Neutral Citation [2013] IEHC 52

THE HIGH COURT

Record Number: 2012 No. 64 JR

BETWEEN:

TK

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REDRESS BOARD

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 8th DAY OF FEBRUARY 2013:

1. The applicant applied to the respondent Board for, and was refused, an extension of time within which to bring her claim for an award of statutory compensation under the Residential Institutions Redress Act, 2002 ("the Act" or "the Act of 2002").

2. It is not disputed that the applicant was at all material times aware that in order to bring her claim for redress within the time prescribed in Section 8 (1) of the Act of 2002, she had to do so on or before the 15th December 2005. Her application was not received by the Board until 16th October 2009, almost four years past the deadline.

3. Therefore, this is not what is termed "a state of knowledge case" where an applicant seeks to establish that there are good reasons why she did not become aware of the deadline. In fact it is accepted on the applicant's part that she made a deliberate decision to delay her application beyond the deadline date. That certainly makes the facts of this case very unusual. Whether they are "exceptional circumstances" for the purposes of the Section 8 (2) is a different question.

4. Section 8 (2) of the Act confers upon the Board a power to extend the period within which a claim is brought "*at its discretion and where it considers there are exceptional circumstances*".

5. Following an oral hearing of her application to the Board for an extension of time, at which she was represented by solicitor and counsel, the Board issued its determination on the 7th September 2011 in which it reached a conclusion that the applicant had not established the existence of exceptional circumstances for the purposes of section 8 (2) of the Act, and refused her application for an extension of time. The Board was also satisfied that no evidence had been adduced that the applicant was under any disability for the purposes of Section 8 (3) of the Act. It is not part of the applicant's case that she was under any such disability.

6. The reason given by the applicant for not bringing her application to the Board within the permitted time, despite the fact that she was aware of the deadline, is that in 2004 her own mother revealed to her for the first time that she had been the victim of sexual abuse while a child in an institution and was bringing a claim for redress to the Board, and that because she (the applicant) herself had never felt able to tell anybody (not even her mother with whom she was very close) about the abuse to which she had been subjected, she decided that she would have to postpone her own application so that she could be a support for her mother while her application was proceeding. She has stated that if she had at that time revealed to her mother what had happened to her while in an institution, her mother would have not proceeded further with her own application.

7. The applicant's evidence before the Board was that it was only after the conclusion of her mother's application in 2008 that she felt able to tell her husband about what had happened to her. It was only then also that she first told her mother about it. She stated in her oral evidence that she just couldn't tell her mother about her time in the institution even though she was very close to her mother. She went on to say that she could see how much it was taking out of her mother, and its effect on her health, and she went on to state that she would not have been able to be of any assistance to her mother if she had had to deal with her won application as well. She stated that because her mother would worry about her so much, her mother would not have gone further with her application if the applicant had told her about her own abuse and that she wanted to bring an application. She would have felt guilty if her mother had withdrawn her application on account of the applicant bringing an application. (See transcript – pages 6-7)

8. The applicant stated that she was aware of the deadline as it was approaching. However, she stated that because of what her mother was going through with her application she just could not do anything about her own application, and just concentrated on helping her mother. She stated also that between 2005 and 2008 she knew about late applications, but while her mother's application was going through she just wanted "to be there" for her mother.

9. It was only on the completion of her mother's application that she told her for the first time about the abuse she herself had suffered. She thinks this occurred in early 2009.Her mother was very upset at hearing this. She told the applicant that she should have told her sooner. But the applicant told her that she couldn't. Following this she revealed it all to her husband also. She described how she felt after she had been able to confide in her mother and her husband as follows:

> "*Well, I think being able to actually talk to my mam now has been a great help and then being able to talk to my husband, because I feel like … when you first talk about it it's like a whole weight is lifted off your shoulders because I kept it in so much and not being able to speak to anyone, but that has helped a lot …" (Transcript – page 13)*

10. When cross-examined by John McDonagh SC, legal adviser to the Board, the applicant acknowledged that she knew of the Redress Board since 2004, and she was aware of the deadline for applications. She was asked why if she knew that it was a confidential process she did not consult a solicitor about her own claim since in that way she would not be causing any upset to her mother. Her answer to that was "*because I felt I couldn't deal with it. I wanted to concentrate on my mother. I just couldn't deal with myself personally". She was pressed further in this regard and she repeated "I just felt I couldn't. I was just going through so much turmoil with what my mother was going through. I just – I couldn't deal with it at that stage*." She added that this was the only reason that she did not bring her own application within the deadline, and she just wanted to be able to devote herself 100% to

her mother at that time.(Transcript – pages 18-20)

11. On re-examination by Dervla Browne S.C, her own counsel, the applicant stated that she would not have been able to just go to a solicitor and tell him all about what had happened to her when she was a child in the institution, in circumstances where she had not even been able to tell her husband and her mother. She added that if she was bringing an application to the Board she would have to have told her mother as her mother would have known that "*something was wrong*", and that her mother would not have gone ahead with her own claim.

