

THE HIGH COURT**JUDICIAL REVIEW****Record no. 2012/442/JR****Between/****B. F.****Applicant****AND****THE RESIDENTIAL INSTITUTIONS REDRESS BOARD, THE MINISTER FOR EDUCATION, IRELAND AND THE ATTORNEY GENERAL****Respondents****Judgment of Ms. Justice Iseult O'Malley delivered the 14th day of March, 2014****Introduction**

1. The applicant is a 55-year old man who, in his childhood, spent approximately one year in St. Vincent's Industrial School in Goldenbridge. He says that while there he suffered physical abuse and lived in constant fear. On the 26th May, 2011 he made an application for redress, through his solicitor, to the first named respondent ("the Board").

2. The Board was established under the provisions of the Residential Institutions Redress Act, 2002, on the 16th December, 2002. By virtue of s. 8(1) applications for redress were to be submitted within three years of the establishment- in other words, by the 15th December, 2005. However, s. 8(2) enabled the Board, at its discretion and where it considered there were exceptional circumstances, to extend time for reception of an application. The applicant's case therefore fell to be considered pursuant to that provision.

3. Although it is not in issue in this case, it may be worth noting that sub-section (3) provides for a mandatory extension of time, where the Board is satisfied that an applicant was under a legal disability by reason of unsound mind at the time when such application should otherwise have been made.

4. An oral hearing on the issue was held by the Late Applications sub-division of the Board on the 13th December, 2011 at which the applicant was represented by solicitor and counsel. By decision dated the 6th March, 2012 the Board determined that there were no "exceptional circumstances" within the meaning of s.8(2) of the Act such as to allow it to exercise its discretion to extend time.

5. By order of the High Court (Peart J.) made on the 21st May, 2012, the applicant was granted leave to seek an order of *certiorari* in respect of the decision. Leave was also granted to seek declarations as to the constitutionality of the Act and particular s.8(2) thereof but these have not been pursued and the court is concerned only with the relief sought against the Board.

The factual background

6. The applicant has not sworn an affidavit for the purposes of these proceedings. However, his solicitor has, and has exhibited the application form, medical documentation and the determination of the Board. The registrar of the Board has exhibited further correspondence and a copy of the transcript of the oral hearing.

7. Upon receiving the application form, the registrar of the Board wrote on the 2nd June, 2011 to the applicant's solicitor making a number of enquiries as to the application, including a question as to when the applicant had first become aware of the existence of the Board. With particular reference to the advertising campaign carried out by the Board from December 2002 to December 2005, she asked whether any of the advertisements had been seen by the applicant. She also requested an explanation as to what exceptional circumstances prevented the applicant from filing an application a) before December 2005 and b) between that date and the date of actual application.

8. The applicant's solicitor responded on the 8th August, 2012 stating that the applicant had been aware of the existence of the Board from news reports before the December 2005 deadline. However, he first became aware that he might be entitled to file an application when his sister-in-law gave him the solicitor's contact details in or around May 2011. It was stated that he did not see any of the advertising campaign and that during that time he was suffering from depression.

"In 2000- 2005 he was trying to deal with things and subsequently was prescribed medication in 2006. During the same period his daughter was going through a very hard time. She started to get addicted to painkillers and nurofen, the Applicant had to help her ... whilst trying to deal with his own depression. In 2007, the Applicant's GP, Dr Thomas Fields, recommended that he see a psychiatrist and he has been on medication for the last 24 months."

9. There was then reference to the treatment he had received and was receiving at the time.

10. A report by a consultant psychiatrist, Dr. Patrick J. Devitt, was submitted to the Board on the day of the hearing in support of the application. The report was based on an interview with the applicant, letters of instruction from the applicant's solicitor and medical records. It sets out his family and personal circumstances and his physical and mental health difficulties. There is specific discussion of the reasons why the applicant had not made an earlier application for redress and conclusions are drawn in relation to this issue.

11. The applicant was born in 1958 and lived as a child in Dublin's inner city. His father apparently received a prison sentence while the applicant was a child, and while that sentence was being served the applicant's mother had an affair. His father subsequently attacked the man in question with an axe. The family had to move as a result and the applicant and one sibling were placed in Goldenbridge. While there he was subjected to physical and mental suffering.

