

THE HIGH COURT

2006 No. 1343 J.R.

J. D.

APPLICANT

AND

THE RESIDENTIAL INSTITUTIONS REDRESS REVIEW COMMITTEE,
IRELAND AND ATTORNEY GENERAL

RESPONDENTS

Judgment of O Neill J. delivered the 11th day of November, 2008.

1. Leave was granted in this case by this Court (Peart J.) on 20th November, 2006 to pursue the following reliefs by way of judicial review:

1. An order of *certiorari* quashing the decision of the first named respondent dated 6th October, 2006 to the effect that the applicant failed to satisfy the criteria of s. 7(1) of the Residential Institutions Redress Act 2002 (the Act of 2002).
2. An order for damages against the respondents for the losses suffered by the applicant arising out of the said decision of 6th October, 2006.
3. A declaration that the definition of "child" and cognate words including "childhood" in the Act of 2002 shall be interpreted in accordance with the meaning of those terms and the status then accorded the applicant in Irish law when sent to a residential institution within the meaning of the said Act in the late 1960s.
4. A declaration that the definition of "child" and cognate words including "childhood" in the Act of 2002 shall be interpreted in accordance with the legal meaning and interpretation then accorded to such expressions in the late 1960s and further to the jurisprudence of the European Convention on Human Rights (the Convention).
5. Further and if necessary, a declaration that the definition of "child" in s.1 of the Act of 2002 is invalid having regard to the provisions of the Constitution of Ireland.
6. Further and in the alternative and if necessary, a declaration that s. 7(1) (b) of the Act of 2002 is invalid having regard to the provisions of the Constitution.
7. Further or in the alternative and if necessary, a declaration that s. 7(1) (b) of the Act of 2002 is incompatible with the second named respondent's obligations under the Convention.

Facts

2. The applicant entered St. Patrick's Mother and Baby Home, Navan Road, Dublin (the Home) in November, 1968. It is alleged that the applicant suffered ten or eleven years of abuse by two of her older brothers and became pregnant through incest at the age of seventeen. The applicant's eighteenth birthday occurred, eleven days before she entered the Home. The applicant's younger sister, who it is alleged was also abused by her two older brothers, also become pregnant through incest, and entered the Home on the same day as the applicant.

3. In December, 1968 the applicant gave birth to a son. After two to three months the applicant's son was taken from her and placed for adoption. The applicant left the Home in April, 1969.

4. By Order entitled the Residential Institutions Redress Act 2002 (Additional Institutions) Order 2004 dated 9th November, 2004, the Minister for Education and Science amended the Schedule to the Act of 2002 by adding further institutions, including St. Patrick's Mother and Baby Home. In May, 2005 the applicant applied to Residential Institutions Redress Board (the Board) for redress in respect of the treatment she experienced during her time spent in the Home. The Registrar of the Board wrote to the applicant's solicitors informing them that it had refused the application of the applicant on the basis that she was not a child within the meaning of ss. 1(1) and 7(1) (b) of the Act of 2002 when she was placed in the Home. The applicant appealed this decision of the Board to the first named respondent. The applicant's solicitors made submissions in the appeal. The first named respondent affirmed the decision of the Board on 6th October, 2006. In the decision, the Chairman of the first named respondent stated as follows:-

"The Act does not apply to or exclude any person by reference to their status as a minor or an adult. The legislation confers a particular remedy on persons who at a particular age, clearly specified in the legislation, were abused whilst resident in certain identified institutions. There is no ambiguity as to the age limits identified by the legislature. There is no room or need to invoke any special canon of interpretation. Neither the Board nor this Committee could award redress to a person who was not a child within the meaning of the Act at the time when he or she was resident in the institution in question. Obviously, any cut off point in respect of the right to redress will involve some measure of hardship or concern but this is not an injustice or hardship which the Committee can address."

5. It is to be observed that having regard to the limits of the statutory jurisdiction conferred on the first named respondent this conclusion was unavoidable.

6. There is no factual dispute in this case concerning the applicant's account of the treatment she received whilst residing in the Home.

