THE HIGH COURT

JUDICIAL REVIEW

Record No. 38 JR/2000

BETWEEN

CHRISTOPHER HUMPHREY, TONY DOYLE,

THOMAS O'CONNOR AND KEVIN BRADY

APPLICANTS

AND

THE MINISTER FOR THE ENVIRONMENT AND LOCAL GOVERNMENT, THE MINISTER OF STATE AT THE DEPARTMENT OF ENVIRONMENT AND LOCAL GOVERNMENT, IRELAND, THE ATTORNEY GENERAL, DUNDALK URBAN DISTRICT COUNCIL, THE RIGHT HONOURABLE, LORD MAYOR ALDERMEN AND BURGESSES OF THE CITY OF DUBLIN THE NATIONAL TAXI DRIVERS UNION AND THOMAS GORMAN (IN HIS REPRESENTATIVE CAPACITY AS GENERAL SECRETARY OF THE UNION) (JOINED BY ORDER)

RESPONDENTS

Judgment of Mr. Justice Roderick Murphy delivered the 13th day of October, 2000.

1. **BACKGROUND**

Demand for passenger transport services, particularly in the Dublin area, has far exceeded supply at peaks causing queuing, frustration and a chronic under supply but also extends to non-peak times. At peak times the excess demand is notorious.

Public transport consists of large and small public service vehicles. The application in this case concerns the licensing of small vehicle hire service. However, the

application needs to be considered in the context of transport available generally for the public.

There has been a traditional distinction between large vehicle public transport such as trains and buses and, within that category between urban, suburban and interprovincial services. Such public transport has been the subject of consolidation and state monopoly in the 1940s and to a degree of fragmentation and liberalisation in the recent past.

The imperative of public supply in relation to the State monopoly imposed an obligation to supply irrespective of adequate economic return and to cross subsidise non-economic routes as a public service.

In relation to small hire vehicles the State and Local Authorities were required by legislation to provide for the regulation of standards by way of licensing of what has always been essentially a private hire market. A key distinction in that market is made between the public hire vehicles (taxis) and private hire vehicles (hackneys). Public and private hire vehicles are, of course, privately supplied to the public. However, there is no obligation on licensee to provide a determined, or indeed, any public service.

Taxis are restricted with regard to the fees to be charged for such a service, while hacknies, the private hire vehicles, are not. However, there would seem to be no significant difference in charges in practice.

Taxis can ply for trade in public, may stand at designated ranks and use bus lanes while hacknies can not.

A licensed vehicle, whether taxi or hackney, must be driven by a licensed driver, that is the holder of a public service vehicle license, irrespective of whether that driver is or is not the owner of the licensed vehicle. Where the driver is not the owner of the vehicle she or he is termed a “cosy”.

The Applicants in the present case are all holders of both public service vehicle driving licenses and hackney licenses granted in respect of small hire vehicles by the local

authorities, the fifth and sixth named Respondents. Each has applied for a taxi license and has been refused. The Applicants are unhappy with the action of the Minister and the Minister for State in relation to the proposal to increase the supply of taxis in Dublin and Dundalk as is contained in Statutory Instrument Number 3 of 2000 of February last, entitled Road Traffic (Public Service Vehicles) Regulations

In an attempt to address the increasing demand for hire vehicles the Authorities propose granting an extra license to each existing taxi license holder. The Authorities also propose granting wheelchair accessible taxis to suitable Applicants, giving priority to the holders of public service vehicles driving licenses who drive taxis but do not own them.

The Applicants submit that the Road Traffic Act, 1961 which, together with other amendments to that Act, govern the regulations relating to the issue of licenses, does not permit restricting the number of licenses to existing taxi license holders. The Act envisages regulations which are qualitative and not quantitative in nature.

The Respondents in this case are the Ministers having responsibility for taxis and hackneys, the State and the Attorney General in relation to the broader context, two local authorities of Dundalk and Dublin and, by Order of the Court, the National Taxi Drivers Union and its General Secretary.

There is no doubt that the decision to issue new licenses in the Dublin area, in particular, was prompted by widespread public concern as to the availability of taxis in the city. At the same time existing taxi license holders were in a situation in which taxi licenses were being exchanged for very substantial sums of money. The decision to offer licenses in the first place to existing taxi license holders was prompted by the duel concern of the Ministers to ensure that the licenses were issued in such a manner as to facilitate their being rapidly mobilised, and to operate in a manner which is in all the circumstances fair and reasonable having regard to the interests of existing taxi license holders.

