

APPROVED

[2022] IEHC 354



THE HIGH COURT
JUDICIAL REVIEW

2020 No. 441 JR

IN THE MATTER OF THE TAXI REGULATION ACT 2013

BETWEEN

MD. SAYDUR RAHMAN

APPLICANT

AND

SUPERINTENDENT COLUMBA HEALY
SUPERINTENDENT THOMAS MURPHY
(AS AUTHORISED OFFICERS FOR THE DUBLIN METROPOLITAN REGION)
COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 20 June 2022

INTRODUCTION

1. The principal judgment in these proceedings was delivered on 5 May 2022 and bears the neutral citation [2022] IEHC 206. This supplemental judgment addresses the form of the final order and the allocation of legal costs. In particular, this judgment addresses the approach to be taken to legal costs in

NO REDACTION REQUIRED

proceedings which have been heard as a “*test case*” notwithstanding that, from the perspective of the applicant, the proceedings are largely moot.

PROCEDURAL HISTORY

2. There is a statutory requirement for a person to hold a licence in order to drive a small public service vehicle for the carriage of persons for reward. This requirement is provided for under section 22 of the Taxi Regulation Act 2013. A licence of this type will be referred to in this judgment as an “*SPSV driver’s licence*”.
3. The applicant for judicial review (“*the Applicant*”) is a citizen of Bangladesh. The Applicant had been refused an SPSV driver’s licence on the basis first, that his immigration permission had not been regularised, and, secondly, that his current immigration permission to remain and work in the State was temporary. The Applicant sought to challenge this refusal in these judicial review proceedings.
4. At the time these proceedings had been instituted, the Applicant held a temporary immigration permission which authorised him to reside in the State and to enter into employment. This permission was one of a series of temporary immigration permissions which had been granted to the Applicant pending the determination of his application for a review of a first-instance decision refusing him a right of residence following his divorce from an EU citizen.
5. By the time these judicial review proceedings came on for hearing, however, the first-instance decision had been affirmed and the right of residence refused. As of the date of the hearing, therefore, the Applicant no longer had an immigration permission which would allow him to remain in the State.

6. The initial response of the public service vehicle licensing authority to this change in the immigration status of the Applicant had been to say that these judicial review proceedings were now moot. More specifically, it was said that the Applicant had no right, not even a temporary right, to remain and work in the State and accordingly there was no basis for his being entitled to an SPSV driver's licence. This was the stance adopted by the licensing authority in its statement of opposition and written legal submissions.
7. At the hearing of the proceedings, however, the licensing authority indicated that it wished to have the issues of principle in the proceedings determined in any event. Counsel for the licensing authority explained that there are a number of appeals against the refusal of SPSV driver's licences pending before the District Court.
8. As recorded in the principal judgment (at paragraphs 37 and 38), these proceedings fulfil the criteria for the determination of a moot as laid down in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49; [2013] 4 I.R. 274. Given that there is a public interest in there being an authoritative interpretation of the Taxi Regulation Act 2013, and having regard to the pending appeals before the District Court, I was satisfied that the proceedings should be heard and determined.
9. By the very nature of the issues raised, legal challenges to the refusal of an SPSV driver's licence on grounds related to immigration status will often be overtaken by events. This is because the applicants will, by definition, almost always be awaiting a decision on their long term immigration status. In many instances, judicial review proceedings will be rendered moot as a result of the anticipated decision having been made on their immigration status before the hearing and

determination of the proceedings. If an applicant is, for example, granted a right to reside, then the supposed impediment to the grant of an SPSV driver's licence will have fallen away. Conversely, if a final and conclusive decision is made refusing the applicant leave to remain, then they are not entitled to an SPSV driver's licence.

10. Put otherwise, the issues raised in this type of proceeding are ephemeral, and will often evade capture because of the likelihood of a change in the immigration status of an applicant prior to the determination of the judicial review.

