

## THE HIGH COURT

[2016 No. 633 J.R.]

BETWEEN

MICHAEL DELANEY

APPLICANT

AND

REVENUE COMMISSIONERS, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

## JUDGMENT of Mr. Justice Binchy delivered on the 21st day of May, 2019

1. The applicant claims to have resided in the United Kingdom between 1st January, 2012, and 12th September, 2015. In February 2015, he purchased a Mercedes E350 for the sum of STG£37,207.40 which he imported into the State in September 2015. He then claimed relief from vehicle registration tax pursuant to Regulation 4 of the Vehicle Registration Tax (Permanent Reliefs) Regulations 1993, (S.I. No. 59/1993) (hereafter the "1993 Regulations"), on the basis that he was transferring his normal place of residence within the meaning of the 1993 Regulations, from the United Kingdom to the State, and otherwise met the requirements of Regulation 4. This application was refused by the first named respondent on 2nd December, 2015. The applicant was informed of his right to appeal that decision pursuant to s. 145 of the Finance Act 2001 (the "Act of 2001"). Section 147 of that Act requires a person exercising his right of appeal to pay any duty assessed by the first named respondent in the first instance. The applicant purported to exercise his right of appeal (albeit that he did so outside the time limit of 30 days provided for in the Act of 2001), but then failed to prosecute that appeal by lodging the amount of duty payable.

2. On 29th July, 2016, the applicant made an application by way of application for judicial review seeking various reliefs against the respondents arising out of the decision of 2nd December, 2015. The applicant was on that date given leave by this Court (Humphreys J.) to amend the statement of grounds and thereafter, to seek application by way of judicial review for the following reliefs, as set forth in para. (d) of the amended statement of grounds:-

(i) An order of *mandamus* directing the respondents to "import into the Republic of Ireland motor vehicle bearing registered letters and numbers LP64 ZTD, a vehicle exempt from payment of VRT (Vehicle Registration Tax) under the mechanism provided for by statute and, by reason of the fact that the applicant is an exempted person under and in accordance with applicable legislation having resided out of this jurisdiction for a period sufficient for him to acquire the status as an exempted person..."

(ii) A declaration that the requirement to pay the VRT assessed by the first named respondent pending an appeal, is not in accordance with law and offends "the well established principle that prosecution of an appeal preserves the status quo pending the determination of that appeal".

(iii) A declaration that unspecified provisions of legislation, that permit the first named respondent, in the event that the applicant is successful with his appeal, to set off any amount repayable to the applicant in respect of other tax liabilities due by the applicant to the first named respondent are "without foundation in law, bereft of legality and unconstitutional".

(iv) Similar relief is again claimed in para. 7 of the amended statement of grounds, in which it is also claimed that unspecified provisions relating to the manner in which VRT is calculated and the appeal provisions relating to same, as well as the possibility of the set off of other tax liabilities against any liability to refund VRT, are also contrary to the European Convention on Human Rights (Articles 1, 13, 17 and 18).

(v) A declaration by way of application for judicial review that the provisions of ss. 145 and 146, of the Act of 2001 are repugnant to the Constitution on the grounds that the manner in which they are applied by the respondents is such as to deny appellants such as the applicant herein the right to be tried in accordance with law, as well as his right to defend himself against any charges that may be laid against him, contrary to Articles 38.1, 40.3 and 40.3.2 of Bunreacht na hÉireann.

3. The proceedings are grounded upon an affidavit sworn by the applicant on 29th July, 2016. In this affidavit, he explains how he left the country on 1st January, 2012, for economic reasons. He explains that by reason of his qualifications and experience in the field of tunnel boring, he was able to procure work in the United Kingdom that had become unavailable in this country. He resided in a number of different addresses in the United Kingdom during this period. However, he avers that his residence was, at all times, during this period in the United Kingdom and that his clear intention when he left Ireland was that he was "gone for good", not because he wanted this but because it was forced upon him by economic circumstances.

4. He avers that in April, 2014, his partner, who had continued to reside in Ireland, experienced a significant health scare and that with the assistance of his then employer he was permitted to return to this country to assist her. While here during that period, he managed to get a job and he avers that the first named respondent was informed that he was taking up temporary employment while his partner recovered from her illness. He refers to that employment as being with Loughran's Stores, Clermont Park, Haggardstown, Dundalk. When his partner recovered, he then returned to the United Kingdom.