2. PLEADINGS

Given the nature of the comprehensive challenge to the legislation over the past 40 years, and the interest of the various parties to the action, it is essential to consider the pleadings in detail before examining the evidence and legal submissions.

2.1 The Applicants seek declarations that certain Road Traffic (Public Service Vehicles) Regulations and in particular, SI number 3 of 2000 are ultra vires the First and Second named Ministers. They also seek a declaration that the decision of the Fifth named Respondent, Dundalk Urban District Council, to amend the fees in relation to the taximeter area of that Council is ultra vires the Council and, in any event, that such fees should have regard solely to the expenses incurred in implementing the licensing regime in question. They also seek a declaration that the power of the Council to vary fees and to vary the taximeter boundaries, conferred on the Council by the Minister, is ultra vires the Minister.

The Applicants further seek an Order of Certiorari quashing the decision of the Second named Minister made on the 30th November, 1999 whereby the Minister decided:-

(a) That a new additional taxi licence would be offered to all current holders of such licences in Dublin;

(b) That any such licences not taken up under this procedure together with 500 more licences would be distributed in accordance with the criteria set out in the Sixth Schedule to the Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1995 as amended by S.I. No. 51 of 1999.

Injunctions are also sought restraining the Fifth and Sixth named local authorities from allocating taxi licences.

On Monday, the 7th February, 2000 O'Neill J granted leave to apply by way of an application for Judicial Review for such declarations and for an Order of Certiorari and ordered that the Fifth and Sixth named local authorities be restrained from allocating taxi licences until after the determination of such application for Judicial Review.

2.2 By Statement of Opposition on behalf of the first two Fourth named Respondents (the State), it is pleaded that the Applicants lack locus standi to seek any of the reliefs claimed. The State Respondents say that the provisions of the Regulations are promulgated under and pursuant to the power conferred by the provisions of Section 5 and 82 of the Road Traffic Act, 1961 as amended by Section 57 of the Road Traffic Act, 1968. Moreover, each of the Regulations was laid before each House of the Oireachtas in accordance with Section 5(2) and, in the premises, the Regulations enjoy a presumption of validity, and are not ultra vires the provisions of the Road Traffic Act, 1961 as amended.

Moreover, the Applicants are, by reason of their laches and acquiescence, precluded from challenging any provisions of the Regulations prior to Statutory Instrument No. 3 of 2000.

The State says that Section 82 enables the Minister to make regulations in relation to the control and operation of public service vehicles, including but not limited to the licensing thereof and of drivers, and the conditions pursuant to which vehicles may be operated as public service vehicles. The power to promulgate regulations under the said provision is not a power in the exercise of which the Minister or the Minister for State is obliged to accord to any person natural or constitutional justice or in respect of which there is any obligation to afford fair procedures. Without prejudice, either Minister in exercising that power is not

obliged to accord natural or constitutional justice, or fair procedures, to the Applicants. The State Respondents complied with any obligations imposed upon them by law in the promulgation of the said Regulations.

The power *to* control and *to* license necessarily entails and/or implies the power to restrict the number of public service vehicles to be granted, or to be issued, at any time. The power to make regulations under Section 82 includes the power to make different regulations for different areas and circumstances and this entails and implies the power to enable or require local authorities to impose such restrictions as either the First or Second named Minister might impose.

The State pleads that the Ministers are entitled to delegate all or any aspects of the licensing function for public service vehicles to local authorities including the function of altering the boundaries of taximeter areas.

The State denies that Article 5 of the 1978 Regulations does not require local authorities to have regard to the principles and practices contained in Section 82 of the Road Traffic Act, 1961, as amended, in exercising any power conferred thereby. That Regulation directs specified local authorities to determine by resolution the number of new public vehicle licences to be granted by the Commissioner of An Garda Siochana in respect of the areas specified therein.

The provision does not entail local authorities to take account of *wholly extraneous or irrelevant* matters in connection therewith. The State deny that any local authority has taken account of extraneous or irrelevant considerations. Neither have the local authorities had regard to the preservation or fostering of the economic interests of one section of the community as alleged. However, the power of licensing and control provided for by Section 82 does not preclude the power to take account of the interests and position of those to whom licences of any particular category have been granted.

In relation to the 1995, 1997 and 1999 Regulations, the State pleads that a specification of a number of taxi licences or wheelchair accessible licences and the provision for a system of points for different categories of Applicants are lawful and *intra vires* the Respondents.

