**THE HIGH COURT**

**[No. 2015 No. 4715 P]**

**BETWEEN**

**FERGAL O'CONNELL**

**PLAINTIFF**

**AND**

**SOLAS**

**DEFENDANT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 24th day of April, 2017**

1. The plaintiff has provided drilling and blasting services to contractors engaged in construction and quarrying in Ireland and the U.K. over the past twenty years.

2. Prior to 2008, there was no statutory requirement for persons engaged in such activities, referred to as "*shotfiring*", to be in possession of particular qualifications. A requirement to hold a registration card in order to engage in shotfiring was introduced by the Safety, Health and Welfare at Work (Quarries) Regulations 2008, and also included in the Safety, Health and Welfare at Work (Construction) Regulations 2013.

3. Reg. 2(3) of the 2008 regulations and reg. 2(4) of the 2013 regulations require the defendant, a statutory agency in succession to FÁS (by virtue of the Further Education and Training Act 2013), to issue registration cards in compliance with Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

4. Schedule 1 to the 2008 regulations and sch. 1 to the 2013 regulations specify what are called the "*requirement*" (singular) for the grant of registration cards, which amount to possession of the appropriate FETAC awards (now QQI awards under the Qualifications and Quality Assurance (Education and Training) Act 2012) or corresponding awards from another Member State. Such FETAC awards are granted on "*completion*" of training as set out in each schedule. Para. 1(1) of sch. 1 to the 2008 regulations therefore simply says that "[*t]he requirement for the issue of a FETAC award under the Quarries Skills Certification Scheme … is successful completion of training under the Scheme in any of the following tasks: … (n) shotfiring …*".

5. It is not in dispute, and is clearly apparent from correspondence issued by the defendant, that the plaintiff has indeed completed the appropriate training, obtained the appropriate FETAC awards and was then issued with registration cards under the 2008 and 2013 regulations having completed the sole "requirement" in that regard. While of course under s.18(a) of the Interpretation Act 2005, singular includes plural and vice versa, that section cannot apply where the context otherwise requires, as such an approach would remove the entitlement of the legislature to refer meaningfully to singular or plural quantities at all. The context does not favour such an interpretation here. There is only one requirement specified in sch. 1. Reading "*requirement*" as "*requirements*" is nonsensical where only one requirement is expressed.

6. It was further conceded by Mr. Remy Farrell S.C. (with Mr. Ronan Kennedy B.L.) in the course of an able submission for the defendant, that the FETAC awards obtained by the plaintiff were not time-limited.

7. However, the registration cards issued to the plaintiff are limited in time to a five-year period. The defendant originally intimated that the requirements for on-site practical assessment would be put in place prior to the renewal of the registration cards. But, on 17th January, 2017, just before the hearing date of 19th January, 2017, the defendants adopted a revised policy whereby a card holder would have to self-certify that he or she had the appropriate experience to renew the card, in particular that he or she had engaged in at least six blasting operations within the previous two years. The defendant would then audit such self-certifications. A card-holder who is not able to meet the experience requirement as laid down by the defendant would be required to be reassessed.

8. I heard oral evidence from the plaintiff, who accepted that when his cards were scheduled to fall for renewal in March, 2017 and August, 2018, he will likely be in a position to self-certify under the requirements as they now stand. However, he objected to being required to so self-certify as to his experience for the purposes of renewing the card, and essentially contended that the card was an acknowledgement of a qualification rather than a mechanism for ongoing supervision of the competence of the card holder.

9. The plaintiff previously unsuccessfully brought judicial review proceedings against the defendant's predecessor agency (*O'Connell v. FÁS* [2013] IEHC 181) complaining about the practice whereby shotfiring supervision was carried out by persons without registration cards. The matters at stake in these proceedings were not issues in the previous application.

**Relief sought**

10. The statement of claim seeks thirteen separate reliefs, but these boil down to two quite net issues. The damages claim was withdrawn. The request for injunctive relief was essentially interlocutory and is not necessary given that I am now dealing with the substantive issue. That leaves a claim for five different declarations in relation to the plaintiff's entitlement to a continuing registration card. That asserted entitlement rests essentially on two propositions; firstly, that the defendant does not have an entitlement to place a restriction on the duration of the card by reference to a period of time and secondly, that the defendant does not have the entitlement to require the plaintiff to "undergo re-assessment in order to retain the benefit of his QSCS and/or CSCS card/s".

