Neutral Citation: [2014] IEHC 220

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 407 J.R.]

BETWEEN

ELIZABETH JONES

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REVIEW COMMITTEE

RESPONDENT

JUDGMENT of O'Neill J. delivered on the 2nd day of May 2014

1. The applicant seeks an order of *certiorari* quashing the decision of the respondent Review Committee dated 7th March 2013, to the effect, that the applicant was not a resident in an institution within the meaning of s. 7 1(b) and (c) of the Residential Institutions Redress Act 2002, and was, therefore, not entitled to redress under the Act. A further order is sought remitting the matter to the respondent Review Committee to be "dealt with in accordance with law".

Statutory Provisions
2. The long title of the Residential Institutions Redress Act 2002, states that the Act was established "*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 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.*"

3. Section 7 of the Act provides:

> *" (1)Where a person who makes an application (an "applicant") for an award to the Board establishes to the satisfaction of the Board –*
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> *(a) proof of his or her identity,*
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> *(b) that he or she was resident in an institution during his or her childhood, and*
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> *(c) that he or she was injured while so resident and that injury is consistent with any abuse that is alleged to have occurred while so resident*
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> *the Board shall make an award to that person in accordance with section 13(1)."*

The respondent Review Committee was established by s. 14 of the Act "*to perform the functions conferred on it under this Act*". This includes reconsidering decisions of the Redress Board.

Background
4. The applicant was born in 1945. As a young child, she suffered from rickets, as a result of a Vitamin D deficiency, and was admitted to St. Joseph's Orthopaedic Hospital for Children, Coole, County Westmeath, where she remained for a period of approximately nine months. Some time in 1958, when the applicant was 13 years old, she was "*taken out of school*" by her mother and returned to the institution. The applicant was not admitted as an in-patient or in receipt of any medical treatment in the institution during this period. While schooling was available to patients on the grounds of the institution, the applicant did not attend school or further her education while there. The applicant gave evidence to the respondent committee that during the two years she spent in the institution, she worked from early in the morning until approximately 10pm every night. Her day began at approximately 6am, when she was awoken by a gong. If she failed to rise immediately, one of the Sisters would throw her and her mattress to the floor. Her primary duties were to assist with the preparation and serving of three daily meals, as well as cleaning in the dining room, corridors and operating theatre, and washing up duties. Asked by the committee if she was free to leave the institution during the day to engage in any personal or leisure activities, the applicant gave evidence to the committee that she was "*frightened to leave because of the consequences*". The applicant gave evidence of one occasion when, after breaking a glass water jug, she felt she had to "*run away*" and was subsequently punished for doing so. She was not permitted to return home at Christmas, Easter, on her birthday or any other holidays, and gave evidence that on the morning of her father's funeral, she was again thrown out of bed and made to wait until somebody took her to the funeral mass.

5. The applicant alleges that she witnessed abuse of patients of the institution and that persons who committed some breach of a rule would have their hair shaved off and be made to wear a sign around their neck which detailed their supposed wrongdoing. The applicant alleges that during the time she spent in the institution, she was subjected to sexual abuse by older male patients in the hospital, and that when she reported it to the Sisters, they failed to do anything about it and told her to carry on with her chores. She also recounted an incident where a priest from the institution allegedly sexually assaulted her. At the hearings before the Redress Board and respondent Review Committee, the applicant described the lasting effects her time in the institution and the abuse she suffered has had on her, and psychiatric reports were submitted in this regard.

6. The applicant gave evidence that a sum of approximately £6 per month was apparently paid to her mother in return for her services. There was no evidence of this payment having been made, apart from what the applicant was told by her mother. The applicant gave evidence that she herself "*didn't receive any money whatsoever*".

7. The applicant made a claim to the Residential Institutions Redress Board in 2010, and was granted an extension of time for making such an application under s. 8(2) of the Act. A hearing took place on 7th April 2011, and the Board issued its decision on 19th June

2012. The Board held that the applicant's claim did "*not fall within the terms of the statue for the following reason – it has not been established to the satisfaction of the Board that the applicant was injured while resident in an institution covered by the said Act or Orders as required by section 7(1)(c) of the said Act*." The applicant applied to have the matter reconsidered by the respondent Review Committee on 27th June 2012, and a hearing before the respondent took place on 17th January 2013. The respondent issued its decision on 7th March 2013. I will now turn to consider this decision in greater detail.

Decision of the Respondent Committee

8. The decision of the respondent outlines that the decision of Board noted that the applicant was not an in-patient at the institution, which was "*the primary purpose of being resident in a hospital that was a Scheduled Institution pursuant to the Act*."

