Neutral Citation: [2014] IEHC 315

THE HIGH COURT

RECORD NO. 2013/148JR

BETWEEN:

J. McE

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REDRESS BOARD

RESPONDENT

JUDGMENT OF MR. JUSTICE MORIARTY delivered on 20th day of June, 2014.

1. This matter is a Judicial Review Application brought on behalf of the Applicant against the Respondents' refusal to extend time for reception of his Application for redress under the provisions of the Residential Institutions Redress Act, 2002. The Board was established under the provisions of that Act on 16th December, 2002. Further to s.8(1), Applications for redress were to be submitted within three years of the establishment, in effect by 15th December, 2005. However, s.8(2) enabled the Board, at its discretion and where it considered there were exceptional circumstances, to extend time for reception of an Application. A number of prior Applications have in recent years been already brought to this Court, with somewhat divergent outcomes relating to their individual circumstances, and these will be referred to later in this Judgment.

2. Little if any controversy arises in relation to the underlying facts preceding Respondents' refusal to extend time pursuant to the Act, and the substantive complaints made on behalf of the Applicant relate to the manner in which the Respondent considered what was placed before it on behalf of the Applicant, and the conclusions that were thereafter drawn. What transpired was that an Application for redress on behalf of the Applicant from his Solicitors was received by the Respondent on 16th September, 2011, some approximately five and three quarter years after the aforesaid date specified for receipt of Applications under s.8(1) of the Act. What was conveyed in that Application was that the Applicant had been born on 25th July, 1958, and that as a child he had resided in St. Kieran's Industrial School for Junior Boys, during which time he had been abused within the meaning of the said Residential Institutions Redress Act, 2002. Following correspondence between the advisors to the parties, in which reference was naturally made to the lateness of the Application, an oral hearing was on 21st November, 2012, held before the Late Applications Sub-Committee at its Dublin offices, in which both parties were represented by Solicitor and Counsel. On 17th January, 2013, a written Determination, which was adverse to the Applicant, was furnished to his Solicitors. The present proceedings were thereafter promptly instituted, and on 4th March, 2013, leave was granted by Peart J.. Leave was granted to proceed in relation to an Order of Certiorari by way of Judicial Review, quashing that adverse Determination, and for an Order remitting the Application to the Respondent, to be determined in accordance with law.

3. The primary matters canvassed at the said hearing were set forth in the Determination, and may be summarised as follows. The Applicant testified that he was unable to read or write, and also referred to long-standing problems with alcohol, contributing to the collapse of his marriage. He drank seven days a week, in particular after finishing work. This pattern had modified as a result of forming a new relationship in or about 2005. He had not seen his son in over twenty years. He further stated that he did not listen to the radio, but did watch television. It was in September of 2011 that his new partner made him aware of an advertisement by a firm of solicitors, in consequence of which he proceeded to bring his Application. He confirmed the contents of a letter that had been written by his Solicitors, in which it was stated that it could have been about three or four years previously when he saw something on television relating to sexual abuse, and thereby learned of the existence of the Respondent. Questioned by Counsel for the Respondent, he stated that between 2000 and 2006 he was working as a block-layer's labourer. He was able to work every day and was not drinking to such an extent as to be unable to work. Insofar as it seemed that no relevant medical records relating to him existed for the period between December, 2000 and January, 2006, he confirmed that he was not then drinking to such an extent that his health was adversely affected. Despite his illiteracy, he stated that on most days he would have watched either the six o'clock news or the nine o'clock news on television. When put to him that within that period there had been extensive publicity relating to the Respondent and the possibility of compensation for abuse suffered in institutional care, he stated that he had never seen this. When questioned further on the matter, he responded that "*what I am saying to you is what I seen on television it was all about, on the news it was always about priests, all that kind of thing. I took no notice of that*". He agreed it was fair to say that he watched the news perhaps once a day most days between the end of 2002 and the end of 2005.