Issues

7. The first issue this Court must address is whether the applicant was discriminated against contrary to Article 40.1 of the Constitution, the right to be held equal before the law, in not being considered to be a child at the time she lived at the Home by virtue of the definition of "child" under the Act of 2002. The Court must consider whether the definition of "child" and cognate expressions contained in the Act of 2002 are unconstitutional as being a discrimination on the basis of age that is not relevant to or justified by any legitimate legislative purpose and as failing to reflect legal and social conditions of the 1960s, when persons under the age of twenty one were minors in law.

8. The second issue that falls for determination is whether the applicant's rights under Articles 8, 13 and 14 of the Convention, as incorporated into Irish law by the European Convention on Human Rights Act, 2003 (the Act of 2003), have been breached due to the

provisions of the Act of 2002.

9. The order in which the Court will conduct the examination of the foregoing issues will be to consider the constitutional issue first.

The Act of 2002

10. The purpose of the Act of 2002 is set out in its preamble:-

"An Act to provide for the making of financial awards to assist in the recovery of certain persons who as children were resident in certain institutions in the State and who have or have had injuries that are consistent with abuse received while so resident and for that purpose to establish the Residential Institutions Redress Board to make such awards and to provide for the review of such awards by the Residential Institutions Review Board to make such awards and to provide for the review of such awards by the Residential Institutions Review Committee and to provide for related matters."

11. Section 1(1) of the Act of 2002 defines "child" as "...a person who has not attained the age of 18 years and cognate words shall be construed accordingly". Section 7(1) of the Act of 2002 sets out the criteria to be met by applicants claiming redress one of which is that the applicant must establish that he or she was resident in an institution during his or her childhood. It provides:

"7.-(1) Where a person who makes an application (an 'applicant') for an award to the Board establishes to the satisfaction of the Board-

(a) proof of his or her identity

(b) that he or she was resident in an institution during his or her childhood, and

(c) that he or she was injured while so resident and that injury is consistent with any abuse that is alleged to have occurred while so resident,

the Board shall make an award to that person in accordance with section 13(1)."

The Constitutional Issue

12. Article 40.1 of the Constitution states:

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

13. It is the applicant's case that she was discriminated against under the Act of 2002 on the grounds of her age, in violation of Article 40.1 of the Constitution. Counsel for the applicant, Mr. O'Reilly S.C., submitted that during the time the applicant resided at the Home she was a minor in law, in that, she was under the age of twenty one years, and that if that status had remained she would have qualified under the Act of 2002 but that, as it changed, she was excluded. Mr. O'Reilly further submitted that the definition adopted in the Act of 2002 categorises minors by reference to modern standards and that given the terms of the long title of the Act of 2002 and the stipulation that redress be restricted to people who were children when placed in homes covered by the Act, it was apparent that the purpose of the Act is to provide a scheme of redress for people who were considered to be children at the time they were placed in homes and, hence, there cannot be a justification for the age discrimination against the applicant.

14. For the first named respondent, Mr. Barniville S.C. submitted that the definition of child in s.1(1) in the Act of 2002 together with its application in s.7(1) (b) of the Act of 2002 is not unconstitutional in that they amount to a discrimination on the basis of age that is relevant to a legitimate legislative purpose. He submitted that the Act of 2002 enjoyed a presumption of constitutionality and consequently it was for the applicant to clearly establish that the said Act was unconstitutional and he contended that the applicant had failed to discharge this heavy onus. He further submitted that if the relevant sections were to be found unconstitutional that no practical benefit would accrue to the applicant as it was not open to the Court to make a substitution for the challenged provision, as that would amount to legislating, contrary to the doctrine of the separation of powers. In this regard he also submitted that the applicant was seeking to persuade the Court that the Oireachtas should have chosen a different class of persons on whom the statutorily created redress remedy ought to have been conferred under the Act of 2002 and that if the Court found in favour of the applicant it would amount to an attempt by the Court to second guess the Oireachtas and this would be an impermissible interference with the choice made by the legislature.

