

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY DAMIEN McCOMB FOR
JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by Damien McComb for judicial review of the decision of His Honour Judge Hart QC, the Recorder of Belfast, dismissing the applicant's appeal against the refusal of his application for a public service vehicle licence.

Background

[2] On 13 November 2001 the applicant applied to the Driver and Vehicle Licensing division of the Department of the Environment for a taxi driver's licence. In his application form he disclosed that he had been convicted at the Central Criminal Court in London on 6 December 1990 of conspiracy to cause explosions and had been sentenced to 30 years imprisonment. The form also contained the information that he had been released "under the terms of the Good Friday Agreement" on 21 December 1999.

[3] On 16 January 2002 the Driving and Vehicle Licensing division wrote to the applicant informing him that his application had been refused on the ground of his conviction. The letter also stated that the department was of the opinion that Mr McComb was not a fit and proper person to hold a taxi driver's licence "in all the circumstances of your case".

[4] The applicant appealed the refusal to Belfast Magistrates' Court on 11 June 2002. At the hearing of his appeal he gave evidence about his personal circumstances. He explained that he suffered financial hardship; that his

marriage had failed while he was in prison; and that he suffered from a knee condition that made it unsuitable for him to undertake manual labour. The appeal was dismissed by the resident magistrate who observed that he was bound by the unreported decision of the Recorder in the case of *Beggs v Department of the Environment*.

[5] The magistrate's decision was appealed to the Recorder's Court on 30 September 2002. The learned Recorder dismissed the appeal. According to the applicant, his counsel submitted to the Recorder that the *Beggs* decision could be distinguished. In particular it was suggested that a distinction should be made between those prisoners released as a result of the Good Friday Agreement (the Belfast Agreement) and those who had served a prison sentence for offences that were not covered by the legislation introduced to implement the Agreement.

[6] The applicant has averred in his affidavit that the Recorder did not accept these arguments but stated that the Belfast Agreement was "an aspiration only"; that the law remained as propounded in the *Beggs* judgment and that there was "no basis for distinguishing between prisoners released under the Good Friday Agreement and other released prisoners". These averments were not disputed by the Recorder (who did not participate in and was not represented on the hearing of the application) or by the notice party, the Department of the Environment.

The relevant statutory provisions

[7] Article 79A of the Road Traffic (Northern Ireland) Order 1981 deals with the issuing of taxi drivers' licences. The material provisions as they relate to this case are: -

"Licensing of drivers of taxis

79A. —

(1) A person shall not drive a taxi when it is standing or plying for hire or carrying passengers for hire unless he is the holder of a taxi driver's licence; that is to say, a licence granted under paragraph (2).

(2) Subject to paragraphs (3) and (4), taxi drivers' licences may be granted to applicants by the Department on payment of such fee as may be prescribed with the approval of the Department of Finance and Personnel.

(3) The Department shall not grant a taxi driver's licence—

(a) to any person who has not for at least 12 months been authorised to drive a motor car, or is not at the date of the application for a driver's licence so authorised; and

(b) unless—

(i) the Department is satisfied that the applicant is a fit and proper person to hold the licence; ...”

[8] Article 76 of the Order deals with appeals from decisions of the department. So far as is relevant it provides: -

“(1) A person who, being the holder of, or an applicant for, a large goods vehicle or passenger-carrying vehicle driver's licence or the holder of an LGV Community licence or a PCV Community licence], is aggrieved by the Department's—

(a) refusal or failure to grant such a licence in pursuance of Article 71,

...

... may, after giving to the Department notice of his intention to do so, appeal to a court of summary jurisdiction acting for the petty sessions district in which the holder of or applicant for the licence resides.

(2) On any appeal under paragraph (1) (except under sub-paragraph (c) of that paragraph) the Department shall be respondent.

(3) On any appeal under paragraph (1) the court may make such order as it thinks fit and the order shall be binding on the Department.”

[9] Article 28 (1) of the County Courts (Northern Ireland) Order 1980 provides: -

“(1) A county court shall have jurisdiction to hear and determine in accordance with county court rules—

(a) any appeal from an order of a magistrates' court;

(b) any appeal from or application in respect of an order or determination of any other tribunal, authority, body or person whatsoever;

duly brought under any statutory provision and the decision of the county court shall, except as provided by Article 61, be final and conclusive."

[10] The applicant aggrieved by the decision of the department to refuse his licence appealed to Belfast Magistrates' Court and thence to the Recorder's Court. It is clear that both courts enjoy all the powers of the original decision-maker, the Driver and Vehicle Licensing division of the Department of the Environment.

The Department's policy/criteria

[11] The Department had devised a policy to deal with applications for public service licences. This is outlined in a document entitled "*Criteria for Licensing of PSV Drivers and Operators*". The document contains the following statements: -

"The normal practice is to consider each case on its merits and the object is to ensure that the travelling public are not subject to unnecessary risk. The question of approval could be summed up as a situation where one would be happy to have a member of his family travel in a vehicle either driven or operated by the applicant.