12. The applicant's mother also gave evidence for the purpose of the applicant's application for an extension of time. She confirmed during that evidence that if the applicant had told her about her won experiences and that she was bringing a claim, she would have dropped her own claim. She confirmed also that she and the applicant are very close.

The Board's decision:
13. Having set out relevant parts of the evidence heard by the Board, as well as setting out relevant statutory provisions, the Board in its decision went on to consider what meaning ought to be given to the phrase "*exceptional circumstances*" for the purposes of Section 8 (2) of the Act. Having noted that the Act does not provide any definition of the phrase, the Board found some guidance from the Oxford English Dictionary's definition, namely "*of the nature of or forming an exception; out of the ordinary course, unusual, special*". The Board noted also that the same dictionary defines the phrase "exceptional case" as being one which is "*excepted, a particular case which comes within the terms of a rule, and to which the rule is not applicable; a person or thing that does not conform to the general rule affecting other individuals of the same class*".

14. Having noted these definitions, the Board stated:

> *"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 definitions outlined provide a useful framework from which it is clear that it would be inappropriate to apply a test of uniqueness in these cases."*

The Board then went on to state:

> *"Accordingly … the Board will determine each application according to its own 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".*

15. Having considered the evidence adduced, and having stated that the applicant was aware of the existence of the Board in 2004 and having noted her reasons for not proceeding with her claim before the expiration of the deadline, the Board stated as follows:

> *" … Both the applicant and her mother gave evidence that they are extremely close to one another. And it is clear from the evidence which was given at the hearing, and the manner in which it was given, that they are very attached to one another and that the other's welfare is a matter of great concern to each. However the Board takes the view that the reality of the situation is that the redress scheme is entirely confidential and that if she was greatly concerned that her mother would not proceed with her application if she knew what the applicant had experienced in [institution] she could have attended with a solicitor and instructed such solicitor to proceed with her application with absolute confidentiality so as to ensure that her mother would have proceeded with her application, and would never have needed to know what had happened to the applicant in [institution]. The applicant had never felt the need to divulge to her mother what had occurred in [institution] prior to that time and as she had managed to stay silent in relation to her experiences in the institution over the previous period of some thirty five to forty years the Board is of the opinion that the applicant could have maintained her silence in that regard and have proceeded with her own application, in which case both parties could have proceeded with their respective applications without the mother ever knowing what had occurred in [institution]."*

16. In such circumstances, and having ruled out any reason by reference to any depressive illness or other post traumatic stress disorder about it had received some evidence, the Board concluded that the applicant had not established the existence of exceptional circumstances for the purposes of Section 8 (2) of the Act.

17. Ms. Browne refers to that portion of the Board's decision where it states that the applicant "*could have attended with a solicitor and instructed such solicitor to proceed with her application with absolute confidentiality so as to ensure that her mother would have proceeded with her application*", and says that such a finding flies in the face of the clear evidence given by the applicant that she would not have been able to do that, never having spoken to anybody about these matters in the 35 years or so since they occurred, not even her husband or her mother. I have set out her evidence in that regard. Ms Browne has submitted that the applicant's case is not, as the Board stated, that she had never felt the need to divulge matters to her mother, or that she had managed to stay silent about it, but rather that she had been unable to divulge the abuse to anybody until after her mother's claim was completed.

18. Ms. Browne has referred to some other evidence to which I have not referred as yet, and which she submits supports what the applicant stated in this regard in her evidence. That is part of what is in a report of Dr Tessa Neville, Consultant Psychiatrist. It details what happened to the applicant, as reported, and states at page 8: *"She used to have flashbacks, both by day and by night, 'I could see the face of the priest with the stern look'. All over the years she was so ashamed that she could never bring herself to confide in anyone, until the last two years when she learned to share her thoughts with her husband." Later in her report, Dr Neville states: "She has only begun to mature in the last two or three years with the help of her husband, who is very supportive. She has now completed a course gaining a diploma as a healthcare assistant and hopes to develop a new and more satisfactory career and lifestyle as a result. However, it has taken her many years to achieve this*."

