

THE HIGH COURT

[2008 No. 57 S.S.]

IN THE MATTER OF A CONSULTATIVE CASE STATED

BETWEEN

BARRY O'SULLIVAN

APPELLANT

AND

THE SUPERINTENDENT IN CHARGE OF THE GARDA STATION, TOGHER GARDA STATION, CORK

RESPONDENT

AND

THE HIGH COURT

[2008 No. 60 S.S.]

IN THE MATTER OF A CONSULTATIVE CASE STATED

BETWEEN

ANDREW CREIGHTON

APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment delivered by Ms. Justice Dunne on the 1st day of April, 2008

1. Two consultative cases stated came before me for hearing in relation to an identical issue of law. In each case the point of law was stated by David Riordan, Judge of the District Court. I propose to refer briefly to the details of the cases stated and to the facts that are relevant in each case.

Barry O'Sullivan

2. In this case an application came before the learned District Judge on the 10th December, 2007, pursuant to the provisions of s. 29(1)(a) of the Road Traffic Act, 1961 as amended in circumstances where the applicant was convicted of an offence contrary to s. 49(4) of the Road Traffic Act, 1961 as amended, on the 1st December, 2005, arising out of an offence that occurred on the 6th October, 2002, which conviction was appealed to the Circuit Court which affirmed the conviction and penalty by way of order dated the 15th June, 2006, to take effect as and from that date. Such a conviction attracts a consequential disqualification order and accordingly, in addition to the penalty imposed, the applicant was disqualified from driving for two years as and from the 16th June, 2006. On the 14th November, 2007, the applicant issued an application for the removal of the disqualification pursuant to the provisions of s. 29(1)(a) of the above entitled 1961 Act, as amended.

3. The learned District Judge sought the opinion of the High Court on the case set out in the consultative case stated and I propose to quote from the same:-

"5. On the 10th day of December, 2007, evidence was given by the applicant to me to the effect that he had paid the monetary fine that had been imposed upon him by virtue of the District Court conviction (as affirmed by the Circuit Court order); that he had not driven whilst disqualified; and that his licence had been handed in to the local relevant authority to be endorsed; he also produced evidence which I accepted from his employer confirming that his position of employment could no longer be maintained unless his driving licence was restored to him. He further gave evidence to the effect that he was suffering specific hardship by virtue of the fact that he was separated and that he could not see his teenage daughters regularly and whenever he did see them, he could not mobilise with them in view of the fact that he was disqualified from driving. The respondent did not cross examine.

6. I found as a fact that the applicant had suffered the alleged hardship and that he had paid the monetary fine, handed up his licence for endorsement and had not driven while disqualified. I was satisfied and expressly found that the application was entirely meritorious and but for the legal issue arising in submission (referred to below), would in the normal case have justified restoration of the driving licence.

7. The legal issue that arose as referred to above was that since the conviction of the accused in the District Court on 1st December, 2005, the Road Traffic Act, 2006 was enacted and in particular, on the 5th March, 2007, s. 7 of the said 2006 Act, was commenced by virtue of SI 86/2007 being the Road Traffic Act, 2006 (commencement) order 2007. Section 7 of the 2006 Act provided for a substituted provision for s. 29 of the principal Act.

8. It was submitted to me on behalf of the respondent that the court had no jurisdiction to remove a disqualification order in view of the express provisions of the now substituted, s. 29 of the Road Traffic Act, 1961 which specifically refers to a disqualification order made whether "before or after the commencement of s. 7 of the Road Traffic Act, 2006".

9. In response, David Browne, solicitor for the applicant referred to s. 27 of the Interpretation Act, 2005 and urged upon me that the effect of s. 7 of the 2006 Act, was to repeal the then existing provision in s.29 of the 1961 Act and substitute in its place a new statutory provision and by virtue of s. 27 of the Interpretation Act, 2005, this repeal of the former s. 29 did not and could not affect any right, privilege, ... accrued under the former provisions of s. 29 of the 1961 Act."

4. Therefore, the learned District Judge being of the opinion that questions of law arise on the foregoing case referred the following question to the High Court for determination namely:-

"Has the enactment of s. 7 of the Road Traffic Act, 2006 which was commenced on the 5th March, 2007, deprived the District Court of its jurisdiction pursuant to the provisions of s. 29 of the Road Traffic Act, 1961 as amended, to remove a disqualification order imposed prior to the 5th March, 2007, for two years?"

Andrew Creighton

5. The first point to note in respect of this case is that the respondent was incorrectly named as the Director of Public Prosecutions.

