

THE HIGH COURT

[2021] IEHC 730

RECORD NO. 2020/1023JR

BETWEEN

ELAINE HANLEY

APPLICANT

AND

THE ROAD SAFETY AUTHORITY

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 22 November 2021

Introduction

1. This case turns on a very net point – whether a fine and penalty points imposed following the acceptance by the applicant of liability under two fixed penalty notices should be quashed, where her acceptance was premised upon an email from the respondent that the applicant says wrongly identified the number of penalty points on her licence. The applicant relies on the doctrine of legitimate expectations to assert that the respondent is estopped from withdrawing her licence in those circumstances and seeks an order of *certiorari* quashing the disqualification imposed by the respondent and communicated on 23 November 2020, disqualifying the applicant from driving for a period of six months. That decision was stayed when leave for judicial review was sought and obtained on 21 December 2020.

Facts

2. The applicant is a probation officer and on 13 November 2020 was a novice driver. In early 2019 she received three penalty points for driving a vehicle while holding a mobile phone. She was sent a notification of endorsement of penalty points on 14 January 2019 which clearly stated that those points would remain on her record for a period of three years from 11 February 2019. Then, on 27 October 2020 she received a fixed penalty notice from the respondent for the offence of holding a mobile phone while driving. On 2 November 2020 she received a further fixed penalty notice from the respondent in respect of an offence of non-display of N plates while driving a vehicle.
3. On 2 November 2020 she emailed the National Drivers Licence Service (“the NDLS”), the body that maintains the record in respect of penalty points, in the following terms

"Hi, I was stopped by garda this am and not sure if I have received penalty points, I received points last week and I'm worried I might have the 12 points. I know I will receive it in post and just very anxious to know

Can this be confirmed if possible

Thanks"

4. On 4 November 2020, she emailed the NDLS again asking how many penalty points she had. On 6 November 2020 she was asked to confirm her name and date of birth and she did so on the same day.
5. On 13 November 2020 she received an email in the following terms from the NDLS;

"Dear Elaine

Driver Number 131032703

Thank you for your email.

You currently have 3 penalty points on this record.

3 Penalty Points began 11-Feb-2019 and are due to expire 10-Feb-2020

If you require information regarding Penalty Points on an official document, you will need to call a member of our customer service team on the telephone number below. You will be required to have your PPSN or driver number to hand at the time of the call

If you have any queries in relation to this communication, please contact our Customer Service Team on +353 (0) 761 087 880 and quote your case reference number, or visit the National Driver Licence Service website [www. ndls.ie](http://www.ndls.ie)

Yours sincerely..."

6. On an unidentified date the applicant paid the amounts due pursuant to the fixed penalty notices.
7. By letter of 23 November 2020, the applicant received a notification of endorsement of penalty points in respect of the alleged offence of 27 October 2020 bringing her total penalty points to six. On 23 November 2020 she received a letter noting that two further penalty points had been endorsed in respect of the alleged offence on 2 November 2020, and that the total penalty points on her record was eight with the result that she had reached or exceeded the maximum number of penalty points allowed and as a result she was disqualified from driving for a period of sixth months commencing on 21 December 2020.
8. On 30 November 2020 a letter was sent by Sarah Ryan Solicitors on behalf of the applicant where reference was made to the email of 13 November 2020 and it was stated as follows;

"My client paid the 2 recent fixed charge penalty notices in the belief that this would result in her licensing record having 5 penalty points and thus within the limit to prevent a disqualification. My client was shocked to receive the letter informing her of the disqualification. The disqualification has the potential to lead to my client not being able to maintain her employment. My client would not have paid the fixed charge penalty notices had she known that the payment would have led to her disqualification. In this regard my client relied on the information in the letter of the 13th of November last".

9. On 18 December 2020 a response was provided to the applicant's solicitor from the respondent setting out the penalty point record details for the applicant and stating as follows;

"The email received by your client from the National Driver Licensing Service 13 November 2020 contained a clerical error of the end date for the penalty points and for this I apologise. However, Ms Handley received formal notification on 14 January 2019 from the Road Safety Authority (RSA) giving a start date of 11 February 2019 for this set of penalty points. In this notification letter from the RSA to your client it stated "these points will remain on the entry for a period of 3 years from 11 February 2019".

