THE COURT OF APPEAL

Record No. 2014/1326

[Article 64 transfer]

Kelly P.
Hogan J.
Edwards J.

BETWEEN/

J. McE.

APPELLANT

- AND -

THE RESIDENTIAL INSTITUTIONS REDRESS BOARD

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 3rd day of February 2016

1. This appeal raises once again the difficult question as to how the discretionary power conferred on the respondent Board by s. 8(2) of the Residential Institutions Redress Board Act 2002 ("the 2002 Act") to extend time so as to permit late applications should be interpreted. The Board refused the applicant's application to extend time. In his judgment in the High Court (*JMcE v. Residential Institutions Redress Board* [2014] IEHC 315) Moriarty J. rejected the argument that this sub-section had been misinterpreted by the Board and accordingly refused to quash that decision. The applicant, Mr. McE., now appeals to this Court against that decision.

2. Section 8(2) of the 2002 Act gives the Residential Institutions Redress Board ("the Board") power to extend time for the making of late applications "at its discretion and where it considers there are exceptional circumstances." It is acknowledged that the applicant in the present case is illiterate and drank heavily at the relevant times, yet the Board did not consider that this amounted to "exceptional circumstances" within the meaning of s. 8(2) of the 2002 Act. It concluded that these education and social disadvantages were not such as "might have prevented the existence of the Redress Board from coming to his attention during the relevant period."

3. The net question which arises is whether the Board had correctly defined the terms "exceptional circumstances." The applicant maintains that the Board misdirected itself in law regarding the meaning of this phrase and that its decision of 17th January 2013 should accordingly be quashed. The issue arises in the following fashion.

The background to the 2002 Act

4. The 2002 Act represents society's belated response to the appalling treatment of generations of children in residential care. Few who endured such treatment have emerged unscathed. The cases which came before the Board and the courts arising from this period are tragically replete with searing accounts of physical cruelty, sexual abuse, emotional neglect and institutional indifference to the fate of those who were condemned by society to be raised in such an environment.

5. The 2002 Act was accordingly enacted by the Oireachtas with a view to making some recompense to those whose lives were broken, ruined or damaged in this fashion. The Long Title to the 2002 Act provides:

> "An Act to provide for the making of financial awards to assist in the recovery of certain persons who as children were resident in certain institutions in the State and who have or have had injuries that are consistent with abuse received while so resident and for that purpose to establish the Residential Institutions Redress Board to make such awards and to provide for the review of such awards by the Residential Institutions Review Committee and to provide for related matters."

6. It is against this background that the Supreme Court has recently confirmed that the 2002 Act is a remedial statute: see *O'G v. Residential Institutions Redress Board* [2015] IESC 41. It follows, therefore, that the 2002 Act should be construed "as widely and liberally as can fairly be done": see, e.g., the comments of Walsh J. in *Bank of Ireland v. Purcell* [1989] I.R. 327, 333.

The application in the present case

7. This was the background to the 2002 Act. The applicant now seeks to quash a decision of the Board dated the17th January 2013, which refused to extend time beyond the statutory time limit. The Board did not consider that the applicant had established the existence of "exceptional circumstances" pursuant to s. 8(2) of the 2002 Act for making applications for redress as would have enabled him to apply to the Board for compensation. Section 8 of the 2002 Act provides:

> "(1) An applicant shall make an application to the Board within three years of the establishment day.
>
> (2) The Board may, at its discretion and where it considers there are exceptional circumstances, extend the period referred to in subsection (1).
>
> (3) The Board shall extend the period referred to in subsection (1) where it is satisfied that an applicant was under a legal disability by reason of unsound mind at the time when such application should otherwise have been made and the applicant concerned makes an application to the Board within three years of the cessation of that disability."

8. The establishment day in question was the 16th December, 2002, so that the closing day for applications for the purposes of s. 8(1) of the 2002 Act was 15th December, 2005. The applicant did not, unfortunately, make an application to the Board until 16th September, 2011. This was, as it happens, one day before the ultimate cut-off date in respect any further applications to the Board

under the 2002 Act. The Board can no longer entertain any further applications after 17th September, 2011: see s. 8(4) of the 2002 Act (as inserted by s.1 of the Residential Institutions Redress Board (Amendment) Act 2011)).

