

THE HIGH COURT

[2004 No. 1954 SS]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL) PROVISIONS ACT 1961
AND IN THE MATTER OF PROCEEDINGS

BETWEEN

KARL O'DONOVAN

APPELLANT

AND

THE CHIEF SUPERINTENDENT OF AN GARDA SÍOCHÁNA
ANGLESEA ST. CORK

RESPONDENT

JUDGMENT of Quirke J. delivered on the 10th day of February, 2005.

This is a case stated by Judge David Riordan, a judge of the District Court, District no. 19 (being the District Court area of Cork City) pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act 1961, for the opinion of this court on a question of law which arose in the course of proceedings before the District Court.

FACTUAL BACKGROUND

The following facts are relevant to these proceedings.

1. The appellant, who is a 33 year old unemployed man applied to the respondent for a small public service vehicle licence (hereafter called a PSV licence) on 7th December, 2001.
2. The respondent lawfully referred the application to his nominee Sergeant Liam Maloney, for a decision.
3. On 16th October, 2002, Sergeant Maloney advised the appellant that his application could not be recommended to the respondent for approval on the following grounds:
 - (a) because of an alleged failure to disclose a previous conviction for larceny,
 - (b) because the appellant was a recipient of disability allowance,
 - (c) because the appellant was awaiting the outcome of a claim for damages for personal injuries resulting from a road traffic accident,
 - (d) because in the absence of medical evidence, Sergeant Maloney had formed the opinion that the appellant was not medically fit to hold a PSV licence.It was indicated that the appellant could renew his application when his circumstances had changed.
4. On 28th May, 2003, the appellant was advised by Sergeant Maloney that although his personal injuries action had been resolved, his application would not be considered until such time as he was no longer in receipt of disability allowance and was deemed medically fit to lift luggage and to assist disabled passengers who might be confined to wheelchairs.
5. By letter dated 5th April, 2004, the appellant's legal advisors wrote to Sergeant Maloney advising him:
 - (a) that the appellant had not failed to disclose the previous conviction because of the application of the Probation of Offenders Act, 1907 in respect of the conviction (some 20 years earlier) and
 - (b) enclosing a report from a Dr. Tom Cahill certifying *inter alia* that the appellant is not suffering "...any physical disablement which is likely to affect...(his)...ability to drive safely".
6. By letter dated 12th April, 2004, Sergeant Maloney replied indicating *inter alia* that:

"...the medical report for driver's licensing purposes would not suffice for an application for a PSV drivers licence and a medical certificate would have to be forwarded stating that the applicant would be fit and able to lift luggage, loading and unloading etc. and is generally fit to work as a Taxi/Hackney driver."
7. After an exchange of correspondence between the appellant's solicitors and Sergeant Maloney, the latter, by letter dated 18th May, 2004, formally rejected the appellant's application.
8. The Notice of Refusal which was furnished to the appellant indicated that the respondent was satisfied that the appellant was not:

"a fit and proper person.. within the meaning of the said regulations because you declared in your application that you are in receipt of disability allowance for a back injury which you sustained as a result of an accident at your place of work. You also recently declared that you are still in receipt of this allowance. I am of the opinion that because of your injury you could not discharge your duties as required under Article Act. 52 (4) (b) of the Road Traffic (P.S.V.) Regulations part IV 1963 that is to comply with every reasonable request/requirement of any person hiring or being conveyed in a Public Hire Vehicle."
9. Having submitted a further letter to Sergeant Maloney without response, the appellant's solicitors, pursuant to the provisions of article 37 of the 1963 Regulations, lodged a formal appeal to the District Court against the decisions of the respondent.

10. The appeal came before Judge Riordan in the District Court in Cork on 8th June, 2004.

Having heard the testimony from both the appellant and Sergeant Maloney the matter was adjourned to the 13th July, 2004, to enable the appellant to submit a medical report.

11. On 13th July, 2004, that report was available to the Court. The report indicated that it was the opinion of Dr. Cahill, (the appellant's medical practitioner) that although the appellant had made a satisfactory recovery from his injuries, he was incapable of working for periods in excess of 20 hours each week.

