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Neutral Citation Number: [2006] IEHC 401

THE HIGH COURT

[2006 No. 618 J.R.]

JUDICIAL REVIEW

BETWEEN

P.S.

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REDRESS BOARD

RESPONDENTS

Judgment of Mr. Justice Gilligan as delivered on Friday the 3rd day of November, 2006

1. The applicant in these proceedings, who now lives in C., seeks *inter alia* an order of *certiorari* of a purported decision and judgment of the Institutional Redress Board, communicated by letter entitled "Notice of Award" and a document headed "Application of P.S." as dated 10th day of May, 2006 and made pursuant to the provisions of s. 13 of the Residential Institutions Redress Act 2002.

2. The applicant further seeks a declaration that the division of the Redress Board sitting on 28th and 29th March, 2006 in respect of the applicant's case acted *ultra vires* its powers as set out in the provisions of the Residential Institutions Redress Act 2002.

3. The applicant further seeks a declaration that the purported decision taken by the Redress Board together with the reasons set out in the decision of the Board and signed by its Chairman on behalf of the said division of the Board was unlawful and in breach of the applicant's statutory rights.

4. The applicant further seeks a declaration that the purported decision taken by the Board was made in breach of the requirements of natural and constitutional justice and a further declaration that the Board failed to comply with the provisions of Article 6 and Article 8 of the Convention of Human Rights as implemented by the European Convention on Human Rights Act 2003.

5. The grounds for the relief as set forth by the applicant in the statement grounding application for leave for judicial review are enumerated at paragraphs 1 to 14 therein and the applicant for the purpose of this application is not relying on the content of paragraphs 7 to 10 inclusive.

6. The principal ground relied upon is that the applicant's expert psychiatric evidence was rejected on grounds, *inter alia*, that the psychiatrist was unprofessional in failing to produce his clinical notes at the hearing of the application on 28th and 29th March, 2006.

7. Furthermore the applicant relies upon the Board having acted in breach of the requirements of natural and constitutional justice by acting irrationally, *inter alia*, on the basis of rejecting the psychiatric evidence called by the applicant, *inter alia*, because the applicant's psychiatrist did not produce his medical notes dating from 1998 to 2006 at the hearing of the application without having made any request in writing or otherwise as provided for by s. 10(6) of the Act of 2002.

8. By way of factual background, the applicant was born in Ireland on 28th January, 1953 and was committed by court order to the care of an Industrial School in Dublin on 24th day of April, 1959 and she was detained there until early 1969. Owing to an administrative error, she was released for a brief period in 1968 but was returned to the institution. The applicant subsequently brought an application pursuant to the provisions of the Residential Institutions Redress Act 2002 on 7th November, 2003 and her application contained a detailed account of her experiences as a child in the institution and in particular described details of physical, sexual and psychological abuse. Her application was accompanied by a number of medical reports and these were received and noted by the respondent and in this regard, following an examination of these documents, the respondent issued "a letter of completion" as dated 15th day of September, 2004. In my view, this letter of completion is of significant importance, because the applicant had not furnished any medical or clinical notes from Dr. C, her treating psychiatrist, whom she had attended from 1988 to 2006, other than two extracts of Dr. C's case notes as dated 14th day of June, 1999 and 16th day of June, 1999 which appear in the applicant's statement of abuse as dated 7th day of November, 2003. The respondent was aware of this fact and against this background, the respondent set out in the "letter of completion", that the documents as submitted constituted all the documents which the respondent intended to consider in deciding on the application for redress. The letter of completion goes further, in stating that if at any time additional documents come to the attention of the Board which appear to be relevant, then the applicant would be given an opportunity to examine these and comment prior to any decision being made. The Board and its individual members also retained the right to make such notes as it considered appropriate arising from the disclosed documentation during its decision making process.

9. Also of some significance in this letter of completion is the fact that reference was made to the respondents own independent consultant psychiatrist, Dr. D, and in his report as dated 6th day of January, 2004 as a result of an examination of the documentation as submitted by the applicant, he came to the conclusion that the injuries described are consistent with the alleged abuse and he did not consider that any further examination of the applicant by any consultant psychiatrist was required.

