Neutral Citation Number: [2007] IEHC 376

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 1472 J.R.]

BETWEEN

M.B

APPLICANT

AND
THE COMMISSION TO INQUIRE INTO CHILD ABUSE

RESPONDENT

AND
THE RESIDENTIAL INSTITUTIONS REDRESS BOARD

NOTICE PARTY

Judgment of O'Neill J. delivered on the 7th day of November 2007

1. In this application the applicant seeks leave pursuant to s. 26(a) of the Commission to Inquire into Child Abuse Act, 2002 as inserted by s. 19 of the Commission to Inquire into Child Abuse (Amendment) Act, 2005, to seek by way of judicial review an order of *certiorari* quashing the decision of the respondent communicated by letter of the 21st February, 2006 to refuse to make available to the applicant or to the notice party any records in the possession of the notice party of evidence given by the applicant's late husband J.B. to the confidential committee of the respondents.

2. In addition as this application was brought later than two months from the date of the decision challenged, the applicant seeks an order pursuant to s. 19(3) of the Commission to Inquire into Child Abuse (Amendment) Act, 2005, extending the period of two months for the purpose of bringing this application.

3. The background to this matter is as follows.

> The applicant's late husband J.B. was born in 1935. The applicant and her late husband were married in 1973 and J.B. died on the 14th July, 2005. The late J.B. was a native of Ireland but emigrated to the United Kingdom in the early 1950s and lived and worked there until the end of his life.
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> In or about the month of June 2001, the applicant became aware through material he discovered in his local library of the existence and function of the respondent. At that time the late Mr. B. disclosed to the applicant that he had suffered abuse while in a residential institution in Ireland between 1945 and 1951. The late Mr. B. corresponded with the respondents and arrangements were made for him to give evidence to the respondent. The applicant and the late Mr. B. travelled over to Dublin in early December 2001 and stayed in a hotel in Dublin for two nights. He attended before the Confidential Committee of the respondents and gave his evidence.
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> The late Mr. B. did not at that stage, or at any stage, disclose to the applicant any detail whatever of the abuse suffered. Neither did he furnish any detail of this to any professionals, such as a solicitor who appeared to have acted for him in 2001. The late Mr. B. never attended any psychiatrists or counsellors. The applicant avers that at all times from June 2001 onwards, the late Mr. B. believed that his approach and application to the respondents would result in an award of compensation to him. She avers he was not aware of the existence of the notice party or of the separate functions of the respondent and the notice party. She avers that when the applicant came to Dublin in December 2001 and was met by an officer of the respondents and escorted from his hotel to the respondent's offices and back, that he was assured that there would be an award of compensation to him. After the giving of his evidence to the Confidential Committee, the applicant avers that the late Mr. B. continued to await an award of compensation and as time went on he remarked occasionally on the delay in receiving his award. The applicant avers that the late Mr. B. firmly believed that he had nothing further to do and no further application to make, beyond that which he had made to the respondents, in order to obtain the compensation. As his health declined and as he neared death, she avers that he express the wish that she would receive the compensation to be awarded to him.
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> Following the death of Mr. B., the applicant set about pursuing the matter of compensation. In due course, she instructed a solicitor and learned that a separate application had to be made to the notice party. This application was made on her own behalf as a person entitled pursuant to s. 9 of the Residential Institution Redress Act, 2002. As a result of diligent inquiries carried out on her behalf by her solicitor it became apparent that no record whatever existed of the abuse suffered by Mr. B., except the record of the evidence given by him to the Confidential Committee of the respondents. When this became apparent, the applicant's solicitor corresponded with the respondents seeking to obtain from them the record of his evidence or alternatively that this record would be sent directly to the notice parties on a confidential basis.

4. This record in the possession of the respondents of the evidence given by Mr. B. is of critical importance to the applicant's application for compensation because notwithstanding the fact that that record would be inadmissible evidence in a court, pursuant to s. 10(4) and (5) of the Residential Institutions Redress Act, 2002, this record would be sufficient proof of the abuse suffered by the late Mr. B, for the purposes of obtaining an award of compensation.

5. Having considered the applicant's request, the respondent in a letter of the 21st February, 2006 refused that request in the following terms:-

> "Re: Mr. J.B. (Deceased).
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> Dear Sirs,
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> I refer to your letter dated 9th February, 2006 with enclosures.
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> It is clear from the attached documentation that Mr. B. opted to give evidence before the confidential committee which operates completely separately from the investigation committee.
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> The confidential committee is prohibited by the provisions of s. 27 of the Commission to Inquire into Child Abuse Act 2000, from disclosing information provided to it in the course of the performance of its functions under this Act. I

am therefore not in a position to assist with your request. …"

6. This letter of the 21st February, 2006 was replied to by letter of 24th February, 2006 from the solicitors for the applicant in which they raised the question of applying to the High Court for directions pursuant to s. 25 of the Commission to Inquire into Child Abuse Act, 2000. The respondents replied by letter of 1st March, 2006 in which they say the following:-

> "I reiterate the contents of my letter dated 21st February, 2006. This is not a case of a lack of cooperation between the Commission and the Redress Board. The Commission is precluded by law from disclosing the requested material to any party aside from the exception set out in the legislation."