15. Specifically addressing the alleged discrimination on the grounds of age, Mr. Barniville submitted that the Oireachtas was entitled to set a cut off age after which persons could not apply for redress and the fact that eighteen years was not the age of majority at the time the applicant was in the Home was not a relevant factor in determining whether Article 40.1 was violated by the Act of 2002. He argued that any cut off point would result in some hardship and this choice was exclusively one for the Oireachtas to make. He further submitted that the age limit chosen in the Act of 2002 followed that which was contained in the Commission to Inquire into Child Abuse Act 2000, on foot of a Report from that Commission on its terms of reference dated 7th September, 1999. He stated that a legislative provision should only be interfered with by the Court if the provision is so contrary to reason and fairness as to amount to an unjust attack on constitutional rights. He argued that the classification at issue in this case was within the range of constitutionally permissible choices available to the Oireachtas. He cited the following cases as examples of the State making a selection or categorisation or discrimination in its laws so as to benefit a certain defined group: *An Blascaod Mór Teo. v. Commissioners of Public Works (No. 3)* [2000] 1 I.R. 6; *Enright v. Ireland* [2003] 2 I.R. 321; *O'Brien v. Keogh* [1972] I.R. 144; *Landers v. Attorney General* (1975) 109 I.L.T.R. 1 and *D.P.P. (Stratford) v. O'Neill* [1998] 2 I.R. 383.

Decision

16. Article 40.1 encompasses the Aristotelian concept of equality. As Hamilton C.J. noted *In the Matter of Article 26 of the Constitution and the Employment Equality Bill*, 1996 [1997] 2 I.R. 321 at p.346:

"Article 40, s.1 as has been frequently pointed out, does not require the State to treat all citizens equally in all circumstances."

17. However, discriminations on certain potentially objectionable grounds require scrutiny before they can be considered to be constitutionally valid, as held in *de Búrca v. Attorney General* [1976] I.R. 38 and in *Quinn's Supermarket v. Attorney General* [1972] I.R. 1.

18. Discrimination on the grounds of age was considered by the Supreme Court in *In the Matter of Article 26 of the Constitution and the Employment Equality Bill, 1996* [1997] 2 I.R. 321. Hamilton C.J. identified a number of forms of discrimination that were *prima facie* invalid. He held at p.346 that age discrimination, of itself, is not *prima facie* invalid but that the State must justify it in accordance with the test laid down by Barrington J. in *Brennan and Others v. Attorney General* [1983] I.L.R.M. 449 at 480:

"In particular, classifications based on age cannot be regarded as, of themselves, constitutionally invalid. They must, however, be capable of justification on the grounds set out by Barrington J. in Brennan & ors. v. Attorney General [1983] I.L.R.M. 449 at 480 as follows:

"the classification must be for a legitimate legislative purpose...it must be relevant to that purpose, and that each class must be treated fairly."

19. The respondents submit that the legitimate legislative purpose of excluding persons who were over eighteen years but under twenty one years at the time they lived in institutions from claiming redress was the fact that the vast majority of potential applicants would have left residential institutions by the time they were eighteen years old. In other words, the overwhelming majority of potential claimants would be included in the ambit of the Act of 2002. This begs the question of whether this explanation is a valid justification for the exclusion of persons such as the applicant who were over eighteen but still minors in law when in a residential institution, or was that exclusion an invidious discrimination in breach of the applicant's constitutional right to be held equal before the law.

20. In drafting the Act of 2002 the legislature was not concerned with the balancing of competing rights. It merely set forth the criteria under which a person could apply for redress for abuse suffered in certain residential institutions, including the setting of an age limit. By its very nature, the setting of an age limit is discriminatory. Therefore, the burden of proof shifts to the State to justify the reason for the discrimination. The precise discrimination encountered by the applicant is well illustrated in the stark contrast between her situation and that of her sister, who entered the Home on the same day. Their experiences were exactly similar. They arrived in the Home on the same day for precisely the same reason. Yet simply because the applicant's sister was a year younger than the applicant, the applicant's sister had a right to make a claim under the Act of 2002 but the applicant did not. Both were minors in law at the time.

21. The impact of the addition in 2004 of St. Patrick's Mother and Baby Home to the list of institutions covered by the Act is significant. It could be said that the age profile of children in such an institution could clearly be anticipated to be different to that of the institutions already scheduled. The respondents contend that the addition of the Home in 2004 to the Schedule to the Act of 2002 has no relevance as it is the provisions of the Act of 2002 that the applicant is challenging in the instant proceedings. However, even before the Home was added to the schedule of the Act of 2002, it is clear that the status of the applicant as a minor was not reflected in s. 1(1) of the Act of 2002 in defining a child as a person under eighteen. At all times when the applicant was in the Home in 1968 and 1969 she was a minor in law. The Act of 2002 ignored the reality that the applicant was to all intents and purposes a child whilst at the Home and, in her view, she was treated like a child during her time in the Home. The applicant was a person who lacked the legal capacity to make relevant decisions during her time in the Home. Indeed, her presence in the Home was the result of a decision taken by her guardian and not by her.

