

THE HIGH COURT
JUDICIAL REVIEW

[2015 No. 248 J.R.]

BETWEEN

MICHAEL DUFFY

APPLICANT

AND

ROAD SAFETY AUTHORITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 21st day of September, 2015

1. In the within proceedings, the applicant seeks:

- (a) a declaration that the interpretation by the first named respondent (RSA) of the Commercial Vehicle Roadworthiness (Vehicle Testing) (No. 2) Regulations 2013 (S.I. 347 of 2013) ("the Regulations") is incorrect with respect to the issuing of a certificate of roadworthiness for a vehicle 00CE2192 on the 20th of February, 2015;
- (b) A declaration that the applicant is entitled to a certificate of roadworthiness for a period of twelve months from the 20th of February, 2015;
- (c) A declaration that Articles 5 and 9 of the Regulations are unconstitutional;
- (d) Damages;
- (e) Ancillary relief.

The Regulations

2. The Regulations came into operation on the 25th of September, 2013. They were made by the Minister for Transport, Tourism and Sport in exercise of the powers conferred on him by the Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012. They gave effect to Directive 2009/40/EC of the European Parliament and of the Council of the 6th of May, 2009 as amended by Commission Directive 2010/48/EU of the 5th of July, 2010.

3. The Regulations apply to specified classes of vehicles known as "CVR" vehicles, the acronym standing for commercial vehicle roadworthiness.

4. These proceedings concern in particular the following Regulations:

"Frequency of testing

5. A vehicle shall be submitted for testing in respect of each test due date.

Test due dates

6. (1) Subject to Regulations 7, 8 and 9 the following shall be test due dates in respect of a CVR vehicle:

- (a) the first test due date;
- (b) in the case of a class of CVR vehicle of a class specified in column (2)

of Schedule 1 at reference numbers 1 to 8 in column (1) [*which include the applicant's vehicle*], each subsequent anniversary of the first test due date...

(2) Subject to paragraph (3), the first test due date for a CVR vehicle is the first anniversary of its date of first registration...

Test due dates — certificate of roadworthiness in force

7. Notwithstanding Regulation 6, where on the commencement of these

Regulations there is in force in respect of a CVR vehicle a certificate of roadworthiness issued under the Regulations of 2004 or the Regulations of 2013 the test due dates in respect of that vehicle shall be—

- (a) the expiry date of such certificate of roadworthiness,
- (b) in the case of a class of CVR vehicle of a class specified in column (2) of Schedule 1 at reference numbers 1 to 8 in

column (1), each subsequent anniversary of that expiry date...

Test due dates — early testing

8. Where a CVR vehicle is submitted for CVR testing on a date ("testing date") falling more than one month before a test due date, the following shall be the test due dates for that vehicle:

(a) in the case of a CVR vehicle of a class specified in column (2) of

Schedule 1 at reference numbers 1 to 8 in column (1), each subsequent anniversary of the testing date..."

Test due dates — late testing

9. (1) Where a CVR vehicle is submitted for CVR testing on a testing date more than one year after a test due date the next test due date in respect of that vehicle (in addition to the test due dates specified in Regulation 6, 7 or 8 as the case may be) shall be—

(a) the date falling 6 months after the testing date, or

(b) the next test due date under Regulation 6,

whichever is earlier."

5. The scheme of testing the roadworthiness of commercial vehicles has been established for many years and an annual test for vehicles such as that owned by the applicant has long been a feature. Prior to the commencement of the Regulations however, commercial vehicles undergoing a test were issued with a Certificate of Roadworthiness (CRW) for a period of twelve months from the test date. Although in theory this required testing in consecutive twelve month periods, if the vehicle owner delayed in presenting the vehicle for testing for say three months after the expiry of the previous CRW, it could effectively "gain" an extra three months although of course if the vehicle was being used in a public place during that three months, the owner would be committing an offence.

6. The relevant authorities considered that this gave rise to a level of invidious discrimination against compliant commercial vehicle owners as against others who were not compliant.

7. Thus, the Regulations were brought into effect to address this apparent unfairness by resetting the test due date by reference to the anniversary of the vehicle's first registration. The clear purpose of this measure was to eliminate any perceived advantage in disobeying the law.

The Applicant's Vehicle

8. The applicant acquired the vehicle in question, a Toyota Land Cruiser jeep, new and it was first registered to him on the 21st of February, 2000. It was tested from time to time thereafter although there were significant periods when it was "out of test". The last time the vehicle was tested prior to the commencement of the Regulations was on the 17th of February, 2012 when it was in fact 408 days unlawfully out of test. On that occasion, the applicant received a CRW for twelve months which expired on the 16th of February, 2013.

9. The applicant did not however present his vehicle for retest until the 15th of January, 2014 at which time it had been unlawfully without a CRW for some eleven months. The vehicle failed the test on the latter date and was represented on the 23rd of January, 2014 when it passed a retest.

10. On this occasion, the applicant was erroneously given a CRW valid to the 16th of February, 2014, a period of about three weeks, on the mistaken basis that the new certificate would commence on the anniversary of the last one rather than the anniversary of first registration. This error was subsequently corrected as clearly under the Regulations, the CRW should have expired on the 21st of February, 2014.

11. The applicant says that when he received this certificate, he assumed he had been given one for twelve months as before as he was unaware of the coming into force of the 2013 Regulations. In fact he says he only discovered the true position when he attempted to tax the vehicle in June, 2014 assuming himself to be in possession of a valid CRW. The local authority initially declined to issue the requisite tax disc on the basis that there was no valid CRW then extant. Thereafter, the applicant investigated the matter himself and entered into correspondence with the RSA commencing on the 17th of July, 2014 and ending on the 11th of September, 2014. In this correspondence, the applicant made clear that he was of the view that he was entitled to a CRW of twelve months duration commencing on the 23rd of January, 2014. He also made the case that on his interpretation of the Regulations, his test due date was in fact the 21st of February, 2014 being the first anniversary of the first test date following commencement of the Regulations. He therefore argued that he had in fact presented his vehicle early and as it was within one month of the test due date, he was in fact entitled to a CRW of thirteen months duration expiring on the 21st of February, 2015.

