APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL
CIVIL

Court of Appeal Record Number: 2024/29
High Court Record Number: 2021/1079JR
Neutral Citation: 2024 IECA 258

Costello P.
Faherty J.
Butler J.

BETWEEN/

OSAMA ELSHARKAWY

RESPONDENT/ APPLICANT

- AND –

THE MINISTER FOR TRANSPORT

APPELLANT/ RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 31st day of October 2024

Introduction

1. This appeal concerns the extent to which references to legal advice in the Minister's statement of opposition and verifying affidavit constitute a waiver of the legal professional privilege which would otherwise attach to that advice. The issue came before the High Court on the applicant's application pursuant to Order 31 Rule 18 of the Rules of the Superior Courts for the inspection of that legal advice, as referred to at para. 26 of the affidavit sworn on behalf of the Minister verifying the statement of opposition. The Minister objected to

inspection on a number of grounds (considered in more detail below), but most particularly on the basis that in circumstances where the legal advice had initially been referred to in the applicant's statement of grounds, a response to those pleadings which also referenced the legal advice did not constitute an implied waiver of the privilege which the Minister was entitled to claim in respect of it.

2. The High Court (O'Donnell J. [2023] IEHC 672) rejected those arguments and directed that the Minister allow the applicant to inspect the documents in question. This is the Minister's appeal from that order. Because the Minister is the respondent to the original appeal but the appellant before this court, and the applicant in the High Court is the respondent to the appeal, for the sake of clarity I will refer to the parties as the Minister and the applicant respectively.

3. The core issue on this appeal is whether, in referring to legal advice in the way which was done on the Minister's behalf, the Minister was deploying that advice for the purposes of the litigation. The authorities establish that this is a fact-sensitive exercise which depends very much on the context of the litigation and the manner in which the legal advice is put in issue. In this case, the applicant places particular reliance on the language used in the Minister's pleadings in circumstances where, because these are judicial review proceedings, the Minister is under the duty of candour that applies to all public authorities in this type of litigation. This is a matter to which I will return.

4. In order to understand how this issue has arisen, it is appropriate, initially, to outline the circumstances of the underlying proceedings. In doing so I will refer to both the statutory provisions at issue in the main proceedings and the relevant Rules of Court under which the applicant's application has been brought. I will then look closely at both sides' pleadings since many of the arguments made by each party depend on the specific approach taken and language used by the other.

Background Facts and Circumstances

5. The applicant applied for and received a provisional driving licence (also known as a learner permit) in November 2012. He was still the holder of that permit when he committed an offence, namely driving as a learner driver unaccompanied by a qualified driver, on 28th September 2021. Crucially, for the purposes of this narrative, that offence attracted the mandatory imposition of a minimum of two penalty points on his licence. The applicant was served with a fixed charge notice which, if accepted by him, required payment of a fine and acceptance of the two penalty points. The applicant paid the stipulated penalty rather than, as he would have been entitled to, not complying with the notice and awaiting the service of a District Court summons. In accordance with s.44 of the Road Traffic Act 2010, such a summons would have afforded him a final chance to pay a fine (by then an increased fine) and incur the two penalty points up to seven days before the scheduled hearing in the District Court. The attraction of paying the fixed charge rather than going to court is that the number of penalty points imposed on conviction by the District Court is generally higher than those which apply if the fine is paid.

6. As it happens, around the same time the applicant sat his driving test (for the third time) and was issued a full driving licence on 19th October 2021. Thus, he became a fully licenced driver albeit categorised as a "novice driver" for the first two years of holding a full licence. However, on 1st November 2021 he received correspondence from the Department of Transport, Tourism and Sport ("the Department") following his payment of the fixed charge for the offence described in the preceding paragraph. This correspondence notified him that *"The endorsement of these Penalty Points means you have reached or exceeded the maximum number of Penalty Points allowed"* as a result of which he was disqualified from driving for a period of six months commencing in November 2021. The letter records the number of penalty points at the date of the notice as seven. Whilst the applicant does not

dispute that he had reached seven penalty points, these proceedings concern the applicability or otherwise of a mandatory disqualification on reaching that number.

7. In brief, until 2014 a unified penalty points system leading to mandatory disqualification applied to both learner permits and full driving licences. Under s.3(1) of the Road Traffic Act 2002 when the number of penalty points in respect of the driving licence held by any person reached or exceeded twelve, the driver was automatically disqualified for a period of six months. In making this calculation it should be noted that under s.4 of the 2002 Act penalty points are automatically removed from a licence at the end of a three-year period. The number of penalty points required for automatic disqualification was changed in 2014 when s.8(c) of the Road Traffic Act 2014 amended s.3 of the 2002 Act as follows: -

> *"(1) Where penalty points are endorsed on the entry of a person and, in consequence, the total number of penalty points standing so endorsed—*
>
> *(a) equals or exceeds 12, or*
>
> *(b) in the case of a person who at the time such points are endorsed is a learner driver or a novice driver, equals or exceeds 7,*
>
> *the person shall stand disqualified for a period of 6 months beginning on the appropriate date for holding a licence and a licence held by him or her at the beginning of the period shall stand suspended accordingly."*

8. An amendment in similar terms was made to s.5(1) of the 2002 Act under which the Minister is obliged to notify a person of the endorsement of any penalty points on their licence and that if the number of penalty points exceeds the stipulated number, either twelve or seven, that the person is disqualified. Nothing turns on this additional provision. Further, the 2014 Act introduced the category of novice driver which covers a person for the period of two years after a first full driving licence is issued to them.

9. In simple terms, the effect of these amendments was that post 2014 the holder of a full driving licence would automatically be disqualified from driving for six months once they reached or exceeded twelve penalty points, whereas the holders of learner permits and novice drivers would suffer the same fate on reaching seven penalty points. The 2014 Act did not contain any transitional provisions. Section 8 was commenced on the 1st of August 2014 (S.I. No. 147 of 2014).

10. It seems that in 2014 some consideration was given by the Department to the position of people who held learner permits (perhaps already endorsed with penalty points) and how they might be affected by the change of the law. Apparently, a press release was issued on 25th July 2014 in which it was stated that only persons who received a learner permit for the first time on or after 1st August 2014 would be subject to the new seven point threshold and that persons who held learner permits prior to that date would remain subject to the twelve point threshold. I say "*apparently*" because although the 2014 press release was supposedly exhibited on behalf of the Minister, the document actually exhibited was a later press release dating from May 2021. It is not clear whether the 2014 press release (which the court has not seen) disclosed that this interpretation of the legislation was based on "*legal advice received by the Department*" as Mr. Hattaway has averred in his affidavit on behalf of the Minister. This affidavit also refers to an online information note published by the Road Safety Authority in July 2014 which suggested that the Department applied this legal advice in their "*administrative rules*". The online administrative note is not exhibited.

11. The Road Traffic Acts continued to be applied in this manner until circa May 2021. At this point the Department changed its practice and commenced applying the seven penalty point threshold to all holders of learner permits regardless of the date on which that permit had issued. A further press release was issued on 14th May 2021 outlining this change. The press release recites a portion of the amended section s.3(1) of the 2002 Act, namely s.3(1)(b)

identifying "*a person who at the time such points are endorsed is a learner driver or a novice driver*" and goes onto explain the following: -

> "*The interpretation by the Department, based on legal advice received at the time, was that this new threshold should be applied only to people who enter the driver licencing system on or after that date. Those learner drivers already in the system before the new legislation was introduced on 1st August 2014 should continue to be subject to the standard 12 points disqualification threshold.*
>
> *As a result of further, revised, legal advice, the Department is now applying the 7-point threshold to people who were in the system before that date on the following basis:*
>
> *- If someone who is a learner or a novice receives 7 or more penalty points while a learner or a novice on or after 1 August 2014, they should face disqualification; …"*

The press release went onto state that "*all drivers affected*" would be contacted personally by the Department to notify them of the impact of the changes. This seems to mean those learners or novices already on seven or more penalty points. It is a common case that although some three thousand people were notified of the change, those notified did not include the applicant.

