THE COURT OF APPEAL

Finlay Geoghegan J.
Birmingham J.
Irvine J.

Appeal Number: 120/2014

Record Number: 2012/1037 JR

[Article 64 Transfer Case]

Avril Malone

Plaintiff/Appellant

and

The Minister for Social Protection

Defendant/Respondent

Judgment of the Court delivered on the 10th day of December 2014 by Ms Justice Mary Irvine

This judgment relates to an application brought by the respondent, The Minister for Social Protection, seeking an order that this Court strike out the appeal of the appellant ("Ms. Malone"), against the decision and judgment of the High Court (Hanna J.) delivered on 25th October 2013, on the grounds that the said appeal is moot.

Background Facts

1. Ms. Malone, who is a nurse by profession, is the mother and primary carer of a young boy ("G"), who was diagnosed with autism in November 2011.

2. On the 28th March 2012 Ms. Malone applied to the respondent pursuant to Chapter 8 A of the Social Welfare Consolidation Act 2005 ("The 2005 Act") (as inserted by section 15 of the Social Welfare and Pensions Act 2008 and amended by section 26 of the Social Welfare (Miscellaneous Provisions) Act 2010), for a domiciliary care allowance ("DCA") in respect of G. That allowance is a statutory payment made in respect of children who meet the following qualifying criteria, namely:-

> (a) 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,
>
> (b) the level of disability caused by the severe disability is such that the child is likely to require full time care and attention for at least twelve consecutive months.

3. On 10th May 2012 Ms. Malone's application for the DCA was refused on the grounds that the first deciding officer was not satisfied that G met the requisite statutory criteria. She then sought a review of that decision pursuant to the provisions of s. 301 of the 2005 Act for which purpose she submitted additional evidence. On 26th October 2012, a second deciding officer confirmed the original grounds of refusal and refused to revise the earlier decision.

4. On 17th December 2012 Ms. Malone sought and obtained leave from the High Court (Peart J.) to apply, by way of Judicial Review, to quash the decisions made by the respondent through his deciding officers in refusing to grant the DCA on grounds which were particularised at paragraph D of the Statement of Grounds required to support the application for Judicial Review.

5. The relief claimed by Ms. Malone at the full hearing in the High Court may be summarised as follows;

> 1) A declaration that the respondent was obliged by statute and/or fair procedures and/or natural and constitutional justice, to carry out a medical examination on G given the alleged existence of a conflict in the medical evidence.
>
> 2) A declaration that the respondent, in failing to disclose how the conflict in the medical evidence had been resolved, had erred in law and/or was in breach of statutory duty and/or of fair procedures and/or natural and constitutional justice.
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> 3) A declaration that the said decisions were unlawful and/or invalid and in breach of fair procedures and/or natural and constitutional justice, in so far as reasons were not furnished in support of the said decisions.
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> 4) An order of certiorari quashing the decisions of the respondent's refusing Ms. Malone's application for the DCA.

6. In his judgment of 25th October 2013, Hanna J. reached the following conclusions in relation to the aforementioned issues namely:-

> (a) That while the statutory scheme provided for the power to carry out a medical examination, having regard to the fact that there was no dispute on the medical evidence, there was no duty on the respondent, on the facts of this case, to conduct such an examination on G.
>
> (b) That the reason underlying the decisions of the respective deciding officers was clear and unambiguous. They had rejected Ms. Malone's application on the basis that on the evidence submitted she did not qualify for the DCA as G did not meet the statutory criteria. In this regard he referred to the statement made by the first deciding officer on 10th May 2012 which stated:
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> > "...while the diagnosis of your child's disability is not in question, the medical evidence provided does not indicate that the extra care and attention required is substantially in excess of that required for a child of the same age who

does not suffer from your child's condition."

(c) That the applicant's true remedy, having regard to the comprehensive appeals mechanism provided for in the legislation, lay not in Judicial Review proceedings but in her entitlement to appeal the decisions of the deciding officers pursuant to s.311 of the 2005 Act.

7. For the aforementioned reasons the learned trial judge dismissed the proceedings and with the agreement of the respondent made no order as to costs.

8. Following the decision of the Court, Ms. Malone pursued with success her statutory right of appeal against the respondent's refusal of the DCA under section 311. By decision dated 17th January 2014 her application was allowed with retrospective effect from 1st April 2012, that being the date upon which she had first sought the said allowance.

9. Notwithstanding her success on appeal, on 18th March 2014 Ms. Malone lodged a Notice of Appeal against the decision and judgment of Hanna J. It is that action which has led to the present application on the part of the respondent to strike out the appeal on the grounds that the issues are entirely moot.