7. Faced with this situation the applicant sought the advice of counsel and set about launching these proceedings. Needless to say her application for compensation to the notice parties is entirely dependent upon a successful outcome for her in these proceedings. Otherwise she will be deprived of an essential proof necessary to establish a claim for compensation from the notice party.

8. Manifestly the central issue in the case is whether or not s. 27 of the Commission to Inquire into Child Abuse Act, 2000 precludes the respondents from disclosing to anyone the record of the evidence given to the confidential committee by the late Mr. B.

9. Section 27 reads as follows:-

> "27 (1) Subject to the provisions of this section but notwithstanding any provision of, or of an instrument made under, a statute or any rule of law, a person (including the Confidential Committee) shall not disclose information provided to the Confidential Committee and obtained by the person in the course of the performance of the functions of the person under this Act.
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> (2) A person referred to in subsection (1) ("the person") shall disclose information so referred to -
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> (a) for the purpose of the performance of the functions of the person under this Act,
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> (b) to the legal representatives of the parties to any proceedings referred to in subsection (3),
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> (c) to a member of the Garda Síochána if the person is acting in good faith and reasonably believes that such disclosure is necessary in order to prevent the continuance of an act or omission constituting a serious offence, and
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> (d) to an appropriate person (within the meaning of the Protections for Persons Reporting Child Abuse Act, 1998) if the person is acting in good faith and reasonably believes that such disclosure is necessary to prevent, reduce or remove a substantial risk to life or to prevent the continuance of abuse of a child.
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> (3) Information referred to in subsection (1) shall, if so ordered by a court in connection with proceedings before it for the judicial review of a decision of the Confidential Committee, be disclosed by a person referred to in that subsection to the court if, and to the extent only, that the court is satisfied that such disclosure is necessary in the interests of justice; and any disclosure pursuant to this subsection shall not identify, or contain information that can lead to the identification, of persons the subject of abuse in childhood.
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> (4) Proceedings referred to in subsection (3) shall be heard otherwise than in public.
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> (5) Documents provided to the Confidential Committee or prepared by it (other than a report under s. 16 or prepared by a person for it in the course of the performance of his or her functions as a member of that Committee, a member of the staff of the Commission, or an adviser, shall not constitute Departmental records within the meaning of s. 2(2) of the National Archives Act, 1986.
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> (6) A person who contravenes subsection (1) shall be guilty of an offence."

10. Having carefully considered the submissions of the parties I am satisfied that the obligation of confidentiality contained in s. 27(1) is absolute and cannot admit of any exceptions save those set out in subs. (2).

11. It is clear that s. 27 was part and parcel of a balanced scheme designed to cater for a variety of needs of those who wished to make allegations of abuse suffered in childhood. Many of those persons wanted their allegations heard in an adversarial context and to confront the perpetrators. Their allegations fell to be dealt with by the investigation committee who were equipped with the relevant powers to pursue an investigation of those allegations.

12. The Confidentiality Committee had a completely different function which is set out in s. 15 of the Act of 2000 in the following terms:-

> "15- (1) The principal functions of the Confidential Committee ("the Committee") are, subject to the provisions of this Act -
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> (a) to provide, for persons who have suffered abuse in childhood in institutions during the relevant period and who do not wish to have that abuse inquired into by the Investigation Committee, an opportunity to recount the abuse, and make submissions, in confidence to the Committee,
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> (b) to receive evidence of such abuse,
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> (c) to make findings of a general nature, based on the evidence aforesaid, in relation to the matters specified in section 4 (1) (b), and
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> (d) to prepare and furnish reports pursuant to section 16 .

(2) The Committee shall have all such powers as are necessary for the performance of its functions."

13. As is apparent, the Confidentiality Committee was designed for those persons who did not wish to make allegations of abuse in an adversarial context but who wished to disclose their abuse under an assurance of confidentiality.

14. Thus in order for the confidentiality committee to be able to discharge its function it was necessary that all evidence given to it would be subject to a confidentiality which protected the interests of those making allegations but also the interest of those against whom allegations were made, as those persons would not have had an opportunity to contest those allegations.