12. The only reason proffered for this change of approach – at para. 26 of Mr. Hattaway's affidavit – is that the Department "*subsequently received legal advice which had the effect of altering its opinion on the administrative rules*". It is acknowledged that this new legal advice "*disagreed with the original interpretation*". The new legal advice was affirmed by further legal advice. Thus, the Department received three sets of legal advice on the interpretation and/or application of the changes made to the penalty point system in 2014, the first in 2014 and the second and third in 2021. These are the three documents the subject of the applicant's application for inspection.

13. The applicant claims to have been unaware of this change at the point at which he accepted the fixed charge notice in respect of the September 2021 offence, paid the fine and received the penalty points which automatically followed. This was significant for him because he already had five penalty points endorsed on his licence and the additional two meant that he reached the threshold of seven and, thus, automatic disqualification. This occurred at a time when he understood he had another five points leeway before he would reach, what he understood to be, the twelve point threshold.

14. The Minister's opposition papers are very critical of the applicant as someone who spent nine years driving on a learner permit and incurred penalty points by reason of offences committed while doing so. My initial instinct was to share this view. Nine years seems to be an extraordinarily long period to spend driving on a learner permit. Although the applicant sat his driving test three times before he passed it, his first attempt was in 2018, some six years after he had received his learner permit. However, my view of these facts as exceptional was offset by Mr. Hattaway's affidavit, in which he explained that as of August 2022 (the date of the affidavit) there was more than 611,000 learner or novice drivers in the system who held licences as of 1st August 2014. This means there were at least 611,000 people driving on learner permits for a minimum of between six to eight years and possibly, like this applicant, for longer. Consequently, far from the applicant being exceptional, the change in the application of the law which affected him clearly has the potential to affect a significant number of other people.

15. Further, it should be noted that had the applicant been aware of the change in the application of the law, he might have made a different choice regarding the fixed charge notice. As mentioned, penalty points expire after three years and the effect of accumulating additional penalty points will depend on the number already endorsed on a licence at any given time. In this case, the applicant's solicitor has sworn an affidavit indicating that three

penalty points were endorsed on the applicant's licence on 21st January 2019 in respect of an offence committed in 2018. In normal course those penalty points would expire in January 2022. Therefore, if the two penalty points in respect of the offence committed in September 2021 were not to have been endorsed on the applicant's licence until after 21st January 2022, he would not have reached the threshold of seven penalty points because three of those existing in October 2021 would have been removed. The solicitor avers that he would have advised the applicant not to pay the fixed charge notice but rather to await the issuing of a summons. The summons would have afforded the applicant a final opportunity to pay a fine and accept the lower number of penalty points before going to court. Bearing in mind delays in the system then pertaining due to a backlog because of Covid-19 restrictions, the solicitor expects that the length of time which the applicant would have had to pay the fine pursuant to the summons would have expired after 21st January 2022.

The Applicant's Pleadings

16. As noted above, much of the argument on this appeal centred on the parties' respective pleadings. The Minister points out that the applicant introduced the legal advice into the proceedings by referring to the press release in his statement of grounds and by his solicitor exhibiting the press release in an affidavit. The press release in turn referred to the initial interpretation of the legislation by the Department being based on legal advice received in 2014 and the changed application of the legislation being based on "*further, revised, legal advice*". Consequently, the Minister contends that in responding to the applicant's pleadings he must be allowed to refer to the existence of legal advice already referred to by the applicant without being taken to have waived the privilege attaching to it. The applicant, in reply, contends that the Minister's reference to legal advice goes beyond the reference made

to the press release in the statement of grounds and amounts to deployment of that advice to gain a litigious advantage.

17. The statement of grounds is a lengthy document in which the applicant makes a wide variety of pleas. The relief sought seeks to quash the endorsement of the additional penalty points on his licence and the automatic disqualification which followed. The applicant also seeks declarations that the endorsement of his licence and the subsequent disqualification was "*arbitrary, unreasonable, unfair and otherwise than in accordance with law*"; that the disqualification breached the applicant's right to constitutional and natural justice; that he enjoyed a vested right that the new threshold for disqualification would not apply to drivers "*in the system*" since 2012 and that the respondent was obliged to take account of the interests of persons likely to be affected before changing the application of the law.

18. Significantly, as I read the statement of grounds, the applicant does not seek a declaration to the effect that the revised interpretation of the 2014 amendments, which was adopted in 2021 and allowed the imposition of the new rules on drivers "*in the system*", was incorrect. The focus of the case is on the fact of a change in the interpretation and application of the law by the respondent rather than on the contention that one interpretation was correct and the other incorrect.

19. The initial grounds on which this relief is sought relate to the history of events giving rise to the proceedings as set out in the previous section of this judgment. At para (vi) the applicant pleads that the respondent should have taken account of the interests of drivers, such as himself, likely to be affected by the change in the application of the law and should have notified drivers in sufficient time to enable them to make informed decisions on matters affecting their interests in such a significant way. At para (xii) he pleads that the amendments effected by s.8(c) of the 2014 Act should not be given retrospective effect.

20. At para (xiii) the applicant pleads the interpretation and application of the 2014 amendments originally adopted by the Minister which is described elsewhere in the statement of grounds as "*the publicly stated position of the respondent*". At paras. (xv) and (xvi) the applicant pleads the 2021 press release as follows: -

> *"(xv) On 14th of May 2021 the Department of the respondent published a press release on the official government website affirming that the interpretation by the respondent was that, based on legal advice at the time of the enactment of the Road Traffic Act 2014, that the new threshold of 7 penalty points for holders of learner permits and novice drivers, introduced by the Road Traffic Act 2014, should be applied only to people who enter the driving licence system on or about the 1st of August 2014 and <u>those learners drivers already in the system before the new legislation was introduced on the 1st of August 2014 should continue to be the subject of the standard 12 points disqualification threshold and treated the same as a fully licenced driver</u>.* (emphasis added by applicant)
>
> *(xvi) In the same press release referred to in the preceding paragraph, the Department of the respondent went onto state that, as a result of further revised, legal advice the Road Safety Authority would from thereon apply the 7 point threshold to people who were in the system before that date, namely persons who held learner permits prior to August 1st 2014 and persons deemed to be Novice drivers prior to August 1st 2014."*

21. The applicant then sets out the impact of the change on himself and similarly situated drivers. He refers to an exchange of emails between his solicitor and the Road Safety Authority culminating in an email from the Road Safety Authority dated 23rd November 2021. The text of the email is quoted at para. (xxii), the relevant portion being as follows: -

> "…*When the rules were introduced, the Department of Transport understood, based on legal advice, that this new threshold should not apply to individuals who had any licence before that date. As a result of revised legal advice, the Department now understands that the seven point threshold rule does apply to these individuals, but it only applies in relation to penalty points received after that date*."