No point turned on that particular issue. It appears from the consultative case stated in respect of this applicant that the accused was convicted of an offence contrary to the s. 49(4) of the Road Traffic Act 1961 as inserted by s. 10 of the Road Traffic Act, 1995, on the 5th day of May, 2006, arising out of an offence that occurred on the 25th March, 2005 which conviction was appealed to the Circuit Court and subsequently affirmed by the Circuit Court by way of order on the 13th December, 2006, at which time a consequential disqualification order was made for a period of two years to take effect from the 13th December, 2006. I do not propose to set out in detail the facts contained in the consultative case stated in respect of this applicant save to say that on the 10th December, 2007 at which time an application was made for the restoration of the driving licence of the applicant, the learned District Judge found as a matter of fact that the applicant had paid the monetary fine that was imposed and that he had handed his licence in to the local authority in order that it would be endorsed. The applicant gave evidence that he required his driving licence to be restored to him as he had a specific need by virtue of his employment. He gave evidence that he carried on business as a letting agent and needed to drive in relation to his business. The learned District Judge was satisfied that he should make an order for the restoration of the applicant's driving licence save for the question of law which arises herein. The legal issue that has arisen in this case is identical to that which arises in the case of Barry O'Sullivan. The submissions were similar, but the questions of law arising were stated in a slightly different form and for ease of reference I think it would be useful to set out the questions herein in full:-

"(a) Can the applicant rely on s. 27 of the Interpretation Act, 2005 and make an application under s. 29(1)(a) of the Road Traffic Act, 1961 as amended, to remove a consequential disqualification order imposed for two years in circumstances where the applicant was convicted on 13th December, 2006, of an offence contrary to s. 49(2) of the Road Traffic Act, 1961 as amended?

(b) In particular when should the applicant's right to apply for the restoration of his driving licence be regarded as having accrued, is it on the date of conviction or must nine months of the applicant's disqualification period have elapsed on the 5th March, 2007?

(c) Should the repeal of s. 29(1)(a) of the Road Traffic Act, 1961 be regarded as having affected the disqualification imposed by the court on the 13th December, 2006, so as to allow the applicant rely on s. 27(1)(d) of the Interpretation Act, 2005?"

6. Thus it will be seen that a net issue arises for the determination of this court in respect of both applications, namely, whether or not the commencement of s. 7 of the Road Traffic Act, 2006, by SI 86/2007, in providing for a substituted provision for s. 29 of the principal Act has removed the entitlement of the applicants herein from making an application for the removal of their disqualifications.

7. All of the parties in their submissions referred briefly to the decision in the case of *Conroy v the Attorney General and Another* [1965] 1 I.R. 411 as to the nature of a disqualification resulting from a conviction contrary to s. 49 of the principle Act. In that case the Supreme Court (Walsh J.) noted that:-

"The disqualification from holding a driving licence is in the same category because it amounts to the withdrawal of a right granted by the Act in a manner prescribed by the Act. The fact that the Act grants the holder of a licence or the person entitled to a licence the benefit of a judicial hearing on the question of disqualification itself and the fact that the judicial hearing is conducted by the person who imposes the conviction which in some cases is a necessary condition precedent to disqualification does not alter the nature of it. Insofar as it may be classed as a punishment at all it is not a primary or direct punishment but rather an order which may, according to the circumstances of the particular individual concerned, assume, though remotely, a punitive character." (p. 441)

8. Mr. Coffey S.C. on behalf of the first named applicant stated that the new regime introduced by s. 7 of the 2006 Act, which provided for the substituted provision for s. 29 of the Road Traffic Act, 1961 as amended applied solely in respect of those disqualified after the 5th March, 2007. It was his contention that the first applicant having been disqualified under the old regime has a right under that regime to apply for the removal of the disqualification.

9. He noted that the position adopted by the respondent herein is to the effect that the provisions of s. 7 of the Road Traffic Act, 2006 have a retrospective effect. He submitted however, that s. 7 of the Road Traffic Act, 2006 was irrelevant to the present case in that it is clear from the wording of the section that it only applies to disqualification orders of more than two years. Its only relevance, he submitted, was that it had the effect of repealing *simpliciter* the statutory provisions that had applied to the applicant prior to the commencement of the section. On that basis he argued that the issue to be considered was simply "what is the effect of the repeal of an enactment upon an applicant in these circumstances?"

10. He referred to the provisions in s. 27 of the Interpretation Act, 2005 which provides as follows:-

"(1) Where an enactment is repealed, the repeal does not –

(a) revive anything not in force or not existing immediately before the repeal,

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or

(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.

