

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

The Federation of Passenger Transport (NI) Ltd's Application [2009] NIQB 27

**AN APPLICATION FOR JUDICIAL REVIEW BY THE FEDERATION OF
PASSENGER TRANSPORT (NORTHERN IRELAND) LIMITED**

McCLOSKEY J

INTRODUCTION

[1] By this application for judicial review, the organisation styled as "The Federation of Passenger Transport (Northern Ireland) Limited" challenges certain actions of the Driver and Vehicle Agency (hereinafter "*the Agency*"), purportedly taken in the exercise of statutory powers. [Throughout this judgment, the terms "*the Agency*" and "*the Department*" are used interchangeable]. This is not a bilateral dispute. Rather, it involves a triangulation of interests, reflected by the participation of the Western Education and Library Board ("*the Board*"), as a directly affected interested party, throughout these proceedings.

[2] The Order 53 Statement, which has evolved somewhat in tandem with the progress of this litigation, describes the matter under challenge in the following terms:

"The grant of a road service licence by the Driver and Vehicle Agency to the Western Education and Library Board".

Ultimately, the impugned determination was challenged on four grounds:

- (a) The Agency's asserted failure to have regard to the matters specified in Section 5(2) and Section 6 of the Transport Act (Northern Ireland) 1967.
- (b) The Agency's asserted failure to have regard to the need to ensure fair competition among persons providing facilities in Northern Ireland for the carriage by reward of passengers by road.

- (c) The Agency's asserted failure to require public service vehicle ("PSV") Certificates for the vehicles to which the impugned licence applies.
- (d) The Agency acted *ultra vires* its powers in granting the impugned licence to an ostensibly non-commercial operator and in treating the Board's licence application as if it were an application for a permit under Section 10B of the statute, erroneously transposing the Section 10B criteria to the determination of the application.

[3] The impugned licence is dated 7th July 2008 and bears the title "Road service Operator's Licence". On its face, it was issued by the Department of the Environment Road Transport Licensing Division. The beneficiary of the licence is the Board, one of five Education and Library Boards ("ELBs") in Northern Ireland. The material terms of the licence are the following:

"This licence authorises the above-named operator to use the vehicles detailed below for which valid public service vehicle certificates are held, for the period 01 July 2008 to 30 June 2009.

Operating Centres

At various transport centres throughout the WELB catchment area.

Details of Vehicles and Transport Services Authorised by this Licence

Five eighteen-seater coaches, registration marks ... (etc.)

Five thirty-three seater coaches, registration marks ... (etc.)

One forty-five seater coach, registration mark ... (etc.)

Six fifty-seven seater coaches, registration marks ... (etc.)

To carry out educational and recreational trips in accordance with the Board's statutory functions on a not for profit basis so as to ensure fair competition in accordance with Section 6(1) of the Transport Act (NI) 19672.

By its express terms, the licence was granted subject to a series of specified conditions. The fourth of these conditions stipulated that the holder was not permitted to amend existing services or to introduce new or revised routes. Any proposed cessation or alteration of any of the services provided by the Board under the licence must have the prior approval of the Department.

[4] Some few days previously, on 3rd July 2008, the Agency had issued to the Board a series of certificates of exemption relating to all of the vehicles to which the subsequently granted licence would apply. Each of these certified that the individual vehicle identified by its registration number "is not a Public Service Vehicle within the meaning of Article 2(2) of the Road Traffic (Northern Ireland) Order 1981".

STATUTORY FRAMEWORK

[5] The actions of the Agency were purportedly carried out pursuant to the statutory powers contained in the Transport Act (Northern Ireland) 1967 ("*the 1967 Act*"). Within this statute there are two separate regimes of significance in the context of this litigation. The first of these regulates the grant of road service licences. Section 4 provides:

"4. - (1) The [Department] may, subject to and in accordance with the provisions of this Part and Part IV, grant to any person applying therefor a licence (in this Act referred to as a "road service licence") to provide such a service as may be specified therein for the carriage of passengers and their luggage by road.

(2) Subject to regulations made under section 45, no person shall use a motor vehicle, or cause or permit such a motor vehicle to be used, on a road to carry passengers and their luggage for reward except under a licence granted under subsection (1).

