Neutral Citation Number: [2011] IEHC 332

THE HIGH COURT

JUDICIAL REVIEW

2010 1529 JR

BETWEEN

M. G.

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REDRESS BOARD

RESPONDENT

JUDGMENT of Kearns P. delivered the 9th day of August, 2011

In these proceedings the applicant seeks an order of *certiorari* to quash the decision of the respondent dated 23rd July, 2010 which declined to extend the time period for the making of an application for redress by the applicant. The applicant contends that the refusal by the Board to extend time for the brining of a claim was irrational, in breach of the rules of natural and constitutional justice and further was a decision which failed to apply fair procedures in the particular circumstances.

RELEVANT STATUTORY PROVISIONS

The respondent body was established by the Residential Institutions Redress Act 2002. The preamble to the legislation states that it is:-

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

Section 5 (1) (a) of the Act of 2002 provides that the Board shall:-

> *"Make awards in accordance with this Act which are fair and reasonable having regard to the unique circumstances of each applicant."*

Section 5 (1) (b) of the Act of 2002 provides that the Board shall:-

> *"Make all reasonable efforts, through public advertisement, direct correspondence with persons who are residents of an institution and otherwise, to ensure that persons who were residents of an institution are made aware of the function referred to in para. (a) of the Board."*

Section 7 of the Act provides as follows:-

> *"(1) Where a person makes an application (an 'applicant') for an award to the Board establishes to the satisfaction of the Board –*
>
> *(a) proof of his or her identity,*
>
> *(b) that he or she was resident in an institution during his or her childhood, and*
>
> *(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,*
>
> *The Board shall make an award to that person in accordance with s. 13 (1)."*

The section with which this application is concerned relates to the period for making an application which is governed by the provisions of s. 8 of the Act of 2002:-

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

It is to be noted that, unlike the Statute of Limitations, this section does not contain a saver in the case of an applicant who was unaware of his or her entitlement to bring a claim, or could not reasonably have known that he or she was entitled to bring such a claim. However, as section 8 (2) of the Act of 2002 makes clear, the Board is left with a wide discretion where it considers there are "exceptional circumstances" to extend the period of three years from the establishment day for the making of an application. While it

is a point to which I will return at a later stage, it would strike me as extremely odd if the Board in exercising its discretion did not evaluate "exceptional circumstances" in a manner which was in conformity with the saver contained in the Limitation Acts.

The establishment day for the purposes of the Residential Institutions Redress Board Act 2002 was 16th December 2002. Accordingly, the closing date for receipt of applications was 15th December, 2005.

FACTUAL BACKGROUND
The applicant was born on 16th August, 1969. In July, 1977 she was sent to an industrial school in the midlands where she remained until September 1987. In her affidavit she deposes that whilst in this institution she was subjected to physical and emotional abuse.

She first made application for redress to the Board on 21st August, 2009, almost four years after the time limit for bringing an application had expired. In her affidavit sworn herein, the applicant states that she had "no idea" that she was entitled to apply to the Redress Board for compensation and only learned about the existence of the Board and the scheme when she casually met on the street a woman who had been with her in the same institution at the same time. This meeting took place in June, 2009 following which the applicant attended at the offices of solicitors who had made an application on her friend's behalf for compensation to the respondent Board. That firm wrote to the Board for an application form which she signed and returned on 21st August, 2009. She attended the Redress Board for a hearing on 10th June, 2010 following which she was informed that her application had been rejected. She was informed by her solicitor that the respondents were of the opinion that the application had not been made in time and that there were no exceptional circumstances in her case which would warrant the Board to exercise its discretion to extend the time.