12. It appears that the applicant learned these details of his family history at a relatively late stage in his life, his mother having

refused to tell him before her death in 1997.

13. The applicant left school at the age of 14. He worked at various job until joining the Army at the age of 18. He left that at the age of 21 with an honourable discharge. After that he worked as a bricklayer until 2006. He got married in 1980, and had three children. There appears to have been some degree of violence on his part during the marriage, which broke up in 2000 because he was having an affair. That second relationship broke up in 2002. Since then he has not had a home of his own and has lived with a married sister and, more recently, with a friend. He has not worked since 2006.

14. In 1983 the applicant was admitted to St. Loman's because of depression and para-suicidal tendencies. He described himself to Dr. Devitt as having felt depressed and suicidal "on and off over the years" and had been prescribed anti depressants by his G.P. As of the date of the interview, he was attending psychiatric outpatient services and had been since January 2010. He was on anti depressant medication and was receiving counselling from an agency dealing with persons who were abused as children.

15. Asked by Dr. Devitt why he had failed to make an application to the Board during the prescribed period, the applicant said that while he was aware of its existence, he had not thought that it was relevant to him because he was under the impression that it was for victims of sexual abuse. He referred to his marriage having broken up, his affair breaking up and the fact that he had been living with his sister. He described drinking heavily at the time. He further said that he had become obsessed with finding out why his mother had placed him in Goldenbridge, and getting no answers from family members. At the same time, he felt ambivalent about "opening a can of worms" about such a "shameful thing".

16. According to the applicant his sister had found out the truth about his mother's life "the previous year", and the resulting emotional reaction had caused him to suffer further depressive symptoms requiring referral to a specialist psychiatric clinic. The reference to "the previous year" appears to mean 2010.

17. In December 2010 his sister-in-law saw a solicitor's advertisement relating to late applications to the Board and persuaded him to make contact.

18. Dr. Devitt described the applicant as a "credible informant" who appeared "wracked by shame and guilt regarding his early past and the more shameful aspects of his early adult life with respect to his behaviour and his drinking".

19. Dr. Devitt's conclusions were as follows: -

- The applicant had given a credible account of physical and mental abuse in Goldenbridge.
- Apart from that, he had had a very harsh and traumatic upbringing.
- Throughout his life he had had difficulty controlling his emotions and impulses.
- This had caused him significant problems in his personal life, including mental ill-health requiring psychiatric hospitalisation and outpatient psychiatric care.
- His current diagnosis of depression was long-standing but inadequately treated over the years.
- He had serious problems with alcohol abuse and dependence.

20. With particular reference to the prescribed period for application to the Board, Dr. Devitt's opinion was that

- The applicant's mental health was in a precarious state.
- He was suffering from depression.
- He was drinking to excess.
- He was recovering from the break-up of two significant relationships.
- He was dealing with his daughter's drug abuse.
- He was "obsessed and ruminating" regarding family secrets which caused him to be placed in Goldenbridge.
- He was living with his sister and her family.

21. Because of the foregoing, Dr. Devitt felt that the applicant had not been

"in a position to properly advert his attention to his entitlement to apply, discover that Goldenbridge was, indeed, a designated institution and that the abuse he suffered also allowed him to be eligible".

22. By 2010 his situation had improved in that he had curtailed his drinking, was attending consistently for psychiatric treatment, had confronted his family history and had matured in personality. He was then able to make an application.

23. Dr. Devitt stated that he considered the applicant's circumstances to be exceptional.

The hearing before the Board

24. The hearing took place on the 13th December, 2011. The sub-division of the Board consisted of a barrister and a medical doctor. The Board was represented by Senior Counsel, while the applicant was represented by solicitor and Junior Counsel.

25. In his sworn evidence the applicant said that he had become aware of the Board through the media, probably in 2003. He did not know that it might apply to someone such as himself and did not look into it because at the time he was trying to find out the truth about his life. At the beginning of 2011 his sister-in-law told him that he might have a case.

26. The applicant described the break-up of his marriage in 2000, which he attributed to his depression, his drinking and his affair. He said that after the break-up he moved in with his sister and "went heavy on the drink". He was, he said, depressed and trying to

handle it. After the relationship with the other woman ended he drank even more heavily-"My life went to shatters, pieces". He said that he was drinking seven days a week, going straight from work to the pub. In 2006 his sister asked him to move out of her home.