In relation to fees charged by local authorities the State maintains that there is no requirement in the Act or the Regulations that the fee charged will have any particular relationship to the cost of supervising or licensing small public service vehicles. The imposition of a fee is not the exercise or power to raise tax but of the power to regulate and control the said licences.

The decision to issue new licences was prompted by widespread public concern as to the adequacy of the taxi service available in the city of Dublin, by a desire to ensure a rapid addressing of those concerns, and by the belief that the offering of those licences to existing taxi holders afforded the most efficient and fairest mechanism for the immediate operation of those licences. The decision was consistent with the principles and policies contained in Section 82 of the Road Traffic Act, 1961, was not based on any extraneous consideration or any desire to benefit or to foster the economic interests of one section only of the community in a manner outside the contemplation of the said Act. Without prejudice the Minister is entitled to have regard to the economic effect upon existing taxi drivers of the allocation of large number of new licences to third parties. It was a rational decision. It was not actuated by bias and did not fail to have regard to any principles of natural and constitutional justice or of basic fairness of procedure notwithstanding that these are not applicable to the aforesaid decisions. Any distinction between current licence holders and other persons is justified by reference to the position of the current holders.

The State further says that, while there is no principle of legal certainty applicable to the Regulations, they do not fail to comply with such principle.

Finally, the State pleads that the provisions of Article 40.1 of the Constitution, providing equality before the law, are not applicable to the holding of taxi licences.

2.3 Dundalk Urban District Council (the Council) opposed the granting of the reliefs claimed and claimed that the changes made to the fees are *intra vires* the Council and in accordance with the Regulations of 1995. The proposal to extend the boundary of the taximeter area a distance of 10 miles in all directions is made pursuant to Article 7(1) of the 1995 Regulations. The decision to increase the number of taxi licences from 20 to 100 with 20% to be dedicated to wheelchair accessible vehicles was in accordance with the provisions of Article 8 of the same Regulations. The amendment of the fees specified in the Fourth Schedule to the said Regulations to a fee of £25,000 for a taxi licence and a fee of £5,000 for a wheelchair accessible licence was in accordance with Article 32(1) of the same Regulations. The Council pleads that it is not required to relate the said fees to the cost of supervising or licensing small public service vehicles or to the fees paid by current holders of taxi licences in its functional area. Indeed, the Council says that it is not required to specify the basis on which it determines the said fees. However, it did have regard to the market value of taxi licences and in particular to the fees recently set by Navan Urban District Council in the sum of £20,000 per licence. The current market value of such licences is similar to that being charged in the private market in Dundalk. Such fees are to be paid into the municipal fund and applied for the purposes for such said fund exists.

Pursuant to the Regulations of 1995 the Council invited applications for 80 new taxi licences and received a total of 78 applications including 17 for wheelchair accessible taxi licences. In such circumstances the criteria for the allocation of these licences as set out in the Sixth Schedule to the Regulations will not be applied in relation to new taxi licences and is unlikely to be applied to wheelchair accessible licences.

In relation to the proposals to increase the number of licences and to extend the taximeter area no representations were received by the Council before the closing date on the 1st March, 2000.

The Council says that it has acted intra vires and points out that the Applicant has failed to particularise the details of damage which are denied and are speculative and of an inchoate nature.

2.4 Dublin Corporation (the Corporation) pleads that the Applicants are not entitled to the reliefs claimed; have failed to state sufficient grounds which would entitle them to relief and have failed to act promptly within the time limits prescribed by Order 84 of the Rules of the Superior Courts, 1986.

In addition, the Corporation deny that the statutory provisions do not permit them from imposing a quantitative restriction on the number of public service vehicle licences to be granted pursuant to those provisions. They also deny that the provisions do not permit the Minister from delegating to the local authorities the power to impose such restrictions. Article 5 of the 1978 Regulations is not ultra vires as alleged. The Corporation agrees that article does not permit a local authority to take into account matters wholly extraneous and irrelevant to the principles and policies in Section 82 of the Road Traffic Act, 1961. The Corporation deny that matters unrelated to the operation and control of public services, such as the desire to preserve and foster the economic interests of one section of the community only, are considered or taken into account. The Corporation have at all times complied with the statutory and regulatory criteria for the allocation of the said licences. The decision was not irrational nor do the Regulations fail to comply with the principles of legal certainty.

The new Regulations (S.I. No. 3 of 2000) do not lawfully discriminate against persons other than the current holders of taxi licences and wheelchair accessible licences. The

Corporation deny that such grants amounts to a breach of Article 40.1 of the Constitution or that the maintenance of two assessment systems for allocation of taxi licences and wheelchair accessible licences is invidious, discriminatory and contrary to constitutional justice and fair procedures as alleged.

