THE HIGH COURT

JUDICIAL REVIEW

Record No. 2025 1541 JR

[2026] IEHC 651

BETWEEN:

T.O. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND, R.O.)

APPLICANT

AND

THE HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on 1st October 2026

The parties have been pseudonymised. No identifying details are included in this judgment.

1. Introduction

1.1 This is an application for leave to apply for judicial review. The Applicant is a teenager, referred to herein as "Tom", who is represented by his mother. She submits that a decision to refuse to reimburse to her the cost of prescription weight loss medicine, sold under the brand name Wegovy, under the Respondent's hardship scheme, is irrational and in breach of her son's rights.

1.2 The Applicant has an arguable case on the basis that the decision makers may not have considered, or may have dismissed, potentially significant evidence

concerning a rare syndrome and the case requires further consideration at a full hearing where the relevant legal principles can be addressed.

1.3 The decision to refuse reimbursement was expressly made on the basis that Tom suffered from three named conditions, that an alternative drug was available, and it was noted that this decision that could affect numerous others. If the relevant syndrome had been considered, it is not clear whether the decision in respect of an alternative would have changed, nor is it clear if the decision would affect any, or many, other potential applicants. A potentially material factor is not addressed in the decision and there are distinguishing features in the main precedents opened to me. The case is an arguable one.

2. Leave to Apply for Judicial Review

2.1 The law in relation to leave applications is well established. In *G v. D.P.P.* [1994] 1 I.R. 374, the Supreme Court set out the following propositions: the applicant must show that the most appropriate remedy is judicial review. The burden of proof is on the applicant, who must establish an arguable case. To paraphrase O'Donnell C.J. in *O'Doherty v. Minister for Health* [2022] IESC 32, [2023] 2 IR 488, there must be a prospect of success. The Applicant need not establish a reasonable prospect of success, merely an arguable prospect of success.

2.2 Here, the Respondent opposes the grant of leave on the grounds that this Applicant has no prospect of succeeding in her case and this is the only issue which the Court must decide. In the Supreme Court in *Amariei v. Chief Appeals Officer* [2026] IESC 22, [2025] 2 ILRM 335, Donnelly J. notes (paragraph 95):

> "[*T*]*he court at the leave stage must take the applicant's case at its highest.*"

3. Brief History of Tom's Medical Condition

3.1 Tom is a teenager who is 7 feet tall and was (until relatively recently) severely overweight. There is evidence before the Court that his excess weight was due to a syndrome in respect of which a Consultant Geneticist has provided an

opinion noting that "*it is clinically evident*" that he suffers from this condition. The child's weight has led to numerous health difficulties, including orthopaedic complications. Tom also has a cardiovascular defect, further exacerbated by his weight, and suffers from autism and hyperphagia (described in exhibits as an insatiable hunger). In the past, Tom has displayed aggressive behaviour, complicating his care.

3.2 At different times in this litigation, the prescription drug in question was described as Ozempic and as Wegovy. These are brand names for the same active ingredient: semaglutide. The most recent prescription is for Wegovy, and this was the drug discussed at the last court hearing, so I will refer to this brand throughout this judgment. Tom was prescribed Wegovy in July of 2025. Since then, he has lost 4 stone of his body weight. He has reduced aggression. The effect on this teenaged boy has been striking. The child can now use the bathroom independently and has resumed exercising. The Applicant's mother reports significant improvements in family life generally.

3.3 Tom is a valid medical card holder, however, Wegovy is not generally reimbursable under any general medical or community drug schemes and the Applicant's mother has been paying for this drug herself. Wegovy costs €450 per month and the Applicant's mother cannot afford to continue to pay for the drug. She is a single parent and full-time carer. She has other children, including a child who suffers from a significant and chronic medical condition.

4. <u>Procedural History and Reliefs Sought</u>

4.1 In these proceedings, as originally drafted, the Applicant sought an order allowing him to commence proceedings without the payment of stamp duty, an order quashing the decision to refuse reimbursement, *mandamus* directing the Respondent to include Ozempic under the relevant scheme, various declarations in this regard, damages and costs. In his second application, the

only references to branded semaglutides are to Wegovy and this is the only drug that has been considered in this leave application.

4.2 When this case began, no decision had issued as the Applicant had not applied to the Respondent for supply of the drug under the provision now under scrutiny. This has now been remedied as the case was adjourned (without objection from the Respondent) to enable her to so apply.