19. Ms. Browne submits that the Board's conclusion is not supported by the evidence which was before the Board. It is submitted that the Board failed to give any or at least any adequate weight to the applicant's clear evidence that she simply could not (as opposed to would not) tell any other person (i.e. a solicitor) about the abuse at the relevant time where she had been unable to tell even her own mother and her husband.

20. It is submitted that the Board, having considered what meaning should be given to "*exceptional circumstances*", and having concluded that it means "*something out of the ordinary" and that "the circumstances must be unusual, probably quite unusual, but not necessarily highly unusual*" then proceeded to determine that the unusual or even unique circumstances where, unknown to each other, a mother and daughter had each suffered serious abuse while in different institutions, did not come within the meaning that it

had decided was appropriate.

21. Ms. Browne submits that if exceptional means something out of the ordinary, unusual, quite unusual but not highly unusual, then the circumstances of this case meet that definition precisely. She submits also that the section must not be read as meaning that the only exceptional circumstances to be considered are those which result in the potential applicant missing the deadline, as this is not what the section states. Rather, it is submitted, the Act being a remedial Act and therefore one to which a purposive interpretation must be attributed, should be construed widely and as liberally as possible. In that regard emphasis is placed on the fact that Section 8 (2) provides for a wide discretion so that "*where there are exceptional circumstances*" the Board may extend the period. It is emphasised that the section does not state that the exceptional circumstances which do exist must have caused the deadline to be missed.

22. Ms. Browne has also submitted that it would appear that the Board applied an objective test to whether or not the exceptional circumstances of the applicant were such as would justify her in not making her application within the permitted period, and suggests that such an objective consideration has appeared in so-called "state of knowledge" cases, where the Board looks at the reasons for the late application and considers the reasons given for not being aware of the scheme or the deadline for submitting an application from the point of view of a reasonable applicant i.e. objectively. It has been submitted that the present case is not one in that category since the applicant acknowledges openly and honestly that she was aware of the deadline and made a conscious decision, because of her mother's ongoing case, not to bring her own case until her mother's case was over. Ms. Browne submits that by adopting an objective test the Board has limited or fettered its otherwise wide discretion to extend the period where exceptional circumstances do exist.

23. Denis McDonald SC for the Board has submitted that what the applicant is attempting to do on this application is have this Court substitute its own view for that of the Board, and that this is impermissible in judicial review proceedings. He also makes the point that some of the applicant's submissions go beyond the grounds for which the applicant was granted leave to argue. In that regard he refers to the applicant's submission that the Board has misinterpreted the provisions of Section 8 (2) of the Act, her submission related to Section 48A of the Statute of Limitations1957 as amended (to which I have not in fact referred), and also her submission that the Board fettered its discretion by the way it interpreted Section 8(2) by its view that the exceptional circumstances had to be seen as causative of the failure to bring the application within time.

24. Mr McDonald has submitted that given the wide discretion given to the Board to extend the period where there are exceptional circumstances, the Board's decision can be the subject of judicial review only on the basis of irrationality or unreasonableness. He has referred to the standard of review as stated by Finlay C.J. in *O'Keeffe v. An Bord Pleanala* [1993] I.R. 39. That judgment is so embedded in the jurisprudence of this country that I will confine myself to quoting the final paragraph of that often quoted paragraph which appears at p. 71 of the judgment:

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."*

25. The Court has been referred also to the judgment of Kearns P. in *G v. Residential Institutions Redress Board* [2011] IEHC 332, where the learned President confirmed that the process by way of judicial review was not to be seen as a re-hearing on the merits of the applicant's application, and that to succeed the applicant would have to show that the decision failed to accord with the principles in *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 643, and *O'Keeffe v. An Bord Pleanala* [supra]. He was satisfied that these principles were no different following the judgments of the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3.

26. It is submitted, accordingly, that this Court should interfere with the Board's decision on the basis of irrationality/reasonableness only if satisfied that there was "*no material whatsoever before the decision-maker to justify the decision reached*".

27. Mr McDonald has referred to the fact that the Board was satisfied from the medical evidence adduced by the applicant that she was not suffering from any depressive illness during the relevant period. He refers to that evidence because the applicant as part of her oral evidence referred to what she described as her "mental state" contributing to her not being able to deal with an application on her own behalf. It is submitted that there was ample evidence to which the Board could have regard in concluding that there was no such "mental state" or depressive illness affecting the applicant at the relevant time.

