Neutral Citation No. (2002) NICA 22

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref: CARF3676
Delivered: 24/04/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

———

IN THE MATTER OF AN APPLICATION BY JOSEPH McPARLAND FOR JUDICIAL REVIEW

———

CARSWELL LCJ

This is an appeal from a decision of Higgins J given on 6 July 2001, whereby he dismissed the appellant's application for judicial review of a decision of the respondent, the Department of the Environment for Northern Ireland, not to grant the appellant a road service licence under Part II of the Transport Act (Northern Ireland) 1967, as amended (the 1967 Act). The issue in the court below and on appeal was the way in which domestic legislation must be framed in order to comply with the requirements of the Council Directive 89/438/EEC.

The appellant is a taxi driver who wishes to commence a bus service, for which he requires to obtain a road service licence from the Department. Although he produced evidence of competence and experience, his application, made in September 1997, was refused in April 1998 on the ground that he was not of good repute, as defined by the legislation to which we shall refer. He was convicted on 1 June 1990 at Belfast Crown Court of offences relating to the possession of explosives, firearms and ammunition

with intent to endanger life or property, and sentenced to ten years' imprisonment. Because of the length of the term of imprisonment imposed, the conviction cannot become a spent conviction within the meaning of the Rehabilitation of Offenders (Northern Ireland) Order 1978.

Under section 4 of the 1967 Act a licence from the Department is required for the carriage of passengers and their luggage by road and it is an offence to engage in such carriage without a licence. The original section 5 provided for particulars to be furnished by applicants for licences and section 6 laid down a number of matters to which the Ministry (now the Department) has to have regard in deciding whether to grant or refuse a licence. The terms of the 1967 Act have been substantially amended since its enactment and the requirements to be satisfied by applicants have been increased. These amendments, to which we shall refer later in more detail, have been made in order to comply with the provisions of Council Directives passed in 1974 and 1989.

The 1974 Directive 74/562/EEC (the twin of 74/561 relating to road haulage) recited, inter alia:

> "Whereas it is necessary to provide for the introduction of common rules for admission to the occupation of road passenger transport operator in national and international transport operations in order to ensure that road passenger transport operators are better qualified, thus contributing to rationalization of the market, improvement in the quality of the service provided in the interests of users, transport operators and the economy as a whole, and to greater road safety;

Whereas, therefore, the rules for admission to the occupation of road passenger transport operator should cover the good repute, financial standing and professional competence of operators."

Article 2(1) and (2) provided, so far as is material:

"1. Natural persons or undertakings wishing to engage in the occupation of road passenger transport operator shall:

(a) be of good repute;

(b) be of appropriate financial standing;

(c) satisfy the condition as to professional competence.

2. Pending coordination at a later date, each Member State shall determine the provisions relating to good repute which must be satisfied by the applicant and, where appropriate, the natural persons referred to in paragraph 1."

Article 3 then provided:

"Article 3

1. Member States shall determine the circumstances in which operation of a road passenger transport undertaking may, by way of derogation from the provisions of Article 2(1), be continued on a temporary basis for a maximum period of one year, with extension for a maximum period of six months, in duly justified special cases, in the event of the death or physical or legal incapacity of the natural person engaged in the occupation of transport operator or of the natural person who satisfies the provisions of Article 2(1)(a) and (c).

2. However, the competent authorities in the Member States may, by way of exception and in certain special cases, definitively authorize a person not fulfilling the condition as to professional competence referred to in Article 2(1)(c) to continue to operate the transport undertaking provided that such

person possesses at least three years' practical experience in the day-to-day management of the undertaking."

Directive 89/438 tightened up the requirements to be observed throughout the Community. The fourth recital read:

> "Whereas, as regards the good-repute requirement, it is necessary, in order effectively to reorganize the market, to make admission to the pursuit of the occupation of transport operator uniformly conditional on the applicant having no convictions for serious criminal offences, including offences of a commercial nature, not having been declared unfit to pursue the occupation and on compliance with the regulations applicable to the occupation of transport operator."