(3) For the purposes of this section a motor vehicle used to carry passengers and their luggage for reward shall not be deemed to be used under a road service licence unless it is used by or on behalf of the holder of the licence and in accordance with the conditions applicable to the licence.

(4) Any person who acts in contravention of subsection (2) or who contravenes a requirement of any such directly applicable Community provision as is referred to in section 45(i) as to the keeping or production of any document shall be guilty of an offence and be liable on summary conviction to a fine not exceeding [level 5]."

This is followed by Section 5, which provides:

"5. - (1) A person applying to the [Department] for a road service licence shall give such information as may reasonably be required to enable the [Department] to exercise the functions conferred on it by section 6, and in particular shall give (where appropriate) information as to-

- (a) the type or types of motor vehicles to be used;*
- (b) the services which it is proposed to provide under the licence;*
- (c) the frequency of the services, the times to be taken on the journeys included in those services and the number of vehicles to be used on those services;*

- (d) any previous experience of the applicant as a person providing any facilities wheresoever for the carriage of passengers for reward;*
- (e) any agreement or arrangement affecting in any material respect the provision of passenger transport facilities entered into by the applicant with any other person by whom such facilities are provided;*
- (f) any financial interest (whether past, subsisting or proposed, and whether as a partner or shareholder or as a result of a loan, guarantee or other financial transaction) of the applicant in the provision of any facilities wheresoever for the carriage of passengers for reward, or of any such interest of any other person in any business carried on by the applicant in providing such facilities.*

(2) A person applying for a road service licence to which this subsection applies shall in addition to the information referred to in subsection (1) give the Department such information as may reasonably be required to enable the Department to exercise the functions conferred on it by section 6A, and in particular shall give-

- (a) particulars of any convictions during the five years preceding the making of the application, and at any time thereafter until the disposal of the application, of the applicant and of any person specified in the application in pursuance of section 6A(2) or (3);*
- (b) particulars of the financial resources which are, or are likely to be, available to the applicant;*
- (c) particulars of the professional competence qualifications of the applicant and of any person specified in the application in pursuance of section 6A(2) or (3);*
- (d) a statement indicating whether or not the applicant intends to use vehicles operated under the licence to provide a service for the carriage of passengers by road elsewhere than in the United Kingdom.*

(3) Subsection (2) applies to a road service licence covering motor vehicles so constructed and equipped as to be suitable for carrying more than nine persons including the driver and intended for that purpose, other than-

- (a) motor vehicles constructed or adapted for the carriage of not more than 17 persons including the driver and used, or intended to be used, in the course of a business whose main object is other than that of carrying passengers; and*
- (b) motor vehicles used by an Education and Library Board in the carrying out of the functions of that Board under the Education and Libraries (Northern Ireland) Order 1972.*

(4) Subsection (2)(a) and (b) shall not apply in relation to an application for a road service licence by a person who satisfies the Department that he is an exempt person."

Section 6 provides:

- " 6. - (1) *The [Department] shall, in deciding whether to grant or refuse to grant a road service licence or to attach conditions to any such licence, have regard to the interests of persons likely to use the service to be provided under the licence and those of persons holding other road service licences, and in particular shall have regard (where appropriate) to the following matters:-*
- (a) the suitability of the routes on which the service may be provided under the licence;*
 - (b) the extent, if any, to which the needs of persons likely to use the service to be provided are already adequately and economically served;*
 - (c) any previous conduct of the applicant as a person providing facilities for the carriage of passengers for reward;*
 - (d) the revocation or suspension of any road service licence held at any time by the applicant or where the applicant has or had a controlling interest in a body corporate to any refusal to grant a road service licence to, or revocation or suspension of a road service licence held by, that body corporate;*
 - (e) where the applicant is an agent or nominee of any other person, any previous conduct of that person as a person providing facilities for the carriage of passengers for reward;*
 - (f) where the applicant is an agent or nominee of any other person, the revocation or suspension of any road service licence held at any time by that other person;*
 - (g) where the applicant is a body corporate, the refusal to grant a road service licence to, or the revocation or suspension of any road service licence held at any time by-*
 - (i) any other body corporate having at the time of the application any controlling interest in the body corporate applying for the licence or in which the body corporate applying for the licence has any controlling interest;*
 - (ii) any director of, or any shareholder having a controlling interest in, the body corporate which is applying for the licence or in such other body corporate as is mentioned in sub-paragraph (i);*
 - (h) the general effect which the grant of the licence would be expected to have on the holders of other road service licences and on the facilities being provided under such licences for the carriage of passengers by road;-*
 - (i) the need for ensuring fair competition among persons providing facilities in Northern Ireland for the carriage for reward of passengers by road.*
- (2) In addition to the matters specified in subsection (1) the [Department] shall take into consideration any recommendations made by the Council, any representations which may be made by persons who are already providing facilities for the carriage of passengers for reward on any road along or near the routes the*