5. He further avers that he returned to this country on a permanent basis in late 2015, having previously purchased the vehicle the subject of these proceedings on 24th February, 2015, he was of the opinion that having resided outside of this jurisdiction for several years, he would be entitled to import the vehicle without any liability to VRT. To this end, he completed the necessary forms and submitted them to the first named respondent.

6. He refers to the decision of the first named respondent of 2nd December, 2015 refusing him this application, and to another letter received from the same official of the Revenue Commissioners, (a Ms. Martine Mockler), dated 7th December, 2015, in which she stated that a decision on his application would be made shortly. He avers that he was confused by this correspondence, and engaged the services of a solicitor who then entered into correspondence on his behalf with the first named respondent on 24th December, 2015. As regards the issue of an appeal from the decision of the first named respondent refusing the relief claimed, he says that he

"was not in a position to prosecute an appeal, and "nor is any applicant" (by which he means an appellant), until such time as the full amount of VRT has been paid. While this is somewhat unclear, the applicant does not appear to be suggesting that he was not able to afford to pay the VRT for the purposes of an appeal. If that was what he intended to say, he would hardly have used the words "nor is any applicant", and would surely have averred in clear language that he did not have funds available to pay the VRT pending his appeal. In any case, the applicant did not claim, either in this affidavit or in a supplementary affidavit sworn by him in these proceedings, that he could not afford to pay the VRT pending an appeal. Nor was any argument to this effect made on his behalf at the hearing of these proceedings.

7. The applicant then goes on to complain about unspecified provisions in legislation which permit the first named respondent to set off other tax liabilities of a taxpayer against any entitlement to a refund of VRT. He does not aver that this has any specific relevance to him but merely expresses this as a fear or a concern. He further expresses the concern that these provisions of legislation could well give rise to a full revenue audit of his affairs in the event that he is successful with his appeal and establishes an entitlement to a refund of VRT.

#### **Legislative Provisions for Relief**

8. Section 134 of the Finance Act 1992, provides that a vehicle may be registered without payment of VRT if the vehicle is:-

"the personal property of a private individual and is being brought permanently into the State by the individual when he is transferring his normal residence from a place outside the State to a place in the State."

9. The 1993 Regulations make provision to claim relief from liability to VRT. Regulation 4(1) thereof provides:-

"Subject to paragraph (5), the relief under section 134(1)(a) of the Act shall be granted for any vehicle—

(a) which is the personal property of an individual transferring his normal residence to the State and which has been in the possession of and used by him outside the State for a period of at least six months before the date on which he ceases to have his normal residence outside the State."

10. "Normal residence" is defined in the Regulations as meaning the place:-

"...where a person usually lives, that is to say, where he lives for at least 185 days in each year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties.

However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in 2 or more countries shall be regarded as being the place of his personal ties"

#### **The Application for Relief**

11. In order to claim the relief it is necessary, *inter alia*, to complete a form known as a Form VRT TOR. The applicant submitted a completed form which, although dated 2nd September, 2015, was received by Revenue on 28th September, 2015 (the "Form"). The Form disclosed that the applicant had purchased the vehicle on 2nd March, 2015, for STG£37,207.40 and intended to bring the vehicle into the State on 18th September, 2015. According to the submissions of the respondent, based upon the value of the vehicle, VRT in the sum of €12,200 was payable in the absence of any exemption.

12. Question 1(j) of the Form asks if the applicant had any income arising in Ireland prior to the date of taking up residence. To this he replied "yes – more than three years ago". It subsequently transpired that this was incorrect. On 18th April, 2014, the applicant submitted to the first named respondent a form 12A being an application for a certificate of tax credits and standard rate cut off point, in which he indicated that he was employed as a manager of a store in Haggardstown, Dundalk. This form stated that he was in full time employment at the store. In his grounding affidavit, the applicant addresses this stating, at para. 4 thereof:-

"My clear intention when I left Ireland was that I was gone for good, not because I wanted to but rather, because I had to. There is one brief exception however to this which was that in April 2014, my partner, who continued to reside in Ireland, experienced a significant health scare involving lumps on her breast. With the assistance of my then employer I was released to attend to her and to care for her, as any man would do. Being the kind of person I am and the need to be busy I managed to get a job here whilst I looked after my partner and in this regard, the Revenue Commissioners were accordingly notified by means of a Form 12A that I was taking up what was temporary employment whilst here in Loughran's Stores, Clermont Park, Haggardstown, Dundalk. When my partner recovered from her illness I immediately returned to the United Kingdom where I began working as a consultant in the industry to which I have previously referred."

