



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 61

Record Nos. 2018/337

Record Nos. 2018/339

Whelan J.
McGovern J.
Costello J.

BETWEEN/

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

APPELLANTS/APPLICANTS

- AND-

DISABLED DRIVERS MEDICAL BOARD OF APPEAL, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

BETWEEN/

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

APPELLANTS/APPLICANTS

- AND-

DISABLED DRIVERS MEDICAL BOARD OF APPEAL, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 25th day of February, 2019

1. This is an appeal of the decision of O'Regan J. on the 31st July 2018 ([2018] IEHC 465) where she refused the applicants orders of *certiorari* in respect of decisions dated the 29th January 2018 and 21st May 2018 by the first named respondent pursuant to the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations, 1994 ("the Regulations") and a declaration that Regulation 3 of the Regulations is *ultra vires* s. 92 of the Finance Act 1989 (as amended).

The Statutory Scheme

2. Before considering the cases of the appellants it is necessary to consider the statutory scheme which is at the centre of these proceedings. Section 92 of the Finance Act 1989 (as amended) provides: -

"92(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 and value-added tax and the remission of road tax in respect of a motor vehicle used by, and

(b) the repayment of excise duty relating to hydrocarbon oil used for combustion in the engines of vehicles, to be specified in the regulations, by, a severely and permanently disabled person—

(i) as a driver, where the disablement is of such a nature that the person concerned could not drive any vehicle unless it is specially constructed or adapted to take account of that disablement, or

(ii) as a passenger, where the vehicle has been specially constructed or adapted to take account of the passenger's disablement, and where the vehicle is adapted, the cost of such adaptation consists of not less than 30 per cent. of the value of the vehicle excluding tax and excise duty, or such lesser percentage in respect of certain cases as may be specified by regulations in respect of the repayment of any tax relating to adaptation costs only.

(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,

and the regulations may provide for such other matters as the Minister for Finance considers necessary or expedient for the purposes of giving effect to this section."

3. The Minister made the regulations in 1994 pursuant to s. 92 of the Act. The Regulations state: -

"Disabled passenger" means a severely and permanently disabled person who possesses a certificate of the kind referred to in paragraph (a) or (b) of Regulation 4 and for whom a vehicle has been specially constructed or adapted to the extent prescribed in Regulation 10 (1) (a), to take account of that passenger's disablement;

"Disabled person" means a person who is severely and permanently disabled, fulfilling one or more of the medical criteria set out in Regulation 3..."

4. Regulations 3 and 4 provide:-

"Medical criteria

3. For the purposes of section 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:

(a) persons who are wholly or almost wholly without the use of both legs;

(b) persons wholly without the use of one of their legs and almost wholly without the use of the other leg such that they are severely restricted as to movement of their lower limbs;

(c) persons without both hands or without both arms;

(d) persons without one or both legs;

(e) persons wholly or almost wholly without the use of both hands or arms and wholly or almost wholly without the use of one leg;

(f) persons having the medical condition of dwarfism and who have serious difficulties of movement of the lower limbs.

4. Without prejudice to Regulation 5, a claim for repayment or remission under these Regulations shall be allowed only where the person who makes the claim, or in connection with whom the claim is made, is in possession of either—

(a) a primary medical certificate duly completed in the form prescribed in the First Schedule as evidence of qualifying disablement, signed, dated and endorsed with the official stamp by the appropriate Director of Community Care and Medical Officer of Health, or

(b) a Board medical certificate duly completed in the form prescribed in the Second Schedule as evidence of qualifying disablement, signed and dated by a member of the Disabled Drivers Medical Board of Appeal:

Provided that compliance with this Regulation may be waived by the Revenue Commissioners in the case of a claim made by a qualifying organisation."

5. Thus, the third named respondent was empowered by s. 92(2) of the Act to make regulations providing for eligibility for the repayment or remission of taxes including such further medical criteria in relation to disabilities as may be considered necessary. He exercised that power by promulgating the regulations. The further medical criteria are set out in Regulation 3 of the Regulations. The relevant criteria for the purposes of these cases are: -

(a) Persons who are wholly or almost wholly without the use of both legs.

