THE HIGH COURT

2018 No. 45 MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 22(6) OF THE RESIDENTIAL INSTITUTIONS STATUTORY FUND ACT 2012

BETWEEN

W.

APPELLANT

AND

GERALDINE GLEESON

(APPEALS OFFICER)

RESPONDENT

RESIDENTIAL INSTITUTIONS STATUTORY FUND BOARD

NOTICE PARTY

JUDGMENT of Mr Justice Garrett Simons delivered on 28 June 2019.

SUMMARY

1. These proceedings seek to challenge the manner in which monies, which have been made available by the Oireachtas to support the needs of former residents of residential institutions, are being allocated. A statutory fund in the order of 110 million euro had been established under the Residential Institutions Statutory Fund Act 2012. The fund complements the previous statutory scheme of compensation provided for under the Residential Institutions Redress Act 2002.

2. The function of determining criteria for the allocation of these funds has been entrusted to a statutory board. This board is known as "Bord an Chiste Reachtúil Foras Cónaithe" or, in the English language, "the Residential Institutions Statutory Fund Board". The statutory board is referred to colloquially as "Caranua". The shorthand "the Board" will be used throughout this judgment when referring to this statutory board.

3. The Board has published the criteria by way of "guidelines". In circumstances where the fund is finite, the Board made a decision in April 2016 to impose a limit on the aggregate amount which any individual can receive. This limit has been set at €15,000 or STG£12,000.

4. The Appellant in these proceedings had received benefits in the order of €40,000 prior to the introduction of this monetary limit. The Appellant subsequently submitted a further application in or about April 2017. The refusal of this application is the subject-matter of these proceedings. Whereas there is no question of the Appellant being asked to refund the excess, the Board maintains the position that no *further* allocation can be made to the Appellant in circumstances where he has already received benefits in excess of the monetary limit of €15,000.

5. The Appellant contends that the introduction of the €15,000 limit was *ultra vires*. This contention is advanced by reference to a number of alternative arguments as follows. First, the introduction of a monetary limit is said to be in breach of the Appellant's legitimate expectations. Secondly, it is said that the monetary limit cannot be applied *retrospectively*, and that as the Appellant had made successful applications to the Board *prior* to the introduction of the monetary limit, all subsequent applications must be dealt with on the same basis. It is said that, at the very least, his previous benefits should be ignored when applying the monetary limit to him, i.e. the Appellant should be entitled to further benefits in the amount of €15,000. Thirdly, it is said that the Board is under an obligation to have regard to the individual circumstances, including personal and financial circumstances, of former residents. The imposition of a monetary limit is said to be inconsistent with this obligation.

6. For the reasons set out in detail in this judgment, I have concluded that these arguments are not made out. The fundamental misconception underlying the Appellant's case is that the statutory fund is "an unlimited needs based fund so any purported limit to the amount an applicant can receive is unlawful" (written legal submissions, §1.5). The implication being that if a former resident can demonstrate a need for the payment of a grant or for the provision of an approved service, then the Board has no discretion to refuse those benefits to him or her. With respect, this is not what the legislation actually provides for. Rather, the legislation has entrusted the task of distributing the fund of 110 million euro to the Board. In particular, the function of specifying criteria—by reference to which applications for the payment of grants or for the provision of approved services are to be determined—has been entrusted to the Board. It is clear from a reading of the relevant provisions of the Residential Institutions Statutory Fund Act 2012 ("the Act") that the Board enjoys a wide discretion in this regard. Whereas the exercise of this discretion—as with any statutory discretion—is amenable to the supervisory jurisdiction of the High Court by way of judicial review, no case has been made out for challenging the guidelines published by the Board in 2016. These guidelines are well within the boundaries of the discretion afforded to the Board.

7. The administration of a finite fund will necessitate the making of decisions as to what is the most equitable basis for the allocation of the fund. The Board has explained, on affidavit, that it decided to introduce a monetary limit in June 2016 to address a concern that the demand on the scheme might be such that the fund would be substantially depleted before all eligible applicants had been given a fair opportunity to make an application.

8. There might well be different opinions as to whether this is the most appropriate approach to the allocation of the fund. The Appellant, for one, appears to think that the fund should be administered on a "first come, first served" basis. The question for this court is not, however, whether the court would have adopted the same approach as chosen by the Board, but rather whether the approach adopted is lawful. For the reasons set out in detail in this judgment, I am satisfied that it is.

OVERVIEW OF LEGISLATIVE SCHEME

9. In brief outline, the objective of the Residential Institutions Statutory Fund Act 2012 is to make "approved services" available to former residents of scheduled residential institutions by providing financial support.

10. An "approved service" refers to a service which has been approved by the Board. Section 8 of the 2012 Act lists out four broad classes of services, and the Board has discretion to approve individual services belonging to any one of those classes. The broad classes of services are (a) mental health services; (b) health and personal services (including, relevantly, medical or dental services); (c) educational services; and (d) housing support services. Provision is also made for the Minister to prescribe *additional* classes of

services.