15. I am satisfied that the necessity to protect the interests of all of these interests, required nothing short of absolute confidentiality which could only be breached in circumstances expressly described in subs. (2) of s. 27. None of the exceptions to the general prohibition on disclosure in subs. (1) applies in this case. Neither can subs. (3) apply, it being patently obvious that it would not be necessary for the purposes of these proceedings to have the record of Mr. B's evidence to the confidentiality committee disclosed to this court for the purposes of these proceedings.

16. The force of the prohibition on the disclosure is most unusually, underpinned by the creation in s. (6) of a criminal offence, where there is a contravention of subs. (1). Thus the respondents, in my opinion if they were to comply with the request made by the applicant would be committing a criminal offence.

17. This situation is analogous to that encountered in the case of *Cully v. Northern Bank Finance Corporation Limited* [1984] I.L.R.M. 683 in which O'Hanlon J. set aside a subpoena where the witness, an officer of the Central Bank would if compelled to give evidence, be in breach of the oath of secrecy which he had taken under the provisions of s. 31 of the Central Bank Act, 1942. A further example of a statutory prohibition on disclosure is to be found in another judgment of O'Hanlon J. in the case of *O'Brien v. Ireland* [1995] 1 I.L.R.M. 222 where he held that relevant provisions of the Defence Act, 1954, the Rules of Procedure (Defence Forces) 1954 and the Defence Force Regulations 1982 and the Diplomatic Relations and Immunities Act, 1967 protected certain documents from disclosure. In my opinion the statutory prohibition on disclosure contained in s. 27(1) could not be expressed in clearer terms and the absolute nature of the prohibition could not be more forcefully legislated, than has been done, by the making of a contravention of subs. (1) a criminal offence. If disclosure was refused in the foregoing two cases on the basis of a statutory prohibition on disclosure, a *fortiori* in this case, it must also be.

18. It was submitted by the applicant that the procedures set out in s. 25 of the Act, whereby the respondent can apply to the High Court for directions could be availed of by the respondents in order to enable them to make the disclosure sought.

19. In my opinion this is not an avenue which could lead to a solution of the applicant's problem. This court could not sanction on a s. 25 application conduct which otherwise was a criminal offence. If this court were to do that, it would be impermissibly interfering with the legislative provision contained in s. 27(1).

20. It was further submitted by the applicants that there is an analogy between s. 27 of the Act of 2002 and s. 12 of the Garda Síochána (Complaints) Act, 1986. I cannot accept that such a parallel exists. Section 12(1) of this Act reads as follows:

> "12 (1) A person shall not disclose confidential information obtained by him while performing functions, as a member of the Board, a tribunal or the Appeal Board, or as a member of the staff of the Board, unless he is duly authorised to do so."

21. As is clear from this, far from being a total absolute prohibition on disclosure the Board in that case was vested with the power or discretion to authorise disclosure. Thus in my view the case of *Skeffington v. Rooney* [1997] 1 I.R. 22 is to be distinguished from the circumstances of this case.

22. It is submitted that the refusal of the respondents to furnish the record of Mr. B's evidence is a breach of the applicant's rights under Article 6(1) of the European Convention on Human Rights which provides:-

> "1. In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

23. It must be remembered that the applicant is not deprived of her statutory right to apply to the notice parties for compensation. Her problem is that she is unable to obtain an essential proof to establish her claim. The inability to come up with the necessary proofs to establish a claim is not a denial of access to justice either in breach of Article 40 of the Constitution of Ireland or of article 6(1) of the ECHR. An inability to produce an essential proof is commonplace and invariably will result in the failure of the claim involved. It is well settled of course that a right of access to courts does not mean the right to succeed in any particular claim.

24. In this case the absolute prohibition in s. 27(1) of the Act of 2002 which the applicant sees as the barrier standing between her and success in her claim to the notice party is there for sound reasons of public policy and it does not infringe any provision of the Constitution of Ireland or of the European Convention on Human Rights and correctly construed means that the respondents could not lawfully grant the applicant's request for the record of Mr. B.'s evidence.

25. It is indeed a pity that the late Mr. B. did not otherwise create a record of the abuse he suffered and in particular it is most unfortunate that he did not respond to the letter of 28th February, 2003 from solicitors enclosing an application form to the notice parties and the two further reminders sent by these solicitors.

26. I am quite satisfied that the decision of the respondents of 21st February, 2006 was in all respects within jurisdiction and lawful, and in my view the applicant has not demonstrated any grounds for contending that it is invalid let alone substantial grounds to that effect. I am also satisfied that there could not be good and sufficient reason for extending the time for the making of this application, as required by s. 19(3) of the Commission to Inquire into Child Abuse (Amendment) Act, 2005, where the applicant has failed to demonstrate any grounds for contending that the impugned decision is invalid.

27. In these circumstances I must refuse both reliefs sought in the notice of motion herein.