EVENTS POST-JUDGMENT

11. For completeness, it should be explained that the Applicant, in separate judicial review proceedings, successfully challenged the review decision made by the Minister for Justice on 23 March 2021. The matter was then remitted to the Minister for reconsideration and a fresh decision was made on 3 June 2022. The Minister found that the Applicant's marriage to an EU citizen had been one of convenience contracted for the purposes of obtaining an immigration permission to which he would otherwise not have an entitlement. The Minister accordingly revoked the Applicant's right to reside in the State.

FORM OF RELIEF

12. The first decision challenged in these proceedings had been the decision of December 2019 granting an SPSV driver's licence with a duration coterminous with that of the Applicant's temporary immigration permission. For the reasons explained in detail in the principal judgment, I concluded that this first decision

was invalid. An SPSV driver's licence has a fixed duration of five years. The licensing authority is not entitled to grant a licence for a shorter period of time.

13. Ordinarily, the appropriate remedy in respect of a finding that a licence-decision is invalid would have been an order setting aside the decision and remitting the matter for reconsideration by the licensing authority in accordance with the findings of the High Court. The actual relief sought in the statement of grounds is more ambitious. A declaration is sought to the effect that the Applicant currently holds an SPSV driver's licence for a period of five years from December 2019, together with mandatory relief directing the licensing authority to insert the "*correct*" expiry date into the licence. These reliefs go too far. For the reasons explained in the principal judgment, I concluded that it would not be appropriate simply to sever the time-limit from the licence-decision and leave the balance of the licence intact. Instead, the licensing authority should be afforded an opportunity to consider whether, having regard to the requirement that a licence must be for a fixed duration of five years, it wished to attach some other condition to the licence. See paragraph 15 of the principal judgment.
14. Counsel on behalf of the Applicant has confirmed that her client does not now seek an order for remittal pursuant to Order 84, rule 27 of the Rules of the Superior Courts. This is because counsel anticipates, correctly, that the licensing authority would be entitled to refuse to grant an SPSV driver's licence because the Applicant no longer holds an immigration permission which allows him to work in the State. (See paragraphs 56 to 58 of the principal judgment). As noted above, the Minister for Justice has since affirmed the first-instance decision refusing the Applicant a right of residence. The Minister has held that the Applicant's marriage to an EU citizen had been one of convenience contracted

for the purposes of obtaining an immigration permission to which he would otherwise not have an entitlement.

15. Accordingly, the only relief now pursued is a claim for a declaration. Having regard to the findings in the principal judgment, and to the relief sought at paragraphs (d) (1) and (d) (8) of the statement of grounds, I propose to grant a declaration in the following terms:

“Having regard to regulation 7 of the Taxi Regulation (Small Public Service Vehicle) Regulations 2015, a small public service vehicle driver’s licence has a fixed duration of five years. It is hereby declared that the licence issued to the Applicant in December 2019 is invalid in circumstances where it purports to have a duration of less than five years.”

ALLOCATION OF COSTS

16. Counsel on behalf of the licensing authority submits that there is no basis for the Applicant recovering his costs in circumstances where he has not succeeded in obtaining any of the substantive reliefs sought in the proceedings. Counsel took the court through the statement of grounds and submitted that the Applicant was not entitled to any of the substantive reliefs pleaded. The principal reliefs sought were mandatory orders directing the grant of an SPSV driver’s licence and an order of *certiorari* quashing the second of the two decisions made by the licensing authority. It was not enough, according to counsel, that some form of declaratory relief might be granted in favour of the Applicant.
17. With respect, these submissions overlook the fact that the licensing authority had requested the court to determine the issues in the proceedings notwithstanding

that, from the perspective of the Applicant, the proceedings had been rendered largely moot because of the decision by the Minister for Justice to affirm the refusal of a right of residence.