9. The applicant was born in 1958. He contends that he resided as a boy at St. Kieran's Industrial School for Boys where he was abused within the meaning of s. 1 of the 2002 Act. He stated that he was illiterate and that he drank heavily during the years 2002-2005. While he was aware from radio and television of various controversies associated with child sexual abuse, he assumed that such controversies were exclusively associated with clerical sexual abuse. His case is that he was only made aware of his possible entitlement to apply for redress from the Board when his girlfriend saw an advertisement from a local solicitor in September 2011 immediately before the absolute cut-off date.

10. The challenge in the present proceedings is based on the manner in which the Board interpreted its jurisdiction to extend time under s. 8(2) of the 2002 Act. In essence, the applicant's case is that he was not aware of his entitlement to possible redress until 2011 (*i.e.*, well after the original closing date in December 2005) and that this constitutes or, at least, is capable of constituting "exceptional" circumstances within the meaning of the 2000 Act.

The reasons of the Board
11. The Board gave very detailed reasons for the conclusion in its decision of the 17th January, 2013 that the applicant had not in fact established the existence of exceptional circumstances for the purposes of s. 8(2) of the 20002 Act. The following passages (which are quoted below) may nevertheless be taken as representative of the reasoning of the Board.

12. The Board accepted that the applicant was illiterate and that he had been a heavy drinker. This, however, was not dispositive of the matter.

13. The Board first noted that the there was no definition of the phrase "exceptional circumstances" contained in the 2002 Act:-

> "However, some guidance is to be found in the Oxford English Dictionary's definition of "exceptional circumstances" as being of "the nature of forming an exception; out of the ordinary course, unusual, special". The same dictionary defines "exceptional case" as one which is "excepted", a particular case which comes under the terms of a rule in which the rule is not applicable; a person or thing that does not conform the general rule affecting any other individuals of the same class". In essence the Board considers that "exceptional" means something out of the ordinary. The circumstances must be unusual, probably quite unusual, but not necessarily highly unusual. The definition outlined throughout provides a useful framework from which it is clear and make it appropriate for the Board to apply a test of uniqueness in these cases."

14. While the Board accepted that it was probably impossible to give an exhaustive definition of the term on a priori basis, it went on to say:

> "However, such an approach does not prevent the Board from envisaging or surmising what sort of exceptional circumstances in a particular case might be considered exceptional, *e.g.*, the effect or impact of mental or physical health problems or conditions on a particular individual; personal family circumstances whether in the applicant's own life or in the lives of others for whom he or she cares; communication problems; or difficulties with legal advice. Any of these considered circumstances prevailing at a relevant time could have the effect of preventing or inhibiting an applicant from making an application within the prescribed period and could be considered exceptional."

15. The Board continued, however, that it was of the view that:

> "The Oireachtas, in formulating a test for the purposes of applications for an extension of time in which to bring applications for redress, saw fit to provide in s.8(2) of the 2002 Act a test of exceptional circumstances, as opposed to a state of knowledge test. The applicant's assertion that he did not become aware of the existence of the Redress Board until approximately three or four years ago is, on application in that he has not established exceptional circumstances which might have prevented the existence of the Redress Board from coming to his attention during the relevant period. The Board has found that he was not so afflicted by alcohol difficulties that the existence of the Redress Board was prevented from coming to his attention during the relevant period, and it is noteworthy that he gave sworn testimony that throughout that period he watched either the six o'clock news or the nine o'clock news on most days.
>
> Accordingly, taking all relevant factors into account the Board refuses the applicant's application for an extension of time in which to bring his substantive application for redress. No evidence has been adduced that he was at any material time of unsound mind to such an extent as to be unable to bring his application, and the Board has not considered his application for an extension of time under the provisions of s.8(3) of the Act [by reference to this consideration]."

16. At the heart of this appeal is the applicant's contention that the Board proceeded from the wrong premise in its interpretation of the words "exceptional circumstances." There are, of course, two distinct questions here and which, in the end, may merge into each other, at least so far as the circumstances of this case are concerned. The first question is whether the Board has correctly *identified* the meaning of this statutory phrase. The second is whether this definition has been correctly *applied* by the Board to the facts of the present case.