22. The applicant then proceeds to make a number of legal pleas based on these facts. I do not propose to set them out in detail and indeed many of them are not relevant to the issues on this application. The essence of the applicant's case is that a change by the respondent in the interpretation and application of a law nearly seven years after it was commenced is unlawful for various reasons. These include: a failure to provide adequate reasons for the change, a failure to afford the applicant procedural fairness insofar as the change materially affected him and the plea of irrationality which has, for present purposes, two relevant aspects. These are the contention that there is an obligation on the respondent to provide adequate reasons for the change which, as of the date of the application for leave to apply for judicial review, remained unexplained and that, in order to be rational, the change required express consideration of its impact on the rights and interests of persons likely to be affected, which did not occur. There is a contention that the reversal by the Minister of his original decision as to how the legislation was to be applied offends against the requirements of certainty and foreseeability and thus constitutes a violation of the applicant's personal rights.

23. The applicant's grounding affidavit makes no reference to either the 2021 press release or the legal advice referred to therein. Instead, it sets out his understanding of how the law was applied at the time he paid the fixed charge notice in October 2021, what he would have done had he known an automatic disqualification would follow payment of the fine and how disqualification impacts on his personal and family circumstances. A short affidavit sworn

by his solicitor two weeks later does not make any substantive averments but exhibits a number of documents including the 2021 press release. He also exhibits the email from the Road Safety Authority referred to at para. 21 above.

The Respondent's Pleadings

24. The respondent's statement of opposition is a more problematic document. Under Order 84 Rule 22(5) a respondent who intends opposing an application for judicial review in respect of which leave has been granted must file a statement of opposition. The requirements of a statement of opposition are set out in sub-rule (5) as follows: -

> "*It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (except damages, where claimed).*"

Similar obligations are imposed on applicants as regards their pleadings under Order 84 Rule 20(3), but it is not suggested in this case that the applicant failed to comply with those requirements.

25. For the most part, the statement of opposition is framed as a complete traverse and denial of the applicant's case. Although there are certain formal and factual admissions, there are very few positive pleas which actually set out the Minister's position on either the legal or factual case pleaded by the applicant. The statement of opposition is replete with phrases such as "*the applicant is put on full proof …*", "*no admissions are made*", "*it is not accepted*" and "*it is denied*". In the course of exchanges with counsel on the approach adopted in the

statement of opposition, counsel suggested that the legal effect of a denial was to put the onus of proving the issue on the applicant. This is undoubtedly so in plenary proceedings where a defendant is entitled, without more, to require a plaintiff to prove each element of the case pleaded. However, this approach to pleading will rarely be appropriate from a respondent in judicial review proceedings. Certainly, it does not meet the requirements of Order 84 Rule 22(5) to state precisely each ground of opposition, giving particulars and identifying the facts or matters relied on in respect of each such ground and to deal specifically with every fact or matter in the statement of grounds which is not admitted.

26. It is, of course, appropriate for the applicant to be put on full proof of matters personal to himself, such as the decisions he might have made had he been aware of the change in the application of the legislation or the impact a disqualification might have on him. It will also be appropriate for a respondent to deny something the existence, occurrence or correctness of which is actually disputed by that respondent. However, in my view, is it not appropriate for the Minister simply to deny that the Department changed how the legislation should be applied (as is done in para. 26 of the statement of opposition) or to deny that the Minister had altered the existing regulatory regime (para. 31(b)). This case arises precisely because in 2021 the Minister changed the manner in which the 2014 amendments to the Road Traffic Act 2002 were to be applied from the way in which they had been applied for the previous seven years. In reality, not only is this undisputed, the fact this change occurred was flagged in the Minister's press release of 14th May 2021. Thus, while the Minister may wish to dispute the applicant's characterisation of the change, rather than denying that any change has occurred, Order 84 Rule 22(5) requires the Minister to explain, legally and as a matter of principle, why the change, as flagged in the 2021 press releasee, does not amount to a change in the application of the law or a change in the existing regulatory regime.

27. This pleading issue is not purely pedantic. For example, much of the Minister's argument on a preliminary issue, which was rejected by O'Donnell J., is to the effect that, although Mr. Hattaway's affidavit makes reference to the legal advice received by the Minister, he does not refer to specific documents. Consequently, the Minister argues that the applicant has not identified the documents inspection of which is sought and that this is a requirement of the Rules. Such an argument might be meritorious if the Minister was categorically stating that all legal advice received was oral and that no documents reflecting that advice are in existence. The Minister has not said that. It was not contended before this court that the advice was oral. Rather, counsel argued that the Minister's silence on the issue was not sufficient to allow the trial judge to draw the inference he did, namely that it was sensible to infer that whatever legal advice was offered was reduced to writing. In essence, the Minister approached this application on the basis that there was an onus on the applicant to establish the form in which legal advice was provided to the Minister even though the application was brought because the applicant has not had access to that advice.

28. In my view, this is wholly inappropriate. If the legal advice was exclusively oral, then the Minister is entitled to respond to the application on the basis that there are no documents which can be inspected. On the other hand, if the legal advice was given in writing - and only the Minister knows whether this was so - then he must engage with the application on its merits and not try to deflect the court's consideration of it by raising a preliminary objection based on his own non-disclosure of a fact material to the application.

29. The applicant's arguments regarding his entitlement to inspect the legal advice focused on that part of his case which complained that the decision to change the way the law was applied was irrational and that no reasons were provided for the change. In this context he laid emphasis on two portions of the statement of opposition. The first of these was para. 18 which is as follows: -

"… it is admitted that prior to 2021 it had been decided that the limit of seven penalty points would apply only to persons who obtained their first learner permit on or after 1 August 2014 and that a person who was already a learner at that point would remain on the 12 point limit while they were a learner and when they became a novice. However, any suggestion or implication that this approach was somehow not subject to reconsideration or to change, in particular with the passing of time, is denied."

30. The second was para. 26 which is as follows: -

"… it is denied that the Department of the Respondent "change[d] how legislation should be applied" and it is denied that it is a requirement on the Department of the Respondent to provide "adequate reasons", notwithstanding the vagueness of the plea including what the Applicant considers to be "adequate". While the Respondent's primary position is to deny that the duty to give reasons as a matter of administrative law is in any way engaged in the circumstances of the present judicial review, without prejudice to that, if such a duty applied, the Applicant is put on proof of any proposition that adequate reasons were not advanced. In that regard, it is noted that §16 of the Statement of Grounds itself has referred to the press release of 14 May 2021, as well as its reference to legal advice."

31. The applicant accepts that para. 18 is not a catch-all denial. Instead, he argued that it meant the Minister regarded the 2014 amendments as giving rise to some scope for the exercise of an administrative discretion in that an initial decision had been made in 2014 which the Minister regarded as being open to reconsideration in light of the passage of time. It was argued that this interpretation of the plea was borne out by the references in Mr. Hattaway's affidavit to the "*administrative rules*" of the Road Safety Authority under which the penalty point system appears to be applied. The reference in para. 26 of the affidavit to

the Department having "*subsequently received legal advice which had the effect of altering its opinion on the administrative rules*" was particularly noted.