12. The respondent, who had received a copy of the relevant medical report prior to the hearing on 13th July, 2004, renewed his objection to the grant of a PSV licence to the appellant.

He made submissions to the court to the effect that the award of a licence in such circumstances would be contrary to "*public policy*" since it would compromise the right of the general public to enjoy the benefits of full-time service. He said that this was so because the applicant was unfit to work for a period in excess of twenty hours each week.

13. The learned district judge has, in the light of the foregoing, directed the following question to this court for determination:

"...is it lawful to grant a public service vehicle licence to an individual who is in receipt of disability allowance from the Department of Social and Family Affairs when, according to the medical evidence adduced, he cannot work in excess of twenty hours a week and consequently the public would be deprived of the benefit of a full time and comprehensive service."

THE LAW

Article 34 (3) of the Road Traffic (Public Service Vehicle) Regulations, 1963 provides as follows:

"where an application for the grant of a licence to drive small public service vehicles is duly made, the commissioner shall grant the licence if he is satisfied that the applicant –

(a) is a fit and proper person to hold a licence to drive small public service vehicles;

(b) has an adequate knowledge of

(i) general traffic regulations,

(ii) the area in which he proposes normally to make his services available as a driver of small public service vehicles and of local traffic and parking regulations applying to that area,

(iii) regulations relating to the small public service vehicles

.....

(d) has not been convicted of an offence which, in the opinion of the Commissioner, would render him unsuitable to hold a licence to drive small public service vehicles;

(e) in the case of the applicant who is not the holder of a valid subsisting licence to drive small public service vehicles, holds, at the time of the application a driving licence without endorsement."

Article 37 of the 1963 Regulations provides as follows:

"37.(1) Whenever the Commissioner or authorised officer refuses an application for the grant of a licence to drive small public service vehicles or whenever the Commissioner revokes such a licence, the applicant or person whose licence is revoked may appeal against such refusal or revocation to the Justice of the District Court having jurisdiction in the place in which such applicant or person ordinarily resides.

(2) On the hearing of an appeal under this article, the Justice may either confirm the refusal or revocation or direct the Commissioner or authorised officer to grant the licence or to annul the revocation.

(3) The Justice shall cause notice of his decision on an appeal under this article to be given to the Commissioner or authorised officer, who shall comply with any direction given under this article."

Article 52 of the 1963 Regulations imposes an obligation upon the holders of PSV licences to comply with the reasonable requirements of would-be passengers to convey those passengers to their preferred destination and to comply with their reasonable requirements (subject to a corresponding obligation upon the passengers to tender the lawful fare for conveyance).

Paragraphs (g) and (j) of article 52 (4) of the 1963 Regulations imposes requirements upon the holders of PSV licences to:

"(g) ...take all reasonable precautions to ensure the safety of person in, on, entering or alighting from the vehicle (and) ...

(j) ... when requested by a person who has hired the vehicle, afford reasonable assistance in loading and unloading luggage and in removing luggage to or from the entrance of any house, station or place at which he takes up or sets down such person."

THE ISSUE

On behalf of the appellant it is contended that the question posed by the learned District Judge should be answered in the affirmative. In support of that contention it is argued that a negative answer would comprise an unwarranted interference with a constitutionally protected right vested in the appellant to earn a living from the lawful vocation, trade, business or profession of his choosing.

Furthermore, it is argued that the respondent is estopped from introducing public policy as a ground for objecting to the grant of a licence at the hearing of the appeal since it was not a ground upon which the respondent refused to grant the licence and no evidence was adduced on behalf of the respondent in support of the contention that the service to be offered by the appellant to the public will be unsatisfactory or insufficient in the circumstances.

On behalf of the respondent it is contended that the constitutional right to earn a living is not an absolute right but may be legitimately (and is in this case) qualified in the public interest. It is argued that the legislature has legitimately qualified the right of the holders of PSV licences to earn a living by the enactment of the 1963 Regulations. It is contended that that legislation was enacted in the interests of the common good and is accordingly, valid and lawful. Furthermore it is contended that the appellant's physical incapacity is such that he is incapable of providing the public with the service which is required by the provisions of article 52 (4) and that accordingly the grant of a licence would in the circumstances be unlawful.