4. In the further course of its said written Determination the Respondent stated as follows:

> *"There is no definition of 'exceptional circumstances' included in the 2002 Act. However, some guidance is to be found in the Oxford English Dictionaries definition of 'exceptional circumstances' as being 'of the nature of or forming an exception; out of the ordinary course, unusual, special'. The same dictionary defines an 'exceptional case' as one which is 'excepted, a particular case which comes within the terms of the rule, but to which the rule is not applicable; a person or a thing that does not conform to the general rule affecting other individuals of the same class".*
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> *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 as outlined provide a useful framework from which it is clear that it would be inappropriate for the Board to apply a test of uniqueness in these cases.*
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> *Accordingly, therefore, when considering Applications for an extension of time under s.8(2) of the 2002 Act, the Board will determine each Application according to its individual merits and particular circumstances. In this respect, the Board does not consider that it is possible to define in advance what circumstances might be considered exceptional. Furthermore, to attempt such an exercise could severely restrict the discretion of the Board and might result in injustices to those whose circumstances were in fact exceptional, but who did not fall within a list of stated and prescribed exceptions.*

However, such an approach does not prevent the Board from envisaging or surmising what sort of individual circumstances in a particular case might be considered exceptional, eg the effect or impact or 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/she cares; communication problems; or difficulties with legal advice. Any of these types of 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."

5. For the remainder of its written Determination, reference was made to certain portions of the evidence already referred to, and to inferences which it was felt appropriate to draw from this. There was further reference made to the decision of Kearns P. In his Judgment in the case of *MG -v- The Residential Institutions Redress Board*, delivered on 9th August, 2011, in which it was stated:

"Firstly, I am satisfied that there 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 was also extensive advertisements placed by the Respondent body on a nationwide basis."

6. The Determination concluded by stating that the Respondent accepted the Applicant's evidence that he was unable to read or write, but that however that was not the end of the matter. He had given evidence that throughout the relevant period he had watched the television news almost daily. Reference was made to the extensive relevant publicity throughout the relevant period between December, 2002, and December, 2005. Notwithstanding his response in relation to considering that what he had seen appeared to relate exclusively to priests, the Respondent concluded that the reality of the situation was that, notwithstanding his inability to read or write, there were ample means of acquiring knowledge as regards the existence of the Respondent available to him. Despite his alcohol problems, during the relevant period he was able to carry out the duties of his employment, and accordingly was not in a position to make the case that he was so badly affected by alcohol that the existence of the Respondent could not have come to his attention during the period. The final two paragraphs of the Determination were as follows:

"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."

7. The said Determination concluded in those terms. Whilst not an issue in the present instance, it merits mention that sub-Section (3) aforesaid provides for a mandatory extension of time, where the Board 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. Prior to the hearing of the present Application, written Submissions were delivered on behalf of each Party, and these were capably supplemented at hearing by the respective oral arguments of Mr. F. McDonagh SC, for the Applicant, and Mr. D. McDonald SC for the Respondent. Before noting the principal matters comprised in those Submissions, it is well, although scarcely necessary, to confirm what was already implicit in the form of the relief granted by Peart J., namely that since this matter is one of Judicial Review, no question arises of this Court substituting its own view as to what Determination might preferably have been arrived at by the Respondent, and it is confined under long-settled authorities to considering whether or not what was done by the Respondent was tainted by failures or infirmities of reasoning or procedure such as to warrant remitting the matter back to the Respondent for further consideration. Mr. McDonagh was admirably candid in this regard, acknowledging in the course of the oral argument that even if the matter was sent back to the Respondent for further consideration, his client might still have a tough job in seeking to bring about a different outcome. He was equally explicit in accepting that, since the Oireachtas had seen fit to set forth a test of exceptional circumstances, as opposed to one of a state of knowledge test, there was no question of an Applicant being entitled to succeed merely by virtue of a blanket assertion of ignorance of the Statutory time-limit.

8. At risk of doing less than full justice to the Submissions advanced on each side, I shall seek to summarise their substance. For the Applicant, it was in particular contended that the Respondent, in making its Determination, unlawfully fettered its discretion by finding that the Applicant's ignorance of his potential entitlement to redress from the Respondent could not, unless coupled with factors precluding or inhibiting an Application between 2000 and 2005, warrant sustaining a claim of exceptional circumstances within the meaning of the 2002 Act. It was thereby led astray by what was described as a false dichotomy. Accordingly, the Determination was thereby irrational, in that it did not flow from its premise, in the manner described by Henchy J. In The State (Keegan) the Stardust Victim Compensation Tribunal, 1986 IR658, and further fell to be condemned on the basic test of being fundamentally at variance with reason and common sense. Overall, it was argued that it was irrational to find no exceptional circumstances within the meaning of s.8(2) of the 2002 Act, because the Applicant had not established that he could not have known of the existence of the Respondent prior to 15th December, 2005.