17. The former question is, of course, a pure question of statutory interpretation and vires and, in this context, arguments based on rationality or reasonableness really do not arise for consideration. It would be no answer, therefore, for the Board to show that its interpretation of the section was a reasonable one if that interpretation was incorrect as a matter of law: see, *e.g.,* the comments of Barr J. in *Shannon Regional Fisheries Board v. An Bord Pleanála* [1994] 3 I.R. 449, 456 and those of Clarke J. in *Cork County Council v. Shackleton* [2008] 1 I.L.R.M. 195, 215. As I stated on this very point in my judgment in *AG v. Residential Institutions Redress Board* [2012] IEHC 492:

> "Recalling the time-honoured words of Marshall C.J. in *Marbury v. Madison 5 U.S.* 137 (1803), it is, of course, "emphatically the province and duty of the [the judicial branch] to say what the law is." As that duty represents a core function of the judicial branch, it is the judicial duty to pronounce on whether an interpretation of a statute proffered by an administrative agency such as the Board is correct or otherwise."

The decision of the High Court
18. In the High Court Moriarty J. followed the earlier decision of Kearns P. in *MG v. Residential Institutions Redress Board* [2011] IEHC

332 where he had rejected a "state of knowledge" test as being the governing criterion for the purposes of s. 8(2) of the 2002 Act. Moriarty J. then continued:

> "I am in agreement with Kearns P. that, particularly in the context of the Oireachtas having decided against a state of knowledge test as the sole criterion for assessing late applications, it was appropriate that all relevant matters, including the access to publicity regarding the existence and purpose of the respondent, along with such matters as his education, health and work record, and length of delay in applying, were inquired into in the course of the hearing. As pointed out by Kearns P. in his judgment [in *MG*], the aspect of access to information about the respondent could be material in either direction, so that, as instanced by him, an applicant who had been in a distant country without any access to information about the respondent, during the relevant period would seem almost inevitably entitled to succeed on a late application. The hearing of applications cannot be conducted in a vacuum, and it is surely appropriate that all relevant and material circumstances be inquired into and assessed in the round at late application hearings to enable a balanced assessment to be arrived at."

19. Moriarty J. accordingly rejected the claim that the Board had misconstrued the relevant provisions and dismissed the application for judicial review.

20. The decision to which Moriarty J. had referred was that of Kearns P. in *MG v. Residential Institutions Redress Board* [2011] IEHC 332. In that case the applicant who had moderate intellectual difficulties had failed to make an application until several years after the closing time. She had been sent to an industrial school for a ten year period where she claimed that she had been subjected to physical and emotional abuse. Even though she had been residing in Ireland, it appears to have been accepted by the Board that she only learnt about the existence of the scheme when she casually met another acquaintance of hers who had been in the same institution at the same time.

21. Kearns P. upheld the conclusion of the Board that there were no exceptional circumstances as would warrant an extension of time:

> "It is important perhaps to stress that this approach does not preclude consideration by the Board of a "state of knowledge" approach to the interpretation of the words "exceptional circumstances". For example, I would have no doubt but that the Board would regard as "exceptional circumstances" a situation where an applicant had been residing in a far away jurisdiction, or for some other reason had been cut off from all sources of communication, so that the existence of the Scheme could only have come to that applicant's knowledge after the time limit had expired. In that situation the opportunity to possess the requisite state of knowledge and the existence of exceptional circumstances would amount to one and the same thing."

22. Kearns P. nonetheless went on to add that:-

> "However I am satisfied in this case that even on an interpretation of "exceptional circumstances" which includes extending the time where an applicant could not reasonably have known of the existence of the Board or the compensation scheme, the outcome must be the same in this particular case for the reasons to which I will now turn. …. [T]here were ample means of acquiring knowledge available to this applicant, and indeed any other applicant living in this jurisdiction over the relevant period of time. Not only was there a national furore taking place on an almost daily basis in the print, radio and television media, there were also extensive advertisements placed by the respondent body on a nationwide basis."