**Does SOLAS have an entitlement to limit the duration of registration cards?**

11. Mr. Paul McGarry S.C. (with Mr. Simon Kearns B.L.) submits that there is no provision in the 2008 or 2013 regulations to limit the duration of the registration card. However reg. 2(3) of the 2008 regulations and reg. 2(4) of the 2013 regulations provide that the card must include photographic identification. It is inherent and implied in such a requirement that the photograph must be of reasonably contemporary vintage. The theme of the person whose idea of a picture of themselves is of one from the distant past is familiar in literature (for a recent example see Irvin D. Yalom, *Creatures of a Day* (London, 2015) Ch. 3). By way of *reductio ad absurdum*, a person asked for a photograph of themselves for official purposes does not comply with that requirement by producing a photograph of themselves as a baby.

12. The requirement for photographic identification means that it is inherent in the regulations that the defendant is entitled to limit

the duration of a particular registration card by reference to a reasonable period to ensure that any photograph is reasonably current. That does not mean that the defendant is at large in relation to refusing to renew a card on its expiry once an updated photograph is provided. That is the issue to which I now turn.

**Is SOLAS entitled to impose a requirement as to self-assessment or re-assessment on renewal of a registration card?**
13. Mr. Farrell contends that the object and purpose of the Safety, Health and Welfare at Work Acts 1989 and 2005, and the 2008 and 2013 regulations, is the protection of occupational health and safety, and therefore the defendant should be taken to have an implied power to impose requirements such as ongoing experience and competence, as well as auditing and assessment requirements.

14. At the general level I would endorse the view that legal instruments including statutes and regulations must be read with their object, intention and purpose to the forefront. Mr. Farrell's argument therefore sounds plausible except for the minor difficulty that the manner in which such high-level objectives translate into the issue of jurisdiction to assess holders of registration cards is far from clear and laden with policy choices. The determination of the requirements of occupational health and safety, and the more pertinent issue of what precise entity is to enforce those requirements, are matters of legislative and ministerial policy, and not ones where I can manufacture policy on the hoof. For the court to give effect to the defendant's argument would be to read into the legislation not simply corrections or clarifications, but active policy choices which are not there (see by analogy comments of Clarke J. in *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27 paras. 3.9 and 3.10). The regulations are made by the Minister, and not by SOLAS; and thus the adoption by SOLAS of its own policy does not create a bootstrapping jurisdiction to, in effect, amend or add to the regulations. If SOLAS has jurisdiction to impose additional requirements above and beyond the sole requirement expressly specified in the Minister's regulations, that jurisdiction must be found within the legislation and regulations. This is not a case where an instrument has ambiguous meaning, and where the court should naturally favour an interpretation that would uphold the legislative intent over one that would not. This is a case where there is no real ambiguity in the regulations, which not only do not provide a jurisdiction for what the defendant is attempting to do but on their face provide for the opposite – namely that registration is to be afforded to persons such as the plaintiff who satisfy the sole "requirement" for that end. In such a context, a bare appeal to high-level, abstract legislative purposes is little more than a forensic flight by the seat of one's pants.

15. Furthermore, such an argument is premised on the assumption that there is one and only one legislative purpose – namely the promotion of safety. That is clearly incorrect. Regulation 2(3) of the 2008 regulations and reg. 2(4) of the 2013 regulations make clear that the implementation of free movement is a key legislative purpose; a process which is basically predicated on a once-off recognition of acquired qualifications and not on ongoing, on-the-job, assessment. As Scalia J. (diss.) put it in *King v. Burwell* 576 U.S. __ (2015) (slip op., p. 15), "*it is no more appropriate to consider one of a statute's purposes in isolation than it is to consider one of its words that way*".

16. The regulations imply a clear separation between the possession of a registration card and actual competence on the job. Thus, reg. 13 of the 2008 regulations distinguishes between requirements for an operator to employ a person engaged in shotfiring who has a registration card (subpara. (c)), and the separate but equally binding requirement that such a person must be "*competent*" (subpara. (b)).

17. Just because it is important that persons such as a plaintiff engaged in shotfiring are actually experienced and competent does not mean that it is up to this particular defendant to enforce that requirement. That is one fallacy of Mr. Farrell's "*legislative policy*" argument. Enforcement of the regulations is primarily a matter for the Health and Safety Authority. It would perhaps (without so deciding) be open to that authority to take a view that a certain minimum level of ongoing experience is necessary in order to meet the "*competence*" requirement of the regulations. But that is separate from the question before this defendant of whether the person, such as the plaintiff, has a qualification in the first place.

18. The whole scheme of the regulations in relating to qualifications is premised upon the assumption that a qualification is a historical matter for which one trains; one then completes the training and acquires the qualification. Thus, sch. 1 of each of the regulations refers to a requirement to "*complete*" a period of training, following which one obtains the FETAC award.