9. A substantial portion of the Applicant's case was based on development of this argument, but it was also contended that fairness of procedures had been infringed, due to circumstances in which a further late Application had been brought at the same time as the Applicant on behalf of a nephew of his, who had also been resident in the same Institution. It was argued that the nephew's Application which was acceded to by the Respondent, was to all intents and purposes indistinguishable from that of the Applicant, and that accordingly there had been inconsistency of decision making on the part of the Respondent, insofar as it had failed to have regard to the principal that like cases should be treated alike.

10. In its response to the Applicant's Submissions, the Respondent placed understandable emphasis upon Judicial Review not being an Appeal on the merits, arguing that the Courts should not interfere with the exercise of its discretion by the Respondent merely because it might have exercised its discretion differently, but only as, pursuant to *O'Keeffe -v-An Bord Pleanala* 2011 I.E.H. C.537. In further argument, the Respondent sought to justify its approach to the term "exceptional circumstances", as set forth in its written Determination of 17th January, 2013. It referred to the decision of O'Keeffe J. In the case of *J. O'B -v- Residential Institutions Redress Board* 2009 I.E.H.C284, in which, it was argued, that the High Court expressly endorsed the approach adopted by the Board in relation to whether or not there were exceptional circumstances within the meaning of the 2002 Act. Further argument laid particular stress

upon the decision of Kearns P. in the M.G. case, already referred to in the actual Determination. This decision endorsed an approach based on considering whether the personal circumstances of an Applicant during the relevant period for making an Application may have prevented or inhibited him or her from making an Application on time. Later in the Judgment, Kearns P. added as follows:

> *"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."*

11. Close to the end of the Judgment, Kearns P. added the following:

> *"While the Board state that they differentiate 'exceptional circumstances' from any 'state of knowledge' test, I am equally satisfied that the Board is not precluded from taking into account unusual facts or matters which might have had the effect of preventing an Applicant acquiring the requisite knowledge of the Board, the Scheme and the time limits applying thereto."*

12. In addition, reliance was placed by the Respondent upon portion of the Judgment of Peart J. in *T.K. -v- Residential Institutions Redress Board 2012 I.E.H.C52*. Although the substantive Finding in the Judgment was to the effect that "*exceptional circumstances*", had been established, it was also noted that a passage in the Judgment appeared to reject the argument of the Applicant that the Respondent had fettered its discretion by applying a test as to whether the circumstances relied upon for purposes of s.8(2) may have prevented or inhibited an Applicant from making an Application on time. The relevant portion was as follows:

> *"It is clear from existing case-law that relevant exceptional circumstances are to be interpreted as being those which justify in the opinion of the Board the failure to bring an Application within time, and that the Board is correct in extending the period to bring an Application only where it is satisfied that the exceptional circumstances which are established within the definition of exceptional circumstances set forth by the Board in its decision were causative of the failure by the Applicant to bring his/her Application within the permitted period."*

13. A further recent case relied upon by the Respondent in relation to the interpretation of "*exceptional circumstances*" is the decision of Irvine J. in *P.B. -v- Minister for Health and Children*. Although this case differed from the preceding ones referred to, insofar as it related to a Statutory Appeal against a refusal to extend time to an Applicant within which to make a compensation claim to the Hepatitis C. Compensation Tribunal, the similarities to other cases referred to were very pronounced, and the Trial Judge referred to certain of these prior cases in the course of her Judgment. In holding against the Application for an extension of time grounded on "*exceptional circumstances*", Irvine J. stated as follows:

> *"I believe that an Applicant who wishes to rely upon his mental or physical health as a reason for his failure to know of the existence of the Scheme or make his Application within the prescribed period must be in a position to demonstrate on the balance of probabilities that but for those health problems he would have made his Application within the time prescribed. In other words, he must show a causative connection between the physical or mental health condition and his failure to maintain his claim within the prescribed period of time."*