When Ms Hanley paid the further 2 fixed charge notices your client accepted the offences and this resulted in her current pending penalty."

Relevance of 5 December 2020

10. The fixed penalty notices received by the applicant on 27 October and 2 November 2020 both noted that no prosecution will issue during the period of fifty six days from the date of the notice of the fixed charge if it is paid within that time period. (If paid after twenty eight days but before the expiry of fifty six days the amount payable is higher). If there is a prosecution, and a person is convicted, they are liable to obtain both a higher fine and a higher number of penalty points. The applicant could therefore have paid the fixed charge after 5 December 2020 without exposing herself to prosecution since that was still less than 56 days from the date of the fixed penalty notices.
11. The significance of 5 December 2020 in this case is that, on that date, the applicant automatically moved from novice to full driver. That meant she could have accumulated less than 12 penalty points without attracting a disqualification, as opposed to the accumulation of less than 8 points for a novice driver. In short, had she paid the fixed penalty notices after 5 December 2020, she would still have accumulated eight points but that would not have had the effect of disqualifying her for six months as she would have benefited from the less onerous regime for a full driver.

Proceedings

12. On 21 December 2020 leave was sought and obtained grounded on an affidavit of Ms. Hanley sworn 17 December 2020. At paragraph six of the affidavit she exhibits the email of 13 November 2020 and refers to, but does not exhibit, the email of 4 November. At paragraph 7, she avers as follows:

"7. As a result of same and in direct reliance of the correspondence aforesaid, I proceeded to immediately and lawfully forward payment in respect of both Fixed Penalty Notices, received on the 27th October and the 2nd November.

...

11. *I say that it was on the basis of the information provided to me by the National Driver License Service that I did not seek to challenge either Fixed Penalty Notice, nor did I seek formal legal advice.*
12. *As a result of the actions of the Respondent herein, my employment is now at risk."*
13. At the leave stage, a stay on the disqualification notice was granted pending the determination of the within proceedings.
14. A statement of opposition was provided on 12 April 2021 and an affidavit of Miriam Scott of the respondent was sworn on the same day. An affidavit of Ms. McAloon of the respondent was also sworn on 12 April 2021 verifying various facts and correspondence.

Arguments of the parties

The Applicant

15. The essence of the applicant's case is that there is a breach of legitimate expectations in circumstances where she relied upon the respondent's email of Friday, 13 November 2020 summarising the position as to her penalty points, and that reliance was to her detriment. Her case is that, based on that email, she decided to pay the penalty amount, thus incurring penalty points. She understood that she would continue to be permitted to drive as she would only have five penalty points on her licence i.e. the newly accrued points, after payment of the penalty. It is argued that an implicit representation was made to her that she would not be disqualified if she paid the fine and accrued the points as she would remain below the disqualification threshold of eight points.
16. In the circumstances she argues that the respondent cannot resile from that position (although she accepts that she did have eight penalty points on her licence at the date upon which the decision was made) and is estopped from withdrawing her licence despite the accrual of eight penalty points. I should note that given the acceptance of the existence of eight penalty points by counsel for the applicant, it is clear that ground E(2) of the statement of grounds is not being pursued, which alleges that the respondent erred in law insofar as it imposed a disqualification pursuant to s.3 of the Road Traffic Act 2002 ("the RTA 2002") in circumstances where the applicant had less than seven penalty points on her licence.
17. The applicant has also stressed that she took the decision to accept the fixed penalty notice in good faith on the basis that she had no penalty points remaining and that this is demonstrated by the fact that, had she understood the true situation, she had every incentive simply to wait a number of weeks before paying the notice (an option that was open to her) because, on 5 December 2020 she shed her novice status and was deemed to hold a full driving licence, thus entitling her to accrue up to 11 penalty points before losing her licence.
18. In other words, it could not be said that she relied upon the email despite not believing it to be correct since she could have achieved the same result i.e. avoided having her licence withdrawn, simply by waiting for some weeks and then paying the fixed notice. At

that point she would have accrued eight penalty points but would have been entitled to up to eleven points without losing her licence. She therefore had an alternative course of action open to her apart from contesting the points in court.

