APPROVED **[2023] IEHC 12**

THE HIGH COURT
JUDICIAL REVIEW

2020 No. 921 J.R.

IN THE MATTER OF THE TAXI REGULATION ACT 2013

BETWEEN

NAZRUL ISLAM

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 16 January 2023

INTRODUCTION

1. This judgment addresses the allocation of legal costs in proceedings which became moot shortly after they had been commenced. The object of the proceedings had been to secure the grant of a licence which would allow the applicant to operate a small public service vehicle (colloquially, a taxi driver's licence).

2. The proceedings commenced by way of an *ex parte* application for leave to apply for judicial review on 7 December 2020. A number of weeks later, on 5 January

2021, the licensing authority made a decision to grant the licence. The only outstanding issue between the parties is in respect of legal costs. The applicant seeks to recover his costs against the licensing authority on the basis that the proceedings had achieved their object, namely the grant of the licence. The licensing authority seeks to resist paying costs on the basis, *inter alia*, that the proceedings were issued precipitously.

PROCEDURAL HISTORY

3. There is a statutory requirement for a person to hold a licence in order to drive a small public service vehicle for the carriage of persons for reward. This requirement is provided for under Section 22 of the Taxi Regulation Act 2013. All references in this judgment to a "*licence*" should be understood as a reference to a small public service vehicle driver's licence.

4. The Taxi Regulation Act 2013 envisages that the National Transport Authority will, ultimately, be the licensing authority. However, An Garda Síochána are acting as the licensing authority on an interim basis pending the making of the requisite Ministerial Order pursuant to Section 7 of the Act. In practice, the licensing function is performed by "*authorised officers*", i.e. members of the Garda Síochána, not below the rank of Superintendent, who have been authorised to carry out the licensing function by the Garda Commissioner.

5. The applicant is a citizen of Bangladesh and has been lawfully resident in the Irish State for more than a decade now, pursuant to a series of temporary immigration permissions. The applicant had been granted a small public service vehicle driver's licence on 14 March 2019. The duration of the licence coincided with that of the applicant's then immigration permission.

6. The applicant applied to renew his licence on 22 February 2020. This licence application was ultimately refused by decision dated 4 August 2020. The reasons for refusal related to the fact that the applicant's immigration status had not been "*regularised*" and that he had previously only ever held temporary immigration permissions. It should be observed that this decision to refuse the licence was lawful: see, generally, *Rahman v. Healy* [2022] IEHC 206.

7. A number of weeks later, the applicant's immigration permission was renewed until 19 August 2023 by the Minister for Justice and Equality. The applicant contacted the licensing authority on 5 September 2020 and requested that the decision to refuse the licence be reviewed having regard to his changed immigration status. It should be explained that the applicant would have had a statutory right of appeal to the District Court against the decision to refuse the licence. It appears, however, that the applicant took the pragmatic view that it would be more expeditious to have the matter dealt with informally, by way of an internal review rather than an appeal.

8. On 25 September 2020, the licensing authority sent an email to the applicant informing him that the authorised officer had reviewed his application and had decided to renew his licence. The email went on to state that the licence would be posted to the applicant in the coming weeks. In the event, no licence issued. Instead, the licensing authority wrote to the applicant as follows on 25 October 2020:

> "I am to acknowledge receipt of your email below. I refer to your statement below in relation to your immigration permission. Your application was refused on the 11/08/2020 due to the reasons that are listed on the Refusal Notice that was served on you. Following this refusal you produced documentation to this office which stated that you have received a new long term visa from INIS. As per your request, the Authorised Officer reviewed your file and

> decided to reverse his decision to refuse your application. He instructed that your licence was to issue for the duration of your new visa, providing all other matters were in order.
>
> Further enquiries were carried out in relation to your application prior to final issue. As previously stated said enquiries raised other matters which are now to be brought to the attention of the Authorised Officer who will make a determination on your application. Once said determination has been made you will be contacted by this office."

9. It seems that the mention of "*other matters*" is intended as a reference to the fact that a number of summonses had been issued to the applicant in respect of alleged road traffic offences.

10. At this point, the applicant retained a firm of solicitors to act on his behalf. The solicitors wrote to the licensing authority on 11 November 2020. In brief, it was contended that, having made a decision to renew the licence on 25 September 2020, it was not now open to the licensing authority to reverse that decision. The letter called upon the licensing authority to issue a licence pursuant to the earlier decision and stated that the firm of solicitors had been instructed to initiate judicial review proceedings if the licence was not provided by 18 November 2020.