32. Para. 26, in which express reference is made to the legal advice, is problematic in many respects. Firstly, it is undisputed that there was a change in how the legislation was applied so it is manifestly inappropriate for the Minister to deny the fact of that change. In fairness, the intention of the paragraph is primarily to dispute the applicant's plea that the Minister was obliged to provide adequate reasons for the change in how the law was to be applied by contending that no duty to give reasons arose in the circumstances. However, the follow-on plea to the effect that the applicant is put on proof of the proposition that adequate reasons were not advanced is problematic in circumstances where the applicant has expressly pleaded (at para. (xxxv) of the statement of grounds) that the reversal of the original decision as to how the legislation was to be applied was "*as yet unexplained"*. A respondent can certainly assert that reasons are not required as there is no duty to provide them in the particular circumstances. However, in circumstances where reasons were not given, a respondent cannot place the onus on an applicant to disprove the adequacy of whatever undisclosed reasons the respondent may have had.

33. The most difficult element of this plea from the Minister's perspective is the final sentence. I find it impossible to read that sentence as anything other than a plea that the reasons for the change are to be found in the press release of 14th May 2021 and in the legal advice to which it refers. Counsel ultimately conceded that if, contrary to the Minister's central plea on this issue, reasons are required then the legal advice referred to in the press release will be relied on by the Minister as the reason for the change in the manner in which the law is to be applied. As we shall see this is hugely significant as regards whether the Minister has deployed the legal advice for the purposes of the proceedings.

34. The Minister's statement of opposition was verified by the affidavit by Mr. Hattaway. That affidavit sets out the background to the penalty points system and then moves to address the amendments made by the Road Traffic Act 2014. The applicant's argument focused on paras. 22-26 inclusive of that affidavit, which come under the latter heading. Those paragraphs commence by describing the manner in which the amended legislation was implemented in 2014 (on the basis of legal advice received by the Department at the time). A press release issued by the Minister in 2014 is supposedly exhibited but as noted, the document actually exhibited, presumably in error, is the 2021 press release. Reference is made in para. 24 to the Road Safety Authority applying "*the above legal advice in their administrative rules*" as *per* a 2014 online note. That online note is not exhibited. Para. 25 deals with expired permits – which are not of direct relevance here – and speaks of the application of the "*administrative rules*" in those cases.

35. Para. 26 of the affidavit is crucial. It states: -

> "*The Department of Transport subsequently received legal advice which had the effect of altering its opinion on the administrative rules. That advice disagreed with the original interpretation and determined that there was no reason why a person who held a learner permit or was a novice driver prior to 1 August 2014 should not be disqualified on the accumulation of seven new points after 1 August 2014. Furthermore the advice stated that if the total amounts of points accumulated before and after the 1 August 2014 reached the 12 point threshold the drivers could also be disqualified. This advice was reaffirmed in further advice.*"

36. The Minister contends that this goes no further than the reference to the legal advice already made by the applicant in his statement of grounds and in the press release exhibited by his solicitor and does not amount to deployment of that advice for the purposes of the proceedings. The applicant disagrees. He contends that this paragraph establishes not simply

that legal advice was received in advance of the change but that this legal advice disagreed with the original interpretation as a result of which the Department now takes the entirely opposite view, namely that a learner driver in the system before 1st August 2014 can be disqualified on the accumulation of seven new points after that date. It also referred to a third set of legal advice reaffirming the 2021 advice, the existence of which had not been previously disclosed. In passing, I struggled with the notion of twelve penalty points accumulated since 2014 when penalty points expire automatically after three years so that, in practice, by 2021 only those accumulated since 2018 were relevant. However, I was told that there are a small of cases where either a driver is suspended or a permit lapses in which case any penalty points existing at the time will be suspended and reinstated when the disqualification ends or a new licence is issued. This has no bearing on the applicant's circumstances.

37. The affidavit went on to describe the rationale for sending individual notification of the change to just under 3,000 drivers out of the 611,000 or so learners/novices in the system since 2014. It seems that those notified were already on seven or more penalty points or would have accrued that number were it not for the automatic expiration of penalty points after three years. The applicant was not in that group. The balance of the affidavit deals with the applicant's personal circumstances and is not relevant to the issues on this appeal.

Duty of Candour

38. The specific pleading obligations on a respondent under Order 84 Rule 22(5) is one way through which effect is given to a broader principle, namely the duty of candour on respondents in judicial review proceedings. That duty, which in layman's terms requires a respondent to be "up front" with both the applicant and the court, arises because of the particular position of public authorities in the context of public law litigation. Such

respondents occupy a unique position by virtue of the fact that they have duties and responsibilities regarding the implementation and administration of the law which do not apply generally to defendants in ordinary civil litigation. Whilst all citizens are expected to comply with the law, the positive obligation on a public authority to uphold the law is a materially different and higher one.

39. The duty of candour was first articulated by Donaldson MR in *R v. Lancashire County Council, Ex Parte Huddleston* [1986] 2 ALL ER 941 ("*Huddleston*"), in which a student sought to challenge the refusal to her of a discretionary university grant. Part of her challenge focussed on the extent to which the local authority was obliged to give "*full, or perhaps any, reasons*" for the refusal – a point which has of course been comprehensively resolved in this jurisdiction by the decision of the Supreme Court (Fennelly J.) in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 IR 297.

40. Donaldson MR left that question open in principle, subject to the proviso that where an applicant has satisfied the threshold for the grant of leave to apply for judicial review then "*it becomes the duty of the respondent to make full and fair disclosure*". He continued: -

> "*Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration …*
>
> *The courts must and do recognise that, where errors have, or are alleged to have, occurred, it by no means follows that the authority is to be criticised. In proceedings*

> *for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority.*

As regards the argument that the onus of proof in a judicial review lies on the applicant, Donaldson MR observed:-

> *The analogy is not exact but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why …*
>
> *First, [counsel for the authority] says that it is for the applicant to make out his case for judicial review and that it is not for the respondent authority to do it for him. This, in my judgment, is only partially correct. Certainly it is for the applicant to satisfy the court of his entitlement of judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands*."

41. Initially independent of *Huddleston*, a similar approach was adopted in this jurisdiction especially as regards the requirement for a respondent to disclose the material relevant to the decision sought to be impugned – see Keane C.J. in *O'Neill v. Governor of Castlerea Prison* [2004] IESC 7, [2004] 1 I.R. 298. More recently, in cases including *RAS Medical Ltd v Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 I.R. 63, *Huddleston* is relied on as an additional source for the principles expressed.

42. Whilst "*all the cards face upwards*" has become something of a mantra, some of the underlying concerns Donaldson MR was addressing have been overtaken by other developments since 1986. The legal and regulatory framework within which most public

authorities work is now imbued with an ethos of openness and transparency which was lacking in earlier decades. A person in the position of the *Huddleston* applicant would be able to invoke the Freedom of Information Act 2014 and the data access provisions of the Data Protection Acts 1988 - 2018 in order to obtain the information required to make their case. Other bodies, especially those such as planning authorities which make decisions entailing a degree of public participation, are obliged to make their files available for public inspection even in the absence of litigation. Nonetheless, the duty of candour remains an important principle governing the conduct of respondents in public law litigation, albeit that findings that the duty has been breached remain relatively rare.

43. How does this tie in with the difficulties I have outlined above regarding the manner in which the Minister has pleaded this case? Firstly, whilst it is perfectly proper for a defendant in ordinary civil litigation simply to deny the plaintiff's case thereby placing the onus of proving it on the plaintiff, it is not open to a respondent in judicial review to adopt the same approach. It is not a proper approach for a statement of opposition to formulaically deny the pleas made by the applicant. A denial of something is not a ground of opposition. A denial does not deal specifically with the facts or matters pleaded by the applicant which the respondent does not admit.