27. Asked to describe his life between 2002 and 2006, the applicant said

"All I can say really is my life was a mess. Between the drinking I was down all the time. I was depressed. I just wasn't able to deal with nothing at the time. It just spiralled out. "

28. He referred to the fact that his daughter had developed a drug problem, which he said was probably after 2006 or 2007.

29. In relation to his physical health, the applicant was asked about his condition of hypothyroidism, which was diagnosed in the 1990s. He said that the effects included feelings of lethargy and depression. He had found it hard to understand what was wrong with him and said that there were days on end when he *"just wasn't able to deal with things"*.

30. The applicant described his family background and said that there was a history of alcoholism in the family. He said that he had had a violent upbringing and a hard life.

31. Asked why he had not made the application the applicant said:

"I didn't make the application because first of all I wasn't too sure about it. I didn't think it affected me or not. The way I was going with my life I wasn't able to deal with it really at the time, with my depression and that, and not knowing the truth why I was put into the home. I always wanted to find out the truth and I was trying to deal with it at the time and I don't think I did deal with it. "

32. Asked to compare himself as he was on that date with how he was in the early 2000s, the applicant said that he was calmer now, getting on better with his life and "adjusting it".

33. In cross-examination, the applicant was asked had he worked between 2002 and 2006 and said that he had worked "on and off" as a bricklayer. By that he meant that he might be working for a year, then out of work for six months. He said that he was drinking his earnings.

34. He was asked why he had not gone to a solicitor to enquire as to his entitlements in 2003 and responded that it was because he didn't know the full truth about his family and was depressed all the time. He said that his life was a mess.

35. It was put to the applicant that there was nothing in his medical records to indicate that he had attended a doctor during the years 2002 and 2005 with any difficulties relating to drinking or depression. He agreed and said that he had not addressed it until after 2006. He agreed that he was able to work but said that there were days when he was sent home because of his condition and that he received warnings "maybe once a month".

36. The medical doctor on the Board then asked the applicant questions about the medical records, pointing out that while he had been attending his GP during the relevant years there was no reference to alcohol and depression until 2008. The applicant said that he had "repressed" it within himself. He agreed that even after referral to a psychiatrist, he did not say that he had been depressed and abusing alcohol over the years. He said that he had not felt able to talk about it.

37. The applicant agreed with the doctor that the "on and off" nature of his work was due to availability of work rather than health reasons.

38. It should be noted that the doctor agreed with the applicant as to the symptoms of hypothyroidism.

39. An article on hypothyroidism, taken from an on-line medical journal, was handed in to the Board.

The determination of the Board

40. The Board gave its decision by letter dated the 6th March, 2012. The determination records the matters considered by the Board - the records relating to the applicant's period of residence in Goldenbridge, his medical records, the letter from his solicitor and the report of Dr. Devitt.

41. The Board set out its understanding of the concept of "exceptional circumstances" as follows:

"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. [Having regard to the dictionary definition] it would be inappropriate for the Board to apply a test of uniqueness in these cases.

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.

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, for example 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 particular time, could have the effect of preventing or inhibiting an applicant from making an application within the prescribed period and could be considered exceptional. "

42. There then follows a summary of the evidence given by the applicant.

43. The Board set out its conclusions as follows: -

"Having carefully considered all of the written and oral evidence provided by the applicant the Board takes the view that Mr. F was aware of the existence of the Redress Board during 2003, and that while he was drinking heavily during that period the Board cannot take the view that he was so disabled by his drinking during the period within which he could have brought an application for redress as to have been rendered unable to do so. The Board notes that he was able to

function professionally during that three year period, and was effectively able to carry out his work as a brick layer when it was available to him. While he stated himself that he worked as a brick layer on and off during the relevant period, the sporadic nature of the work carried out by him was as a result of the availability of work as opposed to any inability on his part to work due to either problems with drink or other health difficulties. The Board deems it noteworthy that while he did attend with a general practitioner from time to time during the relevant period there is no reference to either alcohol or depression in the medical records during the relevant period, but that there is specific reference to depression in 2008...

