Neutral Citation: [2015] IEHC 66

THE HIGH COURT

[2014 No. 109 J.R]

BETWEEN

K.M.M.

APPLICANT

AND

RESIDENTIAL INSTITUTIONS REDRESS BOARD

RESPONDENT

AND

S.F.

PROPOSED NOTICE PARTY

JUDGMENT of Mr. Justice McDermott delivered on 2nd February, 2015

1. This is an application pursuant to O.15, r. 13 of the Rules of the Superior Courts and/or O. 84 and/or on the basis of the inherent jurisdiction of the court, whereby S.F. seeks to be joined as a notice party in the proceedings as presently constituted between the applicant and the respondent, in the following circumstances.

2. S.F. is a nun against whom a complaint was made by the applicant in her application to the respondent pursuant to the Residential Institutions Redress Act 2002. The applicant claimed that while a resident in an institution for a period of approximately eight months, having been admitted there on 14th June, 1978, and discharged on or about 25th February, 1979, she was physically and sexually abused by S.F. S.F. was formally notified of the existence of the applicant's complaint by a letter from the respondent dated 3rd April, 2013. A copy of the application form completed by the applicant was requested on her behalf and subsequently, the applicant's statement containing the allegations made against S.F. was furnished by the Board. S.F. denied the very serious allegations made by the applicant which would clearly constitute criminal offences. She was anxious to vindicate her right to her good name and with this in mind, returned to Ireland from Rome where she was residing to consult with solicitor and counsel.

3. S.F. was considered to be a "relevant person" within the meaning of s. 1(1) of the Residential Institutions Redress Act 2002 ("the Act"), and took a full part in the proceedings before the respondent. A statement of evidence was prepared on her behalf and furnished to the respondent on 30th July, 2013. In her statement S.F. denied any allegations of physical or sexual abuse and set out in detail her recollections of the applicant's time at the institution and her own work there. She sought an oral hearing of the claim, wished to give evidence and to be represented and have the claimant cross examined on her behalf. She claimed that she was "very anxious to have the opportunity to refute the claim and allegations and thereby vindicate her constitutional right to her good name".

4. The case was listed for hearing on 2nd October, 2013, before the respondent.

5. On 31st July, 2013, a division of the respondent considered and granted a request made on S.F.'s behalf pursuant to s. 11(8) of the Act for consent to cross examine the applicant. The applicant was informed of this decision on 7th August, 2013.

6. At the commencement of the hearing on 2nd October, 2013, counsel for the applicant advised the respondent of the applicant's intention to present the application pursuant to the provisions of s. 10(5) of the Act, which provided that she could provide evidence either orally or by written statement. The Chairman of the division of the respondent then invoked the provisions of s. 10(8) and requested that the applicant provide oral evidence. Since the applicant had determined to present her application pursuant to the provisions of s. 10(5)(b), by written statement, she declined to comply with the request.

7. S.F. elected to give oral evidence and exposed herself to what is said to have been a "prolonged and difficult cross examination". In her affidavit she states that this decision was made because of her determination to defend her good name. She had travelled from Rome to be present for the oral hearing and engaged solicitor and counsel, thereby expending considerable time and money in what she regarded as the defence of her good name and standing before the respondent. Her affidavit states that she now suffers from cancer and has recently undergone surgery. She continues to receive treatment in Rome.

8. S.F.'s solicitor wrote to the respondent on 3rd October, 2013, seeking written confirmation as to whether the Board had made any adverse finding against her. This was clearly of enormous importance to her in her personal and professional life. On 21st October the Board informed S.F.'s solicitors that they would be in touch "as soon as a decision has been made by the Board". In a further letter dated 23rd October, her solicitors were informed that the Board made "no adverse finding against S.F.".

9. In the course of S.F.'s cross examination the respondent disallowed a number of questions:-

> (i) based on instructions from the applicant which were not reflected in the written evidence provided by the applicant to the Board and in respect of which she would not be providing any oral evidence;
>
> (ii) which repeated a question already asked and answered, namely whether S.F. stood by her evidence that she had never witnessed physical abuse of any child by a Sister or staff member in the institution in circumstances where the congregation of which she was a member had made an apology before the Commission to Inquire into Child Abuse (The Ryan Commission), and;
>
> (iii) questions directed to S.F. and her capacity within the Order of which she was a member rather than her capacity as a "relevant person" before the Board.