44. Where something is denied because it is disputed, the respondent should make clear the basis upon which it asserts that the particular legal or factual proposition is incorrect. Although the applicant bears the onus of establishing the facts or matters relied on in a claim for judicial review, a denial which is intended to put the applicant on proof of something within the knowledge of the respondent cannot have that effect in practice unless the respondent has made full and fair disclosure of all relevant material whether through procedures such as those described in para.42 of this judgment or otherwise in the context of the litigation.

45. In this case the Minister has denied (at para.31(c) of the statement of opposition) that he acted unreasonably, unfairly, disproportionately or retrospectively. However, no positive plea is made as to how the Minister contends that it was reasonable to materially change the application of the law after it had been in operation for seven years. In making this observation I do not intend to suggest that the Minister has acted unreasonably. That remains a matter for the trial judge. However, except for the reference to having received legal advice, it is not possible to discern from the opposition papers why the Minister changed the way the law was to be applied. In circumstances where this case is essentially about the legality of an apparently unexplained change in the application of the law, in my view it is very much open to question whether the Minister has met the obligation on him to explain fully what was done and why. I will return to this in my analysis of the core issue on this appeal.

46. Before leaving the duty of candour I should deal briefly with the State Litigation Principles which were also called in aid by the applicant. These Principles were adopted by the Government and the Attorney General in June 2023 and apply to the State in litigation generally, not just to public law litigation. Their aim is to assist the State in maintaining high standards of ethics and integrity in the conduct of litigation. Many of the Principles overlap with elements of the duty of candour but others address issues which have not, as yet, been identified as coming within the scope of that duty. The Principles do not have a statutory or other regulatory basis. The Introduction to the Principles states expressly that they "*do not have, and are not intended to have, any binding legal effect*", rather they are intended to serve as guidelines. It is undoubtedly a positive step that the State should publicly commit to endeavouring to act in accordance with principles of this nature and that it encourages other litigants to do likewise. It would be both contrary to the express terms of the Principles and, perhaps more importantly, to the spirit in which they were adopted to

allow the applicant to rely on them in the context of this litigation. For this reason, I do not propose to consider them further.

Inspection of Documents

47. The applicant's application to the High Court was made under Order 31 Rule 18 of the Rules of the Superior Court. That Rule forms part of a suite of rules regarding the inspection of documents which form part of Order 31 which deals more broadly with interrogatories, discovery and inspection.

48. Commencing with Order 31 Rule 15, provision is made to allow a party to litigation to serve notice on the other party requiring the production for inspection of any documents to which reference is made in that party's pleadings, affidavit, or list of documents. The party who has referred to the document will not generally be allowed to put it in evidence if he fails to allow the document to be inspected unless he satisfies the court that there is a sufficient cause or excuse for not complying with the notice. The practicalities of inspection are dealt with in Order 31 Rule 17. The relevant parts of Order 31 Rule 18 then provide: -

> *"(1) If the party served with the notice under Rule 15 … objects to give inspection … the Court may, on the application of the party desiring it, make an order for inspection …*
>
> *(2) An order shall not be made under this rule if and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."*

49. Thus, the scheme of these rules is to establish a *prima facie* right to inspect any document referred to in the other side's pleadings subject to circumstances where the court is satisfied that there is sufficient cause or excuse not to require such inspection. As mentioned previously, the respondent raised a preliminary objection on the basis that the

language used in Rules 15 and 18 expressly refers to documents which have been referred to in a party's pleadings and, thus, gave rise to an onus on the applicant to establish that the legal advice was contained in documents. I have already indicated that I do not think that argument is consistent with the duty of candour on a respondent to deal openly and fairly with the issues arising on a judicial review. The respondent knows whether the legal advice is or is not contained in documents. If the legal advice is not contained in any document, then the respondent must expressly state this in order to make whatever argument flows from the text of O.31, R.15 and R.18. On the other hand, if the legal advice was contained in documents, then it is singularly inappropriate for the respondent to argue that the applicant is not entitled to invoke the Rule because the applicant has not proved the existence of the documents. On the basis of the pleadings as they stand, I agree with O'Donnell J. that it is reasonable to infer that the legal advice referred to by the Minister in his opposition papers was reduced to writing and I would uphold his decision to dismiss the Minister's preliminary point.

50. In normal course it is to be expected that a respondent will generally not make reference to privileged material in a statement of opposition or on affidavit. Where reference is made to privileged material, it is beyond argument that the court can consider that claim of privilege in deciding whether there is a sufficient cause or excuse to justify non-compliance with the notice seeking inspection. I anticipate that frequently the matter will be disposed of simply by upholding the claim of privilege. However, there is also a category of case in which the manner in which the privileged material is referred to gives rise to questions as to whether the claim of privilege which would otherwise apply has been waived. That is what is in issue in this case.

Legal Professional Privilege – General Principles

51. The way in which the case has been pleaded is crucial to the central issue on this appeal, namely whether the Minister can be said to have waived privilege in the legal advice. This, in turn, depends on whether the legal advice can be said to have been deployed by the Minister to gain a "*litigious advantage*". However, before this issue is reached there are a number of principles derived from the large number of authorities cited to the court which should be noted. These were not in dispute between the parties.

52. The first of these is the fundamental nature of legal professional privilege as a result of which the law, as a matter of public policy, affords absolute protection to communications between lawyers and their clients save in limited circumstances where the communication is used to facilitate fraud or crime or where the privilege has been waived (see Fennelly J. in *Fyffes Plc v. DCC Plc* [2005] IESC 3, [2005] 1 IR 59 ("*Fyffes*") adopting Bingham C.J. in *Paragon Finance Plc v. Freshfields* [1999] 1 WLR 1183 and Finnegan J. in *Redfern Limited v. O'Mahony* [2009] IESC 18, [2009] 3 IR 583.) Because legal professional privilege is absolute, the court does not have a discretion to displace it by reference to general criteria such as the interests of justice or fairness.

53. Notwithstanding the fundamental nature of legal professional privilege, it can be waived by the party entitled to claim it, namely the client. This can be done expressly or by implication. Express waiver is rarely problematic, but care must be taken in cases where implied waiver is asserted by the opposing party. Because of the fundamental nature of the privilege, waiver should not be lightly inferred (*Fyffes* above). In particular, mere reference in pleadings to the fact that legal advice was obtained will not be sufficient to infer that the privilege attaching to the contents of that legal advice has been waived.

54. A party who wishes to refer to legal advice without waiving privilege may seek to expressly reserve the privilege attaching to the contents of the document the existence of

which is being disclosed (see *Director of Corporate Enforcement Authority v. Cumann Peile Na hÉireann* [2022] IEHC 593). Such an express reservation will not necessarily be determinative of whether the privilege has been impliedly waived but it is a material factor to which the court must have regard and attach appropriate weight (see *Fyffes* above).

55. I note in this regard that the *Fyffes* judgment actually refers to "*express stipulations of confidentiality*" (at para. 43) rather than to privilege. This is because the issue in *Fyffes* concerned the disclosure of privileged material (expert reports) by the defendants to a third party as a result of which the plaintiff claimed the defendants had waived the privilege which would otherwise apply. The defendants argued that the disclosure had been made for a limited purpose and was subject to express stipulations of strict confidentiality which the third party had accepted. The court agreed that this type of disclosure did not amount to a waiver of privilege. The reference to confidentiality was specifically related to the basis on which the defendant had disclosed the reports to the third party and not to the privilege relied on by the defendant as against the plaintiff. The question of confidentiality independent of privilege does not arise in this case and I do not share the Minister's criticism of O'Donnell J. for failing to refer to confidentiality in his summary of the relevant principles which emerge from the authorities (at para. 48 of his judgment).