The applicant must satisfy the licensing officer that he is of good character and in general his previous convictions, if any, give a good indication of his mental or moral nature. They will also show any tendency towards violence and will illustrate his level of responsibility. Convictions are taken at face value with the penalty imposed giving a pointer as to the seriousness with which the court viewed the offence. Insofar as PSV licensing is concerned the convictions are graded into serious or minor offences ...

New applicants are generally expected to have a clear record for 3 years in the case of serious

offences and 12 months for minor convictions depending on the nature and number of minor offences.”

[12] The policy also stated that where particular types of offence were involved a longer period than three years may apply. Included among these were arms or explosives offences. It appears that the Recorder suggested that three years should elapse from the time of the applicant’s release before his application could be successful. The reason for the selection of this period is not clear but it is surmised that the Recorder felt that any enhancement on the three-year period to reflect the applicant’s involvement in explosives offences was offset by the applicant’s knee condition and the difficulty that he would experience in obtaining alternative employment.

Beggs v Department of the Environment

[13] On 8 April 2002 the Recorder gave judgment in the case of *Beggs*. It was an appeal by the Department of the Environment for Northern Ireland from the decision of a resident magistrate allowing the appeal of Mr Beggs against the refusal of the department to grant him a taxi driver’s licence. Mr Beggs had been convicted at Belfast Crown Court on 5 December 1994 of a number of serious offences including murder. He had been released on licence on 28 July 2000 under the terms of the Northern Ireland (Sentences) Act 1998.

[14] In his judgment the Recorder referred to his earlier decision in *Noel Thompson v Transport Licensing & Enforcement Branch, Department of the Environment for Northern Ireland* (1999) unreported. In that case he had said this about the department's criteria: -

“I am satisfied that the criteria provide a suitable framework within which the department and courts on appeal should consider applications in order to ensure that decisions are made on a fair and consistent basis. The criteria provide guidelines but, like all guidelines, these must not be applied in a mechanical fashion, because each decision can only be made after proper weight has been given, whether by the department or an appellate court, to all the circumstances of the particular application under consideration.”

[15] In the *Beggs* case counsel for the applicant suggested that section 3 (6) of the Northern Ireland (Sentences) Act 1998 was particularly pertinent in that it required the Sentence Commissioners to be satisfied that a prisoner applying for early release would not be a danger to the public. The Recorder observed, however, that the decision of the Commissioners that a person was

not a danger to the public is “not the same decision” as that which the court was required to make *i.e.* whether the applicant was a fit and proper person for the purposes of article 79A (3) (b) of the 1981 Order.

[16] The Recorder set out the argument of counsel for the department in the following passage of his judgment: -

“For the department Mr Aiken submitted that it would be an unsustainable position if there were a two-tier regime, with one for those released under the Belfast Agreement and a harsher regime for those who had been convicted of offences but who had not qualified for release under the Belfast Agreement.”

This argument was accepted by the Recorder who stated his intention to consider the application “in the context of the department’s criteria relating to serious convictions”. On that basis he refused the application for a licence and reversed the decision of the resident magistrate.

The judicial review application

[17] For the applicant Mr Treacy QC drew attention to the terms of the Good Friday Agreement in relation to prisoners. He suggested that paragraph 5 of the section of the agreement that deals with prisoners was particularly important. It provides: -

“The governments continue to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, re-training and/or re-skilling, and further education.”

[18] Mr Treacy suggested that this paragraph should inform one’s approach to the application of section 3 (6) of the 1998 Act. The decision of the sentence commissioners that a released prisoner no longer represented a danger to the public was clearly relevant to the question whether such a person was a fit and proper person for the purposes of article 79A (3) (b) (i) of the 1981 Order. Mr Treacy accepted that the finding of the sentence commissioners that a particular prisoner was suitable for release could not be determinative of the issue whether a person was ‘fit and proper’ to hold a taxi licence but it could not, he suggested, be denied that such a finding was at least germane to that decision.

[19] For the department Mr Maguire argued that if Parliament had intended that prisoners released under the terms of the 1998 Act should have more ready access to PSV licences than other prisoners this could easily have been made explicitly clear in the 1998 Act or other legislation. The fact that this had not been done was indicative of Parliament's intention that prisoners released under the 1998 Act should be treated in the same way as other prisoners.

[20] Mr Maguire also pointed out that there were various categories of prisoners who were assessed as to their risk of re-offending before release. He suggested that there could be no warrant for treating those prisoners in any different fashion from prisoners released under the terms of the 1998 Act. The applicant was not entitled to have his release under the Act count as a factor favouring his entitlement to a taxi driver's licence, therefore.

[21] Finally Mr Maguire submitted that, given the breadth of the discretion available to the Recorder under article 79A (3) (b), he was entitled to have regard to whatever factors he considered relevant. If the release of the applicant under the 1998 Act was relevant, the Recorder could only be faulted for having ignored that circumstance if it could be shown that it was *Wednesbury* unreasonable to do so.