10. The Board reserved its decision and subsequently delivered a written determination on 20th November, 2013.

11. In these proceedings the applicant contends, *inter alia*, that the respondent acted unlawfully in permitting S.F. to give oral evidence and also allowing her to cross examine the applicant and any person giving evidence on her behalf in advance of the oral hearing. For its part, the respondent will contend that it is entitled to deal with applications by relevant persons seeking consent to provide oral evidence and to cross examine an applicant in advance of a hearing, because this allows the relevant person to retain solicitor and counsel, if desired, and puts the applicant on notice of the fact that the relevant person will give evidence so that he or she can consider whether to cross examine the relevant person. Furthermore, the applicant will then be on notice of the fact that he or she may be subject to cross examination.

12. It is part of the applicant's case that she was not given an opportunity to make any representation in relation to the decision of the Board to allow the relevant person to give oral evidence, and to cross examine her and any person giving evidence on her behalf. It is the respondent's case that its decision to allow S.F. "in the interests of justice and for the purpose of protecting and vindicating her constitutional rights, to give evidence and to cross examine the applicant and any person giving evidence on her behalf was intra vires, reasonable and consistent with constitutional fair procedures. Furthermore, there was, in this case a conflict of fact between the account given by the applicant on the one hand, and by S.F. on the other". The respondent contends that it was necessary to proceed in the manner adopted by the Board having regard to the conflict of fact that existed between the accounts given by the applicant on the one hand and S.F. on the other.

13. It is also part of the applicant's case that counsel for the applicant was not permitted to cross examine S.F adequately, or at all. The respondent rejects this claim and explains the disallowance of a number of questions as set out above. It contends that, consistent with fair procedures and constitutional justice, it was entitled to restrict the cross examination of S.F. to avoid repetition, to uphold the principle that an answer given under cross examination concerning collateral matters must be treated as final and conclusive, and to restrict irrelevant, vexatious or unfair questions.

14. Furthermore, it is contended that the repeated attempt to question Sister A. and to challenge her on her evidence that she had never witnessed any physical abuse of any child by a Sister or member of staff in the institution, in circumstances when the Order of which she was a member had made an apology before the Commission to Inquire into Child Abuse (The Ryan Commission), was based on a false premise. No such apology had been made.

15. Following the respondent's decision, the applicant applied under s. 13(9) of the Act to the Residential Institution's Review Committee for a review of the decision, the consideration of which has been postponed at the applicant's request pending the outcome of these proceedings.

The Challenge

16. The grounds upon which leave was granted to the applicant to apply for orders of certiorari and the various declarations set out in the statement of grounds are summarised as follows:-

> (a) The proceedings were not constituted in accordance with the provisions of the Act or otherwise in accordance with law, in particular because the applicant was given no opportunity to make any representation in relation to the decision communicated on 20th August, 2013, that her application would proceed as a "full hearing" with "formal cross examination" thereby providing for an adversarial procedure which was not contemplated by the Act.
>
> (b) The respondent failed to strike a balance between the statutory entitlement of the applicant and the statutory entitlement of the relevant person (S.F.) in that though the applicant's counsel was granted leave to cross examine S.F. pursuant to s. 11(8)(d) of the Act, this was "not realistically or practically permitted". It was claimed that the applicant's counsel was constantly interrupted and directed to conduct a cross examination in a manner which frustrated any "meaningful cross examination".
>
> (c) The respondent erred in law and fact by finding that there was no evidence to support the applicant's allegations. It was claimed that the Board misunderstood and misdirected itself in law in holding that the applicant provided an uncorroborated written statement which was controverted by the sworn testimony of the relevant person and/or imposing a requirement for corroboration of the applicant's evidence. The applicant also claims that the respondent gave the appearance of being influenced by the fact that the allegations were made over 35 years ago and wrongly stated that the evidence of S.F. had been unchallenged and that the applicant's counsel had failed to "put" the allegation to S.F. that she had abused the applicant in the manner alleged when, in fact, it had. The conclusions reached are said to be irrational.

