker. Why then should a decision not to revise the original decision be regarded as not appealable, particularly as in the majority of cases, the revision is sought on the basis of new evidence not before the original decisionmaker? As was noted on behalf of the appellant, the extent of the flexibility as to revision is emphasised by the fact that a revision can be sought "at any time". This point was noted in the case of *Corcoran v Minister for Social Welfare* [1991] 2 I.R. 175 in which it was observed at page 183 that there was "an unlimited right to reopen the issue" when the previous legislation which contained similar provisions to those at issue in these proceedings was being considered.

65. Given the degree of flexibility built into the legislation for claimants dissatisfied with a decision on an application for an allowance, the question must be asked if there is a lack of logic or absurdity in having a system which on the one hand is flexible and generous in allowing for a process of revision and/or appeal and on the other hand, a system which denies a claimant an appeal from a decision not to revise a decision?

An examination of the 2005 Act

66. The starting point of the examination of the 2005 Act in this case must be s. 301 but before getting to that point, it is relevant to note, as has been mentioned previously, that the 2005 Act does not contain any definition of "the decision". One is left, therefore, to a consideration of the relevant statutory provisions as a whole in order to determine whether a decision not to revise a decision is appealable or not. S. 301 of the 2005 Act, as has been seen, provides for the revision of decisions of a deciding officer where there there has been an error

on the basis of new evidence or facts, or by reason of some mistake in relation to the law or facts or where it appears that there has been a relevant change of circumstances since the decision was given that it is sought to revise. In each case, s. 301(1) goes on to provide that the provisions of Part 10 of the Act "as to appeals apply to a revised decision under this subsection in the same manner as they apply to an original decision of a deciding officer." Thus, it would appear that a "revised" decision is, for the purpose of appeals, to be regarded as being the same as an original decision.

67. The Court of Appeal in its judgment at para. 49, proceeded to consider s. 311 of the 2005 Act which sets out how an appeal is dealt with. It was observed that insofar as that section provided for an appeal of "the decision", "the decision" must be the original decision of the deciding officer. Particular emphasis was placed on the use of the definite article in that section resulting in the conclusion that s. 301 envisages that the appeal provisions under Part 10 apply to the "revised decision". It was the view of the Court of Appeal that in this case "the decision" was the original decision of the 21st September 2011 and that only that decision was appealable under s. 311. It was in those circumstances that the Court of Appeal concluded "that the decisions of the deciding officer of the 23rd May 2017 and the previous decisions "not to revise" the original decision of the 21st September 2011 do not come within the meaning of "the decision" under s. 311 of the Act and cannot be the subject of an appeal.

68. Curiously, 301(2A) of the Act, which concerns Supplementary Welfare Allowances, is in similar terms to s. 301(1) save for the final part of the subsection which states "and the provisions of this Part as to appeals shall apply to a decision of a deciding officer under this subsection in the same manner as they apply to an original decision of a deciding officer." (Emphasis added)

69. Having regard to this difference, it was suggested on behalf of the appellant that if the first-named respondent is correct in its interpretation of the legislation, then, there are some payments in respect of which the legislation allows for an appeal in respect of both a revised and unrevised decision. I will return to this point later.

70. The Court of Appeal in the course of its judgement considered what is meant by the phrase "the revised decision" by reference to s. 329 of the 2005 Act which, as has been seen, provides that a revised decision "includes a reference to a revised decision or determination which reverses the original decision or determination". The appellant had contended that a decision refusing to revise was in fact a "revised decision". The Court of Appeal disagreed, having noted that the provisions of Part 10 as to appeals also applied to the revised decision as provided for by s. 301(1)(b). Therefore, it concluded "that a decision not to revise the original decision, quite evidently, cannot be said to be a revised decision." (Para. 56)

71. Reference was made in this context to the decision of this court in *Castleisland Cattle Breeding Society Limited v Minister for Social Welfare* [2004] 4 I.R. 150 in which it was held in the context of s. 271 of the predecessor to the 2005 Act that if the Chief Appeals Officer decided not to revise the decision of an appeals officer, there was no revised decision and, therefore, no right of appeal. Geoghegan J. in that case had stated at page 156:

> "*Although under s. 271 an appeal lies to the High Court from the decision of an appeals officer, an appeal lies only from "the revised decision of the chief appeals officer". If, as in this case, the chief appeals officer decides not to revise the decision of the appeals officer, then it would seem to me that there is no "revised decision of the chief appeals officer" and, therefore, no right of appeal. The Act does not appear to give any right of appeal to the High Court from the refusal of a chief appeals officer to revise a decision, though no doubt in an appropriate case there might be grounds for judicial review.*"