By way of further detail, the affidavit of Brian Carolan, solicitor for the applicant, deposes that during the hearing the following matters arose:-

> *"(a) The applicant stated that she only became aware of the existence of the scheme in or around June 2009 when advised of same by an ex-resident of the industrial school who advised her to see a solicitor, which the applicant did.*
>
> *(b) The applicant stated that she was unaware of any advertising concerning the Redress Board or Redress Scheme during the three year period prior to December 2005.*
>
> *(c) The applicant's counsel showed her an advertisement which had been provided to the applicant's solicitor by the Board as the advertisements which had been placed in the newspapers prior to the closing date for applications. When asked by her counsel to look at the advertisement and to tell the Board what her understanding was of what was being said in the advertisement the applicant read out the words 'The Board' before stating that she did not really understand it and that while she could read it she did not know what it was for. When specifically asked what the words "Redress Board" meant to her, she stated "nothing".*
>
> *(d) The applicant had a low to borderline I.Q. and I.Q. testing of the applicant at different times had produced results of between 74 and 82."*

The Board made its determination on the applicant's application on 21st July, 2010 in a detailed five page reasoned decision. It concluded as follows:-

> *"… taking all relevant factors into account, the Board is not satisfied that the applicant has established the existence of exceptional circumstances for the purposes of s. 8 (2) of the 2002 Act, and refuses her application for an extension of time in which to bring her substantive application for redress. No evidence has been placed before the Board that the applicant was under a legal disability by reason of unsound mind at the time when her substantive application should have been made, and the Board has not considered the application for an extension of time under the provisions of s. 8 (3) of the Act."*

THE APPLICANT'S CASE
The applicant's principal ground of complaint is that there was a want of fair procedures at the hearing in the manner in which the Board failed to take into account the applicant's intellectual difficulties and reading difficulties. It was common case that the applicant had been the subject of psychological evaluation during her period in the institution in 1979 when her I.Q. was assessed as being between 74 and 82.

Mr John Shortt, senior counsel on behalf of the applicant, submitted that this was clearly a factor which should have been taken into account and considered as an exceptional circumstance for the purposes of s. 8 (2) of the Act of 2002. However, counsel on behalf of the Board had dealt with this difficulty by asserting there was a "cut off point" at the I.Q. level of 70, at or below which late applicants were deemed to have qualified. Counsel for the applicants submitted that this was dealt with in a very unsatisfactory manner at the hearing itself because a list of qualitative descriptions of WAIS-3 I.Q. scores was introduced in evidence in support of the Board's position without any prior notification to the applicant or his legal advisors. This classification suggested that the applicant was properly classified as "*borderline*" (i.e. lying between 70-79 on the I.Q. scale). The applicant had no opportunity to respond to or deal with this document. A subsequently sworn affidavit by Dr. William Kinsella, Educational Psychologist, made clear that there would be little qualitative difference between a score of 74 and a score of 68, 69 or 70 and further deposed that I.Q. scores should be interpreted to provide for a margin of 4 or 5 points above or below any I.Q. score. On this basis of assessment, the applicant would clearly have qualified and met the Board's criteria for exceptional circumstances, particularly as it was accepted in this case by the respondents that the applicant was genuinely unaware of the Redress Scheme until June, 2009.

As a second ground of attack, it was argued on behalf of the applicant that the respondent was in error in finding that a lack of knowledge of the scheme was of itself incapable of amounting to exceptional circumstances.

Third, it was contended that the Board was not entitled to place reliance on its own advertising in circumstances where the applicant gave positive evidence that she had not seen any advertising and had further given evidence that she would not have understood an advertisement placed in the local newspaper even if she had seen it.

Finally, it was submitted on behalf of the applicant that those portions of the Board's decision in relation to the meaning of "exceptional circumstances" was identical to the wording which had appeared in other rulings and decisions of the Board, thus indicating that the Board gave the matter no real consideration and simply adopted a 'one size fits all' to the meaning of the term "exceptional circumstances", thereby demonstrating irrationality and unreasonableness of such a degree as to warrant the Court's

intervention.

THE RESPONDENT'S CASE
In reply, senior counsel on behalf of the respondent, Mr. Kevin Cross, submitted there was no legal basis for any contention that lack of knowledge of the Scheme was capable of amounting to exceptional circumstances. To hold otherwise would permit a late applicant to overcome a time limit in every case by simply asserting that he or she had not known of the scheme or the time limit attaching thereto. It would be impossible for the Board to refute a bald statement to that effect.

In relation to the applicant's intellectual and reading difficulties, counsel contended that a perusal of the detailed decision of the Late Application sub-Committee dated 20th July, 2011 demonstrated that the respondent did give careful consideration to this issue.

