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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **20/05/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR 307
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION OF A SINGLE JUDICIAL MEMBER OF THE HISTORICAL INSTITUTIONAL ABUSE REDRESS BOARD

John Mackell (instructed by MSM Law) for the Applicant
Philip McAteer (instructed by the Historical Institutional Abuse Redress Board) for the Proposed Respondent

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HUMPHREYS J

Introduction

[1] By this application for leave to apply for judicial review, the applicant seeks to challenge a decision of the Single Judicial Member ('SJM') of the Historical Institutional Abuse Redress Board ('the Board') whereby his appeal against the determination of the Historical Institutional Abuse Redress Board Panel ('the panel') was dismissed.

[2] The Board was established under the Historical Institutional Abuse (Northern Ireland) Act 2019 ('the 2019 Act') in order to process applications for compensation from persons who experienced abuse in residential institutions in Northern Ireland between 1922 and 1995.

[3] On 3 June 1982, when he was aged 15, the applicant was remanded by a court to St Patrick's Training School on the Glen Road in Belfast. That evening, the applicant states that he was sexually abused by a member of the training school staff called 'Fra.' The applicant only spent one night at that institution and was released the following day.

The panel decision

[4] The applicant made an application for compensation under section 2 of the 2019 Act on 31 October 2022. On 14 December 2022 the panel made a request for clarification in which they asked if the individual named 'Fra' was a religious brother or a secular staff member. The response received was to the effect that the applicant was unsure but believed he was not a religious brother as he wore normal clothes.

[5] The application was considered by the panel under section 9 of the 2019 Act and it took into account the following information:

(i) The applicant's statement;

(ii) The applicant's GP notes and records;

(iii) The relevant material from the Historical Institutional Abuse Inquiry ('the Hart Inquiry'); and

(iv) The response of the De La Salle Order under rule 7 of the Historical Institutional Abuse Board (Applications and Appeals) Rules (Northern Ireland) 2020 ("the rule 7 response").

[6] The rule 7 response was dated 9 December 2022 and it stated that there was a trainee chef in the training school named Francis Smith who was known as 'Fra' and who was convicted of sexual abuse in the 1990s. He had been suspended on 12 March 1980 then resigned and did not work at St Patrick's again. There was no other member of staff named 'Fra.'

[7] According to the material before the Hart Inquiry, in which Francis Smith was ciphered as DL137:

> "He was convicted of sex offences and sentenced to four years in prison…He was prosecuted for offences committed between 1977 and 1980, and he pleaded guilty to gross indecency…He was convicted on 4 December 1995 15 years after he left St Patrick's. DL137 died on 24 December 2004. There were further complaints about his abuse of boys after his death, and three civil cases for damages…
>
> Five of the witnesses to the inquiry alleged sexual assault by DL137…"

[8] The panel rejected the application on 17 February 2023 and gave summary reasons for so doing. It was satisfied, on the balance of probabilities, that the applicant and Francis Smith were not in the institution at the same time. The panel noted the

mental health problems referenced in the GP notes but observed that there was no reference in these to any sexual abuse. The evidence to the Hart Inquiry revealed systemic abuse at the institution during the 1970s but that during the 1980s concerted efforts had been made to improve levels of training. It was determined that the threshold for the making of an award of compensation had not been met.

The appeal

[9] The applicant exercised his right under section 16 of the 2019 Act to appeal to an SJM of the Board on 28 February 2023. The grounds of the appeal were as follows:

(i) The panel failed to adequately take the detailed account provided by the applicant into consideration;

(ii) The panel failed to provide sufficient weight to the potential that another person named 'Fra' or similar may have been involved in the abuse;

(iii) The fact that the applicant's medical notes did not mention the abuse ought not to have diminished the credibility of the account given; and

(iv) The panel placed inappropriate weight on the finding of the Hart Inquiry that by the 1980s there had been concerted efforts to improve the level of training for staff.

[10] The SJM, Sir John Gillen, furnished his determination on 5 April 2023. As required by section 16(6) of the 2009 Act, he approached the appeal by way of reconsideration. He directed himself that he had to be satisfied that the abuse alleged had occurred to the requisite standard, namely the balance of probabilities. He stressed the need to scrutinise the evidence provided and consider the detail, accuracy and particularity of the allegations made.

[11] In the SJM's analysis of the evidence, he referred to the detail furnished by the applicant, including the name and physical description provided, and the findings of the Hart Inquiry as to the systemic abuse perpetrated at the institution.

[12] The SJM also took into account the reluctance of victims of sexual abuse to make disclosures, and the potential for the passage of time to corrupt memories.

[13] The SJM concluded that the applicant had failed to satisfy him that the abuse occurred as alleged. He gave the following reasons for so finding:

(i) The applicant stated unequivocally that the member of staff who perpetrated the abuse was named 'Fra' but the evidence revealed that there was no member of staff with that name there at that time, and he considered it troubling that there was a specific abuser at St Patrick's who had been there previously;

(ii) This coincidence raised the possibility of informed imagination and caused a sense of ebbing confidence in the accuracy of the allegation;

(iii) The whole description, given the mistake in relation to the name, was suggestive of an unreliable narrator;

(iv) There was no reference in any medical records to a causal connection between his one night at St Patrick's and his subsequent mental health problems;

(v) Whilst being far from determinative, the Hart Inquiry did indicate a drop off in systemic abuse at the institution by the 1980s;

(vi) There was insufficient evidence to connect the mental health problems suffered with the alleged incident.