11. The Board has discretion as to whether (i) to make arrangements itself for the provision of approved services to former residents, or (ii) to pay grants to former residents in order that they may avail of approved services. Generally, a grant paid to a former resident shall be used solely for the defrayal of the cost to the former resident of availing of the approved service.

12. Individual applications for the provision of an approved service or the payment of a grant are made to the Board in accordance with section 20 of the Act. Relevantly, the Board cannot accede to an application unless the application satisfies the criteria determined by the Board under section 9.

13. The dispute in the present case concerns an application for a grant to pay for medical services.

PROCEDURAL ISSUES

14. Before setting out the detail of my reasoning on the merits of the appeal, it is necessary first to address a number of procedural irregularities in relation to these proceedings.

15. This matter comes before the High Court by way of a statutory appeal pursuant to section 22 of the Residential Institutions Statutory Fund Act 2012 ("the Act"). The legislation provides for two levels of appeal, as follows. First, there is a statutory right of appeal to an Appeals Officer against a first-instance decision by the Board. Secondly, there is then a right of appeal on a point of law to the High Court.

16. On the facts of the present case, the Appellant had applied to the Board in April 2017 for the payment of a grant in respect of *inter alia* certain medical and dental expenses. The Appellant had previously made a number of successful applications and had received benefits in the order of €40,000.

17. The application was refused by letter dated 14 June 2017 on the basis that the payments to date exceeded the newly introduced limit of €15,000. An appeal against this decision was made on behalf of the Appellant to the Appeals Officer.

18. The Appeals Officer, Geraldine Gleeson, issued a very detailed reasoned decision dated 26 January 2018. The key findings are as follows.

> "It is not disputed in this case that Mr W has received in excess of €15,000.
>
> Ms Fox, on behalf of the applicant, contends that the 15,000 limit is unlawful as the scheme is an unlimited needs based fund so any purported limit to the amount an applicant can receive is unlawful. They have failed to take into account Mr W's circumstances and that he is in poor health and requires ongoing treatment.
>
> Caranua, for their part say that the introduction of the limit is lawful and was introduced to ensure that the fund is sustainable for people who have yet to apply. They make the point that they considered Mr W's needs in relation to services sought under the 2014 guidelines.
>
> I accepted that a refusal on the basis that a specified limit has been reached does not take into account the applicant's individual circumstances in relation to the service applied for, but that is the nature of the criterion. The question of whether the criterion is lawful is not within my jurisdiction to decide and can only be decided in a court of law."

19. The decision goes on then to deal with whether payment might be made by reference to the "exceptional circumstances" provision under section 9(4) of the Residential Institutions Statutory Fund Act 2012, and concluded that the requirement for "exceptional circumstances" had not been satisfied. The appeal-decision also addresses separately the question of dental treatment, but it was agreed at the hearing before me that this does not, in fact, form part of the appeal to this court.

20. As appears from the passage cited above, the Appeals Officer considered that she was bound by the criteria specified by the Board pursuant to section 9 of the Act. The decision to introduce the €15,000 limit had been made in April 2016, and was set out in the revised criteria published by the Board in June 2016.

21. An appeal to the High Court was instituted by way of originating notice of motion dated 26 February 2018. The notice of motion was deficient in that it did not comply with the requirement under Order 84C, rule 2 of the Rules of the Superior Courts to state concisely the point of law on which the appeal is made. This deficiency has since been remedied by an order of the High Court (Noonan J.) dated 18 October 2018 directing the service of points of claim. The appeal came on for hearing before me on 4 June 2019. I made an order at the outset of the proceedings directing that the identity of the Appellant not be disclosed. This is consistent with the approach adopted under the Residential Institutions Redress Act 2002 whereby the anonymity of former residents of residential institutions is protected.

22. Much of the argument advanced on behalf of the Appellant at the hearing before me consisted of an attack on the validity of the guidelines published in June 2016. Strictly speaking, such an attack should have been brought by way of separate judicial review proceedings directed against the Board, and not by way of statutory appeal. As explained under the next heading below, an Appeals Officer is bound to apply the criteria which have been specified by the Board pursuant to section 9 of the Act. The Appeals Officer does not have jurisdiction to disregard the criteria. It cannot, therefore, represent a good ground of appeal as against the Appeals Officer to complain that she applied the criteria. If a former resident wishes to challenge the validity of the criteria themselves, then he or she must institute judicial review proceedings against the Board.

23. Counsel on behalf of the Appellant submitted, by reference to the judgment of the Supreme Court in *EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2013] 2 I.R. 669, that the default position is that where a statutory right of appeal has been provided, a party should pursue an appeal rather than initiate judicial review proceedings. The rationale being that, in conferring a statutory right of appeal, the Oireachtas intended that the court would have powers in addition to those already enjoyed by way of judicial review. Put otherwise, the greater includes the lesser, and any ground which could be pursued by judicial review should also be amenable to statutory appeal. I respectfully agree that such an approach has much to recommend it, and that procedural technicalities should not be allowed to prevent the court from resolving the real issues in controversy between the parties.