The Law

17. Order 15, rule 13 of the Rules of the Superior Courts provides that the court may at any stage of the proceedings upon or without the application of either party and upon such terms as may appear to be just, order the names of any parties, who ought to have been joined as plaintiffs or defendants or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter to be added.

18. Order 84, rule 22(2) of the Rules, imposes an obligation on the applicant in a judicial review application to ensure that a "notice of motion…must be served on all persons directly affected…".

19. Order 84, rule 22(9) provides:-

> "If on the hearing of the motion…the court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the court may adjourn the hearing on such terms (if any) as it may direct in order that the notice…may be served on that person."

Order 84, rule 27(1) provides:-

> "On the hearing of an application under rule 22, or an application which has been adjourned in accordance with rule 24(1), any person who desires to be heard in opposition to the application, and appears to the court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the application."

20. Both Order 15 and Order 84 were relied upon by the applicant on this application. In *Dowling & Ors v. Minister for Finance & Ors* [2013] IESC 58, the Supreme Court considered the different principles applicable to an application to permit the joining of a party in purely civil and private proceedings as opposed to those which concern public law. Fennelly J. (Clarke and MacMenamin JJ. concurring) stated:-

> "29. …In civil litigation, generally speaking, parties are allowed to choose whom they wish to sue. In matters of public law persons other than the public authority may have a real and substantial interest in the outcome. The simplest example is the planning permission. While the judicial review must of necessity be sought on grounds that the planning authority or An Bórd Pleanála on appeal has committed an error of law affecting the validity of its decision, any decision of the court is very likely to affect the very real rights and interests of private persons or corporations. The holder of a planning permission is, of course, potentially affected by the outcome of an application for judicial review of its validity. Civil and public-law proceedings are not, however, in completely watertight compartments. There is an underlying principle that a person is entitled to participate in proceedings which are capable of adversely and directly affecting his or her substantial interests."

21. In civil proceedings, a person must demonstrate exceptional circumstances in order to persuade a court to join him or her in an action against the will of the opposing party which must consist of "some real or apprehended adverse effect on his propriety interests. Reputational damage would not suffice. Nor would the fact that the case will lead to a decision on a point of law which could adversely affect the applicant in other litigation" [33].

22. Order 84 has been interpreted in a number of decisions including *BUPA Ireland Limited v. Health Insurance* Authorities [2006] 1 I.R. 201, and Spin Communications trading as *Storm FM v. Independent Radio and Television Commission* (Unreported, Supreme Court, 14th April, 2000). The position was summarised by Clarke J. in *Yap v. Children's University Hospital Temple Street Limited* [2006] 4 I.R. 298, as quoted in para. 40 of the *Dowling* decision. Clarke J. stated at para. 22:-

> "…if a regulatory authority makes a decision in proceedings between two entities, and one of those entities challenges the decision because it was unfavourable, if the court is persuaded that the determination of the regulatory authority should be upset, then that decision has a direct effect upon the party who had secured the favourable decision in the first place and therefore that party must be joined as a notice party because the order itself (rather than collateral matters such as the reasoning of the court or comments which the court might make on the facts) affects the interests of that party."

23. It is submitted that the proposed notice party, S.F., in this case, was not directly affected by the decision made by the respondent and furthermore that S.F. would have nothing to contribute to the legal argument and submissions to be made in respect of the grounds upon which relief is sought. It was claimed that it was unnecessary to join S.F. to enable the court to adjudicate effectually and completely upon the questions raised in these proceedings. However, as noted by Fennelly J. in *Dowling*, that is not the correct test on this application:-

> "54. I do not agree…that the question to be asked is whether the submissions of the party applying to be joined 'are needed on any issue for the court to reach a just and complete adjudication'. It follows that I also disagree… that there was 'no benefit to be gained by the Court, from these parties attending the hearing and backing up the contention of the Minister that the…Order was correctly made in the first place'. That is not the correct test. An interested party, i.e. a party directly affected, is, in my view, entitled to be represented to defend his or its interests, even if the decision-maker is there to advance the same arguments…. a party with a direct interest in an administrative decision is entitled to have his own case put to the court by his own counsel independently of the defence made on behalf of the decision maker. That is his right. It does not depend on the court's view as to whether it finds it necessary to hear the party. Naturally, it often happens in practice, usually to save costs, that a notice party will choose not to make independent arguments and to rely on the principal respondent to defend the case."