72. S. 271 is, broadly speaking, in the same terms as s. 327 of the 2005 Act. The only difference between the provisions has no bearing on the issues that arise in these proceedings. There is no doubt that a distinction is drawn in s. 327 between "a decision" of an appeals officer and "a revised decision" of the Chief Appeals Officer in that only a "revised decision" of the Chief Appeals Officer can be appealed to the High Court on a question of law. Presumably, the distinction drawn between "a decision" and "a revised decision" must have some meaning. Some assistance could, perhaps, be derived from the provisions of s. 327A of the 2005 Act. As was observed by the Court of Appeal at para. 59 of its judgment, "s. 327A (1)(b) confers a unique right to the Minister to appeal a decision of the Chief Appeals Officer "not to revise" the first mentioned decision to the High Court on a question of law. Thus, an express right is conferred by that section on the Minister to appeal against such a decision. Such a right is not conferred on any other party, thereby excluding any other party from such an appeal." This led the Court of Appeal to conclude that having regard to a consideration of Part 10 of the Act as a whole, there is a distinction between a "revised decision" and a "decision not to revise a decision". I do not disagree with the proposition that there is a distinction between a revised decision and a decision but it is also interesting to note the express reference in s. 327A to a decision not to revise a decision.

Decision

73. There are a number of phrases used in Part 10 of the 2005 Act which have the potential to cause confusion. In this case, the problem at issue could be described loosely as follows: Is a decision not to revise a decision a decision which can be appealed? Put like that, it is easy to see the potential for confusion. In order to clarify the position as best as can be, I propose to start by looking at various provisions of Part 10 of the Act.

74. S. 300 is the starting point. It provides that every question to which the section applies shall be decided by a deciding officer. It lists a number of areas of social welfare under which questions may arise. The phrase "every question" is noteworthy in that clearly, if a question arises in respect of any of the issues listed, then "it shall be decided".

75. S. 301 provides for the revision of a decision and can be applied for on the basis of new evidence or facts which have arisen since the date of the decision or by reason of a mistake as to facts or law (which clearly envisages a "revision" in the ordinary sense of that word or a re-consideration on the same facts and law but in respect of which there is said to be a mistake) or a change in circumstances. S. 301(1)(b) also uses the phrase "original decision", which has to be different from "a revised decision". It is difficult to imagine that the phrase "original decision" means anything other than the first decision to be have been made by a deciding officer. Bearing in mind that the criteria for the revision of a decision in most circumstances (save for those circumstances where it is alleged that there has been a mistake of law or facts) will involve the submission of new facts or evidence or details of a change in circumstances, it is very difficult to understand why such a decision, not being the original decision, cannot be the subject of an appeal. Granted that a decision which amounts to a refusal notwithstanding new facts or evidence or a change in circumstances is not a "revised" decision in the sense of a decision which has been changed, can it really be the case that the Oireachtas intended that in that situation there would be no appeal? Even if one was dealing with an application based on a mistake as facts/law, which did not involve new facts or evidence or a change in circumstances, why should such an applicant be deprived of an appeal following a failed application for a revision?

76. The regime for challenging a decision under the 2005 Act is generous and flexible. Not only is there provision for an appeal from a decision but there is a generous scheme for the revision of a decision. Whilst an appeal is time-limited, a revision can be sought at any time,

albeit certain requirements have to be met in the case of a revision as mentioned previously. The view that the decision not to revise a decision is one that cannot be appealed is very much at odds with the scheme as a whole provided for under the 2005 Act which provides for both appeal and revision. To illustrate the point, take, for example, a means tested allowance. A claimant for such an allowance who was refused the allowance or given less than the full amount available by reason of their means is entitled to seek to have the disputed decision revised or appealed. If, on a revision, the amount of the allowance is increased somewhat but not to the level sought by the claimant, an appeal can be brought against that decision. Can it be right that if they are refused the full amount of the allowance claimed, there can be no appeal? It is difficult to understand why that could be so. Nevertheless, it would seem to follow from the respondents submissions, that a claimant who obtains part of an allowance but not the full amount following a revision can appeal but a person who seeks revision and is refused the full amount cannot, apparently on the basis that the original decision has not been "revised". In the overall scheme of the Act, this is hard to understand. Put that alongside the position as set out in section 301(1) as contrasted with section 301(2)A which deals with Supplementary Welfare Allowance and the position becomes even more anomalous. If the respondents' interpretation is correct, then, it seems to me that there is an inbuilt inequality in the Act in between those who seek Supplementary Welfare Allowance as opposed to any other allowance provided for under the Act such as Domiciliary Care Allowance. Why would one class of claimant be treated less favourably than another? There is no explanation in the Act for such a difference in treatment and there is no apparent justification for such a difference in treatment. Obviously if there was such a difference in treatment there could be a concern as to the constitutionality of the legislation but obviously such a concern would only arise if the view of the respondents that a decision not to revise a decision is not a decision which can be appealed.

77. I cannot accept the interpretation placed on the words used in s. 311 of the 2005 Act argued for by the respondents. Such an interpretation is anomalous and further, in my view, does not reflect the legislative intention which as I have noted, is intended to be generous and flexible. In my view, a decision not to revise is a decision, just as a decision to revise is a decision. The legislature did not confine appeals to the "original" decision. Therefore, in my view, the appellant herein was entitled to appeal the decisions not to revise her application for DCA. Accordingly, I would allow her appeal.