28. The critical finding of fact in the Board's decision is that which I have set forth at paragraph 15 above. Mr McDonald submits that being a finding of fact by the Board, the applicant has a high hurdle to surpass in order to impugn it successfully. He submits that there would have to be no credible evidence to support the finding before this Court could determine that it was irrational or unreasonable. He has referred to the judgment of McCarthy J. in *Hay v. O'Grady* [1992] 1 IR. 210 in this regard, and also to the judgment of Hamilton C.J. in Henry *Denny & Sons (Ireland) Ltd v. Minister for Social Welfare* [1998] 1 IR. 34, where at page 37 he states:

> *"… I believe it would be desirable to take this opportunity to of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."*

29. Mr McDonald has submitted that there was before the Board clear evidence to support its conclusion that the applicant could have made an application without telling her mother. In the respondent's written submissions, it is stated that some of that material is expressly referred to in the Board's decision, and in that regard refers to where the Board states that the applicant "*never felt the need to divulge*" to her mother what had occurred, and also that she had "*managed to stay silent in relation to her experiences*". In view of those conclusions the Board had considered that the applicant would have been able to go to a solicitor and give instructions to bring her application, without her mother having to find about that. The Board was also satisfied, as I have already referred to, that the applicant was not suffering during the relevant period from any "mental state" as such which could account for or justify not bringing her application. It is in such circumstances that it is submitted that there was a proper basis for the Board to conclude that the applicant was both emotionally and psychologically capable of making an application without informing her mother that she was doing so.

30. Mr McDonald has submitted that the Board carried out its consideration of whether or not there were exceptional circumstances in the applicant's case which could justify her not having brought her application before the deadline of which she was well aware, and did do in accordance with the approach endorsed by O'Keeffe J. in his judgment in *O'B v. Residential Institutions Redress Board* [2009] IEHC 284, and as followed by Kearns P. in *M.G. v. Residential Institutions Redress Board* [2011] IEHC 332, and also, albeit with some reluctance, by Hogan J. in *AOG. v. Residential Institutions Redress Board,* High Court, unreported, 6th November 2012.

Conclusions:
31. Firstly, I consider that section 8(2) of the Act provides a wide discretion to the Board as to what it may consider to be exceptional circumstances. In fact it is at large in that regard in the absence of any definition or other expressed limitation of the phrase in the Act. The Oireachtas when enacting the section had no way of knowing what particular exceptional circumstances might have affected particular applicants and cause them to miss the deadline. It would have been wrong therefore to confine exceptional circumstances to 'state of knowledge'. It follows that there could be cases such as the present one where due to exceptional circumstances a person, fully aware of the deadline, nevertheless did not bring the application within it.

32. Nevertheless, and it is clear from existing case-law, that relevant exceptional circumstances are 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.

33. Secondly, I find no fault with the definition of exceptional circumstances which the Board has arrived at and which has been explained in this and other decisions as meaning "*something out of the ordinary …… unusual, probably quite unusual, but not necessarily highly unusual*". Looking at those words and aside from the question of causation, it must be the case in my view that the circumstances put forward by the applicant are out of the ordinary and even highly unusual. I refer to the fact that unknown to each other, both mother and daughter had suffered serious physical and sexual abuse in different institutions. I would have thought that this was very exceptional in the sense of highly unusual. I have certainly not encountered such a case, and the no other has been referred to in this application by either side. The Board's decision states at the bottom of page 4 thereof that "*the Board is not satisfied that the applicant has established the existence of exceptional circumstances for the purposes of Section 8(20 of the 2002 Act*". It is reasonable to see that as a decision by the Board as being that while the applicant's stated reason and the circumstances behind it are unusual and in that sense exceptional, they are not considered to sufficient to justify not having brought her application within the permitted time, because in the opinion of the Board she was capable of instructing a solicitor without her mother finding out. It is when those exceptional circumstances are considered through the prism of causation that the real issue in this case comes into sharp focus.

34. Two matters arise. Firstly, the Board has clearly not accepted the evidence of the applicant that she was unable, as opposed to unwilling, to go to a solicitor without telling her mother about it, because it has come to its own contrary view. Nevertheless, that was the applicant's own evidence, supported by her mother's evidence. In so far as credibility is concerned, it is of relevance that the applicant had told Dr Neville that this was the reason, and to that extent she is consistent. I accept, as submitted by Mr McDonald, that that passage from the report of Dr Neville is not evidence by Dr Neville that this was the reason for the applicant's failure to bring her application within time and that it is only what the applicant related to Dr Neville as her own reason, but nevertheless it is corroborative and evidence of consistency.