22. It has not been demonstrated to the satisfaction of this Court that the decision to limit the scheme of redress to persons under eighteen years old had a legitimate legislative purpose. The preamble to the Act of 2002 expressly states that the class of person chosen to benefit from the scheme was "*children ...resident in certain institutions*". The applicant was one such person. At the time she was resident in the Home she was a child as the law then defined that status. Apart from the obvious need to establish a cut off point in terms of age, to limit the extent of the scheme, no other reason has been advanced to justify what, in effect, is the retrospective removal from the applicant of the benefit of her legal status as a child when she was resident in this Home. The arbitrariness of the discrimination is graphically illustrated by the comparison with her sister.

23. I can readily appreciate that when the redress scheme was originally set up that, having regard to the institutions originally covered by the scheme, the possibility of a person between the ages of eighteen and twenty one years being resident in one of these institutions must have seemed remote indeed. The inclusion later of an institution of the kind the applicant was resident in created very different possibilities in terms of the age profile of potential residents, rendering it very likely that persons between the ages of eighteen and twenty one years old would be resident in institutions of this kind.

24. In my view, the understandable desire to clearly limit the extent of the scheme could not justify excluding from the scheme persons who enjoyed, in law, the status of children during the time when resident in a relevant institution. Such an exclusion would appear to fly in the face of the preamble to the Act of 2002 and it is reasonable to infer that had it been anticipated when the Act of 2002 was enacted that institutions like the one in which the applicant was resident would be brought into the scheme and the definition of "*child*" would have included all those who were children in law at the relevant time.

25. Although the preamble to the Act of 2002 does refer to children who were resident in certain institutions, in my view, it is not possible to construe the definition of "*child*" in s.1(1) of the Act of 2002 as meaning anything other than is stated in the definition, i.e. a person who is under eighteen years of age. To attempt a construction which would alter the age clearly and expressly stated would, in my opinion, be an impermissible interference with this legislative provision. In short, it is not possible to construe this definition in a way which would extend it to include persons who were minors in law when resident in a relevant institution.

26. I am satisfied that the applicant has discharged the heavy onus of rebutting the presumption of constitutionality enjoyed by the definition of "*child*" in section 1(1) of the Act of 2002 and I am satisfied that definition works an invidious discrimination against the applicant which violates her right under Article 40.1 of the Constitution to be held equal before the law. As it is not possible to construe s. 1(1) of the Act of 2002 in a manner which is in harmony with the Constitution, I must declare the definition of "*child*" contained in s. 1(1) of the Act of 2002 as repugnant to the Constitution and order it to be struck down accordingly.

27. I do not agree that striking down this definition will be futile in the sense that the applicant will not derive any benefit. This submission assumes that the removal of the definition would render inoperable s. 7 (1) (b) of the Act of 2002, thus defeating the applicant's claim for redress in any event. In my view, s. 7 can function without the definition of "*child*" in s. 1(1). For the purpose of s.7, the meaning of "*childhood*" can be ascertained from the general law and it would seem to me that this term would be construed to mean a person who was a minor in law under the law prevailing when the person was resident in a relevant institution. In the

applicant's case this would mean a person under the age of twenty one years old, that being the age at which minority ended under the law prevailing in 1968 and 1969.

28. Although the foregoing conclusion would be sufficient to dispose of the case, in deference to the learned submissions made I express the following opinion on the Conventions issues raised.