subject of the application or any part of those routes and any representations made by a local authority or the Northern Ireland Tourist Board.

(3) Where the [Department] is not satisfied that an application for a road service licence should be granted the [Department] shall refer the matter to the Council and shall, before deciding whether or not to grant the application, take into account any recommendation made by the Council with respect to the application, and in making any such recommendation the Council shall have regard to the matters specified in subsections (1) and (2)."

The subject matter of Section 6A is the refusal of road service licences in specified circumstances and this is not germane for present purposes.

[6] Thus, in summary, the activity of carrying passengers and their luggage by road requires a so-called "road service licence". The grant of such licence is discretionary. The use of a vehicle without the requisite licence is a criminal offence. An application for a licence must contain all of the prescribed information. This includes particulars of the applicant's fitness and qualifications. Bearing in mind the context of the present challenge, there is a notable exemption pertaining to ELB vehicles, contained in Section 5(3)(b). In deciding whether to grant or refuse a licence or to specify conditions, the Department must have regard to certain obligatory factors. These include, notably:

- (a) The interests of persons likely to use the services to be provided under the licence.
- (b) The interests of persons holding other road service licences.
- (c) The general effect which the grant of the licence would be expected to have on the holders of other road service licences and on the facilities being provided under such licences for the carriage of passengers by road.
- (d) The need for ensuring fair competition among persons providing facilities in Northern Ireland for the carriage for reward of passengers by road.

Furthermore, the Department is obliged to take into account any representations made by persons already providing facilities for the carriage of passengers for reward "*on any road along or near the routes the subject of the application or any part of those routes*": per Section 6(2).

[7] The *second* of the regimes established under the 1967 Act arising for consideration in these proceedings is governed by Sections 10A and 10B in conjunction. Section 10A(1) provides:

"10A. - (1) Section 4(2) (requirement of road service licence) and Articles 59 and 60 of the Road Traffic (Northern Ireland) Order 1981 (licensing of public service vehicles and drivers, etc. thereof) shall not apply to the use of any motor vehicle under a permit granted under section 10B, if and so long as the requirements under subsection (2) of that section are met, and a person may drive any motor vehicle at a time when it is being so used notwithstanding that his licence under Part II of the Road Traffic (Northern Ireland) Order 1981 does not authorise him to drive vehicles of the class to which that vehicle belongs.

(2) Where a holder of a licence under Part II of the Road Traffic (Northern Ireland) Order 1981 was first granted a licence under that Part before 1st January 1997, he may drive any small bus at a time when it is being used as mentioned in subsection (1), notwithstanding that his licence under that Part does not authorise him to drive a small bus when it is being so used.

(3) Where-

(a) a holder of a licence under Part II of the Road Traffic (Northern Ireland) Order 1981 was first granted a licence under that Part on or after 1st January 1997, or

(b) a Community licence holder is authorised by virtue of Article 15A(1) of that Order to drive in Northern Ireland a motor vehicle of any class,

he may drive any small bus to which subsection (4) applies at a time when it is being used as mentioned in subsection (1), notwithstanding that he is not authorised by his licence under that Part or by virtue of that Article (as the case may be) to drive such a bus.