56. Before I move to the more disputed aspects of how the dividing line between a mere reference to a privileged document and the waiver of that privilege should be identified, I should address those grounds of appeal which assert that the trial judge failed to afford sufficient weight to the absolute nature of the privilege, the fact that waivers should not be lightly inferred or to Mr. Hattaway's statement expressly maintaining privilege in his affidavit. All of these factors are identified by O'Donnell J., both in his summary of the Minister's submissions, his extrapolation of the relevant principles from the authorities at para. 48 of his judgment and in his subsequent discussion of the issues from para. 53

onwards. They are not discussed at that point in the same level of detail as the issue concerning deployment, but that it unsurprising since those principles were both undisputed by the applicant and accepted by the court. Consequently, I do not think that O'Donnell J. can be faulted as regards his identification of the relevant principles nor his application of them to the facts of the case. The real issue is whether he was correct in his conclusion that the legal advice had been deployed by the Minister for the purposes of the proceedings. If he was, then the express reservation of privilege does not operate to neutralise the effect of such waiver.

57. In a similar vein, I do not think the judgment of the High Court can be criticised for not referring to all of the authorities that were opened by the Minister even where those authorities were pertinent to the issue before the court. The Minister's written submissions identified two cases (*Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2015] IEHC 457, [2015] 1 IR 124 and *Henderson & Jones Ltd v. David Jason Ross* [2022] EWHC 2560 (Ch)) and one academic text (Malak et al, *Phipson on Evidence* (20th Edition, 2022.)) which were cited in argument, but which are not mentioned in the judgment.

58. There is no general obligation on a judge to cite in their judgment every case that has been referred to by the parties provided the core issues in the case and the core arguments made by each side are correctly identified and considered. As it is, there is an extremely large number of judgments delivered by the High Court each year and those judgments are constantly increasing in length. The ease with which lawyers can conduct digital research has meant that the number of issues raised in cases and the amount of material relied on to support those issues has increased exponentially. Quite often the task of the judge is to sift through this material to identify those cases or texts which are, in principle, core to the issue to be decided as distinct from those which are simply illustrative of the application of the law as decided in earlier cases. Provided all relevant issues are dealt with, considerable

leeway must be afforded to a trial judge in the formulation of their judgment and the determination of what, if anything, needs to be cited in it.

59. In the context of implied waiver of privilege, the authorities are clear that each case will be fact specific. This means that the application of the law in a previous case in a manner which might be perceived as favouring one or other side of the argument will not be determinative because the factual context will necessarily be different. In my view, there is nothing in the extracts from the cases and texts cited in the Minister's High Court submissions, of whose omission from the judgment complaint is made, that materially altered or added to the principles already described in the High Court judgment.

Implied Waiver of Privilege – Deployment

60. All though there were a number of cases cited to the court regarding the waiver of privilege, many of these were not directly on point. For example, *Byrne & Leahy v. Shannon Foynes Port Company* [2007] IEHC 315, [2008] 1 IR 814 involved the inadvertent disclosure in an affidavit of discovery of a number of documents in respect of which privilege could be claimed. Clarke J. held that where privileged documents were disclosed by being included in the wrong schedule to an affidavit of discovery, the claim of privilege was not lost until inspection had taken place. In examining the test to be applied to ascertain whether a document has been "deployed", Clarke J. held that it required the disclosing party to have placed reliance on the content of the document and not simply to have disclosed its existence.

61. I have already noted that *Fyffes* involved an argument that privilege had been waived because of the disclosure of the material to a third party. *Redfern Limited v. O'Mahony* (above) concerned a similar issue and established that disclosure of privileged documents for a particular purpose or to parties with a common interest would not necessarily amount

to a waiver of privilege. It also acknowledged that a broader approach which had been adopted in Australia of deciding whether privilege was waived based on general principles of fairness, did not represent the law in this jurisdiction. Similarly, *Director of Corporate Enforcement Authority v. Cumann Peile Na hÉireann* (above) also concerns whether the disclosure of documents to third parties constituted a waiver of privilege.

62. *Persona Digital Telephony Ltd v. Minister for Public Enterprise* (above) is somewhat *sui generis* in that it concerned a litigation funding arrangement and an application by those who entered into it for a declaration that it did not constitute an abuse of process or a breach of the law regarding maintenance and champerty. In order to meet the application, the defendant sough disclosure of the agreement, in response to which the plaintiffs claimed confidentiality and litigation privilege. The court ordered disclosure of a redacted version of the agreement leaving open the possibility that further portions might have to be disclosed during the hearing of the application. The judgment looks at what might constitute a "*litigious advantage*" – a point to which I return below – and held that it must refer to an advantage regarding an issue between the parties in the substantive action and not just a tactical advantage in the litigation.

63. In distinguishing these cases I am not discounting the importance of the general principles which are identified and analysed in them. I am, however, sounding a note of caution regarding any assumption that because, for example in *Fyffes* and *Redfern v. O'Mahony* privilege was held not to have been waived, a similar conclusion should necessarily follow here.

64. The Irish case which is most directly on point is *Hannigan v. DPP* [2001] IESC 10, [2001] 1 IR 378. That applicant sought inspection of discovered documents in respect of which privilege had been claimed. The judicial review proceedings sought to prohibit a criminal trial in the Circuit Court, the DPP having refused to consent to summary disposal

before the District Court unless the applicant pleaded guilty. The document in issue was a letter from the DPP to the Gardaí containing the DPP's directions as to the prosecution. Portions of this letter were summarised in the affidavit sworn by the prosecuting guard. This led Hardiman J. to conclude that the deponent had not "*merely mention[ed] the existence of the document but relied on a summary of its contents*". He then considered the status of the document once it had been referred to in the pleadings as follows:-

> *"... the status of a document from the point of view of privilege or immunity from disclosure, changes once it has been referred to in pleadings or affidavit. Matthews and Malek's Discovery (London 1992) at para. 9.15 stated: -*
>
> > *"The general rule is that where privilege material is deployed in court in an interlocutory application, privilege in that and any associated material is waived ..."*
>
> *The basis for this rule is discussed in Nenea Karteria Maritime Company Ltd v. Atlantic and Great Lakes Steamships Corporation (No.2) [1981] Com. L.R. 139 as follows: -*
>
> > *"..... the opposite party..... must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question".*

Hardiman J. held that the document in issue had been deployed in the proceedings as it "*was referred to and its contents summarised, for litigious purposes, by the party entitled to claim privilege in it*."

65. Coincidently, in a passage potentially relevant to another of the Minister's criticisms of the High Court judgment, Hardiman J. concluded by noting that "*no grounds specific to the document itself has been urged against disclosure*" as a result of which, given its relevance, it was "*just and equitable*" that the applicant should have access to it. The Minister

complains that O'Donnell J. ultimately concluded that the legal advice should be disclosed because "*it would be unfair to the applicant to allow the respondent to deploy the advice in this manner without affording the applicant the opportunity to satisfy himself as to the proper weight or meaning to be afforded to that advice*" (para. 61 of the judgment). The Minister contends that this was an impermissible application of a different test, namely that of "*fairness*".