24. However, in the context of the Residential Institutions Statutory Fund Act 2012, the distinction between (i) a statutory appeal, and (ii) an application for judicial review is more than a technicality. Whereas it is, of course, correct to say that the matter would come before the High Court irrespective of which of the two mechanisms had been invoked, the respective procedural requirements

are very different. Crucially, whereas the Board would be the principal respondent to any challenge to the validity of the criteria by way of an application for judicial review, the Board is not a mandatory party to a statutory appeal. It would be unfair were an appellant to be allowed to challenge the validity of the criteria prescribed by the Board by way of a statutory appeal to which the Board itself was not a party. The Board, as author of the criteria, is entitled to be heard. Put shortly, the *legitimus contradictor* to a challenge to the prescribed criteria is the Board, not an Appeals Officer.

25. Moreover, the time limits governing judicial review and a statutory appeal are not the same, and are calculated from different starting dates. It is arguable that the three-month period for judicial review proceedings under Order 84, rule 21 runs from the date of the publication of the revised guidelines in June 2016.

26. As it happens, on the facts of the present case, the Board successfully applied to be joined to the statutory appeal as a notice party. This application was acceded to by the High Court by order dated 18 October 2018. Therefore, all relevant parties are now before the court.

27. Notwithstanding the fact that a challenge to the validity of the prescribed criteria cannot, strictly speaking, be pursued by way of statutory appeal, all of the parties urged the court to determine this issue as part of the appeal. It seems that the present case has been advanced as a form of "test case", and there are a number of other statutory appeals outstanding, all of which raise a similar issue as to the validity of the introduction of the €15,000 monetary limit. Given that there is some urgency in having this issue resolved—one way or another—in circumstances where it is intended to complete the distribution of the fund by the autumn of this year (2019), it seems preferable that these issues be determined now notwithstanding the irregular form of the proceedings.

28. With some hesitation, therefore, I have decided that it is appropriate to address all issues in this judgment. This is so notwithstanding that the proceedings are irregular. Any appellant in future proceedings should not assume, however, that another court would show such indulgence.

JURISDICTION OF APPEALS OFFICER

29. One of the first arguments advanced on behalf of the Appellant is to the effect that the Appeals Officer erred in law in regarding herself as bound by the statutory criteria specified by the Board pursuant to section 9 of the Act. The reason that this argument had been advanced first is that it does not necessitate a finding on the part of the court that the statutory criteria are invalid. Put shortly, if the Appellant could persuade the court that the Appeals Officer is not bound by the guidelines, then it would not be necessary to consider the *validity* of same. This would avoid the procedural difficulties identified under the previous heading above.

30. In order to assess this argument, it is necessary to rehearse briefly the relevant statutory provisions. The making of an application for the payment of a grant or for the provision of an approved service is governed by section 20 of the Act. There are three conditions precedent to a successful application. First, the Board must satisfy itself that the person making the application is a former resident. A "former resident" as defined under section 3 of the Act as a person who has previously received an award or settlement under the Residential Institutions Redress Act 2002. Secondly, the Board must be satisfied that the application by the former resident satisfies the criteria determined by the Board under section 9. Thirdly, the Board must be satisfied that the application has been made in accordance with procedures determined by the Board.

31. It is evident, therefore, that the Board's jurisdiction to pay a grant or to arrange for the provision of an approved service is governed by the statutory criteria prescribed under section 9. It is not simply a case of the Board having to "have regard to" these criteria. Rather, the Board cannot accede to an application by a former resident unless it is satisfied that the application satisfies the criteria. These provisions emphasise the central role which the prescribed criteria play under the Act.

32. Provision for the appointment of independent Appeals Officers is made under section 21.

33. A statutory right of appeal to an Appeals Officer is provided for under section 22. The jurisdiction of an Appeals Officer is set out as follows at section 22(5).

> "(5) In considering an appeal under this section an appeals officer shall—
>
> (a) not be confined to the grounds on which the decision of the decision maker was based, but may decide the matter the subject of the appeal as if it were being decided for the first time,
>
> (b) subject to procedures prescribed under subsection (4), as he or she considers appropriate, consider written or oral submissions made by the appellant and consult with the Board,
>
> (c) make a decision in writing determining the appeal as soon as is practicable in all the circumstances of the case which may be a determination to—
>
> (i) confirm the decision the subject of the appeal,
>
> (ii) revoke the decision and replace it with such other decision as the appeals officer considers appropriate, or
>
> (iii) refer the matter back to the decision maker for reconsideration in accordance with such directions as the appeals officer considers appropriate,
>
> and
>
> (d) send a copy of the decision to the appellant, the Board and the decision maker together with his or her reasons for the decision."

SUBMISSIONS

34. Counsel on behalf of the Appellant, Mr David Conlan Smyth, SC, submits that there is nothing under the Act which requires the Appeals Officer to apply the statutory criteria prescribed under section 9. Rather, the criteria are intended only to govern the first-instance decision of the Board. The Appeals Officer is required to be independent in the performance of his or her functions under the Act, and enjoys a very wide jurisdiction under section 22(5). It is further submitted that the Appeals Officer in this case has erroneously elevated the guidelines to a binding rule. Reliance is placed in this regard on the judgment of the Supreme Court in *D.E. v. Minister for Justice and Equality* [2018] IESC 16; [2018] 2 I.L.R.M. 324.