11. The licensing authority never made a formal reply to this letter from the firm of solicitors. Instead, the licensing authority, on 18 November 2020, sent the applicant a statutory notice pursuant to Section 13 of the Taxi Regulation Act 2013. In brief, this section obliges the licensing authority to notify an applicant of a proposed decision to refuse to grant a licence, and to invite representations within fourteen days on the proposed decision. The statutory notice stated that the authorised officer was not satisfied that the applicant was a "*suitable person*" to hold a small public service vehicle driver's licence because he had been

summonsed to attend court in respect of (i) an alleged offence of careless driving, and (ii) three alleged speeding offences.

12. The statutory notice invited representations within fourteen days as to why the licence application should not be refused. Importantly, the statutory notice went on to state that a decision would be issued within seven days thereafter. It follows, therefore, that the process of the making and receiving of representations would not cause any material delay to the decision-making process.

13. The statutory notice of 18 November 2020 had been sent by way of ordinary post. It seems that the licensing authority subsequently took the view that the statutory notice should have been sent instead by way of registered post. Accordingly, a second statutory notice, in identical terms, was sent to the applicant by registered post on 4 December 2020.

14. In the event, the applicant chose not to make representations in response to either version of the statutory notice. Instead, the applicant prepared papers for judicial review proceedings and same were filed in the Central Office of the High Court on 26 November 2020. The *ex parte* application for leave to apply for judicial review was not made until 7 December 2020. The matter was adjourned until 14 December 2020; and, on that date, the High Court (Meenan J.) granted leave. The matter was made returnable to 16 February 2021.

15. Prior to the return date, the licensing authority made a decision to grant a licence. The decision was made on 5 January 2021 and notified to the applicant a number of days later. The judicial review proceedings are now moot and the only outstanding issue between the parties is in respect of legal costs.

16. There was some debate at the hearing before me as to the date upon which the proceedings should be taken as having been commenced. I am satisfied, having regard to the provisions of Order 84, rule 21 of the Rules of the Superior Courts, that the proceedings were not commenced until the *ex parte* application for leave first came before the High Court on 7 December 2020. Whereas an applicant is required, as a matter of practice, to file papers in the Central Office of the High Court in advance of the *ex parte* application so as to obtain a record number for the proceedings, the date of filing does not constitute the commencement date.

CHRONOLOGY

17. The key events in the chronology are summarised in tabular form below:

4 August 2020	Decision to refuse licence
11 August 2020	Notification of decision to refuse licence
5 September 2020	Applicant seeks informal internal review
25 September 2020	Notification of decision to renew licence
25 October 2020	Licensing authority writes to say other matters brought to its attention
11 November 2020	Solicitor's letter threatening judicial review proceedings
18 November 2020	Notice of proposed decision to refuse licence
4 December 2020	Second notice of proposed decision to refuse licence (registered post)
7 December 2020	*Ex parte* application for leave to apply for judicial review
5 January 2021	Decision to grant licence made

LEGAL PRINCIPLES GOVERNING COSTS IN MOOT PROCEEDINGS

18. The legal principles governing the allocation of costs in moot proceedings have been summarised as follows by the Court of Appeal in *Hughes v. Revenue Commissioners* [2021] IECA 5 (at paragraphs 31 to 34):

"First, where the mootness arises as a result of an event that is entirely independent of the actions of the parties to the proceedings, the fairest outcome will generally be that the parties should bear the costs themselves. Neither is responsible for the mootness, and neither should have to pay for costs rendered unnecessary by an event for which they bear no responsibility.

Second, however, where the mootness arises because of the actions of one of the parties alone and where those actions (a) can be said to follow from the fact of the proceedings so that but for the proceedings they would not have been undertaken, or (b) are properly characterised as '*unilateral*' or – perhaps – (c) are such that they could reasonably have been taken before the proceedings, or before all of the costs ultimately incurred in the proceedings were suffered, the costs should often be borne by the party whose actions have resulted in the case becoming moot. In the first of these situations, it can be fairly said that there was an *event* which costs can and should follow in accordance with conventional principle. In the second, it will frequently be proper that the party who is responsible for the unilateral action which results in the mootness should bear the costs. In the third, it might be said that where a party who could reasonably have acted so as to prevent the other party from incurring costs failed to do so, it is proper that they should have to discharge those costs.