The relevance of the release under the Northern Ireland (Sentences) Act 1998

[22] By virtue of section 3 (1) of the 1998 Act a prisoner may apply to the Commissioners for a declaration that he is eligible for release in accordance with the provisions of the Act. Under section 3 (2) the Commissioners shall grant the application only if the applicant satisfies specified conditions. One of the conditions that the applicant was required to satisfy was that provided for in section 3 (6) *viz* that if he was released immediately, he would not be a danger to the public.

[23] As the Recorder held in *Beggs* the decision of the Commissioners that a prisoner would not be a danger to the public is not the same as a decision that such a prisoner is a "fit and proper" person for the purposes of the 1981 Order but it appears to me to be incontrovertible that a conclusion by the Commissioners that a prisoner is not a danger to the public is relevant to an assessment whether he is a fit and proper person.

[24] It is obvious from the terms of the policy devised by the department in the form of criteria that one of the areas of concern is the safety of the travelling public. It is entirely right that this should be so. And it is equally right that, in evaluating potential risk to the public, regard should be had to the previous convictions of the person applying for a licence. That being the case, however, it must follow that where an individual has been assessed as presenting no danger to the public, this is a factor to be taken into account by the deciding authority.

[25] It is of course entirely correct that the answer to the question that the Sentencing Commissioners must pose for themselves does not necessarily supply the answer to the question that the decision maker must ask when deciding whether to grant a licence under the 1981 Order. Subject to what I have to say below about the effect of the Belfast Agreement, it is also right that that decision maker may give such weight as he thinks fit to the conclusion of the Commissioners – see *Tesco Stores Ltd v Secretary of State for the Environment and others* [1995] 2 All ER 636, 642, per Lord Hoffmann. But the decision maker must take all relevant considerations into account, even though he accords little or no weight to them. And in my judgment the conclusion of the Commissioners is beyond question a consideration that is relevant to the issue that the licensing authority (and on appeal the court) must decide.

Did the Recorder take the applicant's release under the 1998 Act into account?

[26] The unchallenged account of the applicant is that the Recorder held that there was no basis for distinguishing between prisoners released under the Good Friday Agreement and other released prisoners. Moreover, he appears to have followed his own decision in *Beggs*. In that case he accepted the argument of counsel for the department that it would be “unsustainable” to distinguish between those prisoners released under the 1998 Act and other released prisoners.

[27] It appears to me that the rejection by the Recorder of the argument that prisoners released under the 1998 Act should be distinguished from those in which no evaluation of the risk that they might present on release is tantamount to a refusal to have regard to the assessment of the Sentence Commissioners.

[28] For the reasons that I have given I am satisfied that this was a relevant consideration which required to be taken into account. I do not accept that, by taking it into account, a two-tier system would be created. It was not required of the licensing authority or on appeal the court that a licence be granted simply because the Sentencing Commissioners had reached a favourable conclusion on the question of whether the prisoner applying under section 3 of the 1998 Act presented a risk to the public. There was therefore no question of such prisoners being entitled automatically to the grant of a licence. But the conclusion of the Commissioners must feature in the matters considered by the decision maker on the grant of a licence. It is primarily its exclusion from those considerations rather than any criticism of the weight attached to this factor that makes the decision of the Recorder amenable to judicial review.

The effect of the Belfast Agreement

[29] The Recorder held that the Belfast Agreement was aspirational only and that it could not affect one's approach to the application of the relevant provisions of the 1998 Act. I cannot agree with this conclusion.

[30] In *Robinson v Secretary of State for Northern Ireland & others* [2002] UKHL 32 Lord Hoffmann discussed the effect of the agreement in relation to the Northern Ireland Act 1998. He said this: -

“This agreement was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland. A key element in the agreement was the concept of decisions being made with cross-community support, that is, by representatives of majorities of both the unionist and nationalist communities. The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast.”

[31] Although these observations were made in relation to the effect that the agreement has on the nature of the Northern Ireland Act 1998, they reflect the importance to be attached to the terms of the agreement in the interpretation and application of statutory provisions made under its aegis. The agreement contemplated that mechanisms would be put in place for the accelerated release of prisoners and that those prisoners who benefited from that programme would be reintegrated into the community. It appears to me therefore that particular attention should be paid to the fact that a prisoner released under the terms of the Northern Ireland (Sentences) Act 1998 has been adjudged not to be a danger to the public.

Conclusions

[32] I have concluded that the fact of the applicant's release under the 1998 Act should have been considered by the department and on appeal by the courts in deciding whether he should be granted a taxi driver's licence. I am satisfied that it was not considered. The application for judicial review must therefore be granted and I will issue an order of certiorari quashing the decision of the Recorder.

[33] I will hear counsel on the form that any ancillary or complementary relief should take.