In relation to the adequacy of the advertising campaign, counsel argued that the Board had conducted a multi-faceted advertising campaign of general publicity. The applicant had not demonstrated any circumstances which prevented or inhibited her from becoming aware of the Board's existence through that advertising. In that regard, the Board expressly relied on the fact that the applicant gave evidence that she frequently watched the news and other programmes on television.

Finally, the decision of the Board was in no way compromised by the fact that the Board gave a consistent meaning and interpretation to the words "exceptional circumstances". Indeed, it would have been indicative of irrationality on the part of the Board if it were to adopt different meanings and interpretations of those words when dealing with applications.

In this case there had been a full oral hearing and a detailed and reasoned determination in which the Board took all relevant factors into account in reaching its decision.

This was not a case where s. 8 (3) of the Act of 2002 had been invoked. Notwithstanding the failure to invoke s. 8 (3) of the Act of 2002, the reality of this case appeared to be that the applicant was nonetheless endeavouring to invoke a degree of intellectual disability to circumvent the provisions of the legislation.

DECISION
At the outset it must be remembered that these proceedings have been brought by way of judicial review and the decision of the Court therefore cannot be one given as though this were a full rehearing on the merits of the applicant's case. It is thus incumbent upon the applicant to show that the decision arrived at by the respondent was one which failed to accord with the principles elaborated in *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39. That this remains the test for judicial review intervention was made clear recently by the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC3.

In considering whether the failure of the applicant to become aware of the existence of the Redress Board or the scheme for compensation until June 2009 constitutes "*exceptional circumstances*", it is necessary to consider that portion of the impugned decision of 20th July, 2010 which indicates the Board's approach and understanding of the words "*exceptional circumstances*". In its decision the Board states:-

> *"There is no definition of 'exceptional circumstances' included in the 2002 Act. However, some guidance is to be found in the Oxford English Dictionary's definition of 'exceptional circumstances' as being 'of the nature of or forming an exception; out of the ordinary course, unusual, special'. The same dictionary defines 'exceptional case' as one which is 'excepted, a particular case which comes within the terms of a rule, and to which the rule is not applicable; a person or a thing that does not conform to the general rule affecting any other individuals of the same class.*
>
> *In essence, the Board considers that 'exceptional' means something out of the ordinary. The circumstances must be unusual, probably quite unusual, but not necessarily highly unusual. The definition outlined provides 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.*
>
> *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.*
>
> *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, for example the effect or impact of mental or physical health problems or conditions on a particular individual; personal family circumstances, whether in the applicant's own life or in the lives of others for whom he or she cares; communication problems; or difficulties with legal advice. Any of these 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.*
>
> *The Board is of the view that ignorance of the existence of the Scheme and/or closing date, in and of itself, does not constitute exceptional circumstances. A substantial majority of late applicants state that their applications are late because they did not know about the redress scheme in time. However, if the Oireachtas had intended that all such applications be accepted, the Board considers that it would have employed a state-of-knowledge test in s. 8 (2) rather than the test of exceptional circumstances. However, lack of knowledge may have arisen in the context of other factors such as those described above, and in that sense, exceptional circumstances may arise."*

This issue has already received consideration in the High Court in *J.O.B. v. Residential Institutions Redress Board* [2009] I.E.H.C. 284 in which O'Keeffe J. stated:-

> *"Looking at the instances which the Board said might constitute exceptional circumstances, it is clear that these instances are related to the personal circumstances of the applicant. It is the applicant who must show and establish exceptional circumstances. I adopt this approach. In my judgment, the Board was entitled to conclude that ignorance of the existence of the Scheme and/or closing date did not constitute exceptional circumstances."*

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.

However I am satisfied in this case that even on an interpretation of "exceptional circumstances" which includes extending the time where an applicant could not reasonably have known of the existence of the Board or the compensation scheme, the outcome must be the same in this particular case for the reasons to which I will now turn.