35. Secondly, the Board has misstated in its decision the evidence given by the applicant in that regard and has relied on that misstated evidence in its decision. That raises the question whether there actually was any evidence before the Board for its conclusions, and whether it has relied upon an incorrect understanding of the evidence, and one that was not open to it, in arriving at its decision. The question then is whether the Board has fallen into error and whether its decision must be quashed.

36. The Board in its decision justifies its conclusion that the applicant could have attended a solicitor without her mother ever needing to know about what happened to the applicant at her institution by stating "*the applicant never felt the need to divulge to her mother what had occurred at [institution] … and as she had managed to stay silent in relation to her experiences in the institution over the previous period of some thirty five to forty years … [she] could have maintained her silence in that regard and have proceeded with her application*".

37. The Board must reach its conclusions on the evidence before it. In my view there was no evidence given by anybody before the Tribunal or in any material that was before the board that the applicant "*never felt the need to divulge to her mother what had occurred*". It is true that there is evidence that the applicant and her mother were very close yet neither told the other what had happened (Q. 28 – p.5). Taken on its own one could surmise that therefore neither felt the need to divulge to the other what happened to them. But that is to ignore the very next answer given by the applicant about not revealing matters to her mother. She stated "*I couldn't. I couldn't*". (Q.29 – p.5). The Board has made no adverse credibility finding against the applicant. Reading all the evidence in the transcript, I can find no evidence to support that important conclusion by the Board that the applicant never felt the need to divulge matters to her mother. She never said that, and anything she did say was to the contrary, namely that she had been unable to do so. That is very different to not feeling the need to.

38. Neither is there any evidence to support the conclusion by the Board that as she had "managed to stay silent" for so long she could have instructed a solicitor without her mother ever knowing that she had done so. In fact the evidence goes the other way. While at a superficial level one might be able to say that the applicant could have gone in confidence to a solicitor without her mother ever finding out, since as a matter of fact, if the applicant did not tell her mother about that her mother could never find out, it would be to ignore two important factors.

39. Firstly, the applicant's evidence was that she would have been unable to deal with her own application as well as her mother's because she felt the need to give all her support to her mother because she saw the toll that it was taking on her mother to deal with her application (Q. 31 – page 6). She was cross-examined on that, and she did not waver. In that regard she was asked why she did not just go to a solicitor and discuss matters with the solicitor in confidence. She replied "*Because I felt I couldn't deal with it*". She was pressed in the matter and she again replied "*I just felt I couldn't. I was just going through so much turmoil with what my mother was going through – I just couldn't deal with it at that stage*". (Qs. 103-105). She was asked if that was the only reason and she said that it was. The Board has not reached any conclusion that the applicant was not credible. There is no suggestion of that in the decision, or in the manner in which the applicant was cross-examined.

40. Secondly, the Board's conclusion ignores completely the applicant's evidence that she could not just go to a solicitor and talk about all that had happened to her in the institution in circumstances where she had never before confided in anybody. She stated that she was unable to do it without telling her mother (Q. 114 – page 20), and she would have to tell her mother that she was

making an application because, being so close to her mother, her mother would know something was wrong (Q.117 – page 20). The Board's conclusion appears to ignore this evidence, and it is noteworthy again that the applicant has not been found to lack credibility. I find no other evidence within the transcript and other material before the Board which supports the Board's opinion that the applicant could have maintained her silence while proceeding with her own application.

41. I do on the other hand feel that the conclusion by the Board that there was nothing in the medical history of the applicant that prevented her from bringing her application within time is completely justified by the evidence which was available.

42. I am satisfied on the evidence in this case that the O'Keeffe test has been satisfied, and that the decision of the Board should be quashed.

43. I will hear the parties as to whether the matter should be remitted to the Board or whether any other order should be made by this Court. I am certainly satisfied that the circumstances put forward by the applicant are exceptional circumstances in the sense that they are very unusual indeed. I have decided that the conclusion by the Board that they are not such as to justify an extension of time has not been reached on any evidence before the Tribunal. If I was to express a view in this regard I would certainly myself have concluded based on the evidence given by the applicant that those exceptional circumstances were what led to this applicant leaving over her application until after her mother's application was concluded, even if other persons might act differently. But I am mindful that this application cannot be an appeal on the merits, and for that reason an order of mandamus sought in the Notice of Motion may not be appropriate unless there was agreement on all sides that I should do so. It may be that the proper order to make is to remit the application to the Board for further consideration and determination in the light of this judgment. But I will hear the parties when they have had an opportunity to consider this judgment.