13. There was a further inaccuracy in the manner in which the applicant completed the Form. He stated that the address of his closest relative is that of his mother, although the Form itself asks for details in the following terms: address of closest relative (*i.e.* spouse, partner *etc.*). The applicant did not disclose that he is actually married and has two children.

14. Furthermore, when asked to state his current address in September 2015, having then returned to the State, the applicant replied that he was renting accommodation in his mother's home, when in fact at the time he was living at another address with his wife and children. When asked the reason for the transfer of his residence into the State, the applicant advised that it was in order to "take up new employment in Ireland and to be close to my aging mother" and made no reference at all to his wife and children.

15. The first named respondent relies on these matters as evidence of a lack of candour on the part of the applicant in bringing these proceedings, as well as an indicator that the applicant brought his application for relief in the first place on a misleading basis. The respondent denies these allegations. In the context of his application for relief, he avers that when completing the Form, he made no reference to his spouse because he did not consider that information concerning his spouse had any relevance to the application he was making. He acknowledges that he did make an error in failing to disclose the fact that he had returned to Ireland for a period in 2014, for the reasons mentioned above.

16. Following upon the submission of the Form, there was correspondence between the applicant and the first named respondent of the kind that one would expect from such an application, whereby the first named respondent raised queries and sought supporting documentation in connection with the application. The application at the time was dealt with by Ms. Mockler, who issued the decision

of 2nd December, 2015. In this decision, she stated simply: "I regret to inform you that your application has been unsuccessful as the documentation submitted with your application is not sufficient to grant you relief under the Transfer of Residence Regulations". She then went on to advise the applicant that he was obliged following upon that decision to register the vehicle immediately or to have it exported from the State. She also advised him of his right to appeal the decision, and further advised him that if he wished to do so, it would be necessary for him in the first place to have the vehicle registered and to discharge the appropriate amount of VRT.

17. While it is correct, as claimed by the applicant, that he received a further email from Ms. Mockler dated 7th December, 2015, in which she stated that a decision would be made shortly and that he would receive the outcome in the post, Ms. Mockler explains in an affidavit sworn by her in these proceedings that that email was sent by her in error in response to another email received from the applicant. In any case, nothing at all turns on the issue of the email of 7th December, 2015, by Ms. Mockler. Following upon notification that his application had been unsuccessful, the applicant instructed his solicitors in the matter who commenced correspondence with the first named respondent on 24th December, 2015, and requested the reasons for the refusal of the application. This gave rise to a reply from a different official of the first named respondent, a Ms. Helen Keelty, who, by letter of 20th January, 2016, explained in some detail the reasons why the application for exemption from VRT had been refused. In one sentence, this may be stated to be that the applicant had failed to satisfy the first named respondent that at the time the vehicle was brought into the State, his "normal residence", as defined in the 1993 Regulations, was outside the State. The letter gave detailed reasons for this conclusion.

18. Although the first named respondent had already given its decision on 2nd December, 2015, Ms. Keelty nonetheless sought clarification on five issues raised by her in this letter. She also advised the solicitors for the applicant (in response to their request to do so) of the applicable appeal procedure.

19. The solicitors for the applicant responded to Ms. Keelty's letter by a letter of 22nd February, 2016, whereby they provided Ms. Keelty with additional documentation regarding the applicant's work in England, including payslips and tax returns. They also responded to the queries raised by Ms. Keelty.

20. Ms. Keelty then replied by letter of 29th February, 2016, in which she stated that she had reviewed the applicant's application taking into consideration the response of his solicitors to the points of clarification sought. So, therefore, while Ms. Keelty was not conducting a formal appeal of the decision to refuse the relief of 2nd December, 2015, it is clear that in an effort to be helpful, she carried out a thorough review of the file and of the reasons for the decision of 2nd December, 2015, and sought further information and clarification of certain issues in the context of this review, presumably to the intent of making certain that the decision of 2nd December, 2015, was fair and correct. However, having reviewed all documentation and information available to her, Ms. Keelty arrived at the same decision stating that: "I regret to inform you that your client is ineligible to apply for exemption from Vehicle Registration Tax under the transfer of residence regime. Mr. Delaney's residence is deemed to be Ireland as his personal ties remained here."