S.F.'s Application

24. S.F. was a "relevant person" as defined under s. 1 of the Residential Institutions Redress Act 2002, namely a person who was alleged to have physically and sexually assaulted the applicant in the application. The respondent was under a duty under s. 11(8) of the Act to "take such reasonable steps as are necessary and in accordance with Regulations made under this section, to inform a relevant person of an application…in which the relevant person is referred to…". S.F. was, pursuant to s. 11(8)(a), invited to provide the respondent with any evidence in writing concerning such an application as S.F. considered appropriate. In accordance with s. 11(b), it received an application from S.F. to give oral evidence in respect of the application. In accordance with s. 11(8)(c), S.F. was granted consent to cross examine the applicant for the purpose of:-

> "(ii) defending the relevant person in relation to any allegation or defamatory or untrue statement made in the application; or
>
> (iii) protecting and vindicating the personal and other rights of the relevant person."

25. In the course of the hearing before the respondent, the applicant's counsel cross examined, S.F., in accordance with section 11(8)(d). The consents given under ss. 11(8)(a) to (d) are granted, if the respondent "considers that, in the interests of justice, it is necessary or expedient to do so for any of the purposes so specified".

26. Section 11(12) provides that the making of an award to an applicant "notwithstanding a conflict between the evidence given by the applicant and a relevant person, shall not constitute a finding of fact relating to fault or negligence on the part of the relevant person". However, it is clear that the provisions set out in s. 11 are calculated to ensure the observance of the principles of *audi alteram partem* to the extent to which that is necessary in the interest of justice, and in accordance with Article 40.3 of the Constitution.

27. This enabled S.F. to assert her innocence of the very serious charges made against her by the applicant. She exercised her right to fair procedures under the Act and was given the opportunity to participate in the decision making process by challenging and denying the allegations made, by giving oral evidence and submitting to cross examination. At the conclusion of that process, she was informed that no adverse findings had been made against her. The matter is addressed in this way in the affidavit of Ms. Patricia Kavanagh, Registrar to the respondent:-

> "13. Having weighed up the conflicting written evidence of the applicant and the written and oral evidence of the said relevant person, the Board preferred the evidence of the relevant person. I say, believe and am advised that there was

credible evidence before the Board to support such a conclusion, that the said conclusion was reasonable and rational and was one to which the Board was entitled to come in the exercise of its statutory discretion."

28. The respondent's decision, notwithstanding the closed nature of the proceedings conducted before the Board, was of immense significance to S.F. She exercised her statutory and constitutional rights to fair procedures having obtained the necessary consents under the statute, secured legal representation, prepared and submitted a statement to the Board, attended, gave evidence and submitted to cross examination. S.F. is entitled to regard the finding made in respect of that evidence as one which was in accordance with the evidence which she gave and her previously stated position. The court is satisfied that S.F.'s engagement in this process was as a result of her deep concern at the allegations made against her and her participation gave rise to considerable inconvenience and expense. The court is also satisfied that the respondent's decision which preferred her evidence is one which directly affects S.F., not least because she has secured what she is entitled to regard as a valuable and favourable conclusion following her participation.

29. The court is not satisfied that the further submission made by the applicant that the joining of S.F. is unnecessary for the determination of any issue by the court because relevant issues may be addressed by the respondent in argument, offers a basis upon which to refuse this application. S.F. has a right to put her own case by her own counsel independently of those made by counsel on behalf of the respondent at the hearing of this matter.

30. The court will, therefore, make an order joining S.F. as a notice party in these proceedings.