66. I do not agree. Firstly, O'Donnell J.'s observations in this regard are clearly premised on his prior finding that the legal advice had been deployed and, therefore, privilege had been waived. Hardiman J.'s comments in *Hannigan* suggest that even where privilege has been waived, there could still be grounds on which a court might refuse to order inspection. Although not elaborated upon by Hardiman J., this is consistent with the text of Order 31 Rules 15 and 18 under which a court may decline to order inspection if satisfied that there is sufficient cause or excuse to justify non-disclosure or that inspection is not necessary for the fair disposal of the matter. Thus, while the question of fairness is not relevant to the antecedent issue of whether privilege has been waived, where privilege has been waived the court must still ask itself whether inspection of the document is necessary for the fair disposal of the matter as between the parties. If anything, this invocation of fairness operates only to the advantage of the party claiming privilege. It means that the implied waiver of privilege is not necessarily determinative of whether inspection should be ordered although, of course, where the document is otherwise relevant and in the absence of any other grounds it frequently will be.

67. I do not think that the extract from *Redfern v. O'Mahony* (above) in which Finnegan J. makes comments in relation to the partial waiver of privilege and partial disclosure of the document is on point. Finnegan J. stated: -

> "*Where a party deploys in court material which would otherwise be privileged, the other party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood*."

I accept the applicant's argument that the rationale for ordering inspection in such cases is a concern that what has been partially disclosed or actually deployed is a selective extract from legal advice, in circumstances where the overall advice may be more nuanced as to its content. However, that is a somewhat different issue which does not arise here.

68. The issue narrows down to whether O'Donnell J. was correct to have found as he did at para. 61 of his judgment that the legal advice was deployed by the Minister for a litigious advantage. This entails consideration of two separate but interrelated concepts, namely deployment and litigious advantage. As we have seen, the Irish cases which refer to deployment (*Hannigan* and *Shannon Foynes Port Co.*) do not tease out the meaning of that concept in depth. Hardiman J. accepted the relevance of deployment and held the document in issue had been deployed as it had been referred to and its contents summarised for litigious purposes. Clarke J. clarified that mere reference to a privileged document is not sufficient to establish deployment, the party referring to it must place reliance on the content of the document.

69. The two concepts have been teased out in a number of more recent UK authorities, the main one of which is the decision of Mr. Justice Waksman in *PCP Capital Partners LLP v. Barclays Bank Plc* [2020] EWHC 1393 (Comm.). He begins his analysis of the law (at para. 47 of the judgment) with a number of overarching points starting with the fundamental nature of legal professional privilege and the need to carefully control the loss of that right

through waiver. Of relevance to the preceding paragraphs of this judgment, he also notes that the concept of fairness underpins the rationale for having a concept of waiver which may lead to the production of further privilege documents so that a party cannot "*cherry pick*" portions of a privilege document to convey a misleading impression. However, he emphasises that the question of whether there has been an implied waiver "*is not to be decided simply by an appeal to broad considerations of fairness*". I accept that this is correct, but I do not think that O'Donnell J. made any error in this regard.

70. Drilling down into the meaning of "*deployment*", Waksman J. identified two relevant factors namely that the reference to the legal advice must be "*sufficient*" and that the party waiving it must be relying on that reference to support or advance his case on an issue that the court has to decide. Thus, a purely narrative reference to the giving of legal advice will not generally constitute a waiver because it is not relied on in respect of an issue in the case.

71. This in turn led him to consider what he regarded as the difficult distinction between a reference to the effect of legal advice as opposed to its contents. This arose from previous case law in which a party's admission that something was done (or not done) as a result of having received legal advice was not considered to be a reference to the content of that advice sufficient to amount to a waiver of privilege. He noted that the distinction was not one which could be "*applied mechanistically and without any reference to context and purpose*". He ultimately concluded (at para. 60) as follows: -

> "*The application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the*

conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver."

72. In looking at whether the reference to the legal advice is "*sufficient*" he distinguished situations which had arisen in previous cases where legal advice was referred to in circumstances such as, for example, an application to serve out of the jurisdiction, made on an *ex parte* basis, or an application for summary judgment where a party may be obliged to aver that they have received legal advice confirming that there is a basis for or a defence to the claim made. These references would not generally be sufficient to waive the privilege attaching to that legal advice, not least because they are directed at a preliminary issue (service out or whether a summary claim should be sent for trial) rather than the substantive issue between the proceedings. This seems to me to be consistent with the conclusion reached by Donnelly J. in *Persona Digital Telephony* (above) that the litigious advantage conferred must relate to an issue between to the parties in the substantive action or in a truly interlocutory hearing.

73. *PCP Capital Partners LLP v. Barclays Bank Plc* (above) was recently approved in *Henderson & Jones Ltd v. David Jason Ross* (above), one of the cases which the Minister complains was not cited in the High Court judgment. This judgment examines in a very fact-specific way the context of the proceedings in question. The Minister placed reliance on the findings (at para. 35) that the defendant, i.e. the party claiming the privilege, was entitled to respond when reference was made by the claimant to one of the defendant's privileged documents, noting that the defendant had responded "*in minimal terms, replying only to the specific averments positively advanced by the claimant*". As may be apparent from the discussion of the pleadings earlier in this judgment, this is not the case here. The applicant's reference to the legal advice at paras. (xv) and (xvi) of the statement of grounds is purely narrative, whereas the Minister has relied on the legal advice as a reason for the Department's

change in its application of the law (should any reason be required). This is a specific response to the applicant's case on irrationality and inadequacy of reasons in respect of which the legal advice was not expressly invoked by the applicant. In this context, although the response may be brief, I do not think it can be characterised as minimal.

Analysis

74. In order to determine whether the legal advice has been deployed by the Minister, it is necessary to look at the context in which it had been referred to by the Minister in the Minister's pleadings. The Minister argues that as the advice was initially introduced in the applicant's statement of grounds, he was entitled to refer to it in response. Whilst this may be the case in principle, in the preceding paragraph I explain why I do not think that the Minister's utilisation of the legal advice was minimal in response to the applicant's narrative reference to it. It was expressly conceded on behalf of the Minister that para. 26 of the statement of opposition meant that if, contrary to the Minister's primary argument, it were to be held that reasons were required to be provided by the Minister for a change in the application of the law, then the Minister would rely on the legal advice obtained in 2021 and the fact that it was different to the advice which had been obtained in 2014 as a reason to justify that change. The applicant has alleged that the Minister's decision was irrational and that adequate reasons have not been provided for it. In those circumstances it seems to me impossible to conclude that the Minister's reference to the legal advice in his statement of opposition goes no further than adverting to the existence of that advice as a fact.

75. Instead, reliance is placed by the Minister on the content of the legal advice. Without disclosing the contents, the Minister seeks to rely on the fact that the advice received in 2021 was different to the advice received in 2014, as a justification for reconsidering the Department's administrative rules and changing the way the legislation should be applied.

The purpose of the reliance is directly related to issues in the proceedings, namely rationality and adequacy of reasons. In my view, the fact that the legal advice was different (a fact the Minister claims is evident from the press release exhibited by the applicant) is not in itself sufficient to explain to the applicant why the application of the law was changed. This is all the more so in circumstances where the Road Traffic Acts do not expressly envisage that there will be "*administrative rules*" involved in the application of the penalty points regime. It seems to me that the Minister has deployed the legal advice received in both 2014 and 2021 for litigious advantage in that he is relying on it to provide reasons and justify the rationality of his decision.