(4) This subsection applies to any small bus which, when laden with the heaviest load which it is constructed to carry, weighs-

(a) not more than 3.5 tonnes, excluding any part of that weight which is attributable to specialised equipment intended for the carriage of disabled passengers, and

(b) not more than 4.25 tonnes otherwise.

(5) In this section-

"Community licence" has the same meaning as in Part II of the Road Traffic (Northern Ireland) Order 1981, and

"small bus" has the same meaning as in sections 10B to 10D."

Section 10B provides:

"10B. - (1) In this section and sections 10C and 10D-

"bus" means a motor vehicle which is adapted to carry more than eight passengers;

"large bus" means a motor vehicle which is adapted to carry more than sixteen passengers;

“small bus” means a motor vehicle which is adapted to carry more than eight but not more than sixteen passengers; and

“permit” means a permit granted under this section in relation to the use of a bus for carrying passengers for hire or reward.

(2) The requirements that must be met in relation to the use of a bus under a permit for the exemption under section 10A(a) to apply are that the bus-

(a) is being used by a body to whom a permit has been granted under this section;

(b) is not being used for the carriage of members of the general public nor with a view to profit nor incidentally to an activity which is itself carried on with a view to profit;

(c) is being used in every respect in accordance with any conditions attached to the permit; and

(d) is not being used in contravention of any provision of regulations made under section 10D.

(3) A permit in relation to the use of a small bus may be granted by a body designated by an order under subsection (6) either to itself or to any other body to whom, in accordance with the order, it is entitled to grant a permit.

(4) A permit in relation to the use of a large bus may be granted by the Department to any body which assists or co-ordinates the activities of bodies which appear to the Department to be concerned with-

(a) education;

(b) religion;

(c) social welfare; or

(d) other activities of benefit to the community.

(5) The Department shall not grant a permit in relation to the use of a large bus unless satisfied that there will be adequate facilities or arrangements for maintaining any bus used under the permit in a fit and serviceable condition.

(6) The Department may by order, made subject to negative resolution, designate for the purposes of this section bodies appearing to it to be eligible in accordance with subsection (7), and with respect to any body designated by it, any such order-

(a) shall specify the classes of body to whom the designated body may grant permits;

(b) may impose restrictions with respect to the grant of permits by the designated body and, in particular, may provide that no permit may be granted, either generally or in such cases as may be specified in the order, unless there are attached to the permit such conditions as may be so specified; and

(c) may require the body to make returns with regard to the permits granted by it.

(7) A body is eligible under this subsection if it is concerned with-

(a) education;

(b) religion;

- (c) social welfare;
 - (d) recreation; or
 - (e) other activities of benefit to the community.
- (8) *A body may hold more than one permit but may not use more than one bus at any one time under the same permit.*"

[8] Thus, in summary, where a motor vehicle is operated pursuant to a permit granted under Section 10B, such vehicle does not require a road service licence granted under Section 4. Section 10B is accompanied by the marginal note "*Permits in relation to buses used by educational and other bodies*". This is followed by three separate definitions of "*bus*". The effect of a Section 10B permit is to authorise the use of the bus in question for "*carrying passengers for hire or reward*". The grant of a permit is discretionary. The permit may be granted to bodies active in the fields of education, religion, social welfare or other activities of benefit to the community. Only agencies of this kind are eligible for the grant of a permit.

THE APPLICANT'S GROUNDS OF CHALLENGE

[9] Of the Applicant's four grounds of challenge, the feature common to the first two is that each consists of an assertion that the impugned licence is vitiated by a failure by the Department to take specified matters into account. In every case where this species of challenge is advanced, two separate questions arise. The first is whether the Agency was obliged, as a matter of law, to have regard to the factor in question. The second is the purely evidential question of whether the Applicant has discharged the onus of making good his assertion. With regard to the first question, the following passage has been frequently cited with approval:

"Under many statutes the discretion conferred is extensive and it is no concern of the court to restrict it artificially by limiting the considerations that are relevant ...

Cooke J pointed out 'the difference between obligatory considerations (i.e. those which the Act expressly or impliedly requires the Minister to take into account) and permissible considerations (i.e. those which can properly be taken into account but do not have to be)' ...

