Neutral Citation Number: [2010] IEHC 444

THE HIGH COURT

JUDICIAL REVIEW

2009 559 JR

BETWEEN

ANNE WELDON

APPLICANT

AND

MINISTER FOR HEALTH AND CHILDREN

AND

LOURDES HOSPITAL REDRESS BOARD

RESPONDENTS

JUDGMENT of Kearns P. delivered the 10th day of December, 2010

By order of Peart J. dated the 26th May, 2009, the applicant was granted leave to apply for judicial review of a decision taken by the second named respondent which had the effect of refusing the applicant compensation under the Lourdes Hospital Redress Scheme. The reliefs sought by the applicant include the following:-

(i) An order of *certiorari* quashing the decision of the respondents dated the 28th August, 2008, which stated that the applicant was 'not eligible to be considered for redress' under the Lourdes Hospital Redress Scheme.

(ii) An order of *mandamus* requiring the respondents to consider all the evidence in the applicant's application under the Lourdes Hospital Redress Scheme including the evidence of Mr. Roger Clements, and to determine what redress is appropriate for the applicant.

(iii) A declaration that the respondents have failed to consider the applicant's application under the Lourdes Hospital Redress Scheme in a manner that is lawful or in accordance with the applicant's right to fair procedures.

(iv) A declaration that the second named respondent's refusal and/or failure to consider medical evidence other than that commissioned by itself in the applicant's case gives rise to a reasonable apprehension that the respondents have acted, and continue to act, in a manner that is biased and/or unfair.

(v) If and insofar as it is required, an Order granting an extension of time.

(vi) Such further or other order as to this Honourable Court shall seem meet.

(vii) An order providing for costs.

FACTUAL BACKGROUND

These proceedings arise out of the decision of the second named respondent, the Lourdes Hospital Redress Board (hereinafter referred to as "the Board"), in relation to a claim for redress under the Lourdes Hospital Redress Scheme made to the Board by the applicant.

The applicant had a planned hysterectomy in 1990 during which a bilateral oophorectomy was also carried out by Dr. Michael Neary at Our Lady of Lourdes Hospital, in Drogheda, Co. Louth.

The first named respondent, the Minister for Health and Children, introduced the Lourdes Hospital Redress Scheme (hereinafter referred to as "the Scheme") following the report of the Lourdes Hospital Inquiry. The Board was established as an independent redress board to determine applications and direct *ex gratia* payments to be made by the Minister in accordance with the Scheme. The object of the Scheme was to provide compensation to those women who underwent unnecessary obstetric hysterectomies and bilateral oophorectomies carried out by Dr. Michael Neary during the period 1974 to 1998.

The following is a chronology of the relevant events in relation to this application.

- On the 18th June, 1990, the applicant underwent a planned hysterectomy at Our Lady of Lourdes Hospital in Drogheda. Dr. Michael Neary carried out this hysterectomy in addition to a bilateral oophorectomy.

- On the 18th April, 2007, the first-named respondent established the Scheme to be administered by the Board.

- On the 25th July, 2007, the applicant responded to a newspaper advertisement, placed by the Health Service Executive advertising the Scheme and calling on possible claimants to contact the Board, and applied for redress under the Scheme.

o The solicitor for the Board wrote to the applicant by letter dated the 2nd August, 2007, acknowledging receipt of her application and seeking the applicant's relevant records and a copy of the required gynaecologist's report which would advise that the operation was medically unwarranted. It appears that the applicant sought copies of her medical records from Our Lady of Lourdes Hospital and was informed that, save for a histology report (which was provided to the applicant by the hospital), her records could not be located.

o The solicitor for the Board wrote again to the applicant on the 5th September, 2007, informing the applicant that in order to consider her application a gynaecologist's report was required advising that the operation giving rise to the application was medically unwarranted.

o The applicant was further informed in conversation with the solicitor for the Board on both the 16th January, 2008, and the 26th February, 2008, that she was required to furnish a medical report stating that the operation of bilateral oophorectomy was unnecessary. The applicant was informed that the Board had written to the hospital to try to obtain hospital records that were not held on the applicant's chart and that the Board required a copy of the applicant's G.P. records.