Article 4 replaced Article 3(2) of the 1974 Directive as follows:

> "4. Article 3(2) is replaced by the following:
>
> 2. Member States shall determine the conditions which must be fulfilled by undertakings established within their territory in order to satisfy the good-repute requirement.
>
> They shall provide that this requirement is not satisfied, or is no longer satisfied, if the natural person or persons who are deemed to satisfy this condition under Article 3(1):
>
> - have been convicted of serious criminal offences, including offences of a commercial nature,
>
> - have been declared unfit to pursue the occupation of transport operator under any regulations in force,
>
> - have been convicted of serious, repeated offences against the regulations in force concerning:

- the pay and employment conditions in the profession, or

- road haulage, in particular the rules relating to drivers' driving and rest periods, the weights and dimensions of commercial vehicles, road safety and vehicle safety.

In the cases referred to in the above three indents, the good-repute requirement shall continue to be unsatisfied until rehabilitation or any other measures having an equivalent effect has taken place, pursuant to the existing relevant national provisions."

It is not necessary for present purposes to trace the history of the amendments to the 1967 Act passed in order to implement the requirements of the Directives. It is sufficient to look at the amended statute as it stood in 1997 and still stands. By section 5(2)(*a*) an applicant for a road service licence must furnish particulars of any convictions in the preceding five years. Under section 6A(1) the Department must refuse to grant a licence unless it is satisfied that the applicant is of good repute. Section 46A provides for the interpretation of certain expressions used earlier in the Act. The material portions of that section read:

"46A-(1) The following provisions of this section shall have effect for the interpretation of certain expressions used in sections 5, 6A, 7, 10 15, 15A, 28A and 29.

(2) (a) 'conviction' means –

(i) any conviction mentioned in section 29(1) or any conviction of contravening any provision of the law of Great Britain or of a country or territory outside the United Kingdom corresponding to any such conviction, or

(ii) any other conviction of any offence which is a serious offence as defined in subsection (3B) or a road transport offence as defined in subsection (3C),

not being in either case a spent conviction within the meaning of the Rehabilitation of Offenders (Northern Ireland) Order 1978 and a reference to a person being convicted of an offence shall be construed accordingly.

(b) 'a sentence of imprisonment' includes any form of custodial sentence or order other than one under the enactments relating to mental health and 'a community service order' means an order under Article 7 of the Treatment of Offenders (Northern Ireland) Order 1976(c); and

(c) references to an offence under the law in force in any part of the United Kingdom include a reference to a civil offence within the meaning of the Army Act 1955 the Air Force Act 1955 or the Naval Discipline Act 1957.

(3) For the purpose of determining whether a person is or is not of good repute regard shall be had in particular to the existence and number of any convictions (within the meaning of subsection (2)) relating to the person or any partner, employee or agent of the person or, in the case of a company, any officer of the company during the period of 5 years ending with the date on which the matter falls to be determined."

"(3A) The Department shall determine that a person or any partner, employee or agent of the person or, in the case of a company, any officer of the company is not of good repute if he –

(a) has been convicted of serious offences; or

(b) has been repeatedly convicted of road transport offences.

(3B) For the purposes of subsection (3A)(a) a serious offence is –

(a) an offence under the law in force in any part of the United Kingdom for which a sentence of imprisonment for a term exceeding 3 months, a fine exceeding level 4 on the standard scale or a community service order for more than 60 hours was imposed; and

(b) any corresponding offence under the law of a country or territory outside the United Kingdom for which a corresponding punishment was imposed.

(3C) For the purposes of subsection (3A)(b) a road transport offence is –

(a) an offence under the law in force in any part of the United Kingdom relating to road transport, including in particular drivers' hours and rest periods, the weights, dimensions and taxation of commercial vehicles and road and vehicle safety; and

(b) any corresponding offence under the law of a country or territory outside the United Kingdom.