4.3 On the 27th January 2026, the Applicant's mother applied for an individual discretionary arrangement under s.23 of the Health (Pricing and Supply of Medical Goods) Act 2013 whereby Wegovy would be supplied to Tom, notwithstanding that it was not a listed item. Section 23 allows the HSE at its discretion and subject to certain conditions to make arrangements to supply such an item. The application was refused in a decision dated 19th May 2026. The Respondent did not object to the application for leave being reframed to reflect this application and the consequent decision.

4.4 An issue was raised in a letter signed by Consultant Clinical Geneticist, Willie Reardon (exhibit 2, dated 10th March, 2022), who found that "*it is clinically evident*" that the Applicant suffers from a rare syndrome. The Respondent did not consider this syndrome in its written decision.

4.5 The renewed application in respect of the decision to refuse was heard on the 27th July 2026. The Applicant now seeks *certiorari* of the decision and declaratory relief. In submissions, his mother sought to quash the decision, primarily by reference to this syndrome. She pointed to the relatively low potential for others to require the same exemption noting that it was a rare condition. The Applicant's mother also relied on the inappropriateness of the proposed alternative drug, pointing to what she has characterised as less effective results, again with reference to the syndrome and her son's various co-morbidities. Primarily, she notes that it is less effective in achieving weight loss.

5. Exemption from Stamp Duty

5.1 This Court granted the Applicant an order permitting him to commence proceedings without payment of stamp duty in an *ex tempore* ruling having heard submissions and received affidavit evidence as to her limited means.

5.2 In *Airey v Ireland* (1979) 2 EHRR 305 the European Court of Human Rights held that Ireland violated Article 6 of the European Convention on Human Rights by failing to provide legal aid to an applicant for judicial separation. The central tenet of *Airey* is that economic barriers should not obstruct access to justice.

5.3 The courts are entitled to, and required to, charge a reasonable fee for the reasons set out in *Murphy v Minister for Justice* [2001] 2 ILRM 144.

5.4 The Applicant seeks to distinguish this case from that of *Murphy*, in which the Supreme Court refused to exempt the applicant from stamp duty. She bases her argument on the nature of the case, the specific hardship of this Applicant's circumstances and the public interest. *Murphy* involved modest court fees (£7-£10) payable in initiating a personal injury claim. The court fee in this case is comparably modest. However, there is evidence here that this Applicant has been unable to obtain legal aid, unlike the applicant in *Murphy*. Further, this case concerns a matter of public interest and the health of a child. The Applicant points out that *Murphy* predated the referendum amending our Constitution in 2015, which added Article 42A, further bolstering the rights of children in this jurisdiction and making their welfare a primary concern for the courts.

5.5 The Applicant's mother set out her expenses and income in an affidavit, exhibiting relevant supporting evidence. Taking into account the subject matter of the case, the unavailability of legal aid and her personal circumstances, including other duties at home and her very limited income comprising various State support payments, I made the exceptional direction that she be permitted to file papers on the Applicant's behalf without payment of the court fees as even this modest sum would impose a significant burden on this Applicant.

6. Statutory Discretion and the Garda Representative Association case

6.1 Under section 17 of the Health (Pricing and Supply of Medical Goods) Act 2013 [the 2013 Act], the Respondent must establish a list, referred to as the reimbursement list, which is a list of items in respect of which payment will be made to those who require the medication listed. Wegovy is not listed. Section 23 of the same Act allows the Respondent to add to the list. The section reads:

> 23.— The Executive may, at its discretion and subject to such conditions as it considers appropriate, make arrangements to supply an item, pursuant to section 59 of the Act of 1970, to a patient notwithstanding that the item is not a listed item if the Executive is satisfied that—
>
> (a) the patient requires that item for clinical reasons, and
>
> (b) there is no listed item which is a suitable alternative for that item in so far as that patient is concerned.

6.2 It is argued that the words "*at its discretion*", in section 23, mean that the Respondent may make its decision subject to such conditions as it considers appropriate. Even if satisfied that a patient requires a drug for clinical purposes and that there is no suitable alternative, it is not obliged to supply the drug. In fact, the two conditions are conditions precedent to exercising the discretion. Even if the Respondent decides, as it is entitled to do, that it will refuse to supply the drug, it is arguable that it must assess the circumstances of this patient on an accurate factual basis.