10. Any reasonable interpretation of the report of Dr. D of 6th day of January, 2004 indicates, that in his medical opinion, the applicant was telling the truth. It is however to be noted that the Board retains the right to come to its own independent conclusion on any matter referred to in Dr. D's medical report.

11. In relation to the principal point as advanced on the applicant's behalf, the hearing (as requested by the applicant as opposed to exploring the possibility of settlement) took place on 28th/29th March, 2006, at the premises of the respondents in Clonskeagh and oral evidence was heard from both the applicant and Dr. C and a reserved judgment issued on the 10th May, 2006.

12. In the applicant's statement of abuse as furnished to the respondent on 7th day of November, 2003, there is a distinct reference to the medical/clinical notes of Dr. C on pages 14 and 15. The specific reference is to the effect that the applicant cannot adequately deal with the awful events surrounding the alleged sexual abuse and with the consent of her psychiatrist she referred to his notes taken during therapy sessions on 14th June, 1999 and 16th June, 1999. As I understand the position, the actual case notes for these dates were lodged with the respondent at or about the time the statement of abuse was furnished.

13. There is no doubt but that the factual details of the alleged sexual abuse as made out by the applicant could only be described as heinous and appear to represent one of the most serious cases of alleged sexual abuse ever to come before the Redress Board.

14. In respect of the medical/clinical notes of Dr. C which assume considerable importance, the only material reference in the entire hearing to these notes appears at question 287 on Day No. 2 of the hearing when Dr. C was giving evidence. The lead in is as follows:

> Q. 286: But an identifiable core of sexual allegations of a particular kind, which have lasted, though being added to down through the years?
>
> Answer: Yes.
>
> Q. 287: Forget about being added to just for the moment but whats the earliest date, do you have your notes with you there?
>
> Answer: No I don't. I would say its about two and a half to three years. Two and a half to three years when she begins to start communicating.

15. It is in my view of significance that the applicant never indicated that she was going to produce the medical/clinical notes. The respondents in the letter of completion accepted that the documentation as provided constituted all the documents which the Board intended to consider in deciding on the application. No indication was given to the applicant or her legal advisors that the content of the notes or the absence of the notes was of any significance, nor was any opportunity afforded to the applicant or her legal advisors or to Dr. C the psychiatrist to obtain the notes which no doubt in the present day and age could have been obtained at very short notice and no request for the production of any documentation was indicated by the respondents pursuant to s. 10(6) of the Act of 2002. This states:

> "For the purposes of establishing the matters specified in paragraphs (a) to (d) of subs. (4) the Board may on its own behalf or at the request of an applicant request by notice in writing any person to produce to the Board or to the applicant any document in his or her possession custody or control which relates to such matters."

16. In my view the relevant notes were a matter specified in paragraphs (a) – (d) of subs. (4) of the Act.

17. Counsel for the respondent submits that s. 10 (6) of the Act of 2002 applies only for use by the Board in respect of third party proceedings and its use would not be available to the Board in the particular circumstances of this case. I do not accept this submission having regard to the wide wording of s. 10 (6). I take the view that it is clear that the Board can, on its own behalf, request by notice in writing any person to produce to the Board any document in his or her possession, custody or control which is relevant and comes within the ambit of s. 4 of the Act of 2002. It follows that I take the view that the Board could of its own volition have requested Dr. C to produce his medical/clinical notes in his possession, custody or control relating to the matters in issue and at hearing before the Board.

18. In its reserved judgment the respondent came to the conclusion that the applicant was not entitled to compensation in respect of the alleged sexual abuse but did compensate her for physical and psychological abuse.