18. The licensing authority had, very properly, acknowledged that the proceedings represent a “*test case*”, and that a determination of the legal issues would be of assistance to the District Court in adjudicating upon the appeals pending before it. It is this public interest factor, rather than the absence of any practical benefit to the Applicant personally, which is of significance for the purpose of allocating legal costs. As counsel for the Applicant correctly observed, proceedings which are moot will, by definition, not confer any practical benefit upon an applicant. Yet there is no bright line rule which stipulates that an applicant cannot recover their costs in a moot which has been heard as a “*test case*”.
19. There is an obvious overlap between the type of consideration which informs the exercise of the court’s discretion to hear and determine a moot, and those considerations which inform the exercise of the court’s discretion in respect of costs. In each instance, weight is attached to the public interest in having the legal issues raised in the proceedings determined. As appears from the judgment in *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49; [2013] 4 I.R. 274, the considerations to be taken into account in deciding whether to hear and determine a moot include whether the proceedings present a point of law of exceptional public importance, and whether the moot case had been a “*test case*”, with other cases having been adjourned pending the determination of that case.
20. These considerations resonate with those relevant to the court’s discretion in respect of costs. The Court of Appeal has confirmed in *Lee v. Revenue*

Commissioners [2021] IECA 114 (at paragraphs 6 and 7) that a court retains discretion to depart from the general rule that costs follow the event where proceedings raise issues of general public importance.

“[...] it is clear that the Court retains an exceptional jurisdiction to exempt a litigant from the consequence of this principle where proceedings were of general public importance. That jurisdiction continues following the enactment of the Legal Services Regulation Act 2015. The essential factors guiding it were, I think, well summarised recently by Simons J. in *Corcoran and anor. v. Commissioner of An Garda Síochána and anor.* [2021] IEHC 11 at para. 20. Having referred to the balancing exercise involved in reconciling the objective of ensuring that litigants are not deterred from pursuing litigation which serves a public interest with the aim of not encouraging unmeritorious litigation, Simons J. continued:

‘In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant’s case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights.’

As this description suggests, the ‘*public interest*’ cases in which the court absolves the losing party from the cost consequences that usually follow the failure of their litigation may cover a wide terrain. In their purest form, they will involve significant issues of Constitutional or European law of general importance that have been pursued by the claimant to advance a public concern rather than to obtain a private and personal advantage. In some such cases the public interest in the underlying issue has been such as to justify the grant to the unsuccessful claimant of orders for the payment by the successful respondent of a proportion, or all, of their costs. The circumstances in which orders of this kind have been made are comprehensively examined in the decision of the Divisional Court in *Collins v. Minister for Finance* [2014] IEHC 79.”

21. The Court of Appeal went on to endorse the approach taken to “*test cases*” by the High Court in *Cork County Council v. Shackleton* [2007] IEHC 241; [2011] 1 I.R. 443. The judgment in *Lee v. Revenue Commissioners* describes the judgment in *Cork County Council v. Shackleton* as having introduced a further variable, namely that in some cases to which the State or one of its agencies is a party, and which have been necessitated by the complexity or difficulty of legislation, it may be appropriate not to direct costs in favour of that State party and against the other litigant, even where that litigant is unsuccessful in its claim.
22. Turning now to apply the principles enunciated in this case law to the circumstances of the present case, I am satisfied that the appropriate costs order is that the Applicant should recover his costs from the Commissioner of An Garda Síochána *qua* interim licensing authority under the Taxi Regulation Act 2013. These proceedings represent a “*test case*”, with a large number of statutory appeals before the District Court having been adjourned to await the outcome of same. It was, therefore, in the public interest that these judicial review proceedings be heard and determined.
23. The proceedings have conferred a practical benefit upon the licensing authority and potential licence-applicants in that the principal judgment has addressed the nature and extent of the licensing authority’s powers under the Taxi Regulation Act 2013. In particular, the principal judgment has clarified the extent to which a person’s immigration status may be taken into account in determining an application for a small public service vehicle driver’s licence.
24. It has to be said that neither the Taxi Regulation Act 2013 nor the Taxi Regulation (Small Public Service Vehicle) Regulations 2015 is a model of good legislative drafting. It is telling that even the licensing authority has had

difficulty in understanding its own governing legislation: as explained in the principal judgment, the licensing authority misconstrued the prescribed duration of a licence.