14. Reliance was further placed by the Respondent on a further portion of the Judgment of Irvine J. in the same case:

> *"In this case, the Appellant's failure to maintain his claim was entirely due to his lack of knowledge of the existence of the Scheme. This is proven by the fact that when he became aware of the Scheme he was able to expeditiously bring forward his claim. The lack of knowledge was not as a result of his physical or mental condition over the relevant period. The fact that he had contemporaneous psychiatric problems is a separate matter and in that I believe that they do not impact upon his ability to engage with the compensation process or to know of its existence. Accordingly, regardless of the Appellant's undoubtedly troubled upbringing and difficult life from a social, family and health perspective, I am not satisfied that he has established 'exceptional circumstances' such as would justify the Court granting the extension of time sought.*

Conclusions

15. I have considered each of the aforesaid Judgments referred to. I have also considered the Judgment of Hogan J. in *A.G. (Applicant) -v- Residential Institutional Redress Board (Respondent) 2011 No. 1103JR*. In that case, the learned Trial Judge reviewed facts relating to a late application that were in many respects not dissimilar to those that had given rise to the prior Judgments of O'Keeffe J. and Kearns P. In his Judgment, he stated that had the matter been res integra, he would have been disposed to accede to the Application to extend time for a late Application, but in view of the two prior Judgments he took the view that the matter was not res integra, and accordingly felt constrained to refuse the Application for Judicial Review with reluctance. I have also read what I understand to be the most recent Judgment in relation to this type of Application, which was that of O'Malley J. In the case of *B.F. (Applicant) -v- The Residential Institutions Redress Board & Ors*. In her Judgment, which was delivered on 14th March, 2014, O'Malley J. summarised the evidence that had been heard before her in relation to the Application, reviewed the previous cases which had been opened to her by the parties, and ultimately concluded that the Respondents had fallen into error and acceded to the Applicant's Application. However, this conclusion was reached on foot of grounds which appear to me to have been clearly distinguishable from the facts of the present case, a factor which also applies to the aforesaid conclusion reached by Peart J. In addition to considering all of these prior authorities, I have again read the written Submissions furnished by both sides, and reviewed my note of what transpired over the two days of hearing.

16. In seeking to arrive at an informed view of my own on the matter, I have had careful regard to what transpired at the hearing of the Application, in addition to the precise terms of s.8 of the Act in its entirety. The hearing was chaired by an appropriately qualified barrister and a medical practitioner, with Solicitor and Counsel in attendance on both sides, and appears to have been conducted in a painstaking and courteous fashion. 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, 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.

17. In the aforesaid Judgment of Hogan J., he indicated as a material factor in evaluation of late Applications what he termed the "*remedial*" nature of the Statute. I note that a different view of what should be viewed as remedial legislation is advanced in the course of the Respondent's written Submissions, but in any event, while the Respondent presumably does pay heed to the consideration that many Applicants are persons who have been damaged by past experiences, this can scarcely be viewed as a determinative factor.

18. As to the contention that the late Application Appeal made by the Applicant's nephew was assessed more favourably in such fashion as to amount to invidious preference, this somewhat ran aground in the latter course of the hearing by reason of privilege not being waived, but the Respondent in its written Submission contended for significant difference between the two cases as justifying different outcomes. In any event, I do not view this as an argument of substance.

19. Given these observations, and the preponderance of what has been set forth in the prior High Court Judgments cited, I am not persuaded that the Respondent wrongly construed the appropriate construction of "*exceptional circumstances*", whether by way of formulating a false dichotomy or otherwise.

20. As already stated, it is no function of this Court to seek to substitute its own view of what it might have decided as the outcome of the Application on the relevant material. That the outcome of his Application was an unhappy one for a person who already had enjoyed few advantages in life is undoubted, but the duty of Courts is to furnish Rulings that accord with law rather than indulge in sententious expressions of sympathy. On the totality of the material examined and assessed by me in the course of the case, and having assessed the arguments, I am unable to find that the Respondent in this instance wrongly assessed the concept of "exceptional circumstances", or that there was insufficient material laid before it to entitle the Determination that was reached being made, or that such Determination was otherwise tainted by bias or other impugning factor, on the basis of clearly established prior legal authorities. In all these circumstances, the Application must stand dismissed.