(3D) For the purposes of subsection (3A) spent convictions shall be disregarded.

(3E) Subsection (3A) is without prejudice to the Department to determine that a person is not of good repute for reasons other than convictions of the kind there mentioned."

Spent convictions are defined in the Rehabilitation of Offenders (Northern Ireland) Order 1978 (the 1978 Order). Variable rehabilitation periods up to ten years, depending on the penalty imposed, are fixed by the tables appended to Article 6(2) and after the expiry of the relevant period the conviction is classed as a spent conviction. By Article 6(1) certain sentences

are excluded from rehabilitation, including in paragraph (*b*) a sentence of imprisonment for a term exceeding thirty months. The appellant's sentence accordingly was excluded from rehabilitation and cannot become a spent conviction. Counsel for the appellant pointed out that in England Directive 89/438 has been implemented in a more flexible manner. Under the Public Passenger Service Vehicles Act 1981, as amended, licences are granted by traffic commissioners. Under paragraph 1(3) of Schedule 3 to the Act the commissioner must determine that a person who has been convicted of a serious offence, which is defined in the same terms as in section 46A of the 1967 Act in Northern Ireland, is not of good repute. Paragraph 1(8) of that Schedule provides:

> "For the purposes of sub-paragraph (3) above spent convictions shall be disregarded and a traffic commissioner may also disregard an offence if such time as he considers appropriate has elapsed since the date of the offence."

We were also informed that the comparable legislation in the Republic of Ireland provides that the requirement of good repute is not satisfied where the applicant for a licence has been convicted of a relevant offence within the period of five years prior to the application.

It is therefore clear that under the provisions of the 1967 Act the Department was precluded from granting the appellant a road service licence, whatever the merits of his case, and did not have any discretion in the matter. If the domestic legislation was validly made, the appeal must fail. In his Order 53 statement the appellant based his case on the validity in domestic

law of the Department's refusal of a licence, the vires of section 46A of the 1967 Act and allegations of breaches of the European Convention on Human rights. He abandoned all of these arguments in the court below and did not seek to revive any of them in this court. He instead presented a series of submissions based on the effect of Directive 89/438, which are summarised at pages 22-3 of Higgins J's judgment. The Order 53 statement has not been amended to include these, and we assume that the respondent's counsel made no objection to their being argued.

As put forward in this court, the appellant's submissions resolve into the following propositions:

1. The Department was not bound by the terms of Directive 89/438 to adhere strictly to the rehabilitation provisions of the 1978 Order and it was open to it to adopt a more lenient measure having equivalent effect, as has been done in England and the Republic of Ireland.
2. Since the Directive aims at harmonising the law between Member States, Northern Ireland cannot adopt a different standard from another constituent part of the United Kingdom in respect of past convictions when legislating to implement the provisions of the Directive relating to good repute.
3. If Northern Ireland could, contrary to his submissions, adopt a different standard, that which was adopted was not proportional.

The learned judge did not accept the appellant's first proposition. He accepted the argument then advanced on behalf of the Department that no

discretion was permitted by Directive 89/438 and that section 46A(3D) of the 1967 Act correctly complied with its requirements by restricting the convictions which may be disregarded to spent convictions. The consequence of that conclusion was that the English legislation and that of the Republic of Ireland both must be regarded as having failed to comply with the Directive in an important respect. The appellant's counsel submitted that this would be surprising, since the Government's advisers in England and the Republic would have considered the draft legislation to ensure that it was compliant, and the EC institutions would almost certainly have taken the point up with the respective Governments if they thought that the provisions were not compliant.