6.3 The Respondent argues that s.23 activates a discretion but does not create an entitlement. Counsel concedes that the decision is not beyond the scope of judicial review but argues that it is not appropriate to grant leave. The Respondent emphasises how wide the discretion is and how closely a decision as to reimbursement resembles a policy decision, not a quasi-judicial decision.

6.4 The Respondent points out that it has information in respect of its own budget and the needs of the public, and can consider these factors, and that this is more appropriate than the Court looking at one case in order to review its rationality.

It was submitted that section 23 is not beyond the reach of review, but that only if a decision is arbitrary or capricious can the Court interfere. The Respondent concludes that this leaves little scope for a rationality review.

6.5 The Respondent points, in particular, to paragraph 22 of the judgment of Charleton J. in *Garda Representative Association v Minister for Finance* [2010] IEHC 78, [the GRA case] in support of its core argument that the more closely a decision appears to align with a political choice, the more care the Court should exercise in interfering with a discretion. That paragraph comprises a lengthy quotation from Costello J. in *O'Reilly v Limerick Corporation* [1989] ILRM 181. There, the High Court determined that a decision in respect of distribution of housing funds was not amenable to judicial review.

6.6 Charleton J. also acknowledges that an apparent discretion may, in fact, be an entitlement where certain criteria are required by law, concluding that this may occur "*once the detailed qualifying criteria set out in legislation are met*." (At paragraph 18). He drew attention to cases of naturalisation and citizenship, noting that these were "*apparently unfettered by particular qualifying criteria*". The Respondent makes the same argument here, submitting that supplying a drug under section 23 is entirely at the discretion of the Respondent and not a matter that can be reviewed or assessed as though it was an entitlement.

6.7 Paragraph 26 is useful in deciding if the GRA case requires this Court to find against the Applicant, even at the leave stage. Having referred to the uphill battle faced by the GRA in terms of the clear language of the statute and the requirement that any decision be just and equitable, Charleton J concluded:

> *26. ..., I would find it impossible to hold in favour of the applicant either on the basis of the argument so eloquently advanced or to imagine any situation, absent a Minister declining to consider a submission at all, where the court could declare such a decision unlawful by reason of the improper exercise of a discretion. I am therefore compelled to hold that the submission to the*

respondent was fully and adequately considered by him in accordance with the law as I understand it."

6.8 In summary, the relevant Act was clear in its terms regarding the Gardaí, and the decision itself was not challenged in terms of its factual basis but in terms of the policy reasons for so deciding. The only potential unlawfulness identified was a failure to consider the submission at all. It is arguable that this includes the failure to consider a material factor in submissions regarding an individual patient, as set out above, in assessing the conditions set out in section 23.

7. <u>Reviewability and Public Resources</u>

7.1 In line with the authorities cited, including *B.M. v Chief Appeals Officer* [2024] IESC 51, it is not appropriate for a judge to substitute her own decision for that of the Respondent as the courts have no access to the information that would allow judges to make a fair decision in terms of distribution of State resources. However, if a decision was made having ignored or irrationally discounted a relevant consideration thus leading to a conclusion that was, arguably, irrational, a judge may take the view that it should be quashed and remitted to the decision makers for a decision based on accurate facts including, as argued here, evidence as to the potential financial effects on the public purse and as to the appropriateness of an alternative drug, if evidence of the syndrome is considered. There was no comparable omission in *B.M.* (another case on which the Respondent relies) where the allocation to the applicant of a limited carer's allowance was challenged.

7.2 The Respondent directed me to paragraph 17 – 307 of *Administrative Law in Ireland* (5th ed, 2019 Hogan & Morgan). The relevant part reads:

The majority of cases on the control of discretionary powers concern a situation in which the public body has taken some positive action which is inimical to the applicant's individual interest. However, there are a minority of cases … which, in a period of contracting public expenditure, would be likely to expand in

number—in which the applicant's case is that it was unreasonable of the respondent public body to refrain from acting. And in response, the public body contends, typically, as a preliminary issue, that the claim is not justiciable; and, if necessary as a substantive matter, that (given all the competing claims) it simply did not have the resources to take the action demanded by the applicant... A successful claim in this area would be likely to mean that the same resources could not be used elsewhere and it would be impossible for a court to make the necessary comparison. In such cases, the courts would be slow to accede to the applicant's argument.