The third general proposition addresses the particular position of statutory bodies. Agencies with obligations in public law cannot be expected to suspend the discharge of their statutory functions simply because there are extant legal proceedings relating to the prior exercise of their powers. They must be free to continue to exercise those powers in accordance with their legal obligations. At the same time, it would be wrong if under the guise of exercising their powers in the normal way, the statutory authority both effectively conceded an extant claim, and avoided the legal costs that would otherwise attend such a concession. The cases strike a balance between these two considerations by suggesting that where the mootness arises because a statutory body makes a new decision in the exercise of its legal powers, the court should look at the circumstances giving rise to that new decision in order to decide whether it constitutes a '*unilateral act*' for these purposes. If the new decision is caused by a change in the relevant circumstances occurring between the time of the first decision, and of the second, the Court might not treat the new decision as a '*unilateral act*' and may accordingly make no order as to costs. If, however, there has been no such change in circumstances so that the body has

> simply changed its mind, costs may be awarded against it. If the respondent wishes to contend that there has been a change in circumstances it is a matter for it to place before the court sufficient evidence to allow the Court to assess whether and if so to what extent it can fairly be said that this is so. This requires the respondent to establish that there was a change in the underlying circumstances sufficient to justify, in whole or in part, it being appropriate to characterise the proceedings as having become moot by reason of a change in external circumstances. In conducting this analysis, the Court should not embark upon a determination of the merits of the underlying case.
>
> Each of these three propositions – it must be stressed – present a general approach rather than a set of fixed, rigid rules. The starting point is that the Court has an over-riding discretion in relation to the awarding of costs, and the decisions to which I have referred are intended to guide the exercise of that discretion. They are thus properly viewed as presenting a framework for the application of the Court's discretion in the allocation of costs in a particular context and should not be applied inflexibly or in an excessively prescriptive manner (*PT v. Wicklow County Council* [2019] IECA 346 at paras. 18 and 19)."

19. The obligation upon a public authority to put forward evidence to rebut an inference that it had changed its position in response to proceedings has been summarised as follows by the Court of Appeal in *Sherlock v. Clare County Council* [2020] IECA 251 (at paragraph 28):

> "In cases involving public bodies taking decisions which are within their statutory remit, it is not uncommon for disputes to arise of the kind that have occurred in this case. Clearly where an order of mandamus is being sought to compel a public body to carry out its statutory obligations, there is always the potential for an argument that a decision is not taken in response to proceedings but in the normal course of the public body's administrative functions. It can thus be difficult to identify whether the action concerned is a unilateral act in response to proceedings, or one that might in the normal course of events have occurred anyway. If the surrounding circumstances are indicative of a significant acceleration of the action concerned beyond what might be expected in the normal course, there may be an onus on the public body to account for that fact if the court is not to infer that the acceleration is a response to the proceedings."

DISCUSSION

20. As appears from the case law cited above, one of the issues which may be relevant to the allocation of costs is whether the administrative decision, which rendered the particular proceedings moot, was made in response to the proceedings. In the context of mandamus proceedings, the issue will often be whether the making of the decision had been *accelerated* as a result of the proceedings, or whether, alternatively, the decision had been made in the normal course of the public body's administrative functions, with the timing of same unaffected by the proceedings.

21. The issue which arises in the present case is more nuanced. Here, the decision-maker had already committed, prior to the commencement of the proceedings, to making a (final) decision by December 2020. More specifically, the licensing authority had notified the applicant of its proposed decision to refuse to grant a licence. The applicant was allowed a period of fourteen days within which to make representations as to why the licence should not be refused. The licensing authority indicated that a (final) decision would then be made within seven days.

22. (Matters are slightly complicated by the fact that two versions of the statutory notification of the proposed decision were sent, on 18 November 2020 and 4 December 2020, respectively. However, this does not affect the analysis: the fact remains that the licensing authority had committed to making a decision in December 2020).

23. The stated rationale for the proposed decision to refuse the licence was that the applicant had been served with summonses in respect of a number of alleged road traffic offences. It is apparent from the statutory notice that the licensing

authority proposed to take these pending criminal proceedings into consideration in assessing the applicant's suitability to hold a licence.