The court will intervene in two situations. The first is where the authority has acted on grounds which the statute never intended to allow ...

The second is where the authority has failed to take proper account of something that the statute expressly or impliedly required it to consider ...".

[*Administrative Law*, 9th Edition, Wade and Forsyth, p. 381]. The statement of Cooke J was made in *Creednz -v- Governor General of New Zealand* [1981] 1 NZLR

172 and was subsequently approved by the House of Lords in *Re Findlay* [1985] AC 318 (per Lord Scarman, at p. ...]. In the present case, the court is not engaged in the sometimes elusive exercise of attempting to identify the factors which the legislature *impliedly* required the public authority concerned to take into account when exercising its statutory power. This is so because of the list of obligatory considerations detailed in Section 6(1) of the 1967 Act and having regard to the terms of the Applicant's challenge.

[10] The second of the considerations highlighted immediately above engages the principle articulated by the Northern Ireland Court of Appeal in *Re SOS Application* [2003] NIJB 252, per Carswell LCJ:

"[19] ... *It is for an applicant for leave to show in some fashion that the deciding body did not have regard to such changes in material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review. In the present case there was no such evidence and in our judgment nothing from which such an inference could be drawn* ".

Bearing in mind the modest threshold to be overcome at the stage of seeking leave to apply for judicial review, the philosophy in this passage must, in my view, apply *a fortiori* at the stage of the substantive hearing.

[11] The further observation which should properly be made is that the first two of the Applicant's grounds of challenge are based on the premise that the Agency had the *vires* to grant the impugned licence. Properly analysed, therefore, the fourth of the grounds of challenge, which contends that the Agency acted *ultra vires*, is advanced in the alternative to the first and second grounds. On due analysis and reflection, it seems to me that the third of the Applicant's grounds is probably linked to the fourth.

First Ground of Challenge

[12] This ground comprises an assertion that the Agency failed to have regard to the matters set out in Section 5(1) and Section 6 of the 1967 Act. The text of these statutory provisions is found in paragraph [5] above. Bearing in mind the two questions identified in paragraph [9] above, I hold that the Agency was plainly obliged, as a matter of law, to have regard to the various considerations listed in Section 6(1). The Agency was also obliged to take into consideration representations made within the framework of Section 6(2).

[13] This ground of challenge has two limbs, the first of which focuses on Section 5(2). It is accepted on behalf of the Agency that it did not require the Board to provide the information which would normally be generated under Section 5(2).

However, as already highlighted in paragraph [6] above, ELB vehicles used in carrying out the statutory functions of Boards are specifically exempted from Section 5(2). I am satisfied that the vehicles to which the impugned licence relates are embraced by Section 5(3)(b). This is established by the express terms of the licence, which authorises the Board to engage in education and recreational trips "*in accordance with the Board's statutory functions*". It follows inexorably that this aspect of the Applicant's challenge is without merit.

[14] In granting leave to apply for judicial review, the court confined the second limb of the first ground of challenge to Section 6(1)(i), whereby the Agency was obliged to have regard to "*the need for ensuring fair competition among persons providing facilities in Northern Ireland for the carriage for reward of passengers by road*". This restriction followed logically from the presentation of the Applicant's case to the court. These provisions of the statute do not, in my view, oblige the Agency to *establish* fair competition among commercial passenger carriers in Northern Ireland. Rather, the statutory provisions are a reflection of a legislative policy that fair competition of this kind is a desirable aim and, therefore, something to which the Agency *should have regard*. Analysed in this way, fair competition is framed as a desirable, aspirational objective, to be contrasted with an obligatory outcome.

[15] The affidavit evidence filed on behalf of the Agency establishes that the Board's application for a licence was made on 17th April 2008. The Agency had proactively alerted the Applicant to this possibility beforehand, giving rise to a meeting with the Applicant's representative on 2nd April 2008. Following receipt of the Board's application, the Agency informed all licensed operators in writing and invited their representations. This gave rise to a series of written objections which raised, *inter alia*, the issue of fair competition. This is exemplified in the Applicant's detailed letter of objection, which complained that the Board, if armed with a licence, would be able "*to compete against private sector operators*", with resulting "*unfair competition*" and "*an unfair competitive advantage over operators who receive no public funding*". In the processing of the application, an internal departmental communication, dated 24th June 2008, explicitly referred to this aspect of the objections:

"The key objection is on the issue that the WELB are publicly funded and therefore should not be granted a licence to permit them with non-public service providers..."