23. Kearns P. then observed that he was satisfied that the applicant's intellectual difficulties were not so severe as contended for, so that the Board was also entitled to reach the conclusion that these difficulties did not in themselves take her case into the category of exceptional circumstances.

Did the Board properly construe the provisions of s. 8(2) of the 2002 Act?

24. It is clear from the decision of the Board that it considered that the words "exceptional circumstances" in s. 8(2) of the 2002 Act should be interpreted as meaning exceptional circumstances "which might have prevented the existence of the Redress Board from coming to [the] attention [of the applicant] during the relevant period." As I have already observed, the Board concluded that the applicant failed this test. The real question, however, is whether this is the correct meaning of these words in s. 8(2) of the 2002 Act.

25. In my judgment, the Board applied the wrong test. Had the Oireachtas sought to circumscribe the discretion of the Board in this manner, it could readily have stated that an applicant seeking an extension of time under s. 8(2) must show (i) the existence of exceptional circumstances and (ii) that these exceptional circumstances were such as to prevent the either existence of the Board or the redress scheme coming to his attention within the appropriate three year period. The Oireachtas did not so define the nature of the discretion: it simply required that the Board might extend time "where it considers there are exceptional circumstances."

26. In passing it might be observed that the statute book provides many instances of where the Oireachtas has given guidance as to the meaning of the phrase "exceptional circumstances". A contemporary example may be found in s. 177A(1) of the Planning and Development Act 2000 (as inserted by s. 57 of the Planning and Development (Amendment) Act 2010) which provides that the phrase "exceptional circumstances" shall be construed in "accordance with s. 177D(2"). Section 177D(2) then provides that "in considering whether exceptional circumstances exist" An Bord Pleanála shall have regard to seven enumerated criteria.

27. It is true that the context of the Planning and Development Act 2000 is entirely remote from that of the present case. I merely cite this provision to demonstrate that so far as s. 8(2) of the 2002 Act is concerned the Oireachtas could either have defined what it meant or understood by this term or otherwise specified the criteria which the court was called upon to apply. The fact that it did not do so provides some textual evidence that the discretion to extend time is thus expressed to be at the highest level of generality. As I said in my earlier judgment in respect of the meaning of this sub-section in *AG:*

> "….the Oireachtas simply intended to leave the Board with the greatest possible flexibility to deal with the wide variety of possible circumstances in which late applications might be made."

28. In this regard, the Board is accordingly given the widest possible discretion to extend time once it is satisfied that there exceptional circumstances such as would make it just and equitable that time should be extended. Contrary to what the Board appears to have required in the present case, there is no necessity to show that the exceptional factors somehow precluded the applicant from making a late application or learning of the existence of the Board or the redress scheme.

29. How, then, is the existence of the exceptional circumstances to be assessed? Is the existence of exceptional circumstances to be measured by the standards of the general population? Or, as counsel for the Board, Mr. McDonald S.C., so powerfully argued in the course of the appeal, is it entitled to look at the circumstances of the class of potential late applicants and measure the concept of exceptionality for the purposes of s. 8(2) of the 2002 Act by reference to that narrow class as distinct from the general population as a whole?

30. This issue is of some significance so far as the circumstances of the present case (and, indeed, other similar cases) is concerned. As I summed up the issue in my judgment in AG:

> "How different matters with regard to the actual experience of the Board with regard to the operation of the 2002 Act were. In the nature of things, these potential applicants experienced what was invariably a degrading and humiliating life experience. They were often left with rudimentary education, little life skills, an acute lack of self confidence and severe emotional trauma. They often faced an aimless existence, with no clearly defined path of life in front of them and with many of the doors of opportunity and advancement open to the rest of society closed firmly shut in their faces. It is no wonder that many were lured by the temporary comforts of alcohol, tobacco and drugs as they struggled to cope with their existence.
>
> It is perhaps equally not surprising that former inmates so traumatised by their experience might allow a three year period to expire without taking any action to seek redress or, alternatively, fail to pay any or, at least, sufficient attention to the existence of the scheme during that period. The Board frankly acknowledges that this has been an all too common experience so far as potential applicants are concerned. It is in its own way a measure of the neglect and trauma which such persons must have suffered and the extent to which their horrible experiences rendered them effectively dysfunctional that experience has shown that the failure on the part of such persons to apply for redress under the scheme is not unusual."