(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

11. Mr. O'Leary S.C. on behalf of the second named applicant placed particular reliance on the provisions of s. 27(1)(b), s. 27(1)(c) and s. 27(1)(d) of the Interpretation Act 2005. He also relied on s. 27 (2) of the Interpretation Act, 2005. He submitted that under the provisions of the old s. 29 of the Road Traffic Act, 1961, as amended, the second applicant was entitled to apply for the

restoration of his driving licence in circumstances where he had been disqualified for a period of two years. His contention was that at the time of the second applicant's conviction he had a right to apply for the removal of the consequential disqualification. The substitution of the old s. 29 by the new s. 29 as provided for in s. 7 of the Road Traffic Act, 2006 did not alter this entitlement. He suggested that the provisions of s. 7 of the Road Traffic Act, 2006 could not apply to someone in the position of the second applicant, because the new s. 29 contained therein states:-

"This section applies to a person in respect of whom a disqualification order has been made ... disqualifying the person for holding a licence during a period of more than two years..."

12. The applicant is a person who has been disqualified for two years and not a person disqualified from holding a licence during a period of more than two years.

13. However, the essential point made by Mr. O'Leary and indeed by Mr. Coffey is that the right to apply for a removal of the disqualification in the case of each applicant exists from the date of conviction. In his written submissions, he put the matter on the basis that the entitlement to make an application for the restoration of the driving licence was a right or privilege acquired by the second applicant on the date of the imposition of the conviction.

14. Finally he referred to the provisions of Article 7 of the European Convention on Human Rights which provides:-

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

15. He argued, relying on the authority in *Malige v France*, unrep. 23 Sept. 1988, that the disqualification order was the equivalent of a penalty and as such could not be applied retrospectively.

16. Mr. McDonagh S.C. on behalf of the respondent in each case, first of all made a point to the effect that the argument on behalf of the first applicant to the effect that he had a legitimate expectation that he would be entitled to make an application for the restoration of his driving licence was not correct. He argued that the doctrine of legitimate expectation did not arise in the circumstances of this case. I accept Mr. McDonagh's submission on this point. This is not a situation in which the doctrine of legitimate expectation arises.

17. Mr. McDonagh submitted that this was a matter which concerns the interpretation of the statute. He argued that the wording of s. 29 as inserted by s. 7 of the 2006 Act, was perfectly clear. Having referred to the section he emphasised that it is provided therein that the section applies to a person "in respect of whom a disqualification order has been made, *whether before or after the commencement of s. 7 of the Road Traffic Act, 2006*, disqualifying the person for holding a licence during a period of more than two years ..." and he submitted that the new s. 29 applies only to disqualifications for more than two years and he also submitted that it is intended to apply retrospectively. He submitted that the applicants herein were not entitled to apply to the District Court as of the 5th March, 2007 by reason of the repeal of the old s. 29, for the restoration of their licences and that as such there was no basis upon which they could make such application.

18. Mr. McDonagh considered the provisions of s. 27 of the Interpretation Act, 2005. It was his view that the only possible part of s. 27 that could be of relevance was s. 27(1)(c). He was of the view that s. 27(1)(a), (b), (d) and (e) were of no relevance to the circumstances. In considering s. 27 he submitted that if an individual's right to apply to the District Court for the restoration of their licence had accrued by the 5th March, 2007, then he accepted that whether an application had been made to the District Court or not, the individual was entitled to make the application. However, in his submission, the applicants had no right accrued by the 5th March, 2007. In each case the period of nine months from the date of conviction had not elapsed by the 5th March, 2007, and therefore he submitted they fell outside the category of those who had acquired a right or to whom the right had accrued within the meaning of s. 27(1)(c) of the Interpretation Act, 2005. Mr. McDonagh placed a great deal of reliance on the use of the word "accrued" in the context of s. 27(1)(c). He referred to the Oxford English dictionary definition which defines the word "accrue" as follows:-

"To fall (to anyone) as a natural growth or increment; to come by way of addition or increase, or as an accession or advantage."

19. He submitted that there was a distinction to be made between the mere possession of a right or privilege and the possession of the right or privilege that has actually accrued. Accordingly, he submitted that if a convicted person had not yet served a sufficient portion of their disqualification so as to have allowed them to institute an application in the District Court to seek to have their licence reinstated, then they are now precluded from doing so as a result of the repeal of the old s. 29.