> "6.4 In addition, it must also be recognised that there is a long established jurisprudence under which it is clear that a decision maker exercising a statutory power cannot improperly fetter their discretion as to how to exercise the power in question (see, for example, *Carrigaline Community Television Broadcasting Company Ltd v Minister for Transport, Energy and Communications (No.2)* [1997] I.L.R.M. 241; *Mishra v Minister for Justice* [1996] 1 I.R. 189 and *McCarron v Kearney* [2010] IESC 28). Elevating guidance or criteria to the level of secondary legislation which needs to be strictly followed in all cases is equally impermissible (see *Bernard Crawford, Inspector of Taxes v Centime Ltd* [2005] IEHC 328)."

35. In response, counsel on behalf of the Appeals Officer, Conor Dignam, SC, commenced his submission by emphasising the centrality of the statutory criteria in the legislative scheme. Section 9 confers the exclusive role of determining criteria upon the Board. The Board has the power to set the criteria by which applications are to be considered and determined. This is said to make "perfect sense" in circumstances where responsibility for the administration of a fund for a fixed amount has been imposed upon the Board.

36. The positive obligation imposed on the Board pursuant to section 9(1) is mirrored by a negative obligation under section 20(5) as follows.

> "(5) The Board shall not make an arrangement or pay a grant under this section unless the Board is satisfied that—
>
> (a) the application by the former resident satisfies the criteria determined by the Board under section 9 , and
>
> (b) the application is made in accordance with procedures determined by the Board."

37. Counsel then conducted a careful analysis of the provisions of section 22(5). The appeal is a *de novo* appeal, not merely a review of the legality or correctness of the earlier decision. The appeal must be determined by reference to the criteria specified under section 9. The Appeals Officer is, in effect, put in the shoes of the Board. An interpretation of the legislation which resulted in an Appeals Officer not being bound by the criteria, and, instead, being at large as to how to determine an application would give rise to an absurdity. It would defeat the legislative intent in conferring a power on the Board to devise criteria for the determination of applications if, on appeal, there were no criteria governing the Appeals Officer.

DECISION

38. The starting point for an analysis of the Appeals Officer's jurisdiction must be section 22(5) of the Act. As appears therefrom, the Appeals Officer is to determine the appeal as if the application had been made to him or her in the first instance. This, by necessary implication, extends the provisions of section 20—which govern the determination of applications—to the determination of an appeal. To borrow the phrase of counsel, the legislation puts the Appeals Officer in the shoes of the Board. The Appeals Officer must, therefore, comply with the requirements of section 20. In particular, an Appeals Officer may only direct the payment of a grant or direct the provision of an approved service where he or she is satisfied that the application satisfies the criteria determined by the Board under section 9. Put shortly, the appeal must be determined in accordance with the prescribed criteria.

39. This interpretation is consistent with the overall scheme of the legislation. The criteria under section 9 have a central role in the operation of the legislation. It would set that role at naught were appeals to be determined on a different basis. It would also undermine the purpose of requiring the Board to publish the criteria. The publication of the criteria is intended to promote the principles of equity, consistency and transparency as required under section 7 of the Act.

40. The analogy which counsel for the Appellant has sought to draw with the judgment in *D.E. v. Minister for Justice and Equality* [2018] IESC 16; [2018] 2 I.L.R.M. 324 is misplaced. The criticism being made of the decision-maker in that case was that he had given too great a weight to non-statutory guidance. In the present case, the criteria prescribed and published by the Board have been conferred with a special status under the legislation. The Appeals Officer, by complying with the guidelines, is merely reflecting the elevated status which the prescribed criteria have under the Act.

41. The Appeals Officer was, therefore, obliged to comply with statutory criteria as published in the 2016 version of the guidelines. In particular, the Appeals Officer was required to apply the monetary limit of €15,000. In circumstances where it is accepted, as a matter of fact, that the Appellant had previously received benefits in the order of €40,000, the Appeals Officer was constrained to dismiss his appeal.

LEGITIMATE EXPECTATION

42. The Appellant contends that it represents a breach of his legitimate expectations to apply the monetary limit of €15,000 to him in circumstances where he had previously made successful applications to the Board prior to the introduction of the limit. The inference here seems to be that because the Appellant had previously engaged with the Board, he was entitled to assume that the prescribed criteria would not change.

43. With respect, this argument is inconsistent with the express language of the Act. Section 9(5) provides as follows.

> "(5) The Board may amend or revoke any criteria determined under this section including an amendment thereto under this subsection and that amendment or revocation may provide for incidental, consequential or transitional matters."

44. The Board, therefore, has an express statutory discretion to amend or revoke any criteria previously determined by it. Thus, the Board's decision to publish revised guidelines in June 2016, setting out amended criteria (which included the introduction of the monetary limit of €15,000) was lawfully made pursuant to its statutory discretion.

45. It is well established that the concept of legitimate expectations is subject to the limitation that it cannot be relied upon to prevent a public authority from exercising a discretion which has been conferred upon it by statute. This principle is stated as follows in the judgment of the High Court (Clarke J.) in *Lett & Co. Ltd. v. Wexford Borough Council* [2007] IEHC 195, which judgment is relied upon by the Appellant at §2.34 of his written submissions.