19. Although in the applicant's written submissions, reference is made to a line of case law involving guilty pleas, including Irish authorities such as *State (Glover) v McCarthy* [1981] ILRM 47 and *Dunne v McMahon* [2007] 4 IR 471, ECHR jurisprudence such as *Artico v Italy* (1980) 3 EHRR 1 and *Natsvdishvili and Tonidze v Georgia* (2014) 37 BHRC 593, in addition to a discussion of the English Court of Appeal judgment in *R v Turner* [1970] 2 QB 321, in fact at hearing counsel made it clear that the applicant was largely relying on what he described as a procedural ground i.e. breach of legitimate expectations, and the justice and fairness of the situation. It is argued that where a person seeks and receives information from a body such as the respondent, she must be entitled to rely upon it.
20. Counsel stressed that the case was not being made that she did not validly have three existing points on her licence at the time of the email. Equally it was accepted that she now has eight points on her licence. However, insofar as it might be said that she ought to have known her points lasted for three years (the same having been clearly stated on the notice imposing the points), it was argued that where a service is made available to the public which allows them to check the position in relation to any penalty points they may have, a person is entitled to rely on that service.
21. In relation to what she would have done had she known the true position, counsel argues that the answer to that is contained in the letter of her solicitor of 30 November 2020 i.e. she would not have paid the fixed charge penalty notice at that time if she had known she still had three points, as she could have waited to pay the points until after she shed her learner driver status, thus ensuring she would not be disqualified.
22. It is argued that the three limbs required by the test in *Glencar Exploration Plc. v Mayo County Council (No. 2)* [2001] IESC 64 are met by the communication of 13 November 2020.
23. A separate argument was made based on the case of *E v. Secretary of State for the Home Department* [2004] EWCA Civ 49, to the effect that, even if the doctrine of legitimate expectations could not be relied upon, the applicant was entitled to relief where a mistake of fact was made, and that mistake caused unfairness. I deal with that argument in more detail below.
24. In the applicant's written submissions, reference was made to a line of case law on guilty pleas. In that respect, counsel for the applicant accepted the imposition of a fine and penalty points was not of a penal nature but noted that it still amounts to a punishment. He stressed that in context, considerations of fairness will always be important where a plea of guilty is made in the context of a mistake and, relying upon *Glover v McCarthy*, notes that where a plea is made erroneously or due to a mistake, a court must not accept it.

The Respondent's Arguments

25. The respondent argues by way of a preliminary point that there is no decision susceptible to judicial review in this case in circumstances where the respondent is simply implementing statutory requirements under the RTA 2002. It observes that no natural justice considerations arise where no decision was made by it and that therefore principles of natural or constitutional justice do not apply in this case. There was no failure to apply any such principles because same do not apply given the statutory regime.
26. Under s.2(1) of the RTA 2002, where a person makes payment under s.103 in respect of an alleged penalty point offence, the number of penalty points applicable to that offence shall be endorsed on the entry relating to the person in respect of the alleged offence. Under s.2(5), where a payment is made to the Gardaí, the Gardaí shall cause the Minister to be notified of the payment and the Minister shall cause the appropriate number of penalty points to be endorsed on the entry concerned.
27. Section 3(1) of the RTA 2002 provides as follows:
- "3.(1) Where penalty points are endorsed on the entry of a person and, in consequence, the total number of penalty points standing so endorsed —*
- (a) equals or exceeds 12, or*
- (b) in the case of a person who at the time such points are endorsed is a learner driver or a novice driver, equals or exceeds 7, the person shall stand disqualified for a period of 6 months beginning on the appropriate date for holding a licence and a licence held by him or her at the beginning of the period shall stand suspended accordingly."*
28. Thus, the statutory regime provides that a learner or novice driver who equals or exceeds seven points on their licence is automatically disqualified without any decision requiring to be made in that respect. Nor, in the submission of the respondent, does the disqualification amount to a criminal sanction or penalty.
29. In summary, the respondent further points out that the applicant agrees she paid the fine; she agrees notice was validly given under the statute; she agrees that the correct number of points were imposed at the correct time and that on the relevant date under the statute, she had seven points and therefore she was automatically disqualified subject to the operation of the RTA 2002.
30. In respect of the legitimate expectation argument, counsel for the respondent notes that to successfully rely on the doctrine of legitimate expectations, the applicant would have to identify what expectations she had and that is not set out in the papers.
31. Further, it is argued that there is nothing in the email that could give rise to a legitimate expectation on her part for two reasons. First, to do so, it would be necessary to ignore the statutory consequences of the imposition of penalty points under the RTA 2002 and