(b) Persons wholly without the use of one of their legs and almost wholly without the use of the other leg such that they are severely restricted as to the movement of their lower limbs.

...

(e) Persons wholly or almost wholly without the use of both hands or arms and wholly or almost wholly without the use of one leg.

6. It is necessary to apply to the second named respondent for a primary medical certificate in order to obtain remission from the taxes referred to in s. 92 of the Act. The certificate is "evidence of qualifying disablement". If the application is refused, an applicant for a primary medical certificate may appeal the decision to the Disabled Drivers Medical Board of Appeal, the first named respondent. An appellant is free to produce any relevant medical evidence upon which he or she seeks to rely. The first named respondent consists of three medical doctors. They consider all relevant evidence submitted by an appellant and any oral submissions made by or on behalf of the appellant. They conduct an assessment including a physical examination, reviewing the notes and asking questions on the relevant medical history of the appellant to see whether he or she satisfies the criteria established in the Regulations. If they do, the first named respondent will issue a certificate to the appellant.

George Lennon

7. George Lennon suffers from Ehlers-Danlos Syndrome (Hypermobility) and Postural Tachycardia Syndrome (POTS) and as a result he is severely and permanently disabled and uses a wheelchair much of the time. At the time of the application for the primary medical certificate he was sixteen years old. At that stage he could no longer walk more than a few steps on a bad day and up to half a mile on a good day. He could not run and his ability to stand was restricted by dizziness. He also suffered from POTS and Professor Grahame of the Hyper Mobility Unit at the Hospital of St. John and St. Elizabeth in London reported that he was severely disabled by chronic pain aggravated by muscle deconditioning resulting in "multi systemic complications". Dr. Terence Prenderville, a consultant paediatric cardiologist, from Crumlin's Children Hospital, Dublin, stated that George Lennon suffered from a variety of symptoms and that he had significantly limited mobility and had been provided with a wheelchair. Dr. John Cuddihy G.P. referred to his mobility issues "which have resulted in severe restrictions in the use of limbs, particularly lower limbs due to POTS". Ms. Sabrina Dunne, physiotherapist, conducted an assessment of his balance and risk of falling and noted that he could walk for three minutes without rest over a distance of 103.5 metres.

8. George Lennon's mother applied for a primary medical certificate on the 12th January 2017 on his behalf. She included all the relevant medical reports to support the application. On the 25th April 2017 the application was disallowed and she appealed that decision to the first named respondent. George Lennon and his mother attended for an assessment by the first named respondent in the National Rehabilitation Hospital on the 25th January 2018. The three doctors comprising the first named respondent explained the purpose of the meeting and the criteria to be adopted in carrying out the assessment. The lead doctor, Dr. Leitch, carried out the medical assessment which consisted of informing them that the board had reviewed the notes, asking questions on the relevant medical history and carrying out the physical examination of George Lennon. Having considered the information which had been furnished, including the information arising out of the assessment, the board reached a decision to refuse the appeal. The acting chairperson wrote to George Lennon's mother by letter dated the 29th January 2018 informing her that the medical board was unable to issue a certificate which would entitle George Lennon to claim under the scheme. The letter stated: -

"It is the board's opinion that he did not meet the strict medical criteria laid down in the current regulations. Please see attached relevant medical criteria circled."

9. The attached document was headed with the patient's name, George Lennon, and had a paragraph headed 'medical criteria'.

10. It provided:

"Medical criteria for entry to the scheme are that the person must be severely and permanently disabled and come within at least one of the following categories."

11. The document then listed the six categories set out in Regulation 3. The potentially relevant categories A, B and E were circled.

