THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO 2018 No. 205 J.R.]

BETWEEN

GEORGE (FORMERLY EVA) LENNON (A MINOR SUING BY MOTHER AND NEXT FRIEND MARGARET LENNON)

MARGARET LENNON

APPLICANTS

AND

DISABLED DRIVERS MEDICAL BOARD OF APPEAL

AND

THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

[RECORD NO 2018 408 JR]

BETWEEN

ALYSSA REEVES (A MINOR SUING BY MOTHER AND NEXT FRIEND AMANDA REEVES)

AMANDA REEVES

APPLICANTS

AND

DISABLED DRIVERS MEDICAL BOARD OF APPEAL

AND

THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice O'Regan delivered on Tuesday 31st of July , 2018

Issues

1. In the above proceedings, both applicants are claiming an order of Certiorari in respect of each of the impugned orders together with a declaration to the effect that Regulation 3 of the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations, 1994 (the regulations) is *ultra vires* s. 92 of the Finance Act (1989) as amended. It is asserted that the first named respondent failed to give any or any adequate reasons in respect of the decisions made and now under review. Allied to the reasons issue it is asserted that the first named respondent failed to consider adequately or at all the evidence submitted.

2. In respect of the Lennon application there is a further argument to the effect that in respect of the conflict incorporated within the medical reports before the first named respondent, the first named respondent failed to identify why one report was preferred over the other.

3. In the Lennon application, the relevant applicant was born on 12th January 2001 and the decision impugned is dated the 29th January 2018. The application is brought by way of statement of ground of the 12th March 2018 and is grounded upon the affidavit of Margaret Lennon, the applicants' mother, of the 7th March 2018. Leave was afforded on the 12th March 2018. It is common case that the applicant is severely disabled and uses a wheelchair much of the time.

4. In the Reeves application, the applicant was born on the 2nd February 2016. The statement of grounds is dated June 2018. In that matter the impugned decision is dated the 21st May 2018. The application is grounded upon the affidavit of the applicants' mother Amanda Reeves of the 18th June 2018. Leave was afforded on the 22nd June 2018. It is common case that the applicant suffers from spina bifida, hydrocephalus and Arnold-Chiari 2 malformation.

Matters agreed

5. For the purposes of the within application, the respondent accepts that both applicants have a severe and permanent disability.

6. The jurisprudence relevant to whether or not a statutory instrument is ultra vires the primary legislation is accepted.

7. The Oireachtas is not to be diluted or usurped. Furthermore, the Oireachtas is presumed not to have delegated the power to effect a substantial alteration in general law and any delegation of power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation. The power should be exercised reasonably. Such power is not exercised reasonably if there is such manifest arbitrariness or injustice or partiality that a court would say "parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*." (see *Island Ferries Teoranta v. Minister for Communications & Ors* [2015] IESC 95 and *Cassidy v. Minister for Industry and Commerce* [1978] 1 IR 297.)

8. In *Kennedy v. the Law Society of Ireland* [2002] 2 IR 458, it was held that the delegates of statutory power cannot be allowed to exceed the limits of the statute and any excessive exercise of the delegation discretion will defeat the legislative intent. The delegates are bound to ensure respect for the laws passed by the Oireachtas.

9. In or about determining whether or not the exercise of the power is permitted as a legitimate exercise the answer is to be found within the terms of the statute itself (see Ireland Ferries Teoranta aforesaid). The fact that the statutory instrument might be subject to annulment by either house of the Oireachtas is merely a safeguard however the ultimate responsibility rests with the courts to ensure that the exclusive authority of the national parliament in the field of law-making is not eroded by a delegation of power (see *Cityview v. ANCO* [1980] 1 IR 381).

10. In addition to the foregoing, it is accepted by the respondent, in accordance with the applicants' submission, that the true meaning of each statutory provision is ascertained by the plain language of the act and it is only in case of doubt or ambiguity that the purpose and intention might be inferred from other provisions or other statutes expressed to be construed with it. In *Board of Management of St. Molaga's School v. Minister for Education* [2010] IESC 57, Denham J. stated that once the plain meaning of the words are clear unambiguous and not absurd, the statute should be construed accordingly.