[15] Accordingly, the SJM affirmed the decision of the panel.

The test for leave

[16] In order to obtain a grant of leave to apply for judicial review the applicant must establish an arguable case with realistic prospects of success.

The grounds for judicial review

[17] The applicant contends that the decision of the SJM was unlawful by reason of the failure of the SJM to direct, or consider, an oral hearing of the appeal under the power in section 9(3)(b) of the 2019 Act.

[18] In addition, the applicant contends that the decision was infected by procedural unfairness:

(i) The information contained in the rule 7 response in relation to the staff member named 'Fra' had not been provided to the applicant and no opportunity given to scrutinise it or challenge its veracity;

(ii) The SJM arrived at his decision by placing weight on material which had not been made known to the applicant;

(iii) The absence of an oral hearing was itself procedurally unfair and he was thereby denied an opportunity to participate in a decision making process with important implications for him.

[19] In essence therefore the challenge resolves to two issues. Firstly, the lack of an oral hearing and secondly, the use of evidential material which had not been disclosed to the applicant.

Delay

[20] The decision of the SJM was promulgated on 27 March 2023 and notified to the applicant on 5 April 2023. Accordingly, any application for leave to apply for judicial review ought to have been commenced at the latest by 5 July 2023 in accordance with Order 53 rule 4 of the Rules of the Court of Judicature. These proceedings were not brought until 21 July 2023, some 16 days out of time. Accordingly, the Order 53 statement seeks an extension of time for the reasons set out in an affidavit filed by the applicant's solicitor.

[21] In *Re Sheehy's Application* [2024] NIKB 5, I recently set out some principles in relation to delay in judicial review applications at para [15]:

(i) If there has been delay, an applicant must specifically seek an extension of time and each period of delay should be explained;

(ii) The court will examine whether any good objective reason for the delay has been established;

(iii) Time may be extended for good reason consideration of which may include substantial hardship to any person, prejudice to any party or good administration, and the public interest in proceeding;

(iv) Delays in the processing of applications for public funding alone may not constitute 'good reason.'

[22] The solicitor's affidavit sets out the following chronology:

(i) A pre action letter was sent promptly on 27 April 2023;

(ii) A response was received on 17 May 2023;

(iii) A further pre action letter was sent on 30 May 2023;

(iv) A further reply was received on 22 June 2023;

(v) Counsel was then instructed to prepare an opinion for the Legal Services Agency which was received on 28 June 2023;

(vi) An application for legal aid was lodged on 30 June 2023;

(vii) Emergency legal aid was refused on 1 July and substantive legal aid refused on 5 July 2023, an appeal being lodged that day;

(viii) A legal aid panel granted the appeal on 19 July 2023;

(ix) The application was filed on 21 July 2023.

[23] I am satisfied that the applicant has established good objective reasons for the delay in commencing the proceedings and that no significant prejudice has been occasioned to the proposed respondent. I therefore grant the extension of time sought.

The merits of the application

[24] In the seminal case of *R v SSHD ex p. Doody* [1994] 1 AC 531, Lord Mustill summarised the legal position as follows:

> "The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. An essential factor of the context is the statute which creates the discretion, as regards both the language and the shape of the legal and administrative system within which the decision is taken."

[25] Section 9 of the 2019 Act, when read with section 16(6), provides that the SJM may, if he considers there are exceptional circumstances which make it necessary to do so in the interest of justice, direct an oral hearing to be held.

[26] In the instant case, neither the applicant nor his legal representative at any time requested that an oral hearing be held. The statute does not require such an application to be made but the lack of such an application may well be relevant to the exercise of discretion by the SJM.

[27] In *Re Glass's Application* [2022] NIKB 2, Scoffield J summarised the rationale behind the policy of the 2019 Act which establishes a procedure of written applications and appeals. This was recommended by the Hart Inquiry and encourages expedition and saves cost. The statutory scheme must also be seen in the context of a continuing right to pursue a claim for compensation through the courts.

[28] The learned judge noted the statutory test for an oral hearing and commented:

> "The mere fact that it may be better to have an oral hearing than not, or even that it may seem *more* fair to the applicant to do so than not, is not the test. There is an in-built weighting against the use of oral hearings unless necessary, as determined by the panel (or the SJM)." (para [67])

[29] Scoffield J agreed with the SJM's analysis in that case that the matter essentially resolved to one of proportionality: were the circumstances of the case such that refusal of an oral hearing would result in unjustifiably harsh consequences? He stated:

> "The issue is not therefore whether the case is unusual but rather, whether the degree of strength in the arguments for an oral hearing is sufficiently strong to warrant a departure from the usual approach that a hearing is not required in order to determine claims under the scheme." (para [68])

[30] The applicant says that there were exceptional circumstances in the instant case which made it necessary to hold an oral hearing in the interests of justice. The principal complaint is that an adverse view was taken of the applicant's credibility without him being afforded the opportunity of a hearing.