20. Finally Mr. McDonagh dealt with the argument made under Article 7 of the European Court of Human Rights.

Decision

21. As can be seen above s. 7 of the 2006 Act, repealed the provisions of the old s. 29 of the Road Traffic Act, 1961 as amended and substituted a new s. 29. The effect of the new s. 29 is to remove the provision which allowed a person disqualified for two years from holding a driving licence, to apply to the District Court for the removal of the disqualification. As a result of the enactment of the new s. 29, only those disqualified for more than two years can apply for the removal of the disqualification. It is accepted by all the parties that the new s. 29 does not apply to the applicants in this case; therefore the effect of the repeal of the old s. 29 falls to be considered in the light of the provisions of s. 27 of the Interpretation Act, 2005.

Given that the provisions of the new s.29 are not applicable to the applicants, it does not seem to me to be necessary to consider the issue of the retrospective effect of the new s.29.

22. I cannot accept the narrow interpretation of s. 27 of the Interpretation Act, 2005 contended for by Mr. McDonagh. Mr. O'Leary relied on the provisions of s. 27(1)(b), s. 27(1)(c), s. 27(1)(d) and s. 27(2). Section 27(1)(b) provides that the repeal does not "affect the previous operation of the enactment or anything duly done or suffered under the enactment". I do not accept that the repeal of the old s. 29 can be said to have the effect of taking away from the applicants an entitlement they had under the previous operation of s. 29 by virtue of its repeal. At the time of their respective convictions the applicants had the right to apply for the restoration of their licences once the period of nine months had elapsed. Mr. McDonagh conceded that someone who has been convicted and in respect of whom nine months had elapsed prior to the 5th March, 2005, has a right to apply for the restoration of their licence, even if they have not in fact made an application to the District Court for the restoration of their licence as of that

date.

23. Mr. McDonagh placed considerable emphasis on the provisions of s. 27(1)(c) of the Interpretation Act and in particular on the use of the word "accrued" in s. 27(1)(c). This is not surprising in the context of the second question in the case of the second named applicant, Mr. Creighton. I do not disagree with the contention that the right to apply to the District Court under the old s. 29 does not accrue until after the period of nine months has elapsed. However, I think that this ignores the other words in s. 27(1)(c) which refers to "any right, privilege, obligation or liability acquired, accrued or incurred under the enactment". It seems to me that following their conviction, the applicants in these cases having suffered the consequential disqualification, acquired the right to bring an application for the restoration of the driving licence. In the course of his written submissions, Mr. McDonagh made the comment "there is a clear distinction to be made between the mere possession of a right or privilege and the possession of a right or privilege that has actually accrued". However it seems to me that, whilst there is such a distinction, the wording of s. 27(1) (c) of the Interpretation Act, 2005 provides for that distinction by the use of the word "acquired". The word "acquire" is defined in the Concise Oxford dictionary as meaning "come into possession of". I am of the view that the applicants acquired the right or came into possession of the right to apply for the restoration of their driving licences on their conviction and consequential disqualification. The Legislature in enacting s. 27(1)(c) and also s. 27(2) clearly saw a distinction between a right acquired and a right accrued. I accept the argument of the applicants that the right to apply arose following conviction and that the right then accrued after the elapse of nine months.

24. As I have indicated, Mr. McDonagh has submitted that the relevant section of the Interpretation Act 2005 in the context of these cases is s. 27(1)(c) of that Act. If Mr. McDonagh were correct in his submissions to the effect that s. 27(1)(c) was the relevant provision then, that seems to me to set at nought the provisions of s. 27(1)(b) which provides that the repeal does not affect the previous operation of the enactment. If Mr. McDonagh was correct in his contentions then clearly the effect of s. 7 of the Road Traffic Act, 2006 in repealing the old s. 29 is that it does affect the previous operation of the enactment. If that were the intention of the legislature one would have expected that to be done in clear and express terms. The previous operation of the enactment permitted those convicted of an offence and who suffered a consequential disqualification to apply for the restoration of their licences. The application could not be made before the expiration of the period of nine months but it was an entitlement that existed following conviction. I am therefore satisfied that the provisions of s. 27(1)(b) and (c) have a bearing on these cases to the extent outlined above.

25. In the circumstances I am satisfied that the applicants herein are entitled to make application to the District Court for the restoration of their licences notwithstanding the repeal of the old s. 29(1) and I am not satisfied that their right to do so has been taken away by the introduction of the new s. 29(1).

In the circumstances it does not seem to me to be necessary to consider the provisions of Article 7 of the ECHR.

26. I will answer the questions in the cases stated as follows:-

In the case of Barry O'Sullivan, the answer is No.

In the case of Andrew Creighton the answers are as follows:

(a) Yes.

I do not propose to answer question (b) as it is not in the correct form. In any event, my view on this issue is clear from the judgement.

(c) Yes.