> "In the light of those authorities it seems to me that, on the current state of the development of the doctrine of legitimate expectation, it is reasonable to state that there are both positive and negative factors which must be found to be present or absent, as the case may be, in order that a party can rely upon the doctrine. The positive elements are to be found in the three tests set out by Fennelly J. in the passage from *Glencar Exploration* to which I have referred. The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley*, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be

necessary to enable, as in *Hempenstall*, legitimate changes in executive policy to take place. I therefore propose to approach the contentions of the parties as to the existence of a legitimate expectation in this case by first considering the positive elements of the test."

46. This principle is especially relevant in the context of the exercise of a statutory discretion to allocate funds. This point is illustrated by the judgment of the High Court (Birmingham J.) in *Positive Action v. Health Service Executive* [2013] IEHC 279. On the facts of that case, the High Court held that an organisation which provided support for women suffering from haemophilia did not have a legitimate expectation that the level of funding provided by the Health Service Executive ("HSE") would remain constant from year to year. Such a legitimate expectation would be inconsistent with the statutory discretion conferred upon the HSE in relation to the provision of funding.

47. Finally, for the sake of completeness, it should be noted that the previous iteration of the guidelines published by the Board in 2014 had expressly stated at page 8 thereof that they were subject to revision.

> "Will the services that we offer change?
>
> Yes. We will listen to what you have to say about the services we offer and the application process. We will change things if it makes them simpler or more responsive to your needs – within the confines of our legislation. Any changes we make will be included in new editions of these Guidelines. They will also be notified directly to anyone on our mailing list and highlighted on our website […]."

48. In summary, the alleged legitimate expectation asserted by the Appellant is inconsistent with the provisions of section 9 of the Act. Accordingly, it cannot avail the Appellant.

ALLEGED RETROSPECTIVE EFFECT

49. The Appellant argues that the monetary limit of €15,000 cannot be applied to him because to do so would involve giving impermissible retrospective effect to the revised guidelines published in June 2016. The implication here seems to be that because the Appellant had engaged with the Board prior to June 2016 in respect of earlier applications, he is entitled to have all of his subsequent dealings with the Board conducted by reference to the previous iteration of the guidelines. It is said that, at the very least, his previous benefits should be ignored when applying the monetary limit to him, i.e. the Appellant should be entitled to *further* benefits in the amount of €15,000.

50. With respect, this argument appears to misunderstand the limits of the concept of *impermissible* retrospective effect. Leaving aside the special position in respect of criminal legislation under Article 15 of the Constitution of Ireland, the general principle is that a change in legislation is *presumed* not to be intended to affect existing rights and liabilities. This presumption will not apply if the wording of the legislation indicates otherwise.

51. In the present case, of course, there has been no change in legislation. Whereas the guidelines are prescribed pursuant to section 9 of the Residential Institutions Statutory Fund Act 2012, they do not represent a form of secondary or delegated legislation. Even if one were to assume for the sake of argument that a similar presumption to that applicable to changes in legislation should apply to the revised criteria, this would not avail the Appellant. This is because the Appellant has been unable to point to any existing right of his which could be said to have been affected by the publication of the revised criteria. As with any former resident (as defined), the only right which the Appellant enjoys under the legislation is a right *to be considered for* the payment of a grant or the provision of an approved service. No former resident is entitled to assert a substantive right to a benefit. An application falls to be determined in accordance with the provisions of section 20 of the Act. One of the conditions precedent to the receipt of a benefit is that the application satisfies the criteria under section 9. Even if this condition precedent is satisfied, the Board retains a general discretion as to whether to confer a benefit ("may"), and has a specific discretion to impose conditions.

52. Whereas a former resident who had an application *pending* before the Board as of June 2016, i.e. the date upon which the revised criteria were first published, *might* have an argument that his or her application should be completed by reference to the old guidelines, this is not the position which the Appellant was in. His previous applications had all been determined prior to June 2016. The application the subject-matter of these proceedings had not been submitted until April 2017, i.e. almost a full year after the publication of the revised criteria.

53. This application was subject to the revised criteria, and in circumstances where the Appellant had previously received benefits in the order of €40,000, the Appeals Officer was obliged to refuse the application by reference to the monetary limit of €15,000. It is common case that the Appellant is entitled to retain the benefits previously received, i.e. there is no question of his been asked to refund the excess over €15,000.

VALIDITY OF PRESCRIBED CRITERIA

54. In a sense, the grounds of appeal which have been addressed up to this point in the judgment are of all of secondary importance. The true gravamen of the Appellant's case involves an allegation that it is unlawful for the Board to prescribe a monetary limit on the overall value of benefits which any one applicant can receive.

55. In order to assess the correctness or otherwise of this allegation, it is necessary to consider section 9 in detail. The section reads as follows.