19. There is nothing in the regulations which makes the qualification dependent upon post-award ongoing experience, self-certification, auditing, or continuing assessment. Such a requirement would be a major restriction of the rights of the qualification-holder, and would tend to limit or impair the freedom of movement inherent in the single market in the context of mutual recognition of EU qualifications. Of course, the plaintiff is not benefiting from free movement, but the regulations do not put a domestically-qualified individual at a disadvantage by comparison to a person exercising EU law rights. All are treated alike in that all need only demonstrate the initial qualification.

20. While directive 2005/36/EC envisages possible provision for "*lifelong learning*", it does so in terms that are not suggestive of conditionality on the exercise of EU rights, and in any event no provision for such ongoing education has been made in the case of the 2008 and 2013 regulations. Ongoing education and continuous or regular assessment are two very different things in any event.

21. It does only moderate injustice to Mr. Farrell's learned and elaborate argument to say that it boils down in effect to a request to the court to say to itself: "Dearie me, explosions; that sounds frightfully dangerous; surely it must have been intended that registration requires ongoing assessment".

22. However, just because a skill is dangerous does not mean that it will deteriorate with time. Some knowledge once acquired stays with one on an ongoing basis. Riding a bike is the proverbial example, a task not without danger. Other tasks require constant practice – complex surgery perhaps. Whether shotfiring is a skill that needs to be topped up or that stays with the person is a question for neuroscience. For a court assume that it is an activity that requires practice, and a policy must be read into the legislation accordingly, would be to do no more than blunder into the area armed only with a superficial set of assumptions unharnessed from evidence or science. It must be recalled that the defendant called no evidence in this case and there is simply no basis to assume that shotfiring skills require continuous practice to be maintained at a safe level. Nor on any remotely logical or scientific basis does such a conclusion follow merely from the fact that shotfiring may be dangerous.

23. Secondly, even if (which is not the case) one were to come to the view that continuous assessment or regular review of shotfiring skills is a good idea, it does not follow that such assessment is within the jurisdiction of this particular defendant. As we have seen, the legislation involves a number of statutory actors, and there is simply no basis in the statute to hold that ongoing assessment should be carried out by SOLAS as opposed to the Health and Safety Authority or some other agency. It does not follow as a matter of logic or principle that because a step should be taken, it should be taken by the particular agency that proposes to take it. Sir Antony Jay and Jonathan Lynn famously identified this fallacy in 1988: "something must be done; this is something; therefore we must do it" (*Power to the People*). As noted above, the legislative remit for the defendant identifies a single requirement for registration, which this plaintiff satisfies, and directs the defendant to comply with the EU mutual recognition directive which is

concerned with one-off recognition of qualifications and not ongoing assessment of the kind at issue here.

24. Thirdly, even if (which is not the case) I was of the view that ongoing review of skills was a desirable policy requirement, and that it was appropriate for this to be carried out by SOLAS, we come to the most fundamental difficulty of all, namely that the formulation of such a policy is a matter for the Minister and not the court. I am not remotely satisfied that such a position is the ministerial policy, given firstly that it is simply not provided for in the regulations and secondly that the legislation stresses compliance with the directive which is focused on one-off certification of an acquired qualification and not on ongoing assessment. There may very well be sound reasons to do with mutual recognition and the effective operation of the free market as to why the Minister has not so provided.

25. The upshot, therefore, is that while it might (without so deciding) be permissible for the Minister by regulations to allow SOLAS to insist on either self-certification or external certification in order to renew a registration card, she has not done so. The regulations envisage that qualifications are separate and distinct from ongoing competence. The former is a matter for SOLAS; the latter for the Health and Safety Authority. The Minister could, perhaps (subject to any issue of vires which does not arise in this case), change the allocation of responsibilities by amending the regulations, but that is a matter for her. I certainly could not say that the regulations on their normal and literal interpretation are, in any way, absurd or dangerous, or even inappropriate or problematic. They may well make perfect sense, but a court is not the appropriate forum to seek to re-write them if not.

26. Thus, the FETAC award, and consequent registration card, is akin to a university degree or other qualification, which like a FETAC award is also a particular rung in the ladder of the national framework of qualifications; it is a recognition of having attained a particular qualification at the point in time at which that qualification was obtained. The logic of that position is that the plaintiff or other persons similarly situated would have a continuing entitlement to a registration card even if, by reason of infirmity, they were no longer able to carry out shotfiring activities. Is that an absurdity? I think not. Under the regulations, the registration card is, rightly or wrongly, an acknowledgment of a qualification. It is not an acknowledgment of current competence to carry out particular work. That requirement of competence exists, but it is separate under the regulations and is a matter for the Health and Safety Authority.