11. The respondents also accept the applicants' submission relative to adequacy of reasons save that the respondent argues that the relevant starting point for the consideration of adequacy of reasons is the case of *Mallak v. Minister for Justice* [2012] 3 IR 297 as was held by Laffoy J. in *McInerney v. Commissioner of An Garda Siochána* [2016] IESC 66 in or about dealing with the consideration of adequacy of reasons. The respondents accept under this jurisprudence that a failure or refusal by a decision maker to explain or give reasons for a decision may amount to a ground for quashing it, however an important consideration is as to whether or not there is a right of appeal – where there is a right of appeal there is a greater onus to provide reasons. Where however there is no right of appeal, Fennelly J. in *Mallak* indicated that the decision should enable an applicant to know whether he has a good ground for applying for judicial review and this decision should also make it possible for the courts effectively to exercise their power of judicial review. Fennelly J. also stated that the most obvious means of achieving fairness is for reasons to accompany the decision however it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. Fennelly J. stated: -

> "If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

12. In the applicants' submissions relative to the adequacy of reasons, it is argued that the decision maker should not ignore relevant matters or take into account irrelevant matters. The applicants place considerable emphasis on the decision of Kelly J. in *Mulholland v. An Bord Pleanala No 2* [2006] 1 IR 453 where Kelly J. identified that part of the rationale for giving of reasons was to know if the decision maker had directed its mind adequately to the issues which it has considered or is obliged to consider. The applicant in the Lennon matter refers to *DVTS v. Minister for Justice* [2007] IEHC 451 to the effect that if one piece of evidence is preferred over another it is incumbent upon the decision maker to state clearly its reasons for doing so.

13. The applicants also place considerable emphasis on the decision of Baker J. in *M.D. v. Minister for Social Protection* [2016] IEHC 70 where it is stated that the decision did not show an analysis of the evidence and no consideration of the individual factors. The respondent indicates that the *M.D.* decision is not in fact relevant in the instant matter given the facts in that case. The applicant was seeking a domiciliary carer allowance and the court identified the process undertaken as an onerous task. The respondent points to the fact that in the instant circumstances, the task was not onerous. Further, in *M.D.,* there were different parties, (unlike in the instant matter where all reports were from the applicants' medical personnel) and indeed there were contradictory reports before the decision maker. In *M.D.* the applicant claimed a failure of process by not engaging in the conflicting evidence before the decision maker. At para. 53 the court noted that there was a desktop review and the respondent points to the fact that this was not the case in the instant claims.

The Decisions

14. The decisions under review of the 29th January 2018 and the 21st May 2018 are similar in that the decision was to the effect that it was the boards opinion that the applicant did not meet the strict medical criteria laid down in the current regulation. Attached to the letter in each case was a document headed "Disabled drivers medical board of appeal" where it was identified that the medical criteria for entry into the scheme was that the person must be severely and permanently disabled and come within at least one of the criteria thereafter mentioned – there are six criteria set out.

15. In the Lennon matter the criteria considered was as follows: -

> (a) Be wholly or almost wholly without the use of both legs;
>
> (b) Be wholly without the use of one of their legs and almost wholly without the use of the other leg such as they are severely restricted as to movement of their lower limbs;
>
> (e) Be wholly or almost wholly without the use of both hands or arms and almost wholly without the use of one leg.

In Reeves the criteria considered was (a) and (b) above.

Evidence before the Court

16. In each application before the court the application is grounded upon a singular affidavit of the mother of the applicant. In the Lennon matter at para. 6 of the affidavit of the 7th March 2018, it is stated that on a bad day the applicant can take a few steps only, and on a good day the applicant can walk half a mile. At para. 8 it is noted that the applicant has chronic joint pain and limited mobility and has a wheelchair available. In paras 6 – 9 of the affidavit details of the applicants' disability are set out.

17. In the Reeves matter, at para, 5 of the affidavit of the 18th June 2018 it is stated that the applicant will require a wheelchair in the future for long distances and at para. 6 it is stated that the applicant requires safe transport. Further because of the size of the applicant toilet facilities will have to be conducted in the boot of the vehicle as opposed to a public toilet. Paras 5 -7 inclusive set out the medical condition of the applicant.

18. The statement of opposition in both matters relies upon the replying affidavit of Dr. Angela McNamara.

19. In the Lennon matter, the process which was undertaken by the first named respondent is identified at para. 7 of the affidavit and the process undertaken in respect of the Reeves matter is identified at para. 6. The only difference is that the process was undertaken in Reeves on the 17th May 2018 and took approximately fifteen minutes. In Lennon, the process was undertaken on the 25th January 2018 and lasted approximately fifteen to twenty minutes. The applicant was invited to attend for an assessment and to bring any medical information. The board comprised a three-doctor panel and the medics were introduced to the applicant and an explanation as to the purpose of the meeting was afforded together with the criteria which would be adopted in carrying out the

assessment. A medical assessment was carried out with the applicants being informed that the notes were reviewed and questions as to the medical history and the carrying out of the physical examination of the applicant were raised.

Contradictory evidence
20. As aforesaid, this issue arises only in relation to the Lennon application and apparently the contradiction that was before the first named respondent was the report of Ms. Dunne, the applicants' physiotherapist, of the 30th March 2017 wherein it identified that George walked 103.5 metres (the report identified that George walked for three minutes without rest). I am satisfied that this ground cannot succeed on the following basis: -

a. The applicant does not argue that there is any inaccuracy in the report of Ms. Dunne;

b. The applicant does not identify how the report of Ms. Dunne in fact varies or can be distinguished from any other report furnished by the applicant;

c. All medical reports which were before the board were from the applicants' medical personnel;

d. The applicants' mother, in the grounding affidavit of the 7th March 2018 at para. 6 thereof, identifies that the applicant can take a few steps on a bad day and walk up to a half a mile on a good day, therefore the report of Ms. Dunne and the statement made by her is not at all inconsistent with the reality of the applicants' situation as described in para. 6 of the applicants' mothers' affidavit.

e. The applicant never highlighted to the Board that there was a discrepancy notwithstanding that the Applicant's mother had communicated in writing with the Board in advance of the 25th. January, 2018.