> 9.— (1) The Board shall determine criteria by reference to which the Board shall make a decision in respect of an application under section 20.
>
> (2) The Board in determining criteria under subsection (1) shall have regard to the need to—
>
> (a) take account of the individual circumstances, including personal and financial circumstances, of former residents,
>
> (b) assess the likely effect of the provision of a service on the—
>
> (i) health and general well-being,
>
> (ii) personal and social development,

(iii) educational development, or

(iv) living conditions,

of former residents,

(c) apply limits to the moneys that may be made available for an arrangement or grant,

(d) specify minimum standards to be met by a provider of an approved service,

(e) specify any supporting evidence that may be required to be furnished by former residents, and

(f) take into account any other matter that the Board considers, having regard to the functions of the Board, is a proper matter to be taken into account.

(3) Different criteria may be determined under this section as respects—

(a) different circumstances or classes of circumstance relating to former residents,

(b) different approved services or classes of approved service, and

(c) different former residents or classes of former resident.

(4) Criteria determined under this section may include criteria, consistent with this Act, for the purpose of the relief of hardship where it is shown to the satisfaction of the Board on an application under section 20 that exceptional circumstances exist, such that criteria (other than criteria determined under this subsection) determined under this section may be disregarded by the Board in making its decision on the application.

(5) The Board may amend or revoke any criteria determined under this section including an amendment thereto under this subsection and that amendment or revocation may provide for incidental, consequential or transitional matters.

(6) Criteria determined by the Board under this section shall be made available in writing free of charge by the Board to any person on request therefor and shall be published by the Board in such manner, including by electronic means, as it sees fit.

56. The structure of section 9 can be summarised as follows. Subsection 9(1) imposes an obligation on the Board to determine the criteria by reference to which an application under section 20 will be decided. This role is conferred exclusively on the Board, subject only to the possibility of the issuing of directions by the Minister under section 10.

57. Subsection 9(2) then sets out a number of considerations which the Board is required to "have regard to" in determining the criteria. Crucially, subsection (2) does not state that each of these considerations must be included in the prescribed criteria, merely that the Board is to have regard to same.

58. Counsel on behalf of the Appellant submits that the introduction of a monetary limit is inconsistent with the requirement under section 9(2)(a) to "have regard to" the need to take account of the individual circumstances of former residents in determining criteria. Counsel further submits that, on its proper interpretation, the fund is an unlimited needs based fund, and that it is impermissible to impose a monetary limit on the value of the benefits which an individual applicant can obtain.

59. These arguments simply cannot be reconciled with the express language of the legislation. Subsection 9(2)(c) provides that the Board, in determining criteria, shall have regard to the need to apply limits to monies that may be made available for an arrangement or grant. The reference to an "arrangement" or "grant" describes the making of an arrangement for the provision of an approved service, or the payment of a grant, pursuant to section 20. On its ordinary and natural meaning, therefore, section 9 confers upon the Board an express entitlement to prescribe a monetary limit. This in itself is sufficient to dispose of the Appellant's argument. Unless subsection 9(2)(c) is to be drained of all meaning, it provides a proper legal basis for the introduction of the monetary limit of €15,000.

60. Counsel for the Appellant had sought to argue that subsection 9(2)(c) only authorises the setting of monetary limits by reference to specific types of grants. Counsel accepted, for example, that it was lawful for the Board to prescribe the following limits under the 2016 guidelines:– (i) a limit of €5,000 as a contribution towards pre-paid funeral costs, (ii) a limit of €5,000 per annum for formal education courses; and (iii) a limit of €5,000 for dental services (including assessment, cleaning, filling, extractions, bridges, dentures and root canal). Counsel insisted, however, that the one thing the Board could not lawfully do was to prescribe an *overall* limit on benefits.

61. With respect, once it is accepted that monetary limits can be prescribed by reference to *individual* heads of benefit, then it follows as a matter of logic that the practical effect of setting monetary limits for all potential heads of benefit would result in an overall limit on what an individual applicant can receive. If one adds up the monetary limits for each individual item, an aggregate limit is achieved. Put otherwise, there is no principled distinction between prescribing a monetary limit in respect of a particular benefit, e.g. pre-paid funeral costs, medical expenses or housing support, and prescribing an overall monetary limit in respect of all benefits. In each instance, there is a ceiling on the value of the benefit which an applicant can obtain.

62. This interpretation of subsection 9(2)(c) is entirely consistent with subsection 9(2)(a). The latter subsection emphasises the entitlement of the Board to distinguish between former residents by taking account of their individual circumstances. This entitlement to distinguish is reinforced by the provisions of subsection 9(3). There is nothing in subsection 9(2)(a) which imposes an obligation to meet all of the asserted needs of a former resident. Still less is there anything under the subsection which overrides the express entitlement under subsection 9(2)(c) to prescribe monetary limits. At most, subsection 9(2)(a) might possibly preclude a blanket rule to the effect that all applicants were to receive precisely the same benefits, irrespective of their personal circumstances. Of course, this is not what is provided for under the 2016 guidelines. Rather the criteria do take account of the individual circumstances. It is clear, for example, from pages 5 to 7 of Part 2 of the 2016 guidelines that an applicant must be in a position to justify or substantiate an application for a particular medical or dental service.