21. She went on to advise the applicant that his vehicle must now be registered immediately or exported permanently from the State, and she concluded the letter by stating "if you wish to appeal this decision, please note that the vehicle must be registered and the appropriate taxes paid before an appeal will be accepted by this office".

22. The next development in the matter was on 21st April, 2016 when the applicant, through his solicitors, purported to appeal to the Tax Appeals Commission, the refusal from the exemption, but did not register the vehicle or discharge the VRT, as required by s. 147 of the Act of 2001, in order to prosecute his appeal. His appeal has not, therefore, progressed. However, in this form of appeal, the following are the grounds relied upon by the applicant in regard to the same:-

"The applicant claims that his normal residence was in the UK and had lived there from January 2012 to September 2015, save for a period between April 2014 and August 2014. He was out of the State for more than the required period of each of the relevant years and made tax returns in the UK. The grounds for his normal residency are based on personal ties. However, his occupational ties were in the UK where the vehicle in question was purchased. The decision to base this decision on personal ties is quite vague as it is a loose interpretation of the practicality of circumstances where the appellant was responsible for his tax affairs in the UK during this period and returning regularly to visit his family."

23. The wording of this appeal is of some interest because, while it is apparent from the decision of Ms. Keelty, referred to in para. 20 above, that the decision to refuse his application for relief from VRT was made because the first named respondent found that the applicant's personal ties remained in the State, it is unclear from the appeal filed on behalf of the applicant that if he disputes that finding.

24. The next development after the purported filing of his appeal, was the application on the part of the applicant for leave to bring these proceedings, which was brought on 29th July, 2016.

### **Decision**

25. Firstly, it is submitted on behalf of the respondent that these proceedings were issued outside the time limits prescribed by O. 84, r. 21(1) of the Rules of the Superior Courts. Order 84, rule 21(1) of the Rules of the Superior Courts requires an application for leave to apply for judicial review to be made within three months from the date when the grounds for the application first arose. Order 84, rule 21(3) makes provision for extension of this period where the court is satisfied that there is good and sufficient reason for doing so and where the circumstances that resulted in the failure to make the application for leave within the prescribed period were either outside the control of the applicant or could not reasonably have been anticipated by the applicant. Sub rule 5 requires an application for an extension of time within which to make an application for judicial review to be grounded upon an affidavit sworn by or on behalf of the applicant, setting out the reasons for the failure on the part of the applicant to make the application within the prescribed period.

26. Neither the statement of grounds nor the amended statement of grounds identify any particular date of the decision or other action sought to be impugned by the applicant in these proceedings. In para. E(iii) of the amended statement of grounds, there is reference to the decision of 2nd December, 2015, but only in the context that that decision was given while there was still ongoing correspondence with the applicant in the form of the email of 7th December, 2015, which stated that the matter was still being considered. As I mentioned above, the email of 7th December, 2015, was sent in error and there is no doubt at all that the applicant was aware that he had received an adverse decision on 2nd December, 2015, and he instructed his solicitors in connection with the matter soon thereafter, who raised queries in relation to the reasons for the decision.

27. It is the respondents' contention that, for the purposes of O. 84, r. 21, time began to run for the purpose of making an application for judicial review from 2nd December, 2015, or, at latest, from 29th February, 2016, when Ms. Keelty, having reviewed the matter in

the light of further information, again informed the applicant that he was deemed ineligible for the exemption from VRT. Even treating this latter date as being the date from which time began to run, it is clear that the application for judicial review was made well outside the prescribed time, as the time limit of three months expired on 29th May, 2016. Application for leave to bring these proceedings was not made for another two months.

28. No application was brought to extend the time as required by O. 84, r. 21(5). Nor was the matter addressed in the written submissions of the applicant and the only reference made to the issue on behalf of the applicant during the course of the hearing of these proceedings was to suggest that time had not begun to run because the applicant has an extant appeal.

29. There could hardly be a more clear example of proceedings which have been issued outside the time limit prescribed by O. 84 of the Rules of the Superior Courts. The fact that the applicant may have an extant appeal (disregarding that he has not complied with the requirement to pay the VRT and register the vehicle for the purposes of the appeal) is entirely irrelevant. The administrative action about which the applicant complains was taken on one of two dates, either 2nd December, 2015, or 29th February, 2016, and even giving the applicant the benefit of the latter date, application for leave to bring these proceedings should clearly have been made no later than 29th May, 2016. Having failed to do so, it was incumbent upon the applicant to bring a formal application to extend the time to make application for leave to bring these proceedings. Since he did not do so, and since no reason at all has been proffered on behalf of the applicant for his failure to bring these proceedings within the time stipulated by the rules, it follows that this Court has little choice but to dismiss these proceedings on the grounds that they were issued outside the prescribed time.