19. In my view there is no doubt that a number of cogent reasons were advanced by the respondent in its judgment for the conclusion arrived at but clearly one of the crucial factors leading to the conclusion was that the Board found Dr. C to be an unprofessional witness and on a reasoned reading of the judgment in this regard the basis why the Board took that view was because of the importance of the delayed reporting by the applicant of the alleged sexual abuse and that in the view of the Board the timing of the disclosures must play a vital part in the difficult task of the Board in assessing the veracity of the allegations of sex abuse. The Board took the view that Dr. C must have known this when preparing to travel from C. for the hearing and despite this fact Dr. C did not bring any note of the various times of disclosure and indeed attended at the hearing with a few sheets of paper which appeared to the Board to be copies of his reports already in their possession. As a result the Doctor was unable to give any fact based timetable of disclosures and relied on generalities of about two and a half to three years and about a year and a half before referring to dates which were themselves estimates or matters from second hand documentation. The Board went on to state in the course of its judgment that there was no indication from Dr. C that his failure to bring notes was as a result of an oversight. The Board then came to the conclusion that the failure to make relevant information available to the Board was a most unprofessional decision by Dr. C.

20. Mr. C on the respondent's behalf submits that it is clear from the judgment that the respondent Board decided that Dr. C was an unprofessional witness because he failed to bring his medical/clinical notes to the hearing from C. and that the judgment does not indicate that the actual notes themselves were in someway vital to the decision arrived at. Mr. C submits that it was simply the failure to bring the notes to led to the decision that Dr. C was an unprofessional witness.

21. I do not agree with this interpretation of the judgment of the Board. The failure to bring the notes is in my view inextricably linked with the timing of the disclosure by the applicant that she had been sexually abused and the fact of the reference by the Board that there was no indication from Dr. C that his failure to bring the notes was as a result of an oversight. I take the view that the Board came to the conclusion that the information contained in the notes was relevant and by not bringing the notes this relevant information was not available to the Board and the Board took the view that the action by Dr. C accordingly rendered him a most unprofessional witness and lead to the finding of unreliability on the basis of the whole tenure of Dr. C's evidence being both unprofessional and unreliable.

22. I take the view that fair procedures demand that if such weight was going to be attached to the medical/clinical notes and such a significant inference drawn from their non production, the applicant and Dr. C should have been given the opportunity to produce the medical/clinical notes. Alternatively the Board should have exercised its powers pursuant to s. 10(6) of the Act to call for the production of the notes against the particular background in this case where at all times it was clear and made known to the respondent that the applicant had not disclosed the medical/clinical notes (other than as set out in the statement of abuse) and they were not being relied on.

23. I further take the view that if such significance was going to be attached to the notes that such an indication should have been given to the applicant and her legal advisors to enable them to deal with this aspect, for example, possibly by way of an explanation for the non production of the medical/clinical notes.

24. This aspect of the hearing and judgment, assumes in my view even further importance against the stated background by the respondent in its judgment wherein in effect Dr. C is blamed for the failure of the applicant to succeed in her claim for redress for alleged sexual abuse. In the course of its judgment, the respondent states that it is satisfied that the fault for the making of the rejected sexual allegations lies with the scale intensity and uncritical nature of the medical treatment received by the applicant since

1988 from Dr. C and not with any lack of honesty of goodwill from the applicant.

25. If there was no lack of honesty or goodwill from the applicant, then having regard to the nature of the allegations as made by her taken in conjunction with the views of the respondents independent medical advisor Dr. D, it appears to follow that if the applicant was to fail in her claim *inter alia* because of some aspect of the evidence of Dr. C she should have been given the opportunity to clarify and at least offer explanation in relation to the non production of the medical/clinical notes.

26. In my view the aspect of the medical/clinical notes was clearly a crucial feature leading to the judgment of the respondent and in the circumstances that prevailed I take the view that unfair procedures applied.

27. I fully accept that other cogent reasons were advanced in relation to the evidence of Dr. C but the absence of the medical/clinical notes is such a significant feature in the judgment that in my view it renders the decision taken by the Board to be in breach of the requirements of natural and constitutional justice. I do not accept as submitted by counsel for the respondents that the medical/clinical notes aspect is really de minimus when taken in comparison with the other cogent reasons as given by the Board in its judgment in coming to the conclusion that the applicant was not entitled to any award for alleged sexual abuse.