63. More generally, subsection (2)(f) provides that the criteria may take into account any *other* matter that the Board considered, having regard to the functions of the Board, is a proper matter to be taken into account. Counsel on behalf of the Board, Cormac Ó

Dúlacháin, SC, submits that subsection (2)(f) entitles the Board to have regard to its functions as detailed in section 7 of the Act. The position is put as follows in the written legal submissions.

> "37. The Board's obligation to take account of the principles of equity, consistency and transparency in the conduct of its functions cannot be underplayed in circumstances where the Fund was established for the benefit of all former residents and the Board had an obligation to ensure that residents who had not had an opportunity to avail of the fund were not excluded by virtue of repeat applications by some former residents. If the Board were not empowered by the Act to limit the awards and grants to certain former residents, it would be the case that certain residents would have received multiple awards and grants and others would have received none. This would entirely contradict the purpose of the Fund and the Board's express obligations under the 2012 Act, including the provisions of Section 7 (3) and (4).
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> 38. The decision by the Board to introduce a personal allocation limit was in furtherance of this express statutory function under section 7, through the determination of criteria under section 9, and cannot be said to have been *ultra vires* the Act."

64. This submission is well made. Under section 7, the Board is to utilise the resources that are available to it in a manner that promotes the principles of equity, consistency and transparency. The approach adopted by the Board in June 2016, whereby it has sought to ensure that those former residents who are late in applying for support are not denied any benefit, accords with these principles.

65. The administration of a finite fund will necessitate the making of decisions as to what is the most equitable basis for the allocation of the fund. The Board has explained, on affidavit, that it decided to introduce a monetary limit in June 2016 to address a concern that the demand on the scheme might be such that the fund would be substantially depleted before all eligible applicants had been given a fair opportunity to make an application. See affidavit of Rachel Downes of 30 November 2018 (at page 16).

> "7. The Scheme as originally adopted did not contain any maximum limit of the amount [of] funding that could be made available to any applicant.
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> 8. By July 2015 the Board had become concerned that the demand on the scheme might be such that the Fund would be substantially depleted before all eligible applicants had been given a fair opportunity to make an application. The Board, with the assistance of outside consultants, had identified that the maximum number of persons who would be eligible to apply to the Board was in the order of 16,500 of whom it was estimated that 12,000 would still be alive and in a position to apply. It became apparent to the Board that the question of a financial cap had to be considered. In addition, the Board decided that the general criteria should be reviewed having regard to the experience gained by the Board in identifying and meeting the needs of residents.
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> 9. The Board considered the matter further at its meetings on 17 December 2015 and 18 February 2016 and received presentations from its staff on the matter. At the later meeting the Board established a Sub-Committee to consider the matter and to draft proposals for the Board to further consider. The Sub-Committee met on the 11 March, 30 March and 31 March 2016.
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> 10. Proposals were then presented to the Board Meeting on 22 April 2016 which were adopted. The new criteria involved amendments to the various heads of support services and grants for which application could be made. In addition, the Board adopted a new financial cap on the value of assistance that could be provided to any applicant being a limit of €15,000.
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> 11. The Board decided that in applying the financial cap regard should be had to funds already received from the Fund. If a prior applicant had already received a sum equal or greater than €15,000 then they were ineligible for further funding at the present time. If a prior applicant had received more than €15,000 there was never any suggestion that the Fund would seek the return of any funding already given.
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> 12. It should be noted that the Board at all times has the power to amend and vary the criteria when it is satisfied that there is good reason for so doing.
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> 13. The fundamental purpose of introducing a financial cap was to ensure equitable access to the Fund, which is the specific statutory mandate given to the Board. It is the case that those who applied early to the Board for assistance prior to June 2016 would otherwise be at a significant advantage over later applicants solely by reason of their date of application, and that this would not equate with fair and equitable access to the Fund.
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> 14. In June 2016 the new criteria were published in a booklet entitled *'Applying for Services: Information and Guidelines for Making an Application June 2016'*. Pursuant to this scheme the payments from the Fund that could be received by each former resident was capped at a maximum of €15,000. The Guidelines identify categories of need for which support can be applied for. If as a matter of fact for example housing or health issues establish an unmet need then, within the limits of the scheme, a payment in aid can be approved which will alleviate in whole or part the identified need. It is not within the financial capacity of Caranua to address all the needs of former residents.
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> 15. Following the introduction of these 2016 guidelines, Caranua ran an advertising campaign which included posters placed in GP surgeries, Garda Stations, Hospitals and information provided to survivor support groups. This was accompanied by information sessions conducted in London on 9 June 2016 and in Dublin on 10 June 2016 and 8 July 2016 to which the interested parties were invited and at which further outlined details of the new criteria."

66. There might well be different opinions as to whether this is the most appropriate approach to the allocation of the fund. The Appellant, for one, appears to think that the fund should be administered on a "first come, first served" basis. The question for this court is not, however, whether the court would have adopted the same approach as chosen by the Board, but rather whether the approach adopted is lawful.

67. I am satisfied that the criteria prescribed by the Board in April 2016, and published in the revised guidelines of June 2016, are *intra vires* the Residential Institutions Statutory Fund Act 2012. The choice made as to the manner in which to allocate the fund is well within the statutory discretion afforded to the Board under sections 9 and 20. It is also consistent with the principles identified under section 7.