The Convention Issue

29. Section 2 of the Act of 2003 states as follows:

"2.-(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

30. Article 8 of the Convention provides:

"1. Everyone has the right to respect for his private life and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

31. Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

32. Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

33. Counsel for the applicant submitted that the interpretative obligation pursuant to s.2 (1) of the Act of 2003 requires this Court to "read down" the language of the Act of 2002 and the definition of "child" and "childhood" to reflect the personal circumstances of the applicant and the definition of infancy and disability that applied in 1968/1969 to include persons under twenty one years old. Mr. O'Reilly cited the jurisprudence of the European Court of Human Rights to illustrate that the State has positive obligations in upholding the applicant's Article 8 rights. He submitted that the State attempted to honour these obligations by setting up a legal mechanism for redress but that it could not operate the scheme in a discriminatory way. It was argued that the treatment the applicant suffered in the Home failed to respect her right to respect for her private and family life and that she was discriminated against in the operation of the redress scheme contrary to Article 14 of the Convention. It was submitted that only in the event that this Court does not interpret ss. 1(1) and 7(1) (b) of the Act of 2002 pursuant to s. 2 of the Act of 2003, so as to include the applicant within the definition of "child" and does not grant a declaration of invalidity having regard to Article 40.1 of the Constitution, that the Court should grant a declaration of incompatibility further to s.5 of the Act of 2003.

34. Counsel for the respondents argued that, by virtue of the Supreme Court decision in *Dublin City Council v. Fennell* [2005] 1 I.R. 604, that the applicant could not rely on the interpretative obligation under the Act of 2003 as the alleged breach of her rights took place in the 1960s, long before the entry into force of the Act of 2003. The *Fennell* case established that past events are not covered by the Act of 2003. However, legislation predating that Act must be interpreted by reference to Convention principles as required by s. 2(2) of the Act of 2003. Kearns J. made the following observations at p.631:

"On the face of it, the language and terminology of the Act appears to suggest prospective obligations only. None of the sections is directed to backward-looking obligations. No express provision for retrospective application of the Act to past events is anywhere to be found in the Act, other than insofar as s.2(2) provides that existing legislation is also to be interpreted by reference to Convention principles. However, no additional provision appears in s. 2(2) suggesting that a retrospective application of the section is envisaged."

35. From the above it is clear that the Act of 2003 is not retrospective, in that, a person cannot rely on a breach by the State of their rights under the Convention in respect of events that occurred before the enactment of the Act of 2003. Therefore, the Article 8 rights of the applicant based on events in the 1960s cannot be engaged in this case.

36. What is at issue in these proceedings is the decision by the Oireachtas to limit those entitled to benefit from the new remedy of redress under the Act of 2002 to those who had not attained the age of eighteen years when resident in an institution in the past. This issue is not capable of giving rise to a breach of Article 8 rights as Article 8 is not concerned with the right to redress. It is well established that the right under Article 14 is not a stand alone right. In *Schmidt v. Germany*, Judgment of the European Court of Human Rights of 18th July, 2004 (1994) E.H.R.R. 513 the European Court of Human Rights stated as follows at para. 22:

"As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one of more of the latter."

37. It must be considered whether the making of the Order of 2004, which could have included the applicant in the scheme, would have had the effect of reviving the engagement of Article 8, as counsel for the applicant submitted. This could not be so, as the events giving rise to the alleged breaches of the applicant's Article 8 rights took place long before the coming into force of the Act of 2003. The Order of 2004 entitles someone who suffered abuse in the institutions listed to claim redress under the scheme set up by the Act of 2002. However, the entitlement is to claim redress in respect of abuse that occurred prior to the Act of 2003. For this

reason Article 8 rights are not engaged by virtue of the Order of 2004. As a consequence, Article 14 rights could not be engaged either as these are not stand alone rights.

38. The applicant argued that in refusing her application for redress the respondents denied to her an effective remedy in violation of Article 13 of the Convention. In response, the respondents contended that it was at all times open to the applicant to institute court proceedings in respect of her claim for redress for the treatment she suffered and that would constitute an effective remedy. They further submitted that there is no right to a particular remedy under Article 13. In this regard it was submitted that the Act of 2002 itself, in ss. 7(4) and 13(10), preserves the right of a person to litigate in court outside of the redress scheme. I am inclined to agree with this submission. The right to recover a benefit under the statutory scheme for redress is but one remedy in respect of the wrong alleged by the applicant. Her right under the general law to sue in respect of those wrongs has always been there and is not curtailed or compromised by the Act of 2002. The fact that the prospect of successful recovery of compensation is obviously much better under the statutory scheme is irrelevant. Article 13 does not purport to guarantee a successful outcome to litigation, it merely seeks to ensure that an aggrieved party can bring proceedings to seek such remedy, as it is possible to extract from the wrongdoer, within the law.

39. For these reasons, I am satisfied that the applicant's claim based on the Convention, fails.