24. The applicant chose not to make representations in response to either version of the statutory notice. The applicant instead commenced these proceedings by making an *ex parte* application for leave to apply for judicial review on 7 December 2020. Relevantly, one of the grounds pleaded in the statement of grounds had been to the effect that it would be inconsistent with the presumption of innocence for the licensing authority to have regard to *pending* criminal proceedings in assessing the suitability of the applicant to hold a licence.

25. The licensing authority made a decision on 5 January 2021 to grant the licence. This constituted a *volte face* from the proposed decision. Of course, the licensing authority was perfectly entitled to change its mind. The decision notified was only ever a *proposed* decision, and the statutory scheme expressly envisages that the decision ultimately made by the licensing authority might be different. Indeed, this is the precise point of allowing an opportunity for the making of representations.

26. It does appear, however, from the limited evidence adduced before the court that the change in mind in the present case was in direct response to these judicial review proceedings. The authorised officer who made the decision to grant the licence has explained, on affidavit, that the pending criminal prosecutions were not ultimately relied upon in circumstances where no convictions had yet been entered. This appears to reflect the point made in the statement of grounds in the judicial review proceedings. It is reasonable to infer that the change of mind and the decision to grant were in response to the judicial review proceedings.

27. This is not, however, an end of the matter from a cost's perspective. The crucial question is whether it was reasonable for the applicant to commence proceedings without first having exhausted his right to make representations on the then proposed decision.

28. The answer to this question is that it was unreasonable for the applicant not to avail of the opportunity to make representations in response to the statutory notification of a proposed decision pursuant to Section 13 of the Taxi Regulation Act 2013. The applicant acted precipitously in commencing proceedings without having done so. It is a fundamental principle of administrative law that an aggrieved person is, generally, expected to exhaust the statutory procedure before having recourse to the High Court by way of an application for judicial review. It is preferable that any objection should first be raised before the decision-maker. This ensures that the decision-maker has an opportunity to consider the objection. If the objection is accepted as well founded, it should be possible to resolve same within the statutory process, without the necessity for legal proceedings, with all the attendant cost and delay for the parties.

29. In the present case, the applicant should have raised, by way of representations to the licensing authority in response to the statutory notice, the objection which was ultimately relied upon in the judicial review proceedings. The objection made in the judicial review proceedings is that it was inconsistent with the presumption of innocence for the licensing authority to rely on the existence of pending prosecutions for alleged road traffic offences as a reason for refusing to grant a licence. Had this objection been raised by way of response to the statutory notice, then the licensing authority would have had an opportunity to consider the objection. If the licensing authority accepted that the objection was

valid—which is the position it adopted on 5 January 2021—then the applicant would have obtained a licence without the necessity of commencing legal proceedings.

30. It should be emphasised that the making of representations would not have exposed the applicant to any material delay. The licensing authority had committed to making a decision within seven days of the expiration of the time prescribed for the making of representations. Even if one takes time as only running from the date of the second statutory notice (4 December 2020), a decision would still have had to be made before the end of December 2020.

31. Section 169 of the Legal Services Regulation Act 2015 provides that the court, in the exercise of its discretion on costs, is to have regard, *inter alia*, to a party's conduct before and during the proceedings. For the reasons outlined, the applicant acted precipitously in commencing these proceedings without having made any representations in response to the statutory notice issued pursuant to Section 13 of the Taxi Regulation Act 2013. This court is entitled to have regard to this unreasonable conduct in making a determination on the allocation of costs.

CONCLUSION AND FORM OF ORDER

32. The just and fair outcome in the present case is that there be no order for costs. Each party must bear its own costs of the proceedings (to include the costs of the one-hour costs hearing on 11 January 2023). This outcome reflects the fact that whereas the proceedings did achieve the applicant's desired objective, namely the grant of a small public service vehicle driver's licence, the applicant might well have achieved the same result had he exhausted the statutory procedure

under Section 13 of the Taxi Regulation Act 2013. It was unreasonable for him not to have pursued this option, especially given that it would not have resulted in any material delay to the decision-making process.

33. In circumstances where the proceedings are moot, an order will be made striking out the proceedings with no further order.

Appearances

Derek Shortall SC and Femi Daniyan for the applicant instructed by GN and Company Solicitors
Kilda Mooney for the respondent instructed by the Chief State Solicitor