that the doctrine of legitimate expectations cannot trump statutory requirements. Reliance was placed on the dictum of Murphy J. in *Nova Media Service Ltd v Minister for Posts and Telegraphs* [1984] ILRM 161 at page 169;

"if, the position is, that persons in authority are prepared to make use of and co-operate with illegal broadcasting stations it is not surprising that the owners of those stations should assume that they have an immunity from the law or that at the very least the law would not be enforced against them without reasonable warning. However, the effect of a Statute is clear. It does not wither away from lack of use and it cannot be repealed, waived or abandoned even by the express decision or agreement of the Executive or any administrator less still by any implicit representation by public representatives or State agency."

32. Even if the applicant could get over this hurdle, she has failed to satisfy the requirements set out in *Glencar*, i.e. that the representation be unambiguous and clear. The email of 13 November was not clear or unambiguous. In relation to the email, counsel notes that it refers to points being still extant and due to expire and that only the date of 2020 is wrong, and that the applicant chose not to make further inquiries.
33. The case of *Daly v Minister for Marine* [2001] IESC 77 makes it clear that when considering reliance upon a representation, the test is whether that reliance was objectively reasonable, with counsel identifying the following passage:

"the concept of legitimate expectations requires the existence of a clear unambiguous and unqualified promise. There is no such promise in the present case. Furthermore, the legitimate expectation must be reasonable in the sense of being objectively justifiable...."

The Law Relating to Legitimate Expectations

45. *The learned trial judge decided the case essentially on the facts. The applicant did not, he held, have an expectation which it was reasonable or legitimate for him to have. The very name of the doctrine demonstrates, in my view, that this approach is correct. If authority were need for this self-evident proposition, it is to be found in express terms in the judgments of this Court in Wiley v. Revenue Commissioners [1994] 21.R., 160. Blayney J in the High Court and both Finlay C.J. and McCarthy J accepted that the plaintiff, a disabled person, expected, as a fact, that he would be granted a refund of excise tax on a new motor car under a scheme designed to benefit disabled drivers. He had received a refund on previous occasions, but the Minister altered the terms of the scheme so as to require medical evidence that the applicant possesses the disability described in the scheme. He did not, however, in the view of the Court, have an expectation which was legitimate.*
46. *The Minister relied upon the following passage from the judgment of Barr J. in Cannon v Minister for the Marine [1991] 11.R. 82, which seems to me to distil the essence of the doctrine which is fairness:*

"... the concept of legitimate expectation, being derived from an equitable doctrine, must be reviewed in the light of equitable principles. The test is whether in all the circumstances it would be unfair or unjust to allow a party to resile from a position created or adopted by him which at that time gave rise to a legitimate expectation in the mind of another that that situation would continue and might be acted upon by him to his advantage."