[31] There is, however, nothing remotely exceptional about this. In the consideration of the evidence relating to an application, a panel or SJM will frequently have to make a determination as to whether certain evidence is credible, or the account given by a witness is reliable. Whilst in civil litigation such a decision will generally be made after hearing a witness give evidence, the procedure under the 2019 Act involves a different paradigm. If it were the case that any application or appeal which required consideration of an applicant's credibility demanded an oral hearing, this would wholly subvert the statutory scheme.

[32] The role of the judicial review court is supervisory. It does not act as a court of further appeal from the SJM. The SJM is himself a judicial officer, familiar with the tenets of procedural fairness and invested with a power to make discretionary decisions by the 2019 Act. The court will afford a proper measure of respect to such exercise of discretion, whilst retaining the right to intervene in cases of manifest unfairness.

[33] It cannot be said that there has been any unfairness in the denial of an oral hearing in this case. The applicant's legal representatives, following rejection of the claim by the panel, did not see fit to invite the SJM to exercise his discretion. Indeed, the first time the issue of an oral hearing was raised was when the applicant's solicitors sent their second pre action protocol letter on 30 May 2023, almost two months after the SJM decision had been promulgated. This perhaps not surprising since, in reality, there were no exceptional circumstances which would have justified such a course.

[34] This case is far removed from the situation which prevailed in *Glass* where the applicant had sought, but was denied, an oral hearing in circumstances where the court held that there had been significant reasons advanced for discrepancies in the applicant's claim upon which he ought to have been heard.

[35] The claim that the want of an oral hearing in this case was procedurally unfair is unarguable and leave is refused on this ground.

[36] In relation to the second issue, section 9(2) of the 2019 Act provides:

> "The panel must, in so far as it is practicable to do so and in accordance with such provision as may be made in the rules, request the body, society or organisation which provided residential accommodation in an institution to which the application relates to provide whatever information would enable the panel to verify the accuracy of information provided in support of the application."

[37] Rule 7 supplements this by requiring the Board to give written notice to the relevant body specifying the name of any person alleged to have been responsible for the abuse.

[38] In *Glass*, Scoffield J outlined how this procedure provided a structure to the panel's evidence gathering. Demonstrably, the panel and the SJM are obliged to take such evidence acquired into account in the overall decision making process. Notably, the statute imposes no obligation of disclosure to an applicant.

[39] The panel decision was communicated to the applicant, and this included a summary of reasons. It was apparent that the panel had concluded, on balance, that the applicant and Francis Smith were not in the institution at the same time. The evidence relied upon in the Hart Inquiry report and the rule 7 response is set out, save for one point. The panel did not record the fact in its summary that the institution had stated that there was:

> "no other member of staff called 'Fra.'"

[40] This part of the rule 7 response was expressly relied upon by the SJM in his determination.

[41] The applicant's solicitors were able to formulate grounds of appeal based on claims that the panel had failed to properly analyse the evidence from the applicant himself, the rule 7 response, the Hart Inquiry report and the applicant's medical records. The applicant was well aware that the key adverse finding of the panel was that the applicant and Francis Smith were not in the institution at the same time.

[42] Prior to the panel decision, the applicant was afforded an opportunity to provide further information in relation to his alleged abuser. It was also open to him to provide any additional material and/or submissions to the SJM or to seek to adduce fresh evidence under section 9(3)(a) of the 2019 Act or, indeed, to request an oral hearing to address the issues. He did none of these things.

[43] The statutory scheme does not mandate disclosure of any particular information or evidence to an applicant. There is no basis for the common law to impose such an obligation. Following receipt of the rule 7 response, the panel may seek further clarification from an applicant, as occurred in this case, to ensure that all relevant material is considered.

[44] In *R(Pathan) v SSHD* [2020] UKSC 41, the Supreme Court held that the failure to inform a visa applicant of the revocation of his sponsor's licence was procedurally unfair. The lack of notification meant that the applicant was not in a position to mend his hand by identifying a suitable alternative employer to sponsor him. The court found that the SSHD ought to have afforded the applicant a 'meaningful opportunity' in this regard.

[45] However, absent from this applicant's case is any account of what he would have done if he had been provided with the full rule 7 response or the specific averment in relation to the names of staff at St Patrick's. There is no suggestion that he could have adduced any additional or fresh evidence or made any particular submission which would have materially altered the framework within which the SJM had to make his decision. In order for any claim of procedural fairness to succeed, an applicant needs to be able to demonstrate (at least arguably at this stage) that the procedure adopted caused some material prejudice to him, or some 'meaningful opportunity' was lost. There is simply no evidence that this was the case.

[46] It cannot, therefore, be said that the procedure adopted by the SJM gave rise to any unfairness. This ground of review is also unarguable.

Conclusion

[47] For the reasons outlined, no arguable case with realistic prospects of success has been established and the application for leave to apply for judicial review is dismissed.