Neutral Citation Number: [2009] IEHC 284

THE HIGH COURT

JUDICIAL REVIEW

2009 253 JR

BETWEEN

J. O'B.

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REDRESS BOARD

RESPONDENT

JUDGMENT of Mr. Justice Daniel O'Keeffe delivered on the 24th day of June, 2009

Decision Challenged
1. The decision challenged in this application is that of the Residential Institutions Board ("the Board") established by the Residential Institutions Redress Act ("the 2002 Act") sent to the Applicant under cover of a letter dated 19th December, 2008 recording its decision that there were no exceptional circumstances to justify the late admission of the Applicant's application for redress under the 2002 Act.

Facts
2. The Applicant is aged 74 (date of birth, 26th February, 1935). In his application to the Board, he states that he was a resident in St. Patrick's Industrial School, Upton, Cork from 1947 to 1953 where he claims he was abused. He moved to England in 1955 and has lived there ever since. He lives in Coventry. He made an application to the Board which was dated 23rd January, 2006 and was received by the Board on 20th February, 2006. The application was sent under cover of letter from his current solicitor which letter was dated 14th February, 2006. In addition to the completed form there was also enclosed an affidavit sworn by the Applicant on 10th February, 2006. The Applicant in his affidavit explained the circumstances in which he became aware of the scheme established by the 2002 Act. He claimed that he had been unaware of the scheme until late November 2005 when he saw an advertisement in a national newspaper in England. He claimed to have about two weeks to make the application having learned of the scheme. His half brother was killed in Cork in a hit and run accident on 28th December, 2006. The Applicant attended the funeral. On his return to England he attended an Irish Welfare Centre in Coventry in relation to an Irish pension. He was referred to the Survivor's Outreach Team run by the Coventry Irish Centre where he met Mr. Simon McCarthy. He was advised about the Redress Scheme operated by the Board. He received assistance from Mr. McCarthy.

3. The application was initially rejected by the Board on 18th May, 2006 and again on 3rd May, 2007 as being out of time. The Applicant and seventeen others challenged the refusal to extend the time in High Court proceedings. The proceedings were settled on the basis of an oral hearing of the late application. The oral hearing in respect of the Applicant took place on 24th October, 2008. The Applicant gave evidence which was preceded by generic evidence which was treated as evidence in every case including that of the Applicant.

4. In its decision dated 19th December, 2008, the Board rejected the Applicant's application and concluded that it did not consider that there were exceptional circumstances within the meaning of section 8 (2) of the 2002 Act.

Summary of Relief Sought
5. The Applicant claims a declaration that the Board's decision that the Applicant's application was not received within the statutorily permitted period was unlawful and in breach of the provisions of the 2002 Act. He further claims a declaration that the decision of the Board that there were no exceptional circumstances was wrong in fact and in law. He claimed a declaration that the Applicant had insufficient opportunity to submit his application for a redress by 15th December, 2005. He sought orders of *certiorari* quashing the decision of 19th December, 2008 and an order for mandamus to compel the Board to admit the application for redress.

Summary of Grounds Relied Upon
6. The Applicant submitted that in its finding that two weeks constituted an adequate opportunity to make an application for redress, the Board was unreasonable, behaved irrationally and/or acted unfairly. The Applicant submitted that the Board misdirected itself in law in finding that a lack of knowledge of the scheme was incapable of amounting to "exceptional circumstances" within the meaning of section 2 of the Act such as to justify the extension of time in which to lodge an application for redress. The Applicant claimed that relevant considerations were ignored by the Board in reaching its decision. The Board, *inter alia,* failed to have regard to the fact that the Applicant did not know of the existence of the scheme and/or that it applied to him until he was referred to the Outreach Service of the Irish Centre in Coventry on 23rd January, 2006.

7. It was submitted on behalf of the Applicant that the Board in finding that the Applicant was "striving to be truthful and honest" chose to disregard his sworn evidence that he first telephoned the Board in late November 2005 and that the Board found instead that he first telephoned the Board after 29th December, 2005. In so doing, the Board, it was contended, placed reliance upon a significant error of fact. There was no substantial basis for such a finding of fact.

8. It was farther claimed the Board may have taken account of an irrelevant factor, namely its suspicion that the Applicant may have known about the scheme since his mother's death in 2003.

The Law
9. Section 8(2) provides:-

> "The Board may, at its discretion and where it considers there are exceptional circumstances, extend the period referred to in subsection (1)."