34. The respondent further notes that up until 3 November 2020, under SI 537 of 2006, the Road Traffic (Licensing of Drivers) Regulations, the respondent was obliged to supply information requested but that in fact SI 489 of 2020 removed that obligation and there is no longer any obligation to provide the information and any such information provided is done informally. It further notes that it is not pleaded that the respondent has a statutory obligation to provide information.
35. Next, it is argued that there is no evidence before the court of the reliance placed by the applicant on the email. The letter of the applicant's solicitor is an *ex post facto* justification. In fact, the applicant's email makes it clear that she thought the limit was twelve points and she was concerned that she might have exceeded it. Counsel submits that puts the lie to the submission that had she known the true position, she would have waited to pay the fine, since she in fact believed she was at limit of twelve points in any case. Counsel observes that paragraph seven of the applicant's affidavit is not consistent with counsel's submission that she would have waited to pay. There is no suggestion in the affidavit that the applicant would have taken any different course to that which she took irrespective of the content of the email. (In reply to this, counsel for the applicant argues that one can infer from the applicant's actions that, if informed correctly, she would have considered her position).
36. Finally, in relation to what I will refer to as the "mistake" ground, the respondent points out that there is no mistake of fact in the process which lead to the disqualification of the applicant, contrary to the case of *E v. Secretary of State for the Home Department*, where there was an error of fact. Further, in that case, the relevant body were carrying out a quasi-judicial function, unlike the respondent who was simply applying the law in a mechanistic fashion as required by the statute. There was no unfairness in the decision-making process as there was no such process and no decision was made.
37. In response to this, the applicant argues that disqualification amounts to a decision and it was predicated on her decision to pay the fine, which was in turn based on the communication. She also invokes her entitlement to an appropriate remedy in the context of judicial review, where she was treated unfairly.

Analysis

No Decision Susceptible of Being Judicially Reviewed

38. The respondent raises a preliminary objection to the effect that there is no decision capable of being judicially reviewed, since, once the applicant chose to pay the fine, the points were applied automatically, and the applicant was disqualified without any discretion having regard to the provisions of the RTA 2002. That argument raises

interesting legal issues, but I do not propose to decide them in this case. The point has not been pleaded squarely in the statement of opposition. It is certainly the case that in the statement of opposition, it is pleaded that the applicant's disqualification from driving is an automatic consequence of the accumulation of an excess of seven penalty points (paragraph 3(a));

"7. *Further, and without prejudice to the foregoing, it is denied that a single communication could prevent the automatic consequences of the Applicant's driving behaviour, which behaviour she has admitted, from coming into effect.*

...

11. *At all material times, the Respondent acted properly in accordance with law, such that it is denied that the Applicant has any basis for the relief sought or any relief in law/or in fact."*

39. However, it is not pleaded that this renders the disqualification immune from judicial review. The case of *AA v Medical Council* [2003] IESC 70 makes it clear that in judicial review, points must be pleaded in order to be determined. Accordingly, I decline to adjudicate on this issue on the basis that it has not been clearly identified in the pleadings.

Legitimate Expectations

40. The test for legitimate expectations is well established in Irish law. The applicant relied upon the dicta in *Glencar*, where Fennelly J. identified the following requirements;

"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

41. The application of these principles was explicitly endorsed by O'Donnell J. in his judgment in *Lett & Company Ltd v Wexford Borough Council & others* [2012] IESC 14 and it is accepted by both sides that this is the applicable test. In order to decide whether the

applicant meets these tests, it is necessary to look at some detail on the documentation on which she relies.