25. In contrast to the equivalent provisions in England and Wales, for example, the primary legislation does not expressly address the question of immigration status. The secondary regulations address it to a limited extent only: as explained in the principal judgment, it is only in the context of an application for a vehicle licence that there is express reference to an applicant's immigration permission.
26. Had the legislation been better drafted, then these judicial review proceedings might not have been necessary. Given the shortcomings of the drafting, the Applicant had been entirely justified in bringing these judicial review proceedings. As it happens, as a result of parallel decisions made by the immigration authorities, the outcome of these proceedings has transpired to be of little practical benefit to the Applicant personally. The taking of the proceedings did, however, serve a wider public interest.
27. Accordingly, I propose to make an order for costs in favour of the Applicant. Put shortly, the same public interest considerations which justified a departure from the general rule that a court will not hear and determine a moot also justify a departure from the general rule that costs follow the event.
28. For completeness, the fact that an applicant may have a personal interest in the outcome of judicial review proceedings does not preclude a finding that the determination of the proceedings was in the public interest (as had been suggested by counsel for the licensing authority). This notion has been debunked by the Court of Appeal in *Lee v. Revenue Commissioners* [2021] IECA 114 (at paragraph 9) as follows:

“At one point the view was adopted that this exceptional jurisdiction was not available to a claimant whose case was brought in part to obtain a personal advantage (see the discussion at paras. 18-21 of *Harrington v. An Bord Pleanala* [2006] IEHC 223). However, since then costs orders have been made in favour of losing parties who brought litigation in order to advance a personal interest (see *Curtin v. Clerk of Dail Eireann* [2006] IESC 27; *Kerins v. McGuinness* [2017] IEHC 217), and the same jurisdiction has been invoked to justify making no order as to costs in such circumstances (see *HID v. The Refugee Applications Commissioner* [2013] IEHC 146). There is, in practical terms, a sliding scale guided by the importance of the issues, the number of other cases in which those issues are likely to arise and the strength of the claimant’s case, the application of that scale being influenced in any given situation by the nature of the claimant’s interest in the action. A citizen pursuing a challenge on an issue of systemic constitutional importance in which they have no personal interest and which raises substantial issues will have to surmount a lesser burden in obtaining their costs than a similarly positioned litigant who proceeds to litigate an issue which affects their personal or proprietary interests. A litigant in the latter category may be exempted from costs in a case where a claimant in the former situation obtains some or all of them. Each may find themselves bearing costs if their claim turns out to be insubstantial or if it revolves around legal issues that are discrete (rather than general) in their application.”

CONCLUSION AND FORM OF ORDER

29. Having regard to the findings in the principal judgment, and to the relief sought at paragraphs (d) (1) and (d) (8) of the statement of grounds, I propose to grant a declaration in the following terms:

“Having regard to regulation 7 of the Taxi Regulation (Small Public Service Vehicle) Regulations 2015, a small public service vehicle driver’s licence has a fixed duration of five years. It is hereby declared that the licence issued to the Applicant in December 2019 is invalid in circumstances where it purports to have a duration of less than five years.”

30. An order will also be made, pursuant to Part 11 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts, directing that the Applicant is to recover his costs as against the Commissioner of An Garda Síochána, the third named respondent. This costs order is made against the Commissioner in his capacity as the interim licensing authority under the Taxi Regulation Act 2013. The first and second named respondents have only been joined to the proceedings in their capacity as authorised persons under section 70 of the Taxi Regulation Act 2013 and have no personal liability.
31. The costs are to include all reserved costs; the costs of the various sets of written legal submissions; and the costs of the costs application. All such costs to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties.

Appearances

Rosario Boyle, SC, Aengus Ó Corráin and Marie Flynn for the applicant instructed by Thomas Coughlan & Co. Solicitors (Cork)
Robert Barron, SC and Kilda Mooney for the respondents instructed by the Office of the Chief State Solicitor