... The Board notes the contents of the report of Dr. Patrick J Devitt, consultant psychiatrist, and the conclusions contained therein, but again, for the reasons already stated in this determination, the Board cannot take the view that the applicant was so disabled by his alcohol abuse as to have been rendered unable to bring his application in time. In addition thereto the Board is unable to take the view that any concerns he may have had as regards his family background could have been so disabling or severe as to have prevented him from bringing an application, and again, in this regard notes that he was generally able to carry out his work as a bricklayer, when work was available".

The proceedings

44. The grounds for relief, as pleaded, may be summarised as follows:

- The Board breached the principles of fair procedures in failing to have adequate regard to the applicant's alcohol addiction and depression during the relevant period.
- The Board breached the principle of *audi alteram partem* in not affording a reasonable opportunity to the applicant to deal with the proposition that if he was able to attend work during the relevant period he could have made an application at that time.
- The Board acted unreasonably in equating the ability to work with the ability to make an application and finding that the fact that the applicant was able to work meant that his circumstances were not exceptional.
- The Board afforded no consideration to large portions of the evidence presented by the applicant, including evidence as to his emotional distress resulting from the breakdown of personal relationships.
- The Board failed to apply the correct test and failed to assess the application objectively and with due regard to the applicant's personal circumstances.

45. In oral submissions, it was stated by Ms. Sunniva McDonagh SC that the substantive argument in the case related to the applicant's medical condition and the evidence relating thereto. It was accepted that the Board has a wide discretion. However, it was submitted that in this case the Board had, in effect, concentrated too much on the question of the applicant's drinking without regard to other relevant evidence. It asked whether his drinking had prevented him from making the application and decided, having regard to the fact that he was capable of work, that the answer to that question was "No". It did not impugn the applicant's credibility, or that of his medical evidence, but failed to engage with that evidence including, especially, the evidence as to hypothyroidism and depression. According to Ms. McDonagh, further, it failed to take account of the applicant's evidence that he had repressed matters. In the circumstances, the decision did not flow from the premises.

46. On the *audi alteram partem* issue, Ms. McDonagh submitted that it had not been apparent, and could not have been anticipated, that the Board would attach such importance to the capacity of the applicant to work, and that he and his representatives were not, therefore, given an adequate opportunity to deal with it. It was said that Dr. Devitt should have been asked to comment on the issue.

47. It was also argued on behalf of the applicant that the Board fell into error in finding that the ability to work sporadically meant that he was not inhibited in making an application since, it was said, it is possible for a person to work effectively over many years without ever being able to discuss traumatic events from his or her childhood.

48. On behalf of the Board, Mr. Denis McDonald SC emphasised that the test to be applied in relation to s.8(2) required an applicant to show that the "exceptional circumstances" relied upon were causative of the failure to apply.

49. It was submitted that in reaching its decision, the Board clearly had regard to the applicant's ability to work and the fact that he was sent home only one day a month. It also had regard to the fact that there had been no mention of a drink problem or depression during the relevant period, and took this as indicative of the relative lack of severity of the problem. It therefore decided that he had not been unable to make an application or inhibited from so doing. In relation to the medical report, it was contended that Dr. Devitt did not put matters any further than the applicant himself had in his evidence and did not make a case that he had been disabled.

50. The cross-examination of the applicant as to his work and his diagnosis of depression were relied upon as dealing with the *audi alteram partem* argument. It was clear from the questions asked that the issues were important. It was said that if his representatives had felt at a disadvantage they could have said so and sought an adjournment, perhaps for the purpose of calling Dr. Devitt. Further, it was said that the argument outlined in paragraph 46 above was an argument on the merits and not one that the court could enter upon.

51. It was further submitted that the Board had specifically taken account of all the evidence relied upon by the applicant as relevant. Having done so, the question of the weight to be attributed to the evidence was a matter for the Board.

52. On the issue of the applicant's hypothyroidism, Mr. McDonald makes the point that it was not referred to by Dr. Devitt in his conclusions and was not referred to in the Statement of Grounds. It was now being linked to depression, but the issue of depression was specifically dealt with by the Board.

53. As a general point, Mr. McDonald relied on the test for judicial review proceedings established in *O'Keeffe v An Bord Pleanala* [1993] I.R. 39 and argued that the applicant had failed to discharge the onus of showing that the Board had before it no relevant material which would support its decision.