Submissions

10. Counsel on behalf of the respondent submitted that on any formulation of the concept of "mootness" the issues raised on the appeal of Ms. Malone must be considered moot. At the time she lodged her appeal there was no live concrete dispute remaining between the parties and the relief sought, even if granted, could have no impact on the parties. Neither would it resolve any controversy affecting or potentially affecting the rights of the parties.

11. Insofar as Ms. Malone apprehended that at some future review of her entitlement to claim the DCA the issues on the present appeal would be material, Counsel for the respondent submitted that whatever that controversy might be it could not be the same controversy as arose for consideration in these proceedings. The controversy, stemming from s. 300 of the 2005 Act was "spent" having regard to her successful appeal under section 311. Any dispute that might arise in the future would be a different controversy and would involve a consideration of new facts and would be carried out under a different provision. Indeed in light of the affidavit evidence, such a review was entirely hypothetical.

12. In support of his submissions Counsel for the respondent relied on a number of recent decisions concerning the issue of mootness including Goold v. Collins and others [2004] IESC 38, Cunningham v. The President of the Circuit Court [2012] 3 I.R. 222, O'Brien v. PIAB [2007] 1 I.R. 328 and Borowski v. Canada [1989] 1 S.C.R. 342.

13. Counsel for the appellant submitted that regardless of the fact that she was now in receipt of the DCA, there nonetheless remained a live and concrete dispute between the parties in which both parties had an interest. Her right to that allowance was subject to ongoing review which was likely to occur every two years. At that stage she would face an identical situation to that which she had faced when she first applied for the DCA and at the time of review she would have to prove her entitlement to retain this allowance. While the review is provided for under s. 301, the decision is taken under s. 300 using the same process that applies to applications under section 300. Ms. Malone feared that she would be subjected to the same procedural unfairness on such a review. Hence the importance of a determination as to whether the deciding officer is required to give reasons beyond those actually given and whether, in the event of a dispute on the medical evidence, that conflict must be resolved by reference to a medical examination. He submitted that the Court was entitled to look to these anticipated future circumstances and was not confined to an examination of the past when determining the issue of mootness.

14. Counsel for the appellant maintained that the proceedings were never about Ms. Malone's entitlement to receive the DCA. They were about the manner in which the respondent had exercised his statutory powers under s. 300 of the 2005 Act and the fact that she was now in receipt of the allowance did not mean that the outstanding issues did not warrant a final determination. He submitted that the issues before the Court concerned the construction of a statutory provision material to the manner in which the respondent would carry out its statutory functions in the future. That being so the appeal was not only of relevance to Ms. Malone in respect of any potential review of her entitlement to the DCA but was also of real relevance to the very significant number of persons entitled to receive the DCA. In this regard he relied upon the decision of Murray C.J. in O'Brien v. Personal Injuries Assessment Board [2007] 1 I.R. 328, Irwin v. Deasy [2010] IESC 35 and NAA v. Refugees Applications Commission and Others [2007] 2 I.R. 787.

15. In reply Counsel for the respondent stated that the facts of the present case were entirely different to those which arose for consideration in O'Brien. Each of the issues in Ms. Malone's case had been dealt with by Hanna J. on the facts of her case and that in the particular circumstances he had concluded that her arguments as to fair procedures had not been made out. That type of exercise could not be compared to the circumstances under consideration in O'Brien where the Court in the course of resolving the controversy between the parties, made a declaration as to the interpretation of a particular statutory provision which had the effect of constraining PIAB as to how it would exercise its powers if dealing with the applicant in respect of some future claim.

16. As to the peril apprehended by Ms. Malone regarding any potential review of her entitlement to receive the DCA, Counsel for the respondent submitted that any such review was somewhat hypothetical given the affidavit evidence filed on behalf of the respondent. However, even if such a review were to take place, the Court could not be satisfied as to what procedures would be employed by the respondent at that stage or that the issues that presented on the present application would re-present themselves at that time.

The Law

17. The circumstances in which proceedings may be said to be moot have been considered in a significant number of judgments in relatively recent times and it is probably worthwhile identifying the basic principles which emerge from them.

18. In Goold the respondent maintained that the Judicial review proceedings which had been instituted by the applicant were moot by reason of a settlement agreement executed by the parties. In the course of his judgment Hardiman J. considered the circumstances in which the issue of mootness might arise stating as follows:-

> "A proceeding may be said to be moot where there is no longer any legal dispute between the parties. The notion of mootness has some similarities to that of absence of locus standi but differs from it in that standing is judged at the start of the proceedings whereas mootness is judged after the commencement of proceedings. Parties may have a real dispute at the time proceedings commence, but time and events may render the issues in proceedings, or some of them, moot. If that occurs, the eventual decision would be of no practical significance to the parties."