Alyssa Reeves

12. Alyssa Reeves was born on the 2nd February 2016 and she suffers from spina bifida, hydrocephalus and Arnold Chiari II Malformation as a result of which she is severely and permanently disabled. At the time her mother applied for the primary medical certificate she was nineteen months old. She has significant ongoing physical needs and utilises a prone stander to promote weight bearing and to manage her risk of hip dysplasia and hip migration. She uses a Kaye walker for mobilising short distances and additionally she wears ankle foot orthotics daily to support ambulation. It is expected that she will continue to require the use of a walker when she reaches her maximum potential for mobilisation and that she may require the use of quad sticks for ambulating short distances. It is anticipated that she will require a wheelchair for long distances to overcome fatigue. In addition, Alyssa requires a specialised toileting system to support her complex toileting needs. It is therefore necessary to have a family car that can support the transport of all the equipment safely and to allow for toileting in a properly adapted boot of the car.

13. Alyssa Reeves' mother applied for a primary medical certificate on or about the 11th July 2016. This application was refused. She made a second application on the 22nd September 2017 which also was unsuccessful. On the 13th November 2017 she appealed the decision to the first named respondent.

14. On the 21st May 2018 Alyssa Reeves attended for assessment by a three-doctor medical board on appeal. The assessment took place in the National Rehabilitation Hospital on the 17th May 2018. As in the case of George Lennon, the doctors had reviewed the notes. They asked questions on the relevant medical history and one doctor on behalf of the three-person board carried out a physical examination of Alyssa Reeves. Having considered the relevant information, they made a decision by reference to the criteria set out in the document headed "Medical Criteria" which reflects the criteria established in Regulation 3.

15. By letter dated the 23rd May 2018 they wrote to Alyssa Reeves' mother informing her that the medical board of appeal was unable to issue a certificate which would entitle Alyssa to claim under the scheme. The letter stated: -

"It is the board's opinion that she did not meet the medical criteria laid down in the current regulations."

16. The letter enclosed but did not expressly refer to the Disabled Drivers Medical Board of Appeal note. That document was in identical terms as that of George Lennon save that only criteria A and B were circled, on the basis that in the remaining four criteria could have no possible relevance to Alyssa's condition.

The proceedings

17. Each of the applicants/appellants were dissatisfied with the decisions of the first named respondent of the 29th January 2018 and the 21st May 2018 respectively. George Lennon obtained an order granting him leave to seek judicial review on the 12th March 2018 for an order of *certiorari* quashing the decision of the first named respondent of the 29th January 2018, a declaration that Regulation 3 of the Regulations is *ultra vires* s. 92 of the Finance Act 1989 (as amended), a declaration that the first named respondent had failed to consider adequately or at all the evidence submitted by the first named applicant and a declaration that the first named respondent had failed to give any or any adequate reasons in respect of its decision on the 29th January 2018. Alyssa Reeves received an order granting leave to seek judicial review on the 18th June 2018 seeking identical reliefs in respect of the decision of the 21st May 2018. The two applications were heard together on the 18th and 19th July 2018 and O'Regan J. delivered her judgment on the 31st July 2018 dismissing both applications.

18. In relation to the challenge to the validity of Regulation 3 she stated at paras 22 and 23 of her judgment: -

"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 medical (sic) criteria as was identified in s. 92 (2) as being the further medical (sic) 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."

19. She dealt with the issue of the adequacy of reasons in paras 24-27 of her judgment. In para 25 she states: -

"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' (sic) 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 (sic) clearly inapplicable to that applicant and no argument otherwise is made. Insofar as the circled criteria is (sic) 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 (sic) criteria. This comprised the reasons for the failure of the applicant in each appeal."

20. She then concludes that in the circumstances the decisions and the notice circling the criteria relevant in each case provided sufficient reasons to enable each of the applicants to decide whether or not a judicial review might be appropriate and for the court to determine the issues so raised.

The appeals

21. Each of the applicants appealed the decision. The primary ground of appeal advanced was that the power conferred upon the third named respondent to make regulations had been exercised invalidly and/or unreasonably and/or unlawfully amends, circumscribes and/or fetters the parent legislation so that Regulation 3 is *ultra vires* s. 92 of the Finance Act, 1989 (as amended). It was also argued that there had been a failure to consider adequately or at all the evidence submitted by the first named applicant/appellant and a failure to give adequate and intelligible reasons in each decision.