12. Matters rested there until the applicant again presented his vehicle for test on the 30th of January, 2015 when it failed. He represented it on the 20th of February, 2015 at which time it was 364 days unlawfully without a valid CRW.

13. The vehicle passed the test on the 20th of February, 2015 with the result that the applicant received a new CRW valid until the next test due date, one day later on the 21st of February, 2015. It is in respect of this latter certificate that the applicant brings these proceedings. On the 18th of May, 2015, the applicant applied for leave to seek judicial review and I directed that the within application be brought on notice to the respondents.

Submissions

14. The applicant, who appeared in person, submitted that because prior to the commencement of the Regulations, he had always received a CRW for twelve months and thus he had a legitimate expectation after the 25th of September, 2013 that he would also receive a twelve month CRW.

15. He further contended that his test due date subsequent to the commencement of the Regulations was in fact the 21st of February, 2014 and not the 21st of February, 2013 as contended by the RSA. He submits that the RSA's contention cannot be correct because it would give the Regulations retrospective effect. Accordingly, on his case, when the applicant presented his vehicle

for testing on the 23rd of January, 2014, he was not late as suggested by the RSA but in fact early. He argued that the requirement to have a commercial vehicle tested, even one that is not in use in a public place, is unconstitutional and the short dating of CRWs is unreasonable and discriminatory. He submitted that the Directive 2009/40/EC does not permit discrimination such that an individual can be awarded a CRW of shorter duration than other applicants in the same process. Further, it does not entitle the Member State to require a vehicle to be tested annually if not in use.

16. Ms. Phelan BL for the RSA submitted that the applicant's first test due date on the coming into force of the Regulations was in fact the 21st of February, 2013 being the latest anniversary following the expiry of the last CRW. This did not mean that the statutory instrument had retrospective effect but rather merely reset the test dates for the purposes of prospective testing after the commencement of the Regulations. If the applicant's contention were correct, it would mean that between the commencement of the Regulations on the 25th of September, 2013 and the 21st of February, 2014, the applicant was not required to have any CRW and was entitled to use his vehicle in a public place without one. There is no warrant in the Regulations or the governing Act for such an interpretation or the provision of some sort of "amnesty". Accordingly, there was no arguable case against the RSA on foot of which leave could be granted.

17. It was further contended that the proceedings were not within time as they had not been initiated within three months of the grounds for challenge first arising. Such grounds arose, on the applicant's case, in January, 2014 and the applicant was fully aware of the situation as evidenced by his own correspondence at the latest by July, 2014. Finally it was submitted that on discretionary grounds, the application should in any event be refused having regard to the significant periods of non compliance with the statutory regime by the applicant and further his failure to disclose in his *ex parte* application that his vehicle did not in fact have a CRW when initially presented for testing on the 23rd of January, 2014.

18. Mr. Leonard BL on behalf of the second and third respondents argued that those respondents had no role or involvement in the administration or operation of the commercial vehicle testing regime which is the subject matter of complaint by the applicant. The claim essentially related to the procedural implementation of the Regulations which in themselves enjoy a presumption of constitutionality and nothing had been advanced by the applicant to displace that presumption.

Discussion

19. The applicant's fundamental complaint appears to be that notwithstanding the coming into force of the Regulations, he ought to have been entitled on presenting his vehicle for testing and passing that test to a CRW of at least twelve months duration. However, that complaint, valid or otherwise, was available to the applicant since the 23rd of January, 2014 when he received a CRW with a duration of approximately three weeks. Even if he was not actually aware at that time of the passage of the Regulations, and of course ignorance of the law cannot avail the applicant, nonetheless he was certainly fully aware of the position by July, 2014 at the latest. All of the arguments that the applicant advances in relation to the grant of the CRW on the 20th of February, 2015 were equally available to him in respect of the CRW in 2014. In *Shell E & P Ireland Ltd v. Philip McGrath & Ors* [2013] IESC 1, the Supreme Court held that the time limits contained in Order 84 of the Rules of the Superior Courts 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. No discretion arises in circumstances such as here, where there is no application for an extension of time and even if there were, no obvious grounds for granting such an extension arise. Therefore, despite the fact that the applicant's claim ostensibly relates to the 2015 CRW, the gravamen of his case long predates that and the grounds for this challenge first arose long before three months prior to the leave application. Were it otherwise, the applicant would be able to litigate his claim in virtual perpetuity every time he presents his vehicle for testing.

20. It seems to me that that determination disposes of the matter and it is accordingly unnecessary to consider the substantive merits – see *MP v. DPP* [2015] IEHC 40.

21. In any event, it seems to me that the applicant is simply wrong in his interpretation of the Regulations. It cannot have been the intention of the legislating authority in making these Regulations to in effect provide for a period of time when there would be no requirement to have a CRW for a commercial vehicle. Contrary to what the applicant contends, it seems to me that the Regulations have no retrospective effect. In the case of the applicant's vehicle, the only effect was to reset the test due date from the 17th of February, 2013 to the 21st of February, 2013 for the purposes of future tests subsequent to the commencement of the Regulations. That being so, there is no basis for impugning the constitutionality of these Regulations.

Conclusion

22. Accordingly it seems to me that the applicant has made out no arguable case in law that he is entitled to the relief which he seeks.

23. I will therefore refuse the application for leave herein.