Subsection 1 provides that an Applicant shall make an application to the Board within three years of the establishment date (16th December, 2002).

10. The decision of the Board dealt with what constitutions "exceptional circumstances" as follows:-

> "There is no definition of 'exceptional circumstances' included in the 2002 Act. However, some guidance it 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'.
>
> Both counsel for the Applicant and counsel for the Board agreed that this definition was of assistance. The same dictionary defines an "exceptional case" as one which is 'excepted, a particular case which comes within the terms of a rule, but 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'.
>
> 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 for the Board to apply a test of uniqueness in these cases."

11. In this Court, this broad definition of what constitutes "exceptional circumstances" was again accepted by both sides.

12. The Board continued:-

> "Accordingly, therefore when considering applications for an extension of time under section 8(2) of the 2002 Act, the Board will determine each application according to its individual merits and particular circumstances. In this respect, the Board does not consider that it is possible to define in advance what circumstances might be considered exceptional. Furthermore, to attempt such an exercise would severely restrict the discretion of the Board and might result in injustices to those whose circumstances in fact were exceptional, but who did not fall within a list of stated and prescribed exceptions.
>
> However, such an approach does not prevent the Board from envisaging or surmising what sort of individual circumstances in a particular case might be considered exceptional, e.g. 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 types of circumstances, prevailing at a relevant time, could have the effect of preventing or inhibiting an Applicant from making an application within the prescribed period and could be considered exceptional."

13. The above instances of what might constitute instances of exceptional circumstances were broadly accepted by counsel for both parties. It is not an exhaustive list.

14. The decision continued at p. 10:-

> "The Board wishes to add that it is of the view that ignorance of the existence of scheme and/or closing date, in and of itself, does not constitute exceptional circumstances. It is reasonable to assume that a large majority of, if not almost all, late Applicants will state that their applications are late because they did not know about the redress scheme in time. However, if the Oireachtas intended that all such applications be accepted, the Board considers that it would have employed a state of knowledge test in section 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."

15. Looking at the instances which the Board said might constitute exceptional circumstances in a particular case, 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.

16. It is also to be remembered that this is not an appeal on the merits from the Board's decision but is an application for judicial review which has to be decided in accordance with the principles applicable for judicial review. Neither is the application a rehearing.

17. Mr. Kevin Cross, S.C., on behalf of the Respondent referred to the principles which are set out in the decision of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] I.R. 39 and submitted that the principles set out in that case are applicable to the present circumstances.

18. In particular, he referred to the following passage from the decision of Finlay C.J. at p. 71:-

> *"It is clear from these quotations that the circumstances under which the court can intervene on the basis of*

irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642 the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene.

The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it…

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."

19. Mr. Matthias Kelly, Q.C. on behalf of the Applicant referred to the decision of Edwards J. in *D.V.T.S. v. Minister for Justice, Equality and Law Reform and the Refugee Appeal's Tribunal* [2008] 3 I.R. 476 and submitted that this was an authority for an extension of the principles set out in the *O'Keeffe* decision. It was a case in which the Applicant sought leave to apply for judicial review of a decision of the Refugee Appeal's Tribunal under the Refugee Act 1996 (as amended) and section 5 of the Illegal Immigrants (Trafficking) Act 2000. Firstly, it was to be noted that no reference was made to the *O'Keeffe* case in the decision. Furthermore, it turned on the principles of determining applications under the Refugee Act including how medical evidence is to be assessed and how country of origin information which was of a conflicting nature was to be assessed. It is of no relevance to the issues under consideration in this case.

20. Mr. Kelly also referred the following three United Kingdom authorities:-

R. v. London Borough of Brent, ex parte Gunning [1985] LGR 168 (at p. 189), *R. v. Secretary of State for Education, ex parte National Union of Teachers* (14th July, 2000) (paras. 88, 90 and 91) and *R. v. North East Devon Health Authority, ex parte Coughlin* [2000] 2 WLR 622 (p. 72).

21. They were applications to the court challenging the time given to persons for making proposals during a consultation period. (For example, the National Union of Teacher's case concerned the period of consultation allowed prior to introducing a statutory instrument which purported to modify the contracts of employment of teachers.) I find none of these authorities of relevance to the statutory provisions under the 2002 Act.