Discussion and conclusions

54. The test to be applied under s.8(2) has been considered in a number of cases. It is well settled that the Board has a wide discretion in its application and that its standard approach, as quoted in paragraph 40 above, is a legitimate one - see *O'B. v RIRB* [2009] IEHC 284, *M.G. v RIRB* [2011] IEHC 332, *A.G. v RIRB* [2012] IEHC 492 and *T.K. v RIRB* [2013] IEHC 52.

55. The first three of these cases concerned applicants whose applications were late because, due to various personal difficulties, they were unaware of the existence of the redress legislation - the "state of knowledge" cases. The Board had taken the view that they did not meet the "exceptional circumstances" criteria because, in effect, the same was true of so many late applicants. On the facts as presented in those cases, O'Keeffe J. (in *O'B.*) and Kearns P. (in *M.G.*), applying O'Keeffe principles, declined to interfere with the decisions. In *A.G. Hogan J.* felt constrained to follow these authorities, albeit he made it clear that left to himself he would have held that the concept of "exceptional circumstances" should be construed by reference to the general population rather than the particularly vulnerable category of persons concerned.

56. In *T.K.*, the facts were quite different in that the applicant made it clear that she was aware, not only of the possibility of a claim, but of the deadline for applications. She did not meet it because her mother was making a claim in her own right. The applicant said that she had never previously felt able to disclose to her mother, to whom she was very close, the abuse that she herself had suffered. At this stage she felt that she needed to devote herself to supporting her mother through the claim process. She feared that if she told her, her mother would withdraw her own claim. She also said that she "could not" deal with a claim on her own behalf while assisting her mother through the "turmoil" involved. If she told another person and not her mother, the latter would know something was wrong.

57. The Board held against her, taking the view that she

"could have attended with a solicitor and instructed such solicitor to proceed with her application with absolute confidentiality so as to ensure that her mother would have proceeded with her application".

58. The Board also described the applicant as having "*never felt the need to divulge to her mother*" previously, drawing the conclusion that she could therefore have maintained her silence to her mother while instructing a solicitor.

59. Quashing the decision, Peart J. held, firstly, that "exceptional circumstances" were not confined to "state of knowledge" cases and secondly, that the Board was correct in considering that any such circumstances had to be shown to be causative of the failure to apply.

60. In the circumstances of the case, however, the Board had erred in that it had misstated the applicant's evidence- she had not put her position in terms of "not feeling the need" to divulge but on the basis that she was unable to do so. Further, there was no evidence to support the conclusion that, because she had stayed silent so long, she could have instructed a solicitor. This was to ignore her evidence that she could not do this without telling her mother. There was no credibility finding against her in this regard.

61. There is therefore a category of case involving impairment of capacity falling short of legal unsoundness of mind. The instant case is more similar to *T.K.* than to the "state of knowledge" cases in that the applicant did not assert ignorance of the existence of the availability of redress, although he expressed uncertainty as to his entitlements. The issue, rather, is whether he lacked capacity (in a non technical sense) to make enquiries and instruct a solicitor. His evidence was that he could not do so. The Board decided, by reference to his ability to work, that he could have.

62. I am of the view that in coming to this conclusion the Board fell into error and acted irrationally. The issue was never whether the applicant was physically able to attend a solicitor, in the way that he was physically able to do manual work when it was available - it was whether he was, having regard to his personal circumstances and history, emotionally and cognitively capable of addressing the issues relating to those circumstances and history. There was no evidence before the Board to suggest that he was so capable. On the other hand, there was the evidence of the applicant himself, supported by the professional opinion of Dr. Devitt as set out in paragraphs 19 and 20 above, that he was not. There were no adverse credibility findings in respect of either the applicant or Dr. Devitt.

63. It is true that the Board referred to the applicant's medical records and noted the absence of any mention of alcohol abuse or depression in the years prior to 2008. However, it does not appear to have considered the view of Dr. Devitt that there was a long-standing, inadequately treated condition of depression. This view might be thought to be strengthened by the episodes in the 1980s, about which there does not seem to be any doubt.

64. It is also true that the Board specifically referred to the applicant's concerns about his family's past and found that they were "not so disabling or severe" as to prevent him from applying- however, again, it did so by reference to his ability to carry out physical work, rather than on the basis of evidence as to the effect of these issues on the applicant's ability to discuss and give instructions in relation to his childhood.

65. In the circumstances I propose to quash the decision.