9. After considering all of the evidence, the Committee stated that it was "*difficult to accept the argument that the Applicant was not in employment in Coole. She gave detailed evidence of the work she did there, was in receipt of board and lodging, and payment for her services appears to have been made to her mother. If she felt that she was not free to leave it seems likely that it was because it was her mother, rather than the authorities in Coole, who would have prevented her from leaving*". It was found that "*in the ordinary sense of the word the Applicant was 'resident' in Coole for the period in question*" but the issue for the committee to decide was whether or not she was 'resident' within the meaning of the Act. Having found that the term 'resident' where it appears in s. 7(1) of the Act is "*obscure or ambiguous*" the Committee applied the provisions of s.5 of the Interpretation Act 2005 which states:

> *". . . the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

10. The committee decision states that it gained assistance from s. 4 of the 2002 Act, which enables the Minister "*to provide for the insertion in the Schedule of any industrial school, reformatory school, orphanage, children's home, special school which was established for the purpose of providing education services to children with a physical or intellectual disability or a hospital providing medical or psychiatric services to people with a physical or mental disability or mental illness in which children were placed and resident and in respect of which a public body had a regulatory or inspection function*"

11. The committee ultimately concluded the following:

> *"The Committee does not believe that a person who was working in the hospital in receipt of board and lodging, even if under the age of 18 years and was not there for the purpose of receiving medical services, and did not receive schooling there can be said to have been resident in the Institution within the meaning of the Act and accordingly the conditions of s7(1)(b) and (c) have not been complied with the Applicant is not entitled to an award".*

Applicant's Submissions

12. Counsel for the applicant contends that after finding that the applicant was a 'resident' of the institution in the ordinary sense of the word, the committee erred by going on to state that the word 'resident' was "obscure or ambiguous" and by applying the provisions of s. 5 of the Interpretation Act. In the respondent's statement of opposition, it is stated that this was a reasonable and rational approach for the committee to adopt. The applicant contends that the relevant test is not one of reasonableness or rationality, but one of statutory interpretation. In *AG v. Residential Institutions Redress Board* [2012] IEHC 492, Hogan J. held:

> *". . . 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, those of Clarke J. in Cork County Council v. Shackleton [2008] 1 I.L.R.M. 195, 215 and by analogy those of Kelly J. in Cork City Council v. An Bord Pleanála [2006] IEHC 192, [2007] 1 I.R. 761, 768-772. 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 proferred by an administrative agency such as the Board is correct or otherwise."*

13. The applicant contends that the respondent was not required to go any further than to give the word 'resident' its ordinary meaning, and that it is manifestly incorrect to state that the term as it appears in the Act is obscure or ambiguous. It is further submitted that on any interpretation of the word, it cannot be said that a person with the applicant's circumstances could have fallen outside the contemplation of the Oireachtas in terms of being entitled to redress. The Oireachtas was not in a position, at the time of drafting the legislation, to specifically identify all those individuals who might be entitled to redress or the various routes that led them to become resident in a particular institution. It was submitted that the respondent was not entitled to engage in this sort of speculation after having found the applicant to be resident in the ordinary meaning of the word. Reliance was placed on the *Board of Management of St. Molaga's N.S. v Sec-Gen of the Department of Education and Skills* [2010] IESC 57, in which there was an issue concerning the interpretation to be given to the word 'appeal' as found in s. 29 of the Education Act 1998. The High Court engaged in a detailed analysis of the overall purpose of the Act and held that the term was more restrictive than a 'full appeal'. However, the Supreme Court did not approve of this approach and held:

> *"Taking an overview of s. 29 it is clear that the words 'appeal' and 'appeals' are dominant. They appear 21 times, excluding references to 'appealed' and 'appeals committee'. Further, the decision making body is called an 'appeals committee'.*
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> *The words in s. 29 are very clear. The term 'appeal' is not obscure. It has a plain meaning in relation to procedures. The concept of an appeal is a full hearing on the merits with the jurisdiction to make a determination on the issues raised. An appeal goes beyond a review of a decision making process.*
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> *As the words of s. 29 are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law."*

14. The High Court has adopted this approach in subsequent cases including *CP v Chief Appeals Officer* [2013] IEHC 51, where, citing the above passage, Hogan J. held:

"The same can be said here. The language is unambiguous and there is nothing absurd in giving an Appeals Officer an open-ended power to re-open cases in the light of the emergence of new facts or new evidence or changed circumstances. This conclusion is, moreover, re-inforced by the language of the remainder of the section."

Respondent's Submissions

15. Counsel for the respondent submits that the respondent committee found as a fact that the applicant received board and lodging at the institution and that her mother appears to have received a monthly payment for her services. It is accepted that the applicant received no schooling at the institution and was not there for the purposes of receiving medical treatment. The respondent found it "*difficult*" in those circumstances to accept the argument that the applicant was not in employment at the institution.