76. Given that the conclusion I have reached in the preceding paragraph is sufficient to justify an inference that privilege has been waived, it is not strictly speaking necessary to go further and consider the applicant's argument that para. 18 of the statement of opposition, in conjunction with the averments made between paras. 22 and 26 of Mr. Hattaway's affidavit, indicate that a positive choice was taken by the Minister in 2014 through the adoption of administrative rules which, notwithstanding that the legislation does not ostensibly afford the Minister a discretion, the Minister regarded as subject to review in light of the passage of time. The averments made by Mr. Hattaway, in particular, those at para. 26 of his affidavit indicate that the legal advice received had the effect of altering the Minister's opinion on the "*administrative rules"*.

77. The Minister argues that he is not relying on the correctness or otherwise of the legal advice received, but I think that this is to miss the point. The applicant's case is not that the interpretation now adopted is necessarily incorrect but that it is unlawful to change the interpretation and application of legislation seven years after it came into operation. The applicant may or may not be correct in this regard but given the Minister's reliance on the legal advice received to justify both the original adoption of administrative rules (which are

not mentioned anywhere in the Act) and the subsequent changes to those rules, it is again difficult to see how it could be seriously contended that the Minister has not deployed the legal advice for the purposes of the litigation.

78. As noted above, the context of deployment for a litigious advantage refers to the fact that the privileged material must have been deployed in relation to a matter that is in issue between the parties in the proceedings, and not merely for some coincidental or purely procedural purpose. The issues in respect of which the legal advice have been deployed are clearly issues which will have to be decided by the trial judge in determining the substantive proceedings and, thus, this requirement is also met.

79. In light of the fact that the Minister is relying on the legal advice and, more specifically, the differences between the advice furnished to the Department in 2014 and in 2021, as the reason for the change in how the law is to be applied (should such reason be required), in my view it is necessary that the applicant have sight of that advice in order for the trial court to be able to fairly dispose of these proceedings. If inspection were to be refused, the applicant would be unable to engage meaningfully with the Minister's assertion that the reasons for the change are adequate and that the decision to make the change is rational.

80. Finally in this regard, O'Donnell J. closely analysed the extent to which the references to the legal advice in the Minister's opposition papers exceeded those in the applicant's statement of grounds. I think this analysis is broadly correct. However, I would regard the more important factor as being the deployment by the Minister of the legal advice as a reason for his decision and justifying the rationality of the change in the application of the law which has been impugned in these proceedings.

81. Before I leave this issue, I should make it clear that I am not holding that legal advice given to a Minister on the adoption of legislation will lose the privilege that attaches to such advice if the interpretation of the legislation is subsequently put in issue in legal proceedings.

I appreciate that legal advice will inevitably be given to the Attorney General and the Government in the course of the legislative process. Further, it is important that legal advice can be sought in relation to the operation of legislation by those responsible for its implementation. Where issues arise as to the correct interpretation of legislation or as to its correct application (which will usually be based on its interpretation), those issues will fall to be resolved by the courts on a purely legal basis relying on the principles of statutory interpretation. The legal advice which may have been given to the sponsoring Minister, or indeed to the opposing party in litigation, will simply not be relevant. However, this case is not one where the parties advance conflicting interpretations of the legislation. Rather, the Minister adopted a particular interpretation of the legislation and, as a consequence, applied it in a particular way for seven years before changing his interpretation and, consequently, his application of it. When challenged as to his reasons for doing so he relied in his pleadings on the difference between the legal advice given to him at two different points in time. It is this particular and unusual set of circumstances which have led to the conclusion that the privilege which normally attaches to such legal advice has been waived.

Miscellaneous Issues

82. The applicant also argues that when he referred to the press release and, by extension, the legal advice in his statement of grounds and exhibited the press release in his solicitor's affidavit, the press release did not thereby become evidence in the proceedings since neither he nor his solicitor were in a position to prove the truth of its contents. On the basis of this analysis, he argues that when the Minister referred to the same documents in his opposition papers they acquired a different evidential status. This is a complex issue, the resolution of which is not necessary for the purposes of disposing of this appeal. It may well be correct, but I do not think that the different evidential status that a document may have when referred

to by the party in a position to prove it would necessarily suffice to constitute a waiver of privilege attaching to that document. Something more is required to meet the test set out in *Hannigan* and in *Shannon Foynes Port Company*.

83. Finally, the Minister argued that neither the reference by Mr. Hattaway to the legal advice in the press release of May 2021 nor the email sent by the Road Safety Authority can constitute reasons because it is contended that reasons for a decision cannot subsequently be provided on affidavit during litigation. In circumstances where the Minister advanced the legal advice as a reason for the change in the application of the law, should such a reason be required, it is somewhat strange that the Minister has sought to distance himself from his own pleadings in this manner. In any event, I think the Minster has misconstrued the authority relied on to support this proposition namely *Deerland Construction Ltd v. Aquaculture Licences Appeals Board* [2008] IEHC 289, [2009] 1 IR 673.

84. The discussion in that case as to whether adequate reasons had been provided arose in a context where the decision maker was obliged by statute to ensure that both the determination of an appeal and the notification of that determination stated the main reasons and considerations on which the determination was based. Leaving aside the court's comments on the adequacy of reasons, the basis upon which it was held that the reasons as originally stated could not be supplemented on affidavit during the proceedings was clearly statutory. Similar constraints may not apply in circumstances where, first, the impugned decision is not an individualised decision required to be directed at and notified to the applicant and, second, there was no statutory obligation to provide reasons in any particular form at any particular time.

85. There is long established authority for the proposition that, even if reasons are not expressly required to be given for a decision, once a litigant challenges the decision, the decision maker is obliged to disclose the material on which the decision was based and the

reasons for it (see *State (Daly) v. Minister for Agriculture* [1987] IR 165). Whilst courts might no longer be inclined to start from the premise that reasons are not required to be given *per se*, it is certainly the case that, at the very least, when requested reasons can be furnished after the event and, if the absence of reasons is raised for the first time in litigation, they can be provided in affidavit sworn for the purpose of the proceedings. I am not minded to allow the Minister avoid the consequences of the conclusion that he has relied on the difference between the legal advice furnished in 2014 and 2021 as a reason for his decision, by holding that it was not permissible for him to offer that reason on affidavit.

86. I have already dealt with the Minister's appeal against the trial judge's ruling on his preliminary application, albeit on a slightly different basis. I do not disagree with the conclusions reached by O'Donnell J. on this issue, nor with his inference that the legal advice obtained by the Minister was reduced to writing and there are documents available setting out that advice. However, for the reasons explained under the heading "Duty of Candour" I would perhaps have decided the issue at a slightly earlier point by holding that the Minister cannot rely on the applicant's failure to establish whether the legal advice given to the Minister was in writing or oral, and that if the Minister wishes to assert that there are no documents which can be inspected for the purposes of Order 31 Rule 18, then the onus is on the Minister to confirm positively that the legal advice was given orally. Either way I would uphold the decision of the trial judge on this issue also.

Conclusions

87. For the reasons set out in this judgment I would dismiss the appeal on all grounds. In the circumstances, as the Minister has been wholly unsuccessful in this appeal, it seems to me that the appropriate order for costs is one in favour of the applicant. I propose making an order for the costs of the appeal in these terms unless, within 21 days of the delivery of this

judgment, any party who objects notifies the Court of Appeal Office and submits short written submissions (no more than 1,500 words) to which the other side will have a further 10 days to reply.

88. My colleagues Costello P. and Faherty J. have read this judgment in advance and indicated their approval with it.