30. Furthermore, it is clear that these proceedings should be dismissed for substantive reasons. While, in his statement of grounds, the applicant alleges that the first named respondent failed to apply the rules relative to the transfer of residence in an appropriate or lawful fashion, and failed to take into account all relevant material in arriving at its decision, no particulars of these allegations were advanced. It is clear that the applicant is aggrieved at the decision of the first named respondent, and has a different view as to whether or not he meets the transfer of residence requirements, but that is not a ground for judicial review. That is a matter to be addressed by way of appeal. To the extent that the applicant makes any complaint at all as regards the manner in which his application was processed by the first named respondent, such complaint is so general and vague as to be hopelessly inadequate for the purposes of advancing an application by way of judicial review. Furthermore, as I mentioned above, in the appeal that he has filed with the Tax Appeals Commission, the grounds of his appeal are also unclear, particularly as regards the critical issue as to where his personal ties lay during the period he was working outside the State.

31. One thing that is clear is that the submissions made by the applicant were fully and fairly addressed and considered by the first named respondent. There were inconsistencies and deficiencies in the application as originally submitted by the applicant, and he was given an opportunity to address the same. In fact, it seems to me that the first named respondent went further than it might be obliged to do insofar as Ms. Keelty reconsidered the entire application, asked the applicant for further information and then made a fresh decision (albeit to the same effect) in the light of that information. Arguably, the first named respondent obtained the benefit of an informal appeal process not provided for in regulation or statute but in respect of which the first named respondent should be commended for its consideration shown to the applicant.

32. The applicant has a grievance with the appeal procedure, providing, as it does, that duty must be paid before the appeal may be determined. This is an express requirement of s. 147 of the Act of 2001 and applies not just to VRT, but to any of the matters referred to in s. 145(3) of the Act of 2001. In his proceedings, the applicant asserted that the requirement to pay the VRT before the determination of the applicant's appeal is unconstitutional, but that claim was not pursued at the hearing of these proceedings. Nor was the argument that there is a general principle that appeals preserve the status quo pending their determination. In any case, all of these arguments are something of a red herring, because they do not address the substantive issue i.e. the decision of the first named respondent to refuse the applicant the relief claimed.

33. The availability of an appeal is, of course, relevant to another point made on behalf of the respondents which is that the appeal is an alternative remedy which the applicant should have exercised before bringing forward proceedings by way of judicial review. The applicant did not claim and nor was it argued on his behalf that he was unable to afford the payment of the duty in order to be able to exercise his right of appeal. Insofar as the central issue between parties is whether or not the applicant meets the requirements to claim the relief, there can hardly be any doubt that that is an issue that requires determination by the first named respondent or the Appeal Commissioners in accordance with the provisions of the legislation, and not by this Court. The applicant seems to be of the opinion that simply because he may meet one requirement of the legislation – the requirement to live more than half of the year outside the State – he must be entitled to relief. But the requirement to establish normal residency outside the State is more complex. In any case, the applicant had an alternative remedy to address this issue which he should have pursued before coming to court.

34. Somewhat bizarrely, the applicant has also purported in these proceedings to challenge the provisions of legislation conferring upon the first named respondent the entitlement to set off any liability to the applicant (in the event of a successful appeal), any other tax liabilities which the applicant may have to the first named respondent. The reference to these procedures appears in standard form appeal documentation furnished to the applicant. The applicant seeks to characterise this as a kind of set-up designed to ensure that even if he succeeds with his appeal, having paid the duty, it will not be refunded to him and furthermore, that he is likely to be subjected to a revenue audit as a result of these procedures. These are bizarre claims that are not in any way substantiated and have no relevance at all to the matters at issue in the proceedings. To the extent that the applicant has made any case at all that these provisions (which, while not specified by the applicant, are to be found at Section 960H of the Taxes Consolidation Act, 1997) are unconstitutional or contrary to the European Convention on Human Rights, such a claim must be firmly rejected.

35. For all of these reasons, these proceedings must be dismissed.