He also referred to the decision of Finlay C.J. in Murphy v. Roche [1987] 1 I.R.106 where, in dealing with the same issue the Chief Justice stated at p. 110:-

> "There can be no doubt that this court has decided on a number of occasions that it must decline, either in constitutional issues or in other issues of law, to decide any question which is in the form of a moot and the decision of which is not necessary for the determination of the rights of the parties before it."

19. In the course of his judgment in Goold Hardiman J. also referred to the leading Canadian case of Borowski in which the Supreme Court of Canada made a number of significant pronouncements on matters material to the issue of mootness. The court stated at p. 4 that:-

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision".

20. As to the circumstances in which an appeal may not be considered to be moot because its determination may have the effect of resolving some controversy potentially affecting the rights of the parties, the decision of the Supreme Court in O'Brien is material. In that case the applicant instructed his solicitors to institute proceedings against his employer in respect injuries sustained by him in the course of his employment. With his authority they wrote to PIAB which refused to deal with them. The applicant then instituted Judicial Review proceedings in which he claimed, inter alia, a declaration that PIAB, in failing to deal with his authorised solicitor, had acted in breach of s. 7 of the Personal Injuries Assessment Board Act 2003. McMenamin J. granted the declaration sought and made an Order granting the applicant his costs of the proceedings. After the Notice of Appeal was lodged the applicant received an authorisation from PIAB permitting him to institute proceedings in the High Court, thus concluding his dealings with PIAB. In these circumstances he brought an application to stay the appeal that had been lodged by PIAB on the basis that the lawfulness of the practice of PIAB in refusing to deal with his solicitors was then moot.

21. Murray C.J. referred to the fact that the Court was generally reluctant to try issues which were abstract or hypothetical. However, he was satisfied that PIAB, had a real and current interest in having the issues pending on the appeal determined as it concerned the manner in which it might carry out it's statutory powers not only in respect of the applicant's past claim but in respect of any future claim which he might make in respect of personal injuries. He was satisfied that there was a real possibility that the applicant might at some future time have another accident and would be bound to engage with PIAB in relation thereto. That possibility was not so remote as to be purely hypothetical. He was satisfied that in that event the declaration of the High Court as to the correct interpretation s.7 would determine how PIAB would have to deal with that claim and accordingly the appeal could not be considered moot. He considered the continued existence of the order of the High Court was prejudicial to how it might carry out its statutory function in the future.

22. Finally, in Borowski, when dealing with the court's discretion to hear a point which might otherwise be considered moot the Canadian Supreme Court advised that in exercising that discretion it would have regard to the principles underlying the mootness doctrine which it expressed in the following terms stated at p. 5:-

> "The first rationale for the policy with respect to mootness is that a court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. The second is based on the concern for judicial economy which requires that a court examine the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. The third underlying rationale of the mootness doctrine is the need for the courts to be sensitive to the effectiveness or efficiency of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework".

Decision

23. Having considered the submissions of the parties on the respondent's application this court is satisfied that the issues raised in Ms. Malone's appeal are indeed moot.

24. The Court accepts that when these proceedings were commenced there was a real dispute between the parties. That controversy concerned the refusal of the respondent to accede to Ms. Malone's application for the DCA on the basis of her son's medical condition. As a result she challenged the validity of the decisions of the relevant deciding officers who rejected both her initial application under s. 300 of the 2005 Act and her application for a review of that decision under section 301.

25. While Counsel for the appellant maintained that these proceedings were never about Ms. Malone's right to the DCA but were entirely concerned with the decision making process, it's hard to accept that that is an entirely fair description of the controversy. But for the respondent's refusal of the allowance the proceedings would never have been commenced. Ms. Malone brought the proceedings for the purpose of seeking to quash the two decisions refusing her entitlement to the allowance, albeit on the grounds of procedural unfairness and incorrect statutory interpretation, but presumably with a view to making a later application for the DCA, if successful in the proceedings.

26. Following the rejection of her claim by the High Court, Ms. Malone proceeded to appeal the respondent's refusal of her right to the DCA under s. 311 of the 2005 Act and that appeal was resolved in her favour thus disposing of any dispute of any nature concerning her entitlement to the allowance. As a result, the process adopted by the respondent when rejecting her applications under s. 300 and s. 301 of the 2005 Act is of no practical significance to the parties and should therefore, on the basis of the decisions already referred to, be deemed to be moot.