**Procedural objections**

27. Finally, Mr. Farrell seeks to avoid this matter being dealt with on the merits by launching three procedural objections against the plaintiff's claim; that the plaintiff lacks standing, that the matter is moot, and that the plaintiff has fallen foul of the rule in *Henderson v. Henderson* (1843) 3 Hare 100.

28. None of these technical objections are pleaded, and I would reject them in limine on that basis. The technical objector must themselves be absolutely technically correct, even if one were minded to accede to the objection.

29. If I am wrong about the foregoing, I would reject those objections in any event for the following reasons.

30. As regards standing, the plaintiff was positioned to obtain a renewal of his registration card in March, 2017; but renewal in August, 2018, or on future dates, would not be automatic, if, between now and then, the plaintiff were unable to carry out ongoing blasting operations, due, for example, to illness.

31. Furthermore, the plaintiff has an ongoing liability to renewal at such reasonable intervals as the defendant may decide: currently on a five-yearly basis, but that could change. I do not think that the plaintiff's liability to the application of self-assessment or external assessment is so hypothetical as to deprive him of standing. This is a regime he is actually being subjected to at the moment. Merely because he now qualifies does not mean that he lacks standing to complain about it, as the terms of qualification could change at will.

32. Even if the more serious ramifications of the regime are yet to come, the judgment of Walsh J. in *East Donegal Cooperative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 is an emphatic statement of the view that prospective threats to rights need to be guarded against; the Supreme Court holding in the constitutional context of that case that the courts are entitled "*not merely to redress a wrong resulting from an infringement of the guarantees [of rights by the Constitution] but also to prevent the threatened or impending infringement of the guarantees and to put to the test an apprehended infringement of these guarantees*" (p. 338).

33. The fact that the plaintiff may well have qualified for renewal in March, 2017, does not mean that he does not have a complaint. He complains of the principle of being required to demonstrate ongoing experience as a condition for renewal. To complete self-assessment, which he would be required to do as a condition of renewal, could be viewed as a concession of that principle. I have no doubt, and indeed Mr. Farrell accepted, that if he were to submit to the process and self-certify at this point and then seek to bring this challenge in five years' time, if prevented by ill-health from meeting the requirements as they existed at that point, the defendant would then assert that the plaintiff had acquiesced in the process by renewing under the regime that they have now sought to put in place. A court should not pander to catch-22 logic to defeat public law claims – challenges cannot be simultaneously premature and out of time; claimants simultaneously lacking in standing by not yet having a complaint, and also deemed to have acquiesced on the same factual assumptions. The right of access to the court is meaningless under such conditions. One appropriate response would be to hold that a respondent is precluded from mounting arguments about prematurity, standing, mootness and the like unless that objection is accompanied in a binding and properly recorded fashion by a concession that a future challenge by the applicant, on the happening of the event by reference to which the challenge is said to be premature, would be accepted as procedurally correct. There must always be a clear pathway to the court. Here there is no such concession, quite the reverse. But a broader determinative question must arise beyond this thicket of technicality as to whether it would be reasonable for the court to adjudicate on the merits of the claim under the circumstances presented, and in this case I think it would be.

34. The plaintiff is a person affected by the regime of conditions, albeit perhaps technically and, at present, at the level of principle. But that is sufficient to give him standing.

35. For similar reasons, the proceedings are not moot. Any temporary but repeating process is a candidate for an exception to the mootness doctrine. The classic scenario for departure from the mootness doctrine is in relation to short term matters which are "*capable of repetition, yet evading review*" (*Southern Pacific Terminal Co. v. Interstate Commerce Commission 219 U.S. 498* (1911) at p. 515 cited by Blackmun J. in the context of pregnancy in *Roe v. Wade 410 U.S. 113* (1973) at p. 125).

36. In *Goold v. Collins* [2004] IESC 38 (Unreported, Supreme Court, 12th July, 2004), Hardiman J. commented in relation to Southern Pacific formula that "*[a]s might be expected from that formulation, such cases have tended to focus on time limited events such as election campaigns, pregnancy (as in Roe v. Wade) and time limited court orders especially in the domestic violence area*".

37. In *Lofinmakin v. Minister for Justice and Equality* [2013] 4 I.R. 274 (Unreported, Supreme Court, 20th November, 2013) Denham C.J. discussed the issue of exceptions to the general rule that moot issues can nonetheless be heard as a test case, citing *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 I.R. 328 (Murray C.J.), *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152 (Clarke J.) and *Irwin v. Deasy* [2010] IESC 35 (Unreported, Supreme Court, Murray C.J., 14th May 2010). It is clear from that decision that a court can proceed to determine an issue that is strictly moot if the interests of justice so require (see per Denham C.J. at pp. 279 to 280).