22. Accordingly, I propose to adopt the test and principles set out above in the *O'Keeffe* decision.

The Decision

23. At p. 10 of the Board's decision, the Board refers to the evidence given on affidavit by the Applicant in his affidavit of 10th February, 2006 and that given by him at the oral hearing before the Board. It states:-

"The Applicant has presented to the Board two very different versions of what occurred after he read the Board's advertisement in a national newspaper in November 2005. In his affidavit of 10th February, 2006, the Applicant stated that he had immediately telephoned the Redress Board and that he received information from the Board approximately two weeks before 15th December, 2005 deadline.

However, at no point, he averred, did the Board alert him to the fact that he had only approximately two weeks to complete and return his application. Were the Board to accept this evidence, the failure of the Board's staff to alert the Applicant to the eminent deadline might well give rise to exceptional circumstances within the meaning of section 8(2).

However, in oral evidence, Mr. O'B. conceded on a number of occasions that he had not telephoned the Redress Board until after his half brother's funeral in Cork. His brother was killed in a hit and run accident on 29th December, 2005. The Board feels that Mr. O'B. was striving to be truthful and honest when giving evidence before it, and considers the version of events provided during the course of oral evidence to be the correct one. Unfortunately, however, this oral evidence condemns the Applicant's application for an extension of time."

24. Mr. Kelly on behalf of the Applicant submits in so concluding the Board placed reliance upon a significant error of fact and that there was no substantial basis for such a finding of fact. In support of this contention he also relied upon the decision in *D.V.T.S.* above referred to which I have already decided is of no relevance in this case. Mr. Cross on behalf of the Respondent submitted that there was sufficient evidence before the Board to make such a conclusion and that it was entitled to do so. Specifically he referred to the following passages in the transcript of evidence of the Applicant; p. 9 – Q. 75 – 76; p. 10 – 11 – Q. 81 – 89; p. 12 – lines 1 – 7 (Judges Questions); p. 13 – Q. 94; p. 17 – 18 – Q. 116 – 128.

25. I have read the foregoing passages and in my opinion they support the submission of the Respondent. Furthermore, the Board's conclusions are also supported by the evidence on p. 15 – Q. 106 – 108. In my opinion, no basis has been provided by the Applicant for upsetting this critical conclusion of the Board. It was not irrational or unreasonable.

26. The Board's decision continues at p. 11:-

"The Applicant clearly recalls having a conversation with his half brother, Kenneth about the existence of the redress scheme. At one point, Mr. O'B. indicated that this conversation took place at or shortly after his mother's funeral in 2003; however, elsewhere, he stated that it was around the time of his brother's funeral.

The Board considers it possible that the Applicant was aware of the redress scheme as far back as 2003, but in any

event it is absolutely clear that he was aware of the scheme in November 2005 before the deadline for receipt of applications. The fact that the Applicant saw the Redress Board's advertisement in November 2005 is one aspect which is consistent throughout both his affidavit and oral evidence. The terms of this advertisement clearly set out that some who suffered abuse as a child in a residential institution in the Republic of Ireland may be entitled to compensation; it noted that the reader or his/her solicitors could contact the Board; it clearly reminded potential Applicants that the deadline for receipt of all applications was 15th December, 2005 and it set out the Board's contact details. Mr. O'B. at first stated that he had never seen the bottom part of the advertisement which related to the deadline. He subsequently clarified that he had only 'concentrated' on the top half of the advertisement. The Board is satisfied, however, that the full advertisement was published and that anyone who read it was made aware that the closing date for receipt of application was 15th December, 2005.

Having read the advertisement in November 2005, it seems from Mr. O'B's oral evidence, which the Board accepts, that he did nothing further until early January, a couple of days or a week after his brother's funeral, when he telephoned the Redress Board. The Applicant has failed to advance any particular circumstances to explain this delay. Of course, the death of his brother was undoubtedly a traumatic experience, but this occurred approximately one month into this period of delay and two weeks after the deadline for making an application had expired."

27. At p. 12 the Board continued and stated:-

"Mr. O'B.'s counsel suggested in his closing submission to the Board that exceptional circumstances arose because of the Applicant's lack of knowledge until the last minute. As noted above, the Board thinks it possible that Mr. O'B. knew of the scheme from 2003, but even on the assumption that he only found out about in November 2005, it considers that he had an adequate opportunity to make an application on time. Obviously if some particular circumstance had intervened between November 2005 and 15th December, 2005 to prevent him from applying at that point, there may be grounds for extending the period pursuant to section 8(2). However, there is no evidence that anything of this nature occurred."