2.5 The National Taxi Drivers Union and its General Secretary (the Taxi Union) were joined by Order of the Court and made a preliminary objection. The proceedings, they say, are inadmissible for not being brought within the time limited by Order 84 Rule 21 and, as the Applicants had not sought an extension of time, the Court should not enter upon a determination of the grounds relied upon other than the injunction in relation to the Statutory Instrument No. 3 of 2000.

By way of Statement of Opposition the Taxi Union say that the Applicants are not entitled to relief; that the Ministers have power under the Road Traffic Acts to make regulations and that the policy adopted by the Ministers in enacting Section 82 has in fact been given effect to by the regulations. .

Section 82, it is pleaded, envisages a scheme of regulation which is so subject to the control of Parliament. That section empowers the Minister to provide directly for quantitative restrictions. By the use of the words "in relation to" the section expressly affords the Minister a power to delegate within the polices and principles of the Act to provide for the control and operation of public service vehicles. The criteria provided for in the Regulations for assessment of applications are criteria which are legitimately aimed at ensuring the proper control and operation of public service vehicles. The manner in which licences are granted in respect of such vehicles are in accordance with the polices and principles provided for in the Acts.

The Taxi Union further pleads that the decision to issue new licences in

accordance with the provisions of Statutory Instrument No. 3 of 2000 was not taken by reference to extraneous factors. The decision was taken having regard to the public interest that further licences be issued, this was not done in a biased manner nor has there been any breach of the rule of natural and constitutional justice in fair procedures. There had been a process of consultation with interested parties, including representatives of hackney drivers in the context of the several reports which were before the Court.

The Taxi Union deny allegations of failure to comply with requirements of legal certainty; deny unlawful discrimination; deny a failure to treat equally and further deny that the maintenance of two assessment systems is in any way invidious.

3. EVIDENCE

Each of the Applicants filed Affidavits and gave oral evidence. In addition, Professor Rodney Thom supported the Application by way of economic argument in his Affidavit and oral evidence. Mr. Brendan Lynch gave expert economic evidence on behalf of the Taxi Union.

3.1 Mr. John Weafer, Principal Officer in the Office of the Minister for the Environment and Local Government, filed an Affidavit outlining the legislative background to the 2000 Regulation and also gave oral evidence.

Mr. Joseph McGuinness, Senior Staff Officer of the Dundalk Urban District Council verified the facts relied upon in the Statement of Opposition and outlined the background and process of decision making of Dundalk Urban District Council, the Fifth named Respondent herein.

An extensive Affidavit of Thomas Gorman, the General Secretary of the National Taxi Drivers Union and Eighth named Respondent filed an extensive Affidavit

distinguishing between hackneys (private service vehicles) and taxis (street cars). He opposed the Application save for the determination of the exercise of a power to vary fees on the part of the Fifth named Respondent, Dundalk Urban District Council.

3.2 Economic Arguments.

Expert economic evidence was given on behalf of the Applicants, the Hackney drivers, and on behalf of the National Taxi Drivers' Union. I propose to deal with this evidence before legal arguments.

3.2.1 Rodney Thom is Monet Professor of Economics at University College Dublin where he is head of the Economics Department.

Professor Thom's affidavit (at paragraph 29 and 30) concludes as follows:

"..... Regulated entry for taxi services has been detrimental to consumers. It restricts competition, perpetuates inefficiencies and protects the profits of existing licence holders.... The principal effect of the (Minister's) proposal would be to entrench the privileged position of existing holders by protecting them from competition from new entrants. Such a decision, in my view, is illogically and entirely without any economic justification. It is contrary to common sense and it is in my considered view that whatever about creating only a limited number of new licences at this time, the decision to hand out the vast majority of those licences to current holders only has no rational basis from an economic or regulatory perspective.

If a political decision is made to compensate existing holders who have

purchased their licences on the secondary market for their capital losses, this can be done other than through the mechanisms of S.I. 3 of 2000. A more competitive and efficient taxi service can be more readily achieved by granting entry to all PSV licence holders. In short, the justification for regulation is to protect the consumer by reducing monopoly profits and inefficiencies resulting in a better allocation of resources in and an increase of economic welfare. As in most market situations this can be most readily achieved by encouraging rather than deterring free entry."