o Notwithstanding the letters of the 2nd August, 2007, the 5th September, 2007, and the conversations of the 16th January, 2008, and the 26th February, 2008, no medical report was provided by the applicant which stated that the procedures performed on the applicant by Dr. Michael Neary were medically unnecessary. Notwithstanding that the obligation to provide such a report rested upon the applicant, the Board took the step of commissioning its own reports in order to ensure that the applicant's application was not struck out on the basis of her failure to provide such a report or her delay in doing so. The solicitor for the Board informed the applicant that the Board was commissioning these reports and she did not express any disagreement with this course of action. Reports were thus sought and obtained from Professor Wells, professor of gynaecological pathology at the University of Sheffield Medical School, and Mr. James G. Feeney, Professor of Obstetrics and Gynaecology. Both concluded that the hysterectomy and bilateral oophorectomy were medically warranted in the applicant's case due to her extensive endometriosis.

o By letter dated the 28th August, 2008, the applicant was informed that her application was refused with the Board deciding that the applicant's case was "not eligible to be considered for redress".

o By letter dated the 11th September, 2008, the applicant's solicitor wrote to the Board and requested access to the documents and reports relied upon by it.

o By letter dated the 16th September, 2008, the Board replied and enclosed the reports and documents requested. The Board confirmed that their decision was final and that the case was closed.

o The applicant's solicitor responded by letter dated the 29th September, 2008, stating that Mr. Roger Clements, consultant obstetrician and gynaecologist, was reviewing the applicant's case and requested that the Board keep the applicant's file open. The applicant's solicitor forwarded the report of Mr. Clements to the Board and asked it to adopt its findings by letter dated the 12th November, 2008. By this time the Board was effectively wound-up and was *functus officio*.

o The applicant applied for and was granted leave to challenge that decision by judicial review on the 26th May, 2009.

SUBMISSIONS OF THE APPLICANT

The refusal by the Board in August 2008 was based upon two expert medical reports. It was submitted that as these medical reports were the basis upon which the adverse decision was formed, the applicant should have been apprised of these reports. Counsel argued that the omission in providing the applicant with the two reports prior to determining her claim offended the principle of *audi alterem partem*. The applicant believed that she qualified for the Scheme and she was given no indication of the contents of the two expert medical reports obtained by the Board prior to being notified of the Board's decision. Counsel placed reliance upon the US Supreme Court decision in *Goldberg v. Kelly* (1970) 397 U.S. 254.

It was also submitted that the Board was not exempt from the requirement for fair procedures on the basis that it was non-statutory, *ex gratia* or inquisitorial. Counsel relied upon *Kiely v. Minister for Social Welfare* [1977] 1 I.R. 267 and *O'Ceallaigh v. An Bord Altranis* [2000] 4 I.R. 54.

While it was part of the respondents' case that the applicant should be denied any relief because of her delay in bringing judicial review, it was submitted that the facts did not support that case. The applicant was informed that her application had been refused by the Board by letter dated the 28th August, 2008. A series of letters emanated thereafter from the applicant's solicitors to the Board. The only response that was received to these letters was a letter marked "return to sender, Board closed down" which came to hand on the 21st April, 2009. The applicant applied for and obtained leave to bring these judicial review proceedings on the 26th May, 2009. It is submitted by counsel that the relevant date for judicial review purposes was the 21st April, 2009, as that was the relevant date of knowledge.

Counsel further noted that the Scheme was inquisitorial and contended that the applicant was co-operating with the Board yet she did not have knowledge that she had to obtain her own expert reports.

It was further submitted that the evidence relating to events from mid-August 2008 onwards and the explanation provided by the Board in not considering Mr. Clement's medical report was hearsay. It was counsel's contention that the solicitor who ceased employment in July 2008, one month prior to the closure of the Board, was the person who should have sworn the affidavit and no cross-examination of the solicitor thereafter appointed could take place because that solicitor was not working for the Board at the relevant time. Counsel relied in this regard on the decision of the Supreme Court in *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168.