28. In my judgment it was open to the Board to conclude that from November to 15th December, 2005 that the Applicant had an adequate opportunity to make an application on time (before 15th December, 2005). I have also had regard to the contents of the application form which required to be completed before 15th December, 2005. This conclusion by the Board was not irrational or unreasonable. As events turned out, the Applicant did nothing. Furthermore, in my opinion, the Board correctly referred to the fact that in that intervening period that there could be grounds for extending the time pursuant to section 8(2). Finally, that there was no evidence that anything of this nature occurred is in my opinion again supported by the facts of the case and the evidence given by the Applicant.

29. Whilst there is reference to the possibility of the Applicant learning about the scheme in 2003, it is clear that the decision of the Board proceeded on the assumption that the Applicant only found out about the scheme in November 2005. Furthermore, it concluded that it was open to the Board to make its conclusion that the Applicant had an adequate opportunity to make the application on time, he having only found out about in November 2005. Again, I note that the Board specifically found that there was no evidence that any circumstance had occurred between November 2005 and 15th December, 2005 which would have prevented him from applying to the Board. In my opinion, the Board was so justified in concluding that there were no grounds which might have been the basis for extending the time pursuant to section 8(2). In November 2005 the Applicant had an adequate opportunity to make an application on time.

30. At the conclusion of its decision, the Board referred to the fact that the 18 Applicants had made a general submission to the effect that lack of knowledge on the part of formers residents living in the United Kingdom, viewed in the context by an alleged failure by the Board to discharge its function under section 5(1)(b) of the 2002 Act comprised exceptional circumstances for the purpose of section 2. The failure alleged in this respect was a failure to advertise adequately the Board's existence and function in making awards in the United Kingdom. It was stated that there was also a suggestion that the Board should have tried to identify and correspond directly with former residents instead of relying solely on advertising and outreach to initiate contact. In its decision, the Board said that it did not consider it necessary to address this argument in the instant case. The Board concluded that lack of knowledge did not arise in the circumstances where the Applicant was made aware of the Board's scheme within sufficient time to allow him to make his application before 15th December, 2005. It further found that there could be no question of the Board having failed to comply with section 5(1)(b) insofar as the Applicant is concerned: on his own evidence, it was because of the Board's efforts pursuant to such provision namely its advertisement that the Applicant became aware of the Redress Scheme in advance of the deadline for making an application. In my judgment, the Board was entitled to come to these conclusions. The Applicant became aware of the Board's scheme as a result of the advertisement. Furthermore, it was within power of the Board to conclude that there was sufficient time for the Applicant to make his application before 15th December, 2005, as I have already found.

31. Counsel on behalf of the Applicant complained of the onerous nature of completing the application form. It is to be noted that the Board found that he did not receive the application form until January 2006. The Applicant could therefore not have known in the first two weeks of December at a time when he ought to have completed the application form how onerous or otherwise it was. No point of substance emerges from this submission.

32. Again, it was submitted that imposing a cut off date was harsh and severe. In my judgment, the cut off date was a legitimate legislative provision in itself.

33. In generic evidence given to the Board, it is to be noted that Dr. Elizabeth McDonald, a Consultant Psychiatrist had not met the Applicant (or any of the eighteen late applications whose cases were pending).

34. It was also submitted that the court should have regard to the evidence given by the Applicant that he "just gets a bit confused with dates and things like that" (p. 12) and p. 13 where in answer to a question, did he do anything about the ad having seen it, he said "I didn't understand it for a bit you see". Again at p. 14 of his evidence he said he did not know whether the scheme apply to him and he did not know how to go about it and that was his problem.

35. Some of this evidence related to events in January 2006. There was the positive finding by the Board (as it is in my judgment it was entitled to conclude) that the Applicant had the opportunity to make the application in the period from November 2005 to 15th December, 2005. Furthermore, no evidence was adduced by the Applicant to show that his state

of knowledge constituted exceptional circumstances in the period from November 2005 to 15th December, 2005. The Board was entitled to weigh up such evidence having heard the applicant. It is also to be noted that evidence of Dr. McDonald was that the persons concerned would have understood the time limits, but she thought it felt very harsh and unfair for them as individuals to be denied access to the Redress Board because of a time limit.

36. In conclusion, I dismiss this application.