16. It is submitted that the respondent was correct to apply the provisions of s. 5 of the Interpretation Act, and provides clear reasons for doing so. In *Monahan v Legal Aid Board* [2009] I.R. 458, Edwards J. held:

> *"Section 5 implicitly recognises the literal rule as the primary rule of statutory interpretation and authorises the courts to depart from the literal rule and adopt a purposive approach only in clearly defined circumstances. The language of the Bill is close to that set out in the recommendations of the Law Reform Commission Report on Statutory Drafting and Interpretation: Plain Language and the Law , (LRC 61-2000), at p. 21, which was largely derived from the judgment of Keane J. in Mulcahy v. Minister for the Marine (Unreported, High Court, Keane J., 4th November, 1994) where he stated as follows at p. 23:-*
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> > *'While the court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole'.*
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> *As such, s. 5 largely reflects the approach adopted by the courts prior to its enactment in any event. The main departure from the common law position occasioned by s. 5 is the creation of an exception to the general rule where a literal interpretation would defeat the intention of the Oireachtas. This exception to the literal rule of interpretation now applies, together with the traditional common law ambiguity and absurdity exceptions."*

17. It is submitted that the respondent was correct to consider the intention of the Oireachtas in respect of the meaning of the term 'resident' by reference to the Act as a whole, and that s. 4 of the 2002 Act, sets out that the criteria to be applied in this case includes a consideration of the function of the institution and the purpose for which children were placed there. It is argued that a person, such as the applicant, who was working at the institution and in receipt of board and lodging and who was not receiving schooling or medical treatment, cannot be said to be a 'resident' within the true legislative intention.

Decision

18. The decisive issue in this case is whether the respondent was correct in its approach to ascertaining the proper statutory interpretation of the term "*resident*" as used in s. 7 of the Act. At the outset of a consideration of this topic, I would immediately observe that this issue cannot be determined or influenced by a reasonableness or rationality test. Over the years since the judgement of the Supreme Court in *O'Keeffe v An Bord Pleanála [*1993] I.R. 39, and before that in *Keegan v. The Stardust Tribunal* [1987] ILRM 202, this court has been frequently urged in its consideration of other judicial review grounds *i.e* legal and statutory interpretation issues and even natural justice grounds, to assess the legality of the decisions impugned by reference to a reasonableness or rationality test. I would like to emphatically agree with the passage from the judgement of Hogan J. quoted above from the case of *AG v Residential Institutions Redress Board* [2012] IEHC 492 . The reasonableness and rationality test arises only where there is a challenge to the decision of a public authority on the ground that the decision in question offends the principles set out by the Supreme Court in *Keegan v Stardust Tribunal* or *O'Keeffe v. An Bord Pleanála,* where the decision is that of an expert tribunal. No such challenge arises in this case.

19. Here, the challenge is confined to a narrow issue of statutory interpretation, and this court must determine whether the interpretation settled upon by the respondent was correct in law and not whether it was reasonable or can be upheld within an acceptable margin of appreciation. Having concluded that the circumstances of the applicant came within the term "*resident*" when that term was given its natural and ordinary meaning, the fundamental question which arises here is whether they were not obliged to have concluded the matter on that basis, or were they entitled or obliged to reject the application of the literal meaning of the term and to go further by invoking s. 5 of the Interpretation Act 2005, to depart from the literal rule of construction and to adopt what they saw as a purposive interpretation of term "*resident*"

20. The only basis on which the respondent could lawfully have rejected the literal meaning of "*resident*" would have been if it was of the view that the literal meaning, as applied in this case to the applicant's circumstances, would have had the effect of defeating the intention of the Oireachtas in enacting this legislation. The decision of the respondent, whilst undoubtedly expressing dissatisfaction with the outcome of the literal interpretation, does not go near positioning itself on the basis that the intention of the Oireachtas would be defeated. Its decision, as expressed, seems to have been concerned with achieving the most correct interpretation of the term "*resident*", nor is there any surprise here. A conclusion that the inclusion of the circumstances of this applicant would defeat or subvert the intention of the Oireachtas in enacting this legislation would indeed be strange.

21. I am quite satisfied that the respondent was bound to apply the literal meaning of the term "*resident*" when it was apparent that there was no difficulty, ambiguity or absurdity with the term itself, or with including the circumstances of this applicant within the term, given its natural and ordinary meaning.

22. The respondent therefore erred in law, by applying s.5 of the Interpretation Act 2005 and embarking on a purposive interpretation of the 2002 Act.

23. Having made this finding, it is not necessary to embark on any further consideration of the applicant's status in the institution. However, if I am wrong in concluding that s. 5 should not have been applied, and that a purposive construction of the term 'resident' adopted, the respondent erred in law in its conclusion that the applicant's status in the institution was that of a person who was there by virtue of a lawful contract of employment, and therefore fell outside the scope of what was intended by the Oireachtas. Apart from the fact that the terms of her "*employment*" prevented her attending school are in direct contravention of the provisions of the School Attendance Act 1926, the arrangement whereby she was in this institution lacked any of the recognisable elements of a lawful contract of employment and were more akin to that which would be easily recognisable as a form of slavery *i.e* involuntary labour provided with no remuneration given to the person providing the labour, accompanied by extraordinary long hours of work with

little or no time off as of right. Even adopting a purposive approach, I am quite satisfied the circumstances governing the applicant's presence in this institution could not have precluded her from redress under the Act.

24. For those reasons, I will grant the relief sought and remit the matter to the respondent Review Committee.