42. The first relevant document is the fixed penalty notice of 2019 which imposed three penalty points on her. That clearly stated that the penalty points imposed therein would last for three years from the date of imposition, thus giving an expiry date of 2022. No averment has been sworn by the applicant indicating that she did not receive that documentation, or that there was any reason she did not understand it. I must therefore proceed on the basis that, at the time those points were imposed, the applicant understood the length of time they would last.
43. The next set of relevant documents are three emails dated 2 November 2020 and 4 November 2020 from the applicant to the NDLS and the email of 13 November 2020 from the NDLS to the applicant referred to above. In the first of those emails, the applicant identifies that she has been stopped by the Gardaí and identifies her concern that her penalty points may have exceeded the twelve point maximum. At this stage she is clearly not aware of the lower limit for novice drivers, but she is certainly concerned about the existence of points on her licence.
44. The third email i.e. of 13 November 2020 is a critical document, as it is the sole basis of her reliance upon the doctrine of legitimate expectations. The precise nature of the representation relied upon by her is not entirely clear. It may have been a representation that she no longer had any points on her licence. However, in her affidavit of 17 December 2020 she does not identify this.
45. In any case, to rely on the doctrine of legitimate expectations, an applicant must first demonstrate that the representation made to them was clear and unambiguous as per the dicta in Daly where it is stated that the concept of legitimate expectations "*requires the existence of a clear, unambiguous and unqualified promise*". I do not consider that a clear unambiguous representation was made to the applicant that she had no penalty points on her licence by the email of 13 November, and still less was any such promise made.
46. The very first line stated: "*You currently have 3 penalty points on this record*". The reference to penalty points being "*on this record*" suggests that they remain in existence. The applicant's counsel argues that the word "*record*" connotes the entirety of her history of penalty points and does not mean that the points in question are live. In response to that, counsel for the respondent indicated on instruction that a statement of penalty points does not refer to points that have been incurred and expired but only existing points. Even if this were not the case, the argument of the applicant is substantially undermined by the fact that the word "*currently*" appears in the sentence. Read as a whole, it seems to me that the sentence demonstrates very clearly that there are three outstanding points on the applicant's licence.
47. The next sentence is also ambiguous in that it refers to 10 February 2020, some 9 months before the date of the email, raising the implication that the points have expired.

However, the words "will expire" are contained in the same sentence and that is clearly incompatible with the notion that the points have already expired.

48. Read with any degree of care at all (and approaching the matter on the basis of a layperson's reading of the notice) it is difficult to see how a reader could comfortably conclude on the basis of the email that they no longer had any points on their licence. Because the email is internally contradictory, viewed objectively it could not be relied upon as a basis for action and required further clarification. Indeed, the email invited enquiries, but the applicant did not take this course.
49. The necessity for further investigation was in my view made more pressing by the fact that the reference to the points expiring after one year was wholly inconsistent with what the applicant had previously been informed by the penalty notice of 14 January 2019 i.e. that the three points she had accrued would expire after three years.
50. In those circumstances, objectively viewed both on its own terms, and in the context of the previous information provided, the email was not an unambiguous communication of the type identified by the case law. It was not reasonable for the applicant to rely on this email as a definitive statement from the respondent that her existing points had expired.
51. Moreover, the case law makes it clear that the question of whether the representation is sufficiently clear to provide the basis for an expectation is to be considered from an objective stand point. That may be seen from the reference in *Glencar* to "*an expectation reasonably entertained by the person or group*" and from the decision of *Daly*, referred to above. No contrary line of authority in support of the proposition that a subjective approach may be taken was identified by the applicant.
52. Counsel for the applicant pointed out that the surrounding facts make it quite clear that the applicant genuinely understood the email as an assurance that she no longer had any penalty points on her licence. He did so by reference to the fact that she did not need to rely on the statement in the email because, from 5 December, she could have accumulated eleven penalty points without losing her licence. In other words, it was not in her interest to misinterpret the email intentionally, and pay early, since waiting would have enabled her to avoid losing her licence.
53. This explanation assumes that, at the time she chose to pay, she was aware that by delaying payment, she would move into a regime where she could afford to accumulate more penalty points before losing her licence. Indeed, counsel went so far as to make the submission that had the applicant received the correct information and taken advice, she would have waited twenty eight days and she would have avoided a disqualification. But there are no averments from the applicant about her state of understanding at the time she paid the fine and incurred the points. There is a solicitor's letter written some days later but that does not constitute evidence of the applicant's state of mind at the relevant time.

54. In any case, the submissions in relation to her bona fides are not relevant to the determination of this issue since what I must consider is not whether she subjectively believed the email meant that she had no extant points, but whether objectively considered, a representation was made that it was reasonable for her to rely upon. For the reasons set out above, I have concluded this is not so.
55. Accordingly, the applicant has fallen at the first hurdle in respect of the legitimate expectations argument she advances.
56. Equally, in the circumstances I do not need to consider the respondent's argument that the doctrine of legitimate expectations does not provide a basis for quashing a decision made pursuant to statute without any discretionary element. That argument must await determination in an appropriate case in the future.