Discussion

22. The first issue to be considered is whether Regulation 3 is *ultra vires* s. 92 of the Finance Act, 1989 (as amended). In answering this question, the court is first required to interpret the section in the statute. It must then look to see whether what purports to be done by the regulation is in fact within the Minister's powers under the section. See *Cooke v. Walsh* [1984] I.R. 715.

23. Section 92 is permissive. It says that the Minister for Finance may make regulations, not that he must do so. It follows that the section not only does not, but cannot, confer a right or entitlement to certain concessions on severely and permanently disabled persons.

24. The section permits the Minister to make regulations and if he does so the regulations must provide for the criteria for eligibility for the remission of the taxes specified in subs. (1). This means that if the Minister chooses to exercise his discretion to make regulations, those regulations must include criteria for eligibility for the remission of taxes. Furthermore, subs. 2(a) provides that the criteria for eligibility shall include such further medical criteria in relation to disabilities as may be considered necessary. This means that where the Minister makes regulations under s. 92 the regulations must include medical criteria in relation to disabilities. These medical criteria are described as "further" and "as may be considered necessary". This begs the question: further to what? In my opinion, it must be in relation to a disability suffered by a severely and permanently disabled person. The Act leaves to the Minister, after consultation with the Minister for Health and the Minister for the Environment, the discretion to determine what criteria are necessary. This means that the section permits the Minister to choose the sub set of severely and permanently disabled persons who may benefit from the concession on medical grounds.

25. Counsel for the appellants accepts that the Minister is not obliged to make any regulations and that he cannot be compelled to do so. He further accepts that the Minister is entitled to limit the class of severely and permanently disabled persons who may be eligible for the remission of the taxes as specified in subs. (1). So, the issue in this case is not the entitlement of the Minister to make regulations which confine the concession provided by s. 92 to some severely and permanently disabled persons, as defined on medical grounds set out in the regulations, while inevitably excluding other severely and permanently disabled persons from the benefit. The appellants' argument is that the regulations exclude "a significant cohort" of severely and permanently disabled people from the benefit. They submit that this does not reflect the intention of the Oireachtas as expressed in s. 92. While it was conceded that the section allowed for some limitation, it is submitted that Regulation 3 was unlawfully narrow. The essence of the appellants' case was that the limitation was not what was contemplated by the Oireachtas.

26. The Supreme Court considered the role of the courts in determining whether or not delegated legislation is *ultra vires* in *Cassidy v Minister for Industry* [1978] I.R. 297. At p. 305 of the report O'Higgins C.J. said that the duty of the Courts when faced with a claim that a statutory instrument is invalid is to: -

"...enquire whether such instrument has been made under powers conferred, and for purposes authorised, by the Oireachtas..."

If the powers conferred by the Oireachtas on the Minister do not cover what was purported to be done then, clearly, the instrument is ultra vires and of no effect. Equally, if the rule-making power given to the Minister has been exercised in such a manner as to bring about a result not contemplated by the Oireachtas, the Courts have the duty to interfere. Not to do so in such circumstances would be to tolerate the unconstitutional assumption of powers by great departments of State to the possible prejudice of ordinary citizens. If what the Minister seeks to do was not contemplated by the Oireachtas then, clearly, it could not have been authorised."

27. More recently in *Island Ferries Teoranta v. Minister for Communications* [2015] 3 I.R. 637, Charleton J. held that two principles were central to maintaining the exclusive right of the Oireachtas to make laws while, at the same time, enabling subordinate legislation.

"Firstly, delegated legislation is properly enabled where what is involved in the subordinate legislation is "a mere giving effect to principles and policies which are contained in the statute itself". Legislation of a subordinate kind remains "within the permitted limits – if the law is laid down in the statute and details are only filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power" (see Cityview Press v. An Chomhairle Oiliúna [1980] I.R. 381, at p. 399 per O'Higgins C.J.). Secondly, what is or is not permitted as a legitimate exercise of delegated legislative power is to be found within the terms of the statute itself. The limits are to be found in the enabling statute. It is a matter of construction as to whether any exercise of the power to make subordinate legislation delegated by the Oireachtas is within the scope of what was contemplated in the text of legislation in the

conferring of that power on a minister..."