In an earlier part of his Affidavit, Professor Thom avers (at paragraph 26 and 27):-

"I say and believe that the decision by the Minister to offer new licences to incumbents only effectively perpetuates many aspect of the current situation. The supply of taxi services will increase, but given excess demand, there is no real incentive to reduce inefficiencies and to provide better services for customers. There is no incentive for the incumbent to operate the second licence as an independent business in competition with the first licence. In short, there is no logical reason why the licence holder should compete with himself.

If, alternatively, the new taxi licences were available to persons other than current incumbents, the incumbent would be faced with increased competition leading to greater efficiency, better service and a reduction in monopoly profits. This would be the type of disruption which benefits consumers in society generally."

3.2.2 Mr Brendan Lynch on behalf of the National Taxi Drivers' Union gave evidence on affidavit and oral evidence in relation to the proceedings.

Mr Lynch is an economic consultant and holds an Honours Masters degree in Economics. He is the author of a number of reports on the urban economic and local development area and made proposals on behalf of the National Taxi Drivers' Union regarding Dublin transport in 1998. This is referred to in paragraph 32 of the affidavit of Thomas Gorman the Secretary of the Taxi Union which is exhibited at "TG4" and entitled "Public Transport and Taxis in Dublin: Proposals for an improvement in Dublin Transport - An Analysis of the Economic and Transport Role of Taxis."

Mr Lynch avers that Dublin's city taxi service is a small part of the total urban transport system which is where the problem lies and not with the taxi service. Any analysis of the latter in isolation from its Dublin transport context is fundamentally flawed. At paragraph 8 of his affidavit Mr Lynch states:

> *"A balanced conclusion is that the supply of taxi and hackney services in Dublin (and other Irish cities) is considerably greater than other comparable sized cities but that demand for taxi services is extraordinarily high because of the relatively poor public transport systems in Irish cities."*

Mr Lynch refers to the absence of planning and to an *ad hoc* approach to solving problems without reference to an overall urban planning and transport context which, he says, have frequently caused bigger problems. Deregulation of Dublin taxis could fall into this trap.

If there were deregulation there would be strong incentive for taxi holders to

replace expensive vehicles, such as wheelchair accessible vehicles, and replace them with the cheapest possible cars.

Mr Lynch referred to several transport reports. While he believes the Dublin Transport Initiative Report and its recommendations gave a proper planning context for Dublin transport he believes the Oscar Faber report has critical omissions.

The Oscar Faber Report recommends a progressive increase in taxi licences leading to full deregulation of entry after ten years but recommends that there be continued fare regulations. Mr Lynch avers that deregulating supply without deregulating price has major implications, will lead to a major deterioration in quality and would prevent a deregulated market from offering branded premium products to consumers.

The report fails to give proper consideration to the higher number of taxis and hackneys in other British or European cities of comparable size. Manchester's metropolitan area has a larger population than Dublin with little more than half the number of taxis and hackneys. The contiguous area around Birmingham has a population close to 2 million but with fewer taxis and hackneys than Dublin.

In Mr Lynch's opinion the key fact is that demand for taxi services in Dublin is exceptionally high.

In his opinion three particular factors of the Dublin bus service served to highlight its inadequacy and demonstrate how that results in pressure on the taxi services.

- No Rail Link to Dublin Airport
- Rudimentary Night Service three nights a week with main service ending before pub closing
- Rudimentary or non-existent services on many outlying public housing estates with low car ownership

He believes that the Oscar Faber Report impliedly assumes excess labour supply for increased taxis which is not borne out by evidence. Moreover, responsible taxi drivers will not work excessively long and unsocial hours without sufficiently high earnings. In addition, he believes that standards would drop.

Mr Lynch says that it is noteworthy that the 1992 Interdepartmental Report rejected entry deregulation at a time when there was a plentiful supply of labour. Mr Lynch believes that the doubling of taxi licences in Dublin, which the Government announced in November, 1999 brings the risk of destabilisation of the business, although the licence for a licence arrangement mitigates that risk. It will limit disruption to the trade, the public and the economy by focussing on existing operators who would provide a seamless continuation of business.

Professor Thom believes that Mr Lynch failed to have regard to several germaine factors. Firstly, the quality of public transport services is not the only factor determining demand for taxi services. Economic prosperity, demographic changes and lifestyle patterns are also important. Improvements in public transport may moderate the demand for taxi services but there can be no presumption that demand will actually fall in the medium term. Moreover, the public transport sector should not be protected from competition by taxis. A greater number of taxis would ease the burden on an inadequate public transport system.