When considering a RSL application, the Department (DVA) must take into account various issues when deciding on whether to grant a licence in accordance with Section 6 of the Transport Act 1967. One of these is – fair competition which has been raised by the objectors. To address this we are inserting a condition (set out below) on the WELB licence to take this into account".

The proposed condition was formulated in these terms:

"To carry out educational and recreational trips in accordance with the Board's statutory functions on a not for profit basis so as to ensure fair competition in accordance with Section 6(1) of the Transport Act (NI) 1967".

In due course, this condition featured prominently in the impugned licence.

[16] The Agency's affidavit evidence further establishes that on 9th June 2008, during a meeting with a Board representative, it was emphasized that in the event of a licence being granted, it would be subject to conditions so as to preclude the Board from competing unfairly in the commercial market [McCullough, paragraph 27]. The Agency's affidavit also contains the following averment:

"[40] I can confirm that the Agency certainly did have regard to the need to ensure fair competition and considered the interest of private operators in reaching its decision to grant the RSL to the Western Board in the terms in which it did. This is precisely why the RSL issued to the Board specifically stated that it was for 'educational and recreational trips in accordance with the Board's statutory functions on a not for profit basis'".

[17] I find that the evidence, considered as a whole, as summarised in paragraphs [15] - [16] above, confounds the Applicant's assertion that the Agency failed to take into account the consideration specified in Section 6(1)(i) of the 1967 Act. It would be otherwise if I considered that the Agency was engaged in some kind of purely paper or cosmetic exercise, exposing a failure to properly take into account the issue of fair competition. However, having regard to the evidence, I have no basis for thus concluding. It follows that the Applicant has failed to substantiate this ground of challenge.

Second Ground of Challenge

[18] I consider that this adds nothing to the first ground of challenge, within which it is subsumed. The grant of leave to apply for judicial review confined the focus of the Applicant's challenge to Section 6(1)(i) of the 1967 Act. At the substantive hearing, the arguments presented to the court on behalf of the Applicant did not, appropriately, stray into the territory of any of the other obligatory factors adumbrated in Section 6(1).

Third Ground of Challenge

[19] The terms of this ground embody a complaint that the Agency failed to require Public Service Vehicle (PSV) Certificates for the vehicles embraced by the impugned licence. Properly analysed, this would appear to be an illegality species of challenge, while possibly bearing some relationship also with the Applicant's fourth and final ground of challenge.

[20] Article 2 of the Road Traffic (Northern Ireland) order 1981 (*"the 1981 Order"*), as amended, contains the following definition:

"'Public Service Vehicle' means a motor vehicle or a trolley vehicle used in standing or plying for hire, or used to carry passengers for hire, but does not include any vehicle in respect of which a Certificate of Exemption in the prescribed form has been issued in the Department, any motor vehicle exempted from licensing requirements by virtue of Section 10A of the Transport Act (Northern Ireland) 1967 or any vehicle to which Article 66A (car sharing arrangements) applies".

[Emphasis added].

The words highlighted in this definition are germane in the present context, since each of the Board's vehicles identified in the impugned licence is the subject of a Certificate of Exemption. By its terms, each Certificate declares that the identified vehicle is not a public service vehicle within the meaning of Article 2(2). The legal effect of a Certificate of this kind is to exempt the vehicle in question from the requirement of obtaining a PSV licence.

[21] It follows that this aspect of the Applicant's challenge is without substance. On reflection, it may be the case that this ground of challenge is properly incorporated within the fourth (and final) of the Applicant's grounds.

Fourth Ground of Challenge

[22] This ground complains that the Agency acted *ultra vires* in issuing the impugned licence. It is contended that –

"... the DVA exceeded its powers by granting an RSL to an ostensibly non-commercial operator and by treating an SRL application as if it were a Section 10B permit application, transposing the Section 10 Permit criteria to an RSL application".