28. Thus, the question to be addressed in this case is, was the making of Regulation 3 within the contemplation of the Oireachtas when enacting s. 92? The answer to this question is to be found in para 25 of the judgment of Charleton J. in *Island Ferries*: -

"In so far as any discretion is permitted as to the measures to be taken by the subsidiary legislation, such decisions are for those to whom that power is delegated by the primary enactment. Provided what is involved fits within the purposes and boundaries of proper delegation, it is not the function of any court on judicial review to substitute a different view." (emphasis added)

29. Applying these principles, it seems to me that the Oireachtas conferred a discretion on the Minister as to the criteria to be adopted in regulations he might make under s. 92. The regulations fit within the purpose and boundaries of proper delegation. It is common case that he had power to make regulations setting out the medical criteria for eligibility for the remissions from taxes referred to in s. 92(1). Therefore, the exercise of his discretion was within his powers. There is no suggestion that the discretion was exercised capriciously, arbitrarily or otherwise in a manner not contemplated by the Oireachtas. There was no evidence at all to substantiate an argument that the regulations narrowed the category of severely and permanently disabled person to such an extent as to negative the effect of s. 92. The discretion and therefore the decision was his and the fact that the appellants, and indeed possibly the court, might wish to substitute a different view, does not mean that it was an invalid exercise of his powers.

30. It is worth recalling that s. 92 replaced s. 43 of the Finance Act 1968. Section 43 provided that certain excise duties would not be charged or levied in respect of a vehicle specially constructed or adapted for use by a person who "in consequence of injury, disease or defect...is wholly, or almost wholly, without the use of each of his legs". Section 92 empowered the Minister to make regulations for remission of taxes to severely and permanently disabled persons subject to such further medical criteria in relation to disabilities as the Minister may consider necessary. The Minister in effect extended the scope of the concession granted by s. 43 of the Act of 1968 by making the regulations of 1994. It is not true that Regulation 3 produced results that are arbitrary, unjust and partial. The criteria provided are based upon objective physical and medical facts, they apply to all applicants for a primary medical certificate and so the Regulations cannot be said to be arbitrary, unjust or partial. It is not correct to say, as was argued by the appellants, that the regulations negate the intention of the enactment as a whole. There are unfortunately limits to claims on the public purse. The Oireachtas did not give the concession to all severely and permanently disabled persons. It gave the Minister power to decide to whom, amongst that body of people, the concession should be given. Inevitably, very deserving persons will fall outside the criteria established by the regulations. This does not of itself mean that the Regulations are *ultra vires*. The court cannot engage in any policy assessment and cannot substitute its discretion for that of the person to whom the Oireachtas has delegated the decision making power, in this case the Minister.

31. It follows that in my opinion the appellants have not identified any error on the part of the High Court judge when she concluded that there was no basis to suggest that the statutory instrument had diluted or usurped the provisions of s. 92 of the 1989 Act or that the powers of the Minister in making the statutory instrument were exercised outside the limitations provided for by s. 92(2).

32. The second ground of appeal was that the decisions were each void because they failed to give any or any adequate reasons for the relevant decisions.

33. The appellants argued that the first named respondent had extensive medical and other evidence furnished by the appellants. They criticise as inadequate the decisions of the 29th January, 2018 and the 21st May, 2018 as "wholly devoid of reasons". They submitted that the reasons were neither adequate nor intelligible. The decisions do not establish that the decision maker directed its mind adequately to the issues which it had to consider or was obliged to consider. They complain that there was no analysis of the medical evidence whatsoever and no stated reasons why some evidence may have been preferred over other evidence.

