

**THE HIGH COURT  
JUDICIAL REVIEW**

[2018 No. 59 J.R.]

**BETWEEN****OLIVIER ALARY****APPLICANT**

**AND  
CORK COUNTY COUNCIL**

**RESPONDENT****EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 24th day of July, 2018**

1. The applicant is a French national who resides in Edinburgh. He is an artisanal baker and from time to time sells his produce in public places.

2. It is common case that on the 30th September, 2016, a Friday, the applicant engaged in casual trading by selling his baked goods at a public market at Wolf Tone Square in Bantry, County Cork. He did not possess a casual trading licence as required under the terms of the Casual Trading By-Laws Bantry 2014 and consequently was prosecuted for the offence of trading without a licence. He was convicted in the District Court of this offence and he appealed to the Circuit Court. His appeal was heard in Bantry on the 21st July, 2017 when His Honour Judge Riordan affirmed the conviction and fine of €100.

3. In these judicial review proceedings, the applicant seeks an order quashing that conviction. In his statement of grounds, the applicant makes a number of complaints, the first of which is that other persons without casual trading licences on the relevant dates were not prosecuted unlike the applicant. Apart from that, the primary ground raised in the applicant's statement of grounds is that at the date and place in question, the applicant was entitled to avail of a common law market right to trade which he claimed derived from a patent granted in 1679 by King Charles II to the Earl of Anglesey which permits market trading in Bantry to take place at Wolf Tone Square on Wednesdays and Saturdays. As is immediately apparent, even if these market rights were valid, subsisting and available to the applicant to exercise without a casual trading licence, this would not avail him since the offence of which he was convicted related to trading on a Friday. As the case evolved, the applicant conceded that he could no longer rely on this particular ground in the circumstances.

4. Leave to seek judicial review was granted in this case on the 22nd January, 2018, some six months after the date of the applicant's conviction and thus outside the three month time limit provided for in O. 84. The applicant has sought an extension of time on the basis that he had originally understood that the correct legal route for him to pursue was by way of an appeal from the Circuit Court to the High Court whereas of course no such appeal lies. However, by the time the applicant became aware of this, the three month period had expired but undoubtedly he formed the intention to challenge the ruling within the requisite period and in circumstances where the respondent did not contest the applicant's right to an extension of time, I propose granting such extension.

5. However, in a further affidavit sworn on the 14th May, 2018, and entitled "supplement of statement of ground for a judicial review", the applicant purported without leave of the court to introduce new grounds for seeking judicial review. No liberty was sought or granted to introduce such new grounds some nine months after the date of his conviction and the respondent objects to any reliance by the applicant on these grounds. The only reason advanced by the applicant for his failure to raise these grounds originally is that as a lay litigant, he was unaware of the fact that he had to obtain the leave of the court to introduce new grounds.

6. Order 84 r. 21 in relevant part provides as follows:

"(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose.

(2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.

(3) Notwithstanding sub-rule (1), the court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the court shall only extend such period if it is satisfied that: -

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension."

7. As the rule makes clear, the applicant has to surmount two hurdles to successfully obtain an extension of time. The first is that there is good and sufficient reason and the second that the failure to do so is due to circumstances either outside the applicant's control or which he could not reasonably have anticipated. These requirements are cumulative.

8. It seems to me that the applicant has advanced no good and sufficient reason for failing to raise the grounds now relied upon *ab initio*. To use the old adage, ignorance of the law is no excuse and it certainly could never be the case that because a party is a lay litigant and is unaware of the rules, this could constitute a good and sufficient reason for failing to apply in time. Litigants in person are of course entitled to the same rights as represented parties but not to be treated differently on account of their unrepresented status. Even if that were not the case, the applicant could not in any event satisfy the second limb of the test which is that the circumstances giving rise to the failure to apply in time were either outside his control or could not reasonably have been anticipated by him. The relevant rules of court are available readily and freely to be consulted by any party embarking on an application for judicial review.

9. The Supreme Court in *Shell E & P Ireland Ltd v McGrath and Ors* [2013] IESC 1 held that the time limits contained in Order 84 have the same status as time limits to be found in primary legislation. Thus, in the absence of compliance with those time limits, the application for relief must, as a matter of law, fail.

10. Accordingly, I am satisfied that the applicant is not entitled to an extension of time to rely upon the new grounds and that really effectively disposes of his claim. However, if I were to be wrong in reaching that conclusion, I propose in any event to consider the substantive new ground raised by the applicant in May of this year.

11. Put succinctly, the applicant claims that under the terms of Magna Carta Hiberniae which is "The Law of the Land", he has a common law right to trade without a licence. Whilst the applicant made a number of extravagant claims including matters such as the licence fee amounting to evil extortion, and that he never consented to the payment of stallage fees, in summary he claims that the right to trade which derives from Magna Carta Hiberniae cannot be overcome by the terms of the Casual Trading Act, 1995 or the 2014 Bye-Laws derived thereunder. Although the applicant's original statement of grounds included a claim for what is described as judicial review of the Casual Trading Act, 1995 and other legislation, insofar as this purports to be a claim that this legislation is invalid having regard to the provisions of the Constitution, although that has not been pleaded, clearly that issue cannot be entertained in circumstances where Ireland and the Attorney General are not parties to these proceedings.

12. The laws of the State derive from the Constitution and legislation such as the Casual Trading Act, 1995 enjoys a presumption of constitutionality. Insofar as the applicant purports to assert that this legislation is in some way overcome by the provisions of Magna Carta Hiberniae, if it applies at all on which I express no view, clearly that contention is unsustainable.

13. The issue of common law rights to trade in public was considered in detail by Clarke J. (as he then was) in *Simmonds & Anor v. Ennis Town Council* [2012] IEHC 281. In that case, two questions were formulated by the court to be determined in the proceedings and identified at p. 3 of the judgment, the first of which was as follows:

"Whether the exercise of a common law right to trade at a market or fair comes within the definition of 'Casual Trading' in section 2(1) of the Casual Trading Act 1995 so as to disentitle a member of the public from exercising such right unless he holds, and trades in accordance with, a Casual Trading Licence as required pursuant to section 3(1) of the Act of 1995?"

14. In answering this question in the affirmative, Clarke J. said (at p. 37):

"6.22 Given that view it seems clear that the first question raised in the preliminary issue must be answered in the way suggested by Ennis Council. The second question raises some further difficulties on which it is necessary to touch. It is, of course, true that, at the level of principle, a person can only carry out casual trading with a licence. Given that I have found that trading at a franchise market is encompassed within the definition of casual trading then it follows that, again at the level of principle, a person should only be able to trade at a franchise market if they hold a casual trading licence."

15. Clarke J. went to express his conclusions in the following terms (at p. 39):

## **"7. Conclusions**

7.1 I have found that the common law right to trade at a market or fair comes within the definition of casual trading in s. 2(1) of the 1995 Act. I have further found that a member of the public can be precluded from exercising that right where they do not hold and trade in accordance with a licence as required pursuant to s. 3(1). It would follow that Mr. Simmonds and Real Olive are not lawfully entitled, at least at the level of principle, to sell produce at the Ennis Market without holding such a licence."

16. That seems to me to clearly dispose of the applicant's argument that he has a common law right to trade at Wolfe Tone Square in Bantry without the licence that he is required by law to hold under the 2014 Regulations. For this additional reason therefore, I am satisfied that the applicant has not made out any of the grounds either on which leave was granted, or indeed the additional grounds pleaded late and I accordingly dismiss this application. For completeness, I have not overlooked any of the other grounds raised by the applicant but I am satisfied that none provides a basis for relief.