31. The resolution of this issue is brought into sharp relief in the present case having regard to the fact that the applicant is illiterate. While the Board found that this fact did not *of itself* prevent this applicant from learning of the existence of the redress scheme – given, for example, the discussion of the existence of the redress scheme on radio and television during this period – nevertheless, judged by the standards of the general population, the fact that the applicant is illiterate is itself an exceptional circumstances which undeniably hampered his ability to learn of the redress scheme and to seek appropriate redress.

32. If, therefore, the test is one of exceptionality *simpliciter* which is judged by reference to the standards of the general public, then, proceeding from this definition, it would be open to Board to apply that definition to the circumstances of the present case and to extend time pursuant to s. 8(2) of the 2002 Act on the ground that the existence of exceptional circumstances had been established.

33. For my part, I think that this is the appropriate method of construing these words as they appear in s. 8(2) of the 2002 Act. I consider that there are two reasons why the issue of exceptionality should be measured by reference to the standards of the general public.

34. First, the Board argued that its experience has been that as very many late applicants suffer from acute social and educational disadvantages (such as alcoholism and illiteracy), these conditions in themselves could not be regarded as "exceptional circumstances" in themselves, precisely because they were so common in the class of persons to whom the2002 Act was aimed. Yet it must be noted that the 2002 Act is a public general statute which, by definition, is to be applied and understood by reference to the standards of the general public.

35. It is true that a statute which is aimed "at particular class" may sometimes "use the word or expression in question in either a narrow or an extended connotation, or as a term of art", so that the word or express in question should be interpreted in that fashion: see *Inspector of Taxes v. Kiernan* [1981] I.R. 117, 121, *per* Henchy J. This rule of construction is, however, concerned with the meaning of the relevant words as used by that class of persons in a particular context, often associated with trade or commercial usage. Where that usage differs from the common or ordinary meaning, then in some circumstances, the relevant word or expression used in the statute may held to bear that specialised meaning.

36. It does not, however, follow that a standard of general application prescribed in the general words of a statute (such as "exceptional circumstances") should be given a particular and more limited construction by reason of the actual post-enactment experience of the administrative body in dealing with that limited class of persons.

37. Second, in any event, the Supreme Court has recently confirmed in its decision in AG that the 2002 Act is a remedial statute. It is therefore appropriate that the power to extend time under s. 8(2) should be given a wide and liberal interpretation and there is nothing at all in the sub-section to suggest the contrary. All of this re-enforces the conclusion that s. 8(2) of the 2002 Act should be interpreted as referring to the existence of exceptional circumstances *simpliciter* and without reference to the necessity, for example, to demonstrate that such circumstances prevented an applicant from either learning of the existence of the Board or from making a timely application to it.

Conclusions

38. Summing up, therefore, I am of the view that s. 8(2) of the 2002 Act should be given a broad and liberal interpretation as befits a remedial statute of this kind. This means that an applicant seeking an extension of time need only demonstrate the existence of exceptional circumstances *simpliciter*, with the standard of exceptionality measured by reference to contemporary standards prevailing within the general public, as distinct from the more limited class of persons who might have applied under the 2002 Act. It is not necessary for the applicant to go further and show that such circumstances impeded or prevented him or her from making an application to the Board within the original three year period or that such circumstances contributed to a lack of knowledge regarding the existence of either the redress scheme or the Board itself.

39. Inasmuch as the Board took the view that the applicant was required to show that the exceptional circumstances invoked here (illiteracy) prevented him from making the application within time, I believe that the Board erred in law by adding a qualification to the concept of what might constitute "exceptional circumstances" as if this had been so prescribed by the sub-section, when it was not.

40. In these circumstances, I would accordingly allow the appeal. I would quash the decision of the Board and remit the matter to it for further consideration in the light of this judgment in the manner provided for by Ord. 84, r. 27(4).