Mistake of Fact

57. As identified above, the applicant argued in the written submissions and at the hearing that, even if the test of legitimate expectations was not met, there was a separate basis for relief in that a mistake had been made and it had operated unfairly on the applicant, relying upon *E v. Secretary of State for the Home Department* in that respect. In that case, an asylum seeker in the UK challenged a decision of an Immigration Appeals Tribunal where new evidence had come to light after the decision of the IAT had been given but before that decision became final, that the IAT refused to consider. It was held that the material ought to have been considered and if that material disclosed a mistake, that could be a ground of appeal. The Court of Appeal held that a mistake as to fact giving rise to an unfairness could be a separate head of challenge in particular statutory contexts, and set out a four part test for establishing whether a mistake of fact gives rise to such an unfairness;
66. *In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."*
58. The argument that an unfair mistake could be a ground for relief, despite the facts not coming within the doctrine of legitimate expectations, was not pleaded in the statement of grounds, appearing for the first time in the legal submissions of the applicant of 13 September 2021. Counsel for the applicant argued that paragraph E (3) of the statement of grounds was a sufficient identification of the point. That provides;

"3. Further and in the alternative, if the Applicant did have in excess of 7 penalty points endorsed on her driving license, the Respondent has acted contrary to the principles of legitimate expectation in proceeding to impose a disqualification despite their servant and/or agent assuring the Applicant that any penalty points previously held on her license had expired"

59. He also relied upon D (2), which seeks;

"A declaration by way of judicial review that the Road Safety Authority failed to impose the within disqualification in accordance with law and/or acted contrary to fair procedures and/or natural and constitutional justice; acted unreasonably and arbitrarily and in breach of the applicant's rights to fair procedures including the principles of legitimate expectation;

60. Unfortunately, I cannot agree that the argument was sufficiently covered by those pleas. No Irish case was cited to support the proposition that the existence of a mistake by a public body that operates to work an unfairness on an applicant provides a basis for obtaining relief in respect of a decision of that body, even where the applicant cannot establish a breach of legitimate expectations. It is a novel proposition under Irish law and one that would require to be well anchored in the pleadings if it was to be advanced, so that the respondent would have an opportunity to comprehensively respond to same. The extent of judicial debate on the point in the U.K. prior to the decision of *E v. Secretary of State for the Home Department* and the discussion of same in that judgment, demonstrate the complexity of this argument and the corresponding necessity that it be fully pleaded. Even if it were not a novel argument, the case of *AA v Medical Council* makes it clear that in judicial review, matters must be fully pleaded. In those circumstances I do not propose to allow this argument to be advanced.

61. However, for the sake of completeness, I note that even if this ground had been pleaded, and even if I found it, *in abstracto*, to provide a ground for relief, on the facts of this case I do not think the applicant could successfully come within such a ground. On the applicant's case, for relief to be granted on this basis, unfairness must be shown. I have described in the context of the legitimate expectations argument why it was not reasonable (considered from an objective stance) for the applicant to rely upon the email, given its obvious ambiguity.

62. Those considerations are relevant in this context. As identified above, the representation relied upon by the applicant in the email of 13 November was not unambiguous, and its inherent contradictions were manifest. When viewed from an objective standpoint, it was not of such a quality as to attract reliance. Thus, although a mistake can be identified in the email of 13 November, the essential quality of unfairness relied upon by counsel for the applicant is not present. It is not unfair to deny a person relief on the basis of a mistake, where it was not reasonable for the person to rely on the mistake.

63. In conclusion, even if the applicant had been permitted to advance this argument, I do consider it would have availed her.

Conclusion

64. For the reasons set out above, I refuse the relief sought. Consequently, the stay on the disqualification notice that was imposed by my order of 21 December 2020 pending the determination of the within proceedings will be lifted once the order is perfected in this case.
65. I propose to put the matter back for two weeks from the date of judgment to **3 December** at **10am** for any submissions on costs and/or a further stay. The parties have liberty to apply if that date is not convenient.