68. The fundamental misconception underlying the Appellant's case is that the statutory fund is "an unlimited needs based fund so any purported limit to the amount an applicant can receive is unlawful" (written legal submissions, §1.5). The implication being that if a former resident can demonstrate a need for the payment of a grant or for the provision of an approved service, then the Board has no discretion to refuse those benefits to him or her. With respect, this is not what the legislation actually provides for. The only right which a former resident enjoys under the legislation is a right *to be considered for* the payment of a grant or the provision of an approved service under section 20. No former resident is entitled to assert a *substantive* right to a benefit. Even where an application satisfies the criteria prescribed under section 9, the Board retains a residual discretion to refuse an application under section 20. This follows from the use of the permissive term "may" under subsection 20(1). The Board also has a discretion under subsection 20 (2) as to the extent of, and conditions attached to, a benefit.

> "(2) An arrangement made or a grant paid under subsection (1) shall be in respect of such an approved service, of such extent, paid at such time and subject to such a condition as the Board may decide."

69. These provisions are all inconsistent with the Appellant's argument for an unlimited needs based scheme.

INTERPRETATION OF REMEDIAL LEGISLATION

70. Finally, for the sake of completeness, it should be noted that counsel on behalf of the Appellant sought to argue that the Residential Institutions Statutory Fund Act 2012 represents a form of "remedial legislation". It was said that, as a consequence, the court in interpreting the legislation should construe the Act "as widely and liberally as can fairly be done". Reliance was placed in this regard on the judgment of the Supreme Court in *O'G v. Residential Institutions Redress Board* [2015] IESC 41, and the judgment of the Court of Appeal in *J. McE. v. Residential Institutions Redress Board* [2016] IECA 17.

71. The operation of the principle of interpretation has more recently been stated as follows by Clarke C.J. in *J.G.H. v. Residential Institutions Review Committee* [2017] IESC 69.

> "4.5 The underlying principle behind the proper approach to the interpretation of remedial legislation is that it must be assumed that the Oireachtas, having decided that it is appropriate to apply public funds to compensate a particular category of persons, did not intend that potentially qualifying applicants would be excluded on narrow or technical grounds, for that would be wholly inconsistent with the purpose of the legislation. On the other hand the Oireachtas is entitled, when deciding to apply public funds in a particular way, to define, within constitutional bounds, the limits of any scheme which it is decided should be put in place. Where that scheme is remedial, Courts should not be narrow or technical in interpreting those bounds but they should not be ignored either. Against that backdrop I turn to the specific issues of interpretation which arise on this appeal."

72. With respect, reliance upon the principle of statutory interpretation applicable to remedial legislation does not advance the Appellant's case. First, it is clear that this rule of interpretation is only available in circumstances where there is an *ambiguity* in the legislation. For the reasons set out above, there is no ambiguity in the meaning of section 9. Secondly, the principle of statutory interpretation cannot assist in circumstances where the tension is between the competing position of former residents *intra se*.

73. As explained in the affidavit filed on behalf of the Board, the rationale for introducing the monetary limit of €15,000 was to seek to preserve funds for persons who had not yet made an application. The cases relied upon by the Appellant all concerned situations whereby one interpretation of the legislation would self-evidently advance the position of the class of persons in respect of whom the remedial legislation was intended to assist.

74. By contrast, on the facts of the present case, there is no dispute as to the identification of the class of potential beneficiaries. The class is, as defined under section 3, former residents. The meaning of this definition is not in dispute in these proceedings. There is no question of potential applicants being excluded on narrow or technical grounds.

75. Rather, the dispute centres on the extent of the discretion enjoyed by the Board under section 9 and section 20 of the Act. Each of the rival interpretations contended for has the potential to negatively impact on *one part of* the overall class of persons which the Residential Institutions Statutory Fund Act 2012 is intended to assist, i.e. former residents. On the Board's interpretation, the position of persons who have already benefited from the scheme is impacted upon in order to ensure that latecomers have an opportunity of receiving benefits under the fund. On the Appellant's interpretation, the scheme is, in effect, to be administered on a "first come, first served" basis. This interpretation would put later applicants at a significant disadvantage.

76. Reliance on the principle of statutory interrelation that a qualifying class should not be narrowly defined does not assist in the resolution of this dispute between subsets of former residents *intra se*.

77. In a sense, of course, this underlies the fundamental difficulty with the Appellant's case. The challenge is not so much a legal challenge, as a challenge to the choices made by the Board. By its very nature, the administration of a finite fund will require choices to be made as to how competing claims are to be prioritised. This function has been entrusted to the Board, and for the reasons set out herein, I am satisfied that the criteria described and published in June 2016 are *intra vires* and comply with the guiding principles of equity, consistency and transparency as set out in section 7 of the Act.

PROPOSED ORDERS

78. The within appeal is dismissed, and the decision of the Appeals Officer refusing the application for the payment of a grant in respect of medical services is affirmed. The stay restraining the Board from reducing its funds below the sum of €12,000 pending the determination of the within proceedings is discharged. I will hear the parties on the question of liability for the legal costs of the appeal.