34. The appellants accept that the degree of particularity required for a decision depends upon the circumstances in each case but they argue that in these cases these decisions do not satisfy the requirement in law to give adequate or sufficient reasons.

35. In *Mallak v. Minister for Justice* [2012] 3 I.R. 297 Fennelly J. summarised the position as follows:

"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. 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. 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."

36. This paragraph was expressly approved and adopted by Laffoy J. in *McEnery v The Commission of An Garda Síochána* [2016] IESC 66. The passage shows that it is a matter of substance rather than form. The underlying objective is the attainment of fairness in a process leading to a decision. One means of achieving the fairness is for the reasons to accompany the decision. But this is not the only means of achieving the required fairness. An explanation may be given of the decision making process "at some stage". It is for this reason that Fennelly J. said that if the process is fair, open and transparent and where the affected person has been enabled to respond to the concerns of the decision maker, that there may be situations where the reasons for the decision are obvious and by implication need not accompany the decision itself.

37. It follows that it is not just a question of looking at the decision itself but the whole process leading to the decision to ascertain whether the process has been fair, open and transparent, whether the affected person has been enabled to respond to the concerns of the decision maker and whether effective judicial review is not precluded.

38. In this case there was clear uncontroverted evidence before the court that the process was fair, open and transparent. The appellants were aware of the criteria that required to be satisfied in order to obtain a primary medical certificate. In each case the deponents expressly averred that all relevant reports were before the first named respondent. They did not contest the account of the process given in the replying affidavits of Angela McNamara, the acting chairperson of the first named respondent, sworn in each of the proceedings. It is clear that the appellants were permitted to furnish whatever documentation and information they wished to both the HSE and then to the first named respondent. The scheme allowed for a full right of appeal. At the start of the appeal hearing, both appellants were given an explanation of what criteria would be applied. The appeal was then conducted by three medical doctors, one of whom carried out a physical examination of each of the first named appellants, which was observed by the other two doctors. Appropriate questions were asked as to relevant medical history. The first named respondent considered all relevant information which had been furnished to it and reached its decision. The decision stated that in each case the first named

appellant did not fulfil the criteria prescribed by the regulations.

39. It is important to note that the criteria in question was in effect a negative test. An applicant failed to meet the criteria for a primary medical certificate if the applicant was, even to a limited extent, able to use both legs. For example, in the case of George Lennon, he submitted evidence that on a bad day he could take only a few steps but on a good day he could walk half a mile. He could walk for three minutes without rest over a distance of 103.5 metres. In the case of Alyssa Reeves, the evidence was that she used a Kaye walker for mobilising short distances and wears ankle foot orthotics to support ambulation. It is said that she "will require a wheelchair for *long distances* to overcome fatigue". (emphasis added)

40. It is clear from *Mallak and McEnery* that the adequacy of the reasons given for the decisions in these cases must be assessed in the light of the process, the evidence, and the notification of the decision with the accompanying note. In my opinion, the trial judge correctly addressed the appropriate principles to be applied and correctly assessed those principles against the particular process and the facts of these two appeals. She was entitled to conclude that the reasons, though briefly stated, satisfied the obligation to give reasons. The appellants have not stated that they do not understand why they were not granted a primary medical certificate. The second named appellants in each case each expressed surprise that the appeals of the first named appellants were disallowed. Ms. Lennon says at para. 19 of her grounding affidavit:

"I say that other than stating that the criteria was not met, there are no reasons given and no evidence that the medical reports which I submitted were considered properly or at all. I say and believe that the medical criteria applied may in fact be ultra vires the relevant statutory provisions..."

She does not say, quite properly on the evidence before the court, that George Lennon met any of the criteria provided in Regulation 3. Ms. Reeves' affidavit is identical and she too does not assert that Alyssa Reeves satisfied any of the criteria in Regulation 3. In the circumstances, the trial judge's conclusion on this point was correct, in my opinion. I find no error in her approach or her conclusion.

Conclusion

41. The appellants have both failed to establish grounds for reversing the decision of the High Court. For these reasons I would dismiss the appeal and affirm the decisions of the High Court.