Mr Barling QC, who appeared for the respondent Department on appeal, took a different line from that followed by the Department in the court below. He did not attempt to uphold the argument which had prevailed with the judge, but submitted instead that it was open to the Member States, as the appellant contended, to achieve the object of the Directive by providing that convictions may be disregarded when they are spent or by making some other provision having equivalent effect. The provisions in the three jurisdictions were accordingly all compliant with the Directive. The fact that the Member States had a discretion to adopt a more lenient standard, as England and the Republic of Ireland had done, did not mean that the 1967 Act was not compliant. The legislature was entitled to fix the standard by reference to rehabilitation and spent convictions if it chose,

and the 1967 Act was valid. Equally, the English legislation was valid as being a measure having equivalent effect, which Parliament was entitled to adopt.

In our opinion this contention is correct. We consider that Directive 89/438 left it open to Member States to apply either their own domestic rehabilitation legislation or some other measure having an equivalent effect. As Mr Barling pointed out, the Community has consistently left matters relating to the criminal law to Member States and they are free to adopt any type of rehabilitation legislation. We do not think that if a Member State has a formal rehabilitation statute it is bound to use that exclusively as a standard in the present context; if it chooses to allow the application of a more lenient standard, as was the case in England, it is in our view free to do so.

It is, we agree, surprising, and it might be regarded as undesirable, that the law should differ markedly between two different constituent parts of the United Kingdom. But we would regard that as a matter of policy for the Government to address, determining whether differences in social or other conditions justify the maintenance of a different provision in each jurisdiction. It is sufficient for present purposes that the harmonising imperative contained in the Directive does not in our view invalidate the law of either merely because they differ.

It was argued on behalf of the appellant that the effect of the 1978 Order may be so unnecessarily harsh on individual applicants for road service licences that it offends the principle of proportionality to apply them

rather than more lenient measures having equivalent effect. There may well be circumstances in which the offence for which a person was sentenced to thirty months' imprisonment would have little bearing on his fitness to receive a road service licence, and it would not be proportional to prevent such a person from ever being granted a licence. Mr Barling suggested, however, that the principle of proportionality did not apply to the present case. It is applicable as a criterion of the validity of national legislation when Community law requires or authorises a Member State to act in a certain manner. He submitted that where, as in this case, the Directive has specifically provided that rehabilitation provisions of national law may be applied, then they are to be taken to be authorised without the necessity to determine whether such provisions are proportional. Alternatively, if the test of proportionality is to be applied, in a field of social policy such as that of the licensing of drivers to drive vehicles on its own roads, the Member State has a wide margin of appreciation in framing its legislation. As Lord Bingham of Cornhill CJ said in giving the judgment of the Court of Appeal in *R v Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 CMLR 123 at 145:

> "The margin of appreciation for a decision-maker (which includes, in this context, a national legislature) may be broad or narrow. The margin is broadest when the national court is concerned with primary legislation enacted by its own legislature in an area where a general policy of the Community must be given effect in the particular economic and social circumstances of the member state in question."

We consider that these submissions are correct. We regard it as doubtful whether the principle of proportionality comes into play at all, since

the Directive specifically envisaged that the rehabilitation provisions applying in various Member States would be applied. If it is applicable, however, we consider that the margin of appreciation is wide enough to include the rehabilitation provisions of the law of Northern Ireland, even though they may at times make for hard cases. Mr Treacy QC for the appellant argued that since the Department appears erroneously to have thought that it was bound to incorporate the rehabilitation provisions of the 1978 Order and had no discretion to adopt a more lenient standard, its decision to frame the legislation in this way was invalid. We do not accept this argument. It seems to us that one should look at the result, not what the Government or the legislature thought that it had power to do. If, as we accept, the resulting legislation was proportional when objectively viewed, then it is not invalidated by the fact that the Member State may have thought that it could not enact a more lenient provision.

For the reasons which we have given we accordingly consider that the provisions of the 1967 Act are compliant with the Directive 89/438 and the appeal must be dismissed.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

IN THE MATTER OF AN APPLICATION BY JOSEPH McPARLAND FOR JUDICIAL REVIEW

_____

J U D G M E N T

O F

CARSWELL LCJ

_____