27. The court also rejects Ms. Malone's assertion that the issues on the appeal are live and not merely of hypothetical relevance because they concern the potential rights of the parties as are likely to arise on any future review of her entitlement to the DCA under section 301. There are a number of reasons why she is incorrect in this regard.

28. Firstly, the Court is of the opinion that the controversy that will be under consideration on any future review of Ms. Malone's entitlement to the DCA under s.301 of the 2005 Act will be fundamentally different to that which concerned the court prior to her successful appeal under s.311. Further, her rights will be different at that point in time to those which she enjoyed prior to her successful appeal.

29. A person's entitlement to receive a DCA is determined by reference to whether or not the relevant child meets the statutory

criteria earlier referred to. If the application is disallowed, the review of that decision is concerned with the same issue. While on her initial application and subsequent review the relevant deciding officers concluded that G did not meet the qualifying criteria, Ms. Malone, in the course of her appeal under s.311 established her right to the DCA based on an adjudication that G does in fact meet the relevant criteria. That right having been established, any future review of her continued entitlement to the DCA under s.301 will concern itself with a different consideration namely; whether at the time of such review it can be established that there has been a "change of circumstances", that being the only basis upon which her right and entitlement to the DCA may be withdrawn. Accordingly, it is not correct to say that the resolution of the issues the subject matter of the pending appeal will have the effect of resolving an anticipated future controversy between the parties.

30. Secondly, while the applicant asserts that the disposal of the appeal would potentially determine the rights of the parties, including her alleged right to be given reasons for any decision made in the course of a review under s.301, this court does not accept that this is correct when one considers the issues on the appeal. The findings appealed against are fact specific to the applications made by Ms. Malone for DCA. By way of example, at para. (iv) of the Notice of Appeal the applicant claims that "the learned trial judge erred in law in finding that the reasons given by the respondent for the refusal to grant Domiciliary Care Allowance were clear and unambiguous and that further explanation would render the process unworkable". That finding was one made entirely by reference to the specific facts concerning the initial application made for the DCA and the wording of the decisions made referable to those facts by the relevant deciding officers. Accordingly, even if this ground of appeal was to be allowed, it is hard to see how such a finding could be of legal significance in the context of any future review process which would be based on an entirely different set of facts.

31. Precisely the same situation applies in relation to those grounds of appeal which seek to challenge the trial judge's determination that the decisions of the first and second deciding officers were invalid by reason of the fact that G had not been medically examined and that in the absence of a dispute on the medical evidence that the statute could not be construed so as to mandate such an examination.

32. Thirdly, there is no issue on the appeal involving the interpretation of any statutory provision which if resolved in Ms. Malone's favour would bind the respondent in terms of the manner in which he would be obliged to deal with her on any future review conducted under section 301. In this regard the Court is satisfied that Counsel for the appellant's reliance on the decision of Murray C.J. in O'Brien is misplaced.

33. The nature of the present claim is entirely distinguishable from that which was the subject of the Court's consideration in O'Brien where McMenamin J., in the High Court, made a declaration which interpreted a particular statutory provision, namely s. 7 of the Personal Injuries Assessment Board Act 2003, such that if left unchallenged on appeal would have had the effect of determining the manner in which the respondent would in the future be required to perform its statutory functions under that section if dealing with the applicant. The declaration granted was based on his conclusion that the respondent had acted unlawfully in the exercise of its statutory powers in refusing to deal with the applicant's duly appointed solicitor in connection with his claim for personal injuries.

34. In the present case the learned trial judge did not make any declaration as to the meaning of any statutory provision such as would determine the manner in which the respondent would be obliged to carry out its statutory obligations when dealing with the applicant or indeed anyone else on any future occasion.

35. There is one final matter to which the Court feels it should refer and that is the fact that it is satisfied that Ms. Malone cannot be prejudiced as a result of the dismissal of her appeal particularly given the fact that no order as to costs was made against her in the High Court. Further, she currently has the benefit of the DCA. If it should happen that on a review of her entitlement to that allowance at some future date that an adverse decision is made which she considers to be unlawful or erroneous, she enjoys not only a right to appeal that decision but she may also, regardless of the dismissal of her present appeal, seek to apply to quash such a decision in Judicial Review proceedings. In these circumstances and bearing in mind that this court must have concern as to how scarce judicial resources are allocated we believe that once satisfied that the issues pending on appeal are moot there is no justifiable basis to resolve the issues the subject matter of the appeal.

36. For all of these reasons the Court will dismiss the applicant's appeal.