28. Mr. F for the applicant has stressed that if the respondent was intending to disregard the views of its own independent medical assessor Dr. D, the Board ought to have exercised its statutory discretion to permit Dr. D to hear the oral testimony of the applicant. Alternatively should have appointed a further psychiatrist to examine the applicant. Alternatively a psychiatrist should have sat on the Board to hear the applicant at a time when the Minister had appointed at least three qualified consultant psychiatrists to sit as members of the Board and this particular case with its gravity had been listed long in advance for hearing. I do not accept that there is any substance to the submissions as made and I reject the applicant's contention in this regard.

29. The remaining issue is the question of an adequate alternative remedy. Under s. 13 of the Residential Institutions Redress Act 2002 an applicant may submit an award to a review committee for a review of the amount of the award made by the Board. In the present case the applicant has in fact adopted this procedure and submitted the award for review pursuant to a letter of 19th May, 2006. The respondent submits that the review procedure provides an adequate alternative remedy to judicial review and that the gravamen of the applicant's complaint is that the Board at first instance did not attach sufficient or proper weight to the evidence of Dr. C. Counsel submits that this is a matter which is capable of being remedied by the review committee and relies on the judgment of the Supreme Court in *Buckley v. Kirby* [2000] 3 I.R. 431 and The State (Abenglen) *Properties Limited v. Dublin Corporation* [1984] I.R. 381 and submits that the medical/clinical notes are a side issue, that the applicant has already embarked on an application to the review committee and is now estopped from maintaining these judicial review proceedings.

30. Counsel for the applicant submits that the statutory right of appeal provided by the 2002 Act to the review committee cannot cure the defect in the manner in which the impugned decision was taken and cannot remedy the complaints made by the applicant in this matter. Counsel refers in detail to the relevant s. 13(4), 15(1), (2) and (3) of the Act of 2002. Counsel submits that the sole remit of the review committee is confined to a review of the amount of the award made by the Board. It does not conduct an examination of the manner in which the Board came to its decision and the review committee has repeatedly stated that it is concerned with the review solely of the amount of the award on the basis of a review of the transcript and submissions made to it at the review stage. It has expressly stated that matters concerning procedural infirmities, jurisdictional matters or complaints of natural justice whether by reason of irrationality or fair procedures, are exclusively the preserve of judicial review proceedings and will not be considered by the review committee. Further counsel for the applicant emphasises that no oral evidence is heard on review save where no actual award has been made by the Board and that it is not a hearing de novo.

31. Counsel relies on the judgment of McGarry J. in *Leary v. National Union of Vehicle Builders* (1971) Ch. 34 wherein he stated:-

> "As a general rule at all events I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

32. This statement of the law was approved by Pringle J. in *Ingle v. O'Brien* [1975] 109 ILTR at p. 541.

33. Counsel further relies on the statement of Kelly J. in *Stefan v. The Minister for Justice Equality and Law Reform, The Refugee Appeals Authority, Ireland and the Attorney General* [2001] 4 I.R. 203 wherein he stated:-

> "An insufficiency of fair procedures at first instance is not cured by its sufficiency on a appeal".

34. This view was endorsed on appeal by the Supreme Court when Denham J. at p. 431 stated:-

> "The appeals authority process would not be appropriate or adequate so as to withhold *certiorari.* The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing".

35. It is accepted on the respondents behalf that the review committee in this instance pursuant to the provisions of the Act of 2002 does not hear oral evidence, is not a hearing *de novo*, has expressly stated that matters concerning procedural infirmities and *inter alia* complaints of unfair procedures/breaches of natural justice are exclusively the preserve of judicial review proceedings. In essence the review committee pursuant to its statutory function is concerned with a review solely of the amount of the award.

36. Having regard to the fact that I take the view that there was a breach of fair procedures at first instance and a failure of natural justice I am satisfied that the deficiency in this instance cannot be cured by the proposed appellate body.

37. I do not consider that by embarking on the procedure of an application to the review committee the applicant is estopped from maintaining these judicial review proceedings.

38. In the circumstances of this case I will hear the submissions of counsel as to the form of any necessary order to be made.