SUBMISSIONS OF THE RESPONDENT

Counsel for the respondents commenced by drawing the Court's attention to the letter from the H.S.E. to the applicant dated the

12th July, 2007, in which the H.S.E. wrote:-

> *"I am writing to you at this time as our hospital records indicate that you had one of the procedures referred to above during the period covered by the Scheme.*
>
> *The patient advocacy group, Patient Focus, is working in conjunction with the HSE to ensure that you receive maximum assistance and support in relation to this. The following is offered:*
>
> • *facilitation and funding of an independent assessment of your medical records to ascertain if the procedure was appropriate with the help of external experts;*
>
> • *funding for counselling or other one to one supports as appropriate should you require same.*
>
> *Should you not wish to avail of this you are free to contact the Redress Board directly (contact details are given at the end of this letter). The Redress Board will provide you with every assistance and explanation of how to make an application under the Scheme."*

Paragraph 3 of the Scheme sets out the persons who were eligible to apply for payment under the Scheme. These were persons who underwent:-

> "(A) An unplanned obstetric hysterectomy which in the opinion of a consultant obstetrician was medically unwarranted.
>
> (B) In association with an obstetric hysterectomy, an unplanned bilateral oophorectomy or removal of remaining single functioning ovary where such oophorectomy was in the opinion of a consultant obstetrician medically unwarranted.
>
> (C) An unplanned obstetric hysterectomy where the woman's relevant Hospital Records are unobtainable.
>
> (D) [Not relevant to the applicant's claim]
>
> (E) A bilateral oophorectomy or removal of remaining single functioning ovary performed while the applicant was under 40 years and which has rendered her immediately menopausal and where in the opinion of a consultant gynaecologist such oophorectomy was medically unwarranted."

Counsel noted that the applicant was advised at the outset that the Scheme was established and that she may be eligible. The applicant was further informed that she could avail of "facilitation and funding of an independent assessment" of her medical records yet the applicant remained passive about the issue of obtaining an independent assessment. The applicant was informed from the outset and subsequently on a number of occasions that she was required to provide an independent medical report stating that the operation was procedurally unnecessary. To this end, the H.S.E., on behalf of the hospital, had even provided the applicant with a copy of her histology report. Counsel contended that the applicant's claim was "doomed to failure in any event" because she had not submitted an independent medical report stating that her operation was unnecessary. The applicant had been requested on four separate occasions since August 2007 to get an independent medical report and yet continuously failed to fulfill this request. While it was the applicant's contention that had she known that the two reports obtained by the Board were negative then she would have obtained her own advice, counsel for the respondents submitted that this was a largely illogical approach.

The relevant terms of the Scheme were cited to the Court and it was noted that the Scheme provided that decisions once made would be final. The definition of the term "medically unwarranted" under the Scheme is as follows:-

> *"In reference to any hysterectomy or oophorectomy hereinafter listed in Clause 3 A, B, D or E, an operation which, in the expert opinion of the consultant obstetrician or consultant gynecologist (as the case may be) expressed after due professional and reasoned consideration of (i) the Applicant's history and account, and (ii) all relevant medical records including, where available, the report from the hospital pathologists, or following consideration of a report obtained from a pathology expert of tissue slides or blocs, and (iii) all relevant facts and circumstances including the date on which the operation was carried out, was as a matter of probability and for the reasons given in his/her report medically unwarranted."*

In terms of the five categories (A,B,C,D, and E) of persons eligible to apply for payment under the Scheme the applicant did not fall within those categories related to "unplanned" obstetric hysterectomies for which an expert report was not necessary. The applicant's hysterectomy was a planned hysterectomy and not an unplanned obstetric hysterectomy. The applicant was never entitled to compensation under category C, "an unplanned obstetric hysterectomy where the woman's relevant Hospital Records are unobtainable", and the Board were at pains to explain to her that in order for her to claim under one of the other categories the applicant needed an expert medical report so as to establish that the operation was "medically unwarranted".

In summation, counsel for the respondents submitted that the applicant singularly failed to take the step which would have made her eligible to be considered by the Board. As to the correspondence from Mr. Clements, consultant obstetrician and gynaecologist, and the strong view he sets out having viewed the file, counsel noted that Mr. Clements failed to examine the G.P.'s records which set out the fact that the applicant had undergone years of treatment for endometriosis.

It was counsel's contention that the requirement for fair procedures must be looked at within this specific context. Claimants had to furnish an expert medical report so as to bring themselves within the Scheme and an advocacy group had even been formed to assist in this. Ultimately an impasse had been reached in this case where her claim was "doomed to failure" unless the Board tried to establish what she herself had failed to establish. The applicant did nothing to facilitate bringing herself within the Scheme until she was informed that her claim was denied. Counsel noted that the applicant has not been deprived of any right and she does not have an *ex gratia* entitlement to come within the Scheme. Furthermore, the applicant can continue to litigate in the High Court by plenary summons if she chooses to do so.