DECISION

In this case, the question posed by the learned District Judge goes to the jurisdiction vested in the respondent to grant PSV licences pursuant to the provisions of the 1963 regulations (and to the jurisdiction of the District Court on appeal pursuant to article 37 of those Regulations).

I am satisfied that the right conferred pursuant to the provisions of Article 40.3 and 45.2 to earn a livelihood may be qualified for bona fide social policy considerations in the interests of the common good – see *Hand v. Dublin Corporation* [1991] 1 I.R. 409 and *Attorney General v. Paperlink Ltd.* [1984] I.L.R.M. 373.

If the right contended for were absolute than the relevant provisions of 1963 regulations might well be challenged on the grounds of constitutional invalidity. For proper and valid reasons no such challenge has been made in these proceedings.

It follows that the regulations are valid, lawful and of full force and effect. Article 34(3) of the Regulations of 1963 confers jurisdiction upon the respondent (and upon the District Court on appeal) to grant and, where appropriate, to revoke PSV licences.

The jurisdiction conferred upon the respondent (and upon the District Court on appeal) is discretionary in nature. The discretion must, of course, be exercised judicially.

Article 34 (3) of the Regulations also provides that the respondent (and the District Court on appeal) must, before granting a PSV licence first be satisfied, on the evidence, that the applicant;

- (a) is a fit and proper person to hold such a licence,
- (b) has an adequate knowledge of
 - (i) general traffic regulations,
 - (ii) the area in which he proposes normally to make his services available as a driver of small public service vehicles and of local traffic and parking regulations applying to that area,
- (iii) regulations relating to small public service vehicles...
 - (c) have not been convicted of an offence which would render him unsuitable to hold a licence to drive small public service vehicles, and
 - (e) in the case of an applicant who is not the holder of a valid subsisting licence to drive small public service vehicles, holds at the time of the application a driving licence without endorsement.

Satisfaction in respect of each of these issues will be questions of fact for the determination of the respondent (and the District Court on appeal).

In the instant case, it has not been contended on behalf of the commissioner that the appellant does not comply with the provisions of subparagraphs (b) (c) and (e) of article 34 (3) of the 1963 Regulations.

Accordingly if the commissioner (or the District Court on appeal) is satisfied that the appellant;

- (a) is a fit and proper person to hold a PSV licence and
- (b) has not been convicted of an offence which, in the opinion of the Commissioner or (courts) would render him unsuitable to hold a PSV licence then the Commissioner (or the District Court on appeal) should grant the licence to the appellant.

As I have already indicated the questions whether the appellant, (a) is a “*fit and proper person...*” to hold a PSV licence and, (b) “*... has not been convicted of an offence which, ... would render him unsuitable ...*” to hold a PSV licence are questions of fact for determination by the Commissioner (and the District Court on appeal) subject to the exercise of judicial discretion in each case.

Reference has been made to the provisions of paragraphs (d) and (j) of article 52 (4) of the 1963 Regulations and to the requirements imposed upon the holders of PSV licences by those sub-articles. The obligations imposed by those subparagraphs are valid factors which may be taken into account by the commissioner (and by the District Court on appeal) in the exercise by the commissioner (and by the District Court on appeal) of the discretion vested in them to grant or refuse applications (such as the appellant's) for PSV licences.

It follows that in the instant case, the decision whether to grant or refuse a PSV licence to the appellant is a matter within the jurisdiction of the learned District Judge exercising his discretion as outlined above.

If the learned District Judge, having considered the evidence adduced and having taken into account such factors as he deems relevant (including, if appropriate, the provisions of paragraphs (d) and (j) of article 52 (4) of the Regulations of 1963) is satisfied that the appellant is a fit and proper person to hold a PSV licence and otherwise complies with the

provisions of article 34 (3) of the Regulations of 1963 then the obligation to grant the licence is mandatory. It follows that, subject to what is outlined above, the question posed by the learned District Judge should be answered in the affirmative.