38. The defendant relies on *Maguire v. South Eastern Health Board* [2001] 3 I.R. 26, but that decision pre-dates more recent jurisprudence and is best viewed as turning on its own facts, particularly the fact that a ruling on the hypothetical question in that case would not have illuminated future or other cases. Finnegan J. in that case decided that notwithstanding that the High Court had jurisdiction to grant declaratory relief, such relief should not be granted where the declaration related to future rights, or depended upon a contingency, or where a mere academic question of no practical value was involved. That *obiter* statement was in the context of midwifery services for the plaintiff's sixth child, born in the meantime and thus "*events ha[d] overtaken the principal relief*" (p. 31). The contingency at issue in that case was one which, in the court's view, could arise under different circumstances; crucially, not necessarily ones that would be illuminated by declaratory relief in the case at hand. The decision is not, and was clearly not intended to be, a finding that no future events dependent on a contingency can be the subject of a declaration – such a view would be inconsistent with subsequent Supreme Court analysis and would severely restrict the statutory and inherent jurisdiction to grant declaratory relief. It is simply another example of the well-worn point that wide *obiter* statements must be read in the context of the facts and findings in the case concerned, and such statements may well need to be modified in the light of further consideration or different situations arising.

39. A review of the caselaw indicates that the court should not regard a matter as moot if (a) it relates to a matter capable of repetition yet evading review, such as a time-limited but potentially repeating process, or (b) it is in the interests of justice to determine the issue. Here, I take the view that the matter is not moot, but if it is, both exceptions apply.

40. Firstly, the plaintiff is currently actually required to be subject to self-assessment. Therefore the matter is not moot.

41. If I am wrong about that, the matter relates to a time-limited process that is clearly capable of, and likely to, recur. The time taken to determine the issue indicates the futility of putting the matter off to some hypothetical future time.

42. Independently of the foregoing, this is an appropriate case to determine the issues in the interests of justice in any event, having heard full argument. No public benefit would arise in refusing to decide the point now, and in requiring everything to be re-argued at some future renewal point. Furthermore, the point is of relevance to a wider category of applicants for registration cards, not simply the particular plaintiff in this case, which again militates in favour of determining the issue.

43. Finally, this challenge is not precluded by virtue of the doctrine in *Henderson v. Henderson* or *A.A. v. The Medical Council* [2003] I.R. 302. It is true that the plaintiff has had previous litigation in relation to different issues against FÁS, but Henderson does not prevent successive actions relating to different issues. A.A. was a case where the same relief, prohibition of a hearing, was sought in two successive proceedings, and where the grounds of the second action could have been raised in the first action. Nothing of that nature arises here. It would be a massive and illegitimate extension of existing doctrines to suggest that a person is precluded from bringing a bona fide public law claim because he or she previously litigated a separate issue against that entity or a predecessor statutory body. The constitutional, EU and ECHR right to an effective remedy would sit very uneasily with such a restrictive and meritless doctrine; an approach that would confer a windfall benefit on public bodies and create a form of immunity for unlawful acts that is not warranted by, and contrary to the scheme of legality envisaged by, the Constitution or the law. A public body under such a spurious doctrine could behave as it wished towards any applicant who had previously had the temerity to sue it, as long as the body could contend that any new grievance could conceivably have been raised in previous proceedings.

44. Separately and independently from that general issue of principle, the regime of conditions and self-assessment and external assessment is much more crystallised at this point in a way that was not so at the time of the previous action. As noted above, the precise current conditions only came into being two days before the hearing.

45. Again it is doing only moderate injustice to Mr. Farrell's learned and interesting argument to say that his second-best point was that the plaintiff was a bit of a serial litigant. Maybe so, maybe not (and there are certainly more dedicated practitioners of that approach); but just because someone has unsuccessfully brought one set of proceedings in the past does not mean that his or her next set of proceedings must also be dismissed.

**Order**

46. For the foregoing reasons, there will be a declaration that the defendant is not entitled, on renewing the plaintiff's registration cards under the Safety, Health and Welfare at Work (Quarries) Regulations 2008, or the Safety, Health and Welfare at Work (Construction) Regulations 2013, to impose, as a condition of such renewal, a requirement that the plaintiff either self-assess or be assessed or reassessed in relation to having undergone any particular practical experience since the previous grant or renewal of the card concerned.