Validity of Regulation 3 of the 1994 Regulations
21. Both applicants in their statements of grounds state that the Oireachtas by virtue of s. 92 of the Finance Act 1989, determined that persons who have a severe and permanent disability and/or their families, would be entitled to certain rebates or remissions of taxes by way of financial support. The respondents' contention is to the effect that the applicants fundamentally misunderstand the content of s. 92. Section 92 provides: -

"(1) Notwithstanding anything to the contrary contained in any enactment, the Minister for Finance may, after consultation with the Minister for Health and the Minister for the Environment, make regulations providing for—

(a) the repayment of excise duty . . .

by,

a severely and permanently disabled person—

(2) Regulations under this section shall provide for—

(a) the criteria for eligibility for the remission of the taxes specified in subsection (1), including such further medical criteria in relation to disabilities as may be considered necessary."

22. In Regulation 3 of the 1994 Regulations, it is stated that for the purposes of s. 92 (2) (a) of the Finance Act 1989, the eligibility on medical grounds of disabled persons who are severely and permanently disabled shall be assessed by reference to any one or more of the following medical criteria. Thereafter, the six enumerated criteria as included in the attachment to the impugned decisions herein are set out.

22. In my view, the plain and ordinary meaning of s. 92 of the 1989 Act did not, as is contended by the applicants, determine that persons with a severe and permanent disability would be entitled to certain rebates. Rather, s. 92 is an enabling provision in favour of the Minister for Finance to make regulations. Should the Minister so choose to make regulations, then under s. 92 (2) it is incumbent upon him to provide for the criteria for eligibility including further medical criteria in relation to the disabilities as may be considered necessary. Regulation 3 of Statutory Instrument 353/1994 includes such medcial criteria as was identified in s. 92 (2) as being the further medcial criteria required for eligibility for the remission of the taxes. In my view the plain and ordinary meaning of s.92 is to the effect that this further medical criteria is further to (or in addition to) the applicant being severely and permanently disabled.

23. There is no basis therefore to suggest that the statutory instrument has diluted or usurped the provisions of s. 92 of the 1989 Act or that the powers of the Minister in making the statutory instrument was exercised outside the limitations provided for by s. 92 (2). There is no evidence that the criteria are manifestly arbitrary, unjust or partial. There is no basis to suggest that the criteria are unreasonable or *ultra vires*. Once the Minister determined, pursuant to the liberty afforded to him, to introduce regulations he was mandated and obliged to set out further medical criteria for eligibility and that is what he did in Regulation 3 aforesaid. Accordingly, therefore, I do not see any basis to afford a declaration that Regulation 3 of Statutory Instrument 353/1994 is unlawful or fetters amends or circumscribes the parent legislation.

Adequacy of reasons
24. The process undertaken by the first named respondent is as set out in the affidavit of Dr. McNamara and there is no suggestion by either applicant that there is any want of accuracy in the description given by Dr. McNamara. Neither applicant suggests that the balance of the criteria not considered appropriate to the relevant applicant should have been considered.

25. In my view the process was fair, open and transparent and involved explanation and inquiry between the first named respondent and the relevant applicant. Although the decisions under review are brief, nevertheless in each case it is identified that it was the boards' opinion that the applicant did not meet the strict medical criteria laid down in the current regulation and the applicant was referred to the attached relevant medical criteria circled. In each case the criteria not circled is clearly inapplicable to that applicant and no argument otherwise is made. Insofar as the circled criteria is concerned, it is evident from the relevant decision letter and the criteria circled that the relevant applicant did not come within the ambit of that criteria. This comprised the reasons for the failure of the applicant in each appeal.

26. In neither matter is it argued that one of the criteria circled clearly applied to the applicant.

27. In the circumstances therefore in accordance with the jurisprudence identified in the necessity to give reasons, sufficient reasons have been afforded in the decisions to enable each of the applicants decide whether or not judicial review might be appropriate and for the court to determine the issues so raised.

Conclusion
28. I am satisfied in the events that the applicants in both cases have failed to establish sufficient grounds to secure an order of certiorari in respect of the decision of the 29th January 2018, in the case of Lennon, and the decision of 21st May 2018 in respect of Reeves. Further, the declaration sought to the effect that Regulation 3 of the 1994 Regulations is invalid and/or unreasonable is refused as are the balance of the declarations sought.