A decline in quality and reduced wheelchair access would not result from entry deregulation which cannot be confused with enforcing minimum safety and quality standards.

The argument that it would not be possible, in deregulation, to find an adequate numbers of suitable responsible taxi drivers ignores the widespread practice by taxi licence holders to employ “cosies”. Professor Thom believes it to be axiomatic that if additional licences were distributed to current licence holders they will not be in a position to drive both vehicles. Bus and rail drivers as well as taxi drivers are required to work long and unsociable

hours.

Finally, Professor Thom queries what Mr Lynch believes to be "market instability with entry deregulation". The deregulation and innovation in the telecommunications services is not destabilising. It is simply the normal adjustment of market forces when the existing situation is disturbed. Indeed if such a logic commended itself to reason then the issue of new mobile phone licences would be restricted to existing operators only, in the interests of stability and in the interests of limiting disruption in the communications industry.

Professor Thom's opinion is that there does not appear to be any sound economic basis for the Minister's proposal which confers even greater privileges on the existing taxi licence holder. Restrictions on entry are equivalent to restrictions on competition. At a given pricing structure this creates a potential for incumbants to make profits which cannot be competed away by new entrants. Existing licences will reflect the present or discounted value of the expected profit stream. If these profits are low, the prices will be close to the face value or issue cost of the licence. However, the fact that secondary prices for Dublin taxi licences are many times the issue price is convincing evidence that existing licences confer high profits on their owners. This results in a quasi-monopoly situation in which profits earned by incumbants are protected from competition from new entrants. This situation leads to several queuing inefficiencies.

4.1 SUBMISSIONS OF THE APPLICANTS

The detailed submissions made by Mr. McDonagh SC on behalf of the Applicants can be summarised as follows:

Section 82 of the Road Traffic Act, 1961 does not give the Minister power to

restrict the number of taxi licences available on a basis unidentified by that Act nor to favour particular sections of the community in the grant of taxi licences.

Moreover it does not allow the Minister to delegate to local authorities the power to favour particular sections of the community, which delegation is, in his submission, unlawful.

Finally Counsel submits that, if the local authority is entitled to set a fee for the grant of Taxi Licence, such fee should have some relationship to the principles and policies set out in that section.

In view of the above, his clients seek an Order of Certiorari quashing the decision of the Minister to offer additional taxi licences to all current holders and distribute the surplus together with 500 more licences in accordance with criteria set out in the Statutory Instruments of February last.

Section 82 allows the Minster to make regulations in relation to the control and operation of Public Service Vehicles. The regulations may, in particular, make provision for the licensing of Public Service Vehicles. Different regulations may be made under the section in respect of different classes of vehicles. In his submission, Mr. McDonagh SC says that the phrase "control and operation" refers to matters itemised at sub section 2 and other matters in relation to which principles and policies can be discerned from a reading of the section in its context within the Road Traffic Act.

The Applicants submits that there is a strong presumption that the Oireachtas did not intend to delegate to an individual Minister of Government the legislative powers conferred by the Constitution exclusively on the National Parliament.

Reference was made to 11 regulations made by the Minister pursuant to Section 82.

The first of these, the Road Traffic (Public Service Vehicles) Regulations

(Statutory Instrument No 191 of 1963), drew a distinction between a "Public Hire Vehicle" (Taxi) and a "Private Hire Vehicle" (Hackney).

Part 3 of those regulations deals with the licensing of Public Service Vehicles and provided for the grant of such licences by the Garda Commissioner or an authorised officer.

The fifth regulation, the Road Traffic (Public Service Vehicles) (Licensing) Regulations, 1978 (SI No 292 of 1978) provided for a local authority resolution to determine the number of new Public Hire Vehicle (Taxi) Licences which might be granted during a particular period by the Commissioner of An Garda Siochána.

The Road Traffic (Public Service Vehicles) (Amendment) Regulations (SI No 136 of 1995), in the Applicants' submission, exacerbated the unfairness of the situation by allowing the local authorities, as Licensing Authority, to extend or otherwise alter the boundary of a taxi meter area. It was stated that, in practice, a hackney driver who was earning a living outside a taxi meter area could find that he is now in competition with a large number of taxi drivers as soon as the taxi meter area is extended to include the area where he operated. (Articles 7)

Article 11 (2) provides that where licences are to be granted in respect of a taxi meter area for the first time, applications for those licences must be considered in accordance with the "criteria" set out in the fifth Schedule of the Regulations and, in all other cases, in accordance with the "criteria" set out in the sixth Schedule