On the issue of delay, counsel submitted that time began to accrue as of the 28th August, 2008, when the applicant was notified of the Board's decision to refuse her claim. Counsel further noted that even if the date of the 28th August, 2008, was not accepted as

the commencement of the accrual of time, the applicant had full knowledge that the decision of the Board was final and the case was closed by letter dated the 16th September, 2008. Therefore, the principal grounds for this judicial review had cystallised and were known to the applicant/ her solicitor immediately after the 16th September, 2008. This decision was not, however, challenged until nine months later on the 26th May, 2009.

In response to the applicant's argument that the date of knowledge should be deemed to be the 21st April, 2009, the date upon which the applicant's solicitor received the 'return to sender, Board closed down' letter, counsel for the respondents noted that the applicant was informed on the 16th September, 2008, yet contrary to this the applicant's solicitor continued to write to a Board that no longer existed. Counsel for the respondents placed reliance upon the decision of *O'Flynn v. Mid-Western Health Board* [1991] 2 I.R. 223 and *Slatterys Ltd. v. Commissioner of Valuation* [2001] 4 I.R. 91. Counsel further noted that the onus to advance reasons why delay should be excused is placed firmly upon the applicant.

The fact that proceedings were not instituted until the Board was wound up is not only problematic as the Board had deleted its computer records, but also strengthens the merit of the delay argument. In dealing with the applicant's argument that the time limit was extended by virtue of the 'return to sender, Board closed down' letter dated the 21st April, 2009, counsel for the respondents noted the decision of Carroll J. in *Finnerty v. Western Health Board* (Unreported, High Court, Carroll J., 5th October, 1998) in which an analogous argument was rejected by the Court. It was counsel's submission that the applicant had delayed beyond what is allowed for in the Rules of the Superior Courts and had not advanced reasons for this delay to be excused.

DECISION

The contention that the applicant was not afforded fair procedures is in my view without merit in this instance. The applicant in this case was given notice of the intention to make a determination and was also given ample opportunity for making her case. The applicant, however, failed to take the step which would have made her eligible to be considered by the Board. In fact, the Board went beyond what was required in affording the applicant fair procedures. Anxious to ensure that the applicant would not be unfairly excluded from the Scheme by virtue of her own inadvertence in not submitting the required reports, the Board commissioned two medical reports to be completed.

In relation to the delay point, this Court is entirely satisfied that delay is not a matter to be dealt with exclusively at the *ex parte* leave stage, but can also be addressed at the substantive hearing as was held to be the case in *Solan v. Director of Public Prosecutions* [1989] I.L.R.M. 491, *O'Flynn v Mid-Western Health Board* [1991] 2 I.R. 223 and *Slatterys Ltd. v. Commissioner of Valuation* [2001] 4 I.R. 91.

In accordance with Order 84, rule 21(1) time begins to accrue "when grounds for the application first arose". The key issue to be determined is to ascertain as to when the grounds first arose. Order 84, rule 21(2) provides that where *certiorari* is sought in respect of a judgment, order, conviction or other proceeding, the date when the grounds first arose is to be taken to be the date of that judgment, order, conviction or proceeding. In this case, that date must be deemed to be the 28th August, 2008. It is a matter for the discretion of the Court whether the time limits in Order 84, rule 21(1) will be extended and the exercise of that discretion involves a consideration of all the relevant circumstances as detailed in *De Róiste v. Minister for Defence* [2001] 1 I.R. 190. The applicant must demonstrate the "reasons which both explain the delay and afford a justifiable excuse for the delay" as stated by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] 1 I.L.R.M. 301 at p. 315. This was cited with approval by Fennelly J. in *De Róiste v. Minister for Defence* who also stated the view that delay in making an application for judicial review requires both explanation and justification consistent with the provisions of Order 84, rule 21.

The applicant has not satisfied this Court that there was a "reasonable explanation" for the delay of nine months in instituting proceedings. The respondent has successfully established delay which does indeed preclude the applicant from relief. In light of this, I am of the opinion that the applicant must fail in her application for the declarations set out in her statement of grounds.

I am satisfied that in all the circumstances of this case there was undue delay in applying for judicial review and for that reason, in addition to my conclusion that there was no want of fair procedures, I would refuse the relief sought.