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 were also extensive advertisements placed by the respondent body on a nationwide basis. As the Board states in its decision:-

> *"The existence of the Redress Board and the closing date by which applications were to be made were widely advertised by the Board. Advertisements were placed in all national broadsheet and tabloid newspapers, as well as in the main provincial newspapers. In this regard it is noteworthy that the applicant stated in evidence that she is able to read and write, although she does have difficulties with certain words, and that she read her local newspaper, The Tullamore Tribune, most weeks. It is significant that one of the newspapers which was utilised by the Redress Board for the purposes of advertising the Redress Scheme was the Midlands/Tullamore Tribune. Advertisements were also placed in RTE television, Network 2, Sky 1, Sky News, TV 3 and TV 4. In this regard it is also significant that the applicant gave evidence that she frequently watched the news on television. The Redress Board also placed advertisements on all national and major local radio stations. During the period 2002 up to 15th December, 2005 there was widespread publication of the existence and functions of the Redress Board in order to bring its existence and functions to the attention of the greatest possible numbers."*

Insofar as the applicant's intellectual difficulties are concerned, I am also satisfied that they are not as severe as contended for and that there was no irrationality or want of fair procedures in the manner in which the Board dealt with that aspect of the case.

While a document was apparently made available to the applicant's advisers indicating the different classifications of I.Q. during the course of the hearing, this occurred without objection from the applicant's advisers nor did they seek any adjournment for the purpose of considering any implications which might arise therefrom.

A perusal of the transcript of the hearing does not indicate to me that the applicant had any great difficulty in following the questions she was asked or in making replies to same.

I am also satisfied that the Board gave full and detailed consideration to any difficulties which the applicant may have had and cannot, by any stretch of the imagination, be said to have failed to take those difficulties into account when arriving at a decision in this case.

As the Board states in the penultimate paragraph of its decision:-

> *"The applicant gave evidence that she had difficulties with the father of her child extending into 2002, but it is noteworthy that the difficulties as regards maintenance had resolved some time in August or September of 2002, prior to the date upon which the redress scheme became operative. She also gave evidence that she was not working between 2002 and 2006, and had no physical or psychological difficulties during that period which might have disabled or otherwise inhibited her from bringing her application to the Board. It was pointed out on her behalf that she has a low I.Q., which was variously measured during her period in the institution as being between 74 and 82 and this is clearly a factor which should be taken into account and considered to be an exceptional circumstance for the purposes of s. 8 (2) of the 2002 Act. However, as was pointed out during the course of the hearing, under the 'qualitative descriptions of WAIS-3 I.Q. scores' an I.Q. of 82 is classified as being in the 'low average' category while an I.Q. of 74 is in the 'borderline' category, neither of which are low enough to be classified as giving rise to an intellectual disability. It is of significance that the applicant gave evidence that she had no difficulty in reading the Tullamore Tribune which she bought most weeks. Matters might be somewhat different if the applicant had a measured I.Q. falling below 69, as such scores under the said 'qualitative descriptions of WAIS-3 I.Q. scores' place persons who score in that range into the 'extremely low' category, and an I.Q. score in that category is something which can be taken into account by the Board when assessing whether or not exceptional circumstances are established for the purposes of s. 8 (2) of the 2002 Act particularly where there are clear signs of significant intellectual disability. However this is not the case in this applicant's application for an extension of time under that subsection as quite clearly she does not fall within the 'extremely low' category, and having had the opportunity of witnessing the applicant at the hearing there is also no sign of any intellectual disability. The contents of the record of the case conference of 17th June, 1987 which indicated that the applicant could pass her Leaving Certificate with a little effort would also indicate the absence of intellectual disability."*

I am thus satisfied that the respondent did give careful consideration to the concerns about the applicant's intellectual abilities which were highlighted by her advisers. In my view they had ample material and justification for arriving at the conclusion which they did in this respect. I cannot see that there was any irrationality or want of fair procedures in this regard or in any other part of the hearing process in this case.

Finally, it is by no means an indication of irrationality that an administrative body would adhere to the same formula of words to explain that body's understanding of a particular expression, in this case "exceptional circumstances". Indeed it would be a far more worrying situation if the respondent body were to capriciously alter the definition from case to case rather than provide certainty in the manner in which it conducts its decision making.

While the Board state that they differentiate "exceptional circumstances" from any 'date 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.

For all of the foregoing reasons, I would dismiss the applicant's claim herein.