Ultimately, it appeared to the court that this emerged as the main focus of the Applicant's case. It was argued by Mr. McCann on behalf of the Applicant that the two separate regimes established by the statute – the licensing regime [Section 6] and the permits regime [Section 10] – are a reflection of a dichotomy of commercial operations (on the one hand) and non-commercial operations (on the other). It was submitted that the licensing regime applies to the former, whereas the permits regime governs the latter. Mr. McCann's skeleton argument encapsulated this contention in the following terms:

"The authorisation necessary to undertake commercial operations under the Act as amended is an RSL. The authorisation necessary to undertake non-commercial operations is a Section 10 Permit".

It was submitted that ELB's, charitable organisations and voluntary agencies fall within the exclusive remit of the Section 10B permits regime.

[23] By Article 37(1) of the Education and Libraries (Northern Ireland) Order 1986 ("*the 1986 Order*"):

"Each Board shall secure the provision for its area of adequate facilities for recreational, social, physical, cultural and youth service activities and for services ancillary to education ...".

Pursuant to Article 135 of the 1986 Order, the whole of the Education and Libraries (Northern Ireland) Order 1972 was repealed. Thus there is an incongruity in Section 5(3)(b) of the 1967 Act, as amended, which refers to the 1972 Order. The draftsman has clearly included this reference *per incuriam*. The court's attention was drawn to Section 29(1)(b) of the Interpretation Act (Northern Ireland) 1954 by Mr. McLaughlin, on behalf of the Board, in this respect.

[24] In my view, the important point is that within those provisions of the 1967 Act which govern the licence regime, there is explicit reference to ELB's and their statutory functions. In short, Section 5 specifically provides (on the one hand) that a road service licence applicant must supply certain information, in accordance with Section 5(2) and, simultaneously (on the other hand), that motor vehicles used by ELB's in the performance of their statutory functions are exempted from this requirement. Accordingly, Section 5, by its terms, expressly contemplates the grant of a road service licence by the Department to ELB's in respect of their vehicles. In argument, Mr. McCann sought to confront this obstacle by submitting, in terms, that the court should airbrush this part of the statute, on the ground that it is anachronistic. However, I hold that neither principle nor precedent supports this submission and I accept the contrary argument, advanced by Mr. Scoffield on behalf of the Agency that the court must take account of and give effect to these statutory provisions.

[25] Furthermore, by Section 4(1) of the 1967 Act, "*any person*" is entitled to apply for a licence. There is no exclusion of ELB's. The Applicant's argument is further weakened by the interaction between Section 4 and the relevant provisions of Sections 10A and 10B. The introduction of these latter provisions presented the legislature with an opportunity to spell out in unequivocal terms that ELB's are confined exclusively to the Section 10B permits regime. However, there is no provision to this effect. It is indisputably clear that agencies involved in the provision of education may seek to avail of the Section 10B regime. The underlying intention seems to have been to confer a benefit on this kind of organisation. However, I find nothing in the language of Sections 10A and 10B to support the interpretation that ELB's who wish to operate "buses", as defined, in the discharge of their statutory functions, must apply for a permit (under Section 10B) and are prohibited from applying for and obtaining a licence (under Section 4). I accept the

submission on behalf of the Agency and the Board that ELB vehicles fall within both regimes. I conclude that the legislative intention for which the Applicant contends is not reflected in the express or implied terms of this series of statutory provisions, considered as a whole.

[26] Insofar as the Applicant also sought to contend that cross-border journeys undertaken by Board vehicles pursuant to the impugned licence are outwith the statutory functions of ELB's, I reject such argument. I have already rehearsed the terms of Article 37(1) of the 1986 Order above. Article 37 behoves ELB's to secure the provision "*for*" their individual areas of adequate facilities for the services specified. I find nothing in the language of Article 37(1) to support the existence of kind of geographical constraint for which the Applicant appeared to contend.

CONCLUSION

[27] I conclude that the Applicant has failed to make good any of its grounds of challenge. Accordingly, the application for judicial review is dismissed. I award one set of costs against the Applicant, to be divided between the Agency and the Board.