7.3 This passage is preceded by descriptions of several cases in which the separation of powers prevailed over the supremacy of the Constitution, that is, where the Applicant was unsuccessful (paragraph 17–257). The section begins: "*The dominant judicial view would appear to be that all discretionary powers are reviewable. This may be illustrated by Duff v Minister for Agriculture.*" (*Duff* is reported at [1997] 2 IR 22). This is not a test that is clear or easy to apply, therefore. As such, while the Respondent has a wide discretion and this case *may* not ultimately succeed, it is not appropriate to decide it at leave stage.

7.4 Section 23, by its own terms, allows the discretionary supply of items if there is a clinical need and no adequate alternatives for that patient. This section was described in oral submissions as "*the release valve for hard cases*." While the section provides for a discretionary power, there remains the argument that such powers must not be arbitrarily or capriciously exercised. The Respondent concedes that the exercise of such a power is reviewable. I also note, though it is neither dispositive nor even perhaps significant, that the GRA case was not a leave application but a full hearing, suggesting that leave had been granted.

7.5 The Respondent submits that the principles of the GRA case apply and also resists review of the decision's rationality. This last argument was made despite the decision makers' express concern that the Respondent must view the issue as one that may potentially affect many patients and thus, a decision that

cannot be considered on the circumstances of this Applicant alone. It is simply not clear if this consideration would apply at all if the rare syndrome identified in the evidence here had been a factor in the decision.

8. Evidence before the Decision Makers

8.1 The Respondent submitted in oral argument that evidence of a syndrome was not provided to the decision makers and should not be considered. The decision itself refers to the pending genetic test in respect of that syndrome, which suggests that the decision makers were aware of the potential relevance of the condition. However, it is not clear whether the decision makers were aware of the clinical diagnosis but did not consider it relevant, or if they were not given a copy of the letter containing that diagnosis. It is not apparent from the written decision which of these events occurred. This issue (whether a clinical diagnosis was discounted, ignored or never provided) may affect the issue of rationality, even accepting the high bar which the Applicant must overcome in a full hearing given the large measure of discretion involved here.

8.2 The deponent for the Respondent, Pat Healy, does not refer to the relevant letter. However, in the written decision itself (at page 4 of 21), the decision makers conclude that Tom would likely satisfy most and probably all of the criteria necessary for Saxenda [the brand name of the alternative drug proposed] reimbursement "*based on an examination of the Court papers*".

8.3 Two potential scenarios arise here. First, that the letter from March 2022 was before the decision makers, in which case the arguable ground identified is the failure to consider or address a potentially material factor. Indeed, the decision appears to have been made on the express basis that this condition was not a factor, without explaining why that was so.

8.4 Second, the report may not have been submitted by the Applicant to the decision makers in her most recent application. It may have been assumed that the Respondent had knowledge of it and that the decision would refer to it.

That may raise issues of procedural fairness and evidential burdens at different stages. It is not possible that the report was never before the Respondent in circumstances where it was exhibited in the first application made by the Applicant in 2025. The Court will not resolve these issues of fact at this stage. The references in the written decision to the syndrome and to the court papers, together with the contents of the Applicant's initial application, provide a basis for an argument that a material aspect of the case was not addressed.

8.5 Without going into exhaustive detail, a consideration of this case will involve examination of the medical issues arising and what was available to the decision makers, no matter how cursory. The decision is reviewable and the legal consequences of omitting or discounting material evidence cannot be regarded as clearly determined by the authorities cited by the Respondent.

8.6 This leads me to the view that the case cannot be decided fairly at this leave stage, where the Applicant need only establish an arguable case.

9. <u>Conclusions</u>

9.1 The Applicant has an arguable case in respect of the application to quash the decision dated 19th May 2026 refusing to supply this patient with Wegovy based on clinical need and in the absence of an alternative, under s.23 of the 2013 Act.

9.2 The Respondent relies on authorities which urge judicial restraint, but which do not prevent a grant of leave in circumstances such as those outlined here.

9.3 The Applicant has leave to seek the first and third reliefs set out in the amended statement of grounds, namely, *certiorari* and the usual residual relief expressed as "*such other relief as the court deems just*." The declarations sought refer, in detail, to the suitability of a named alternative drug and are not necessary reliefs so leave in this respect is refused. The basis for the application to quash the decision includes any such considerations as are relevant and the broader claim in the residual relief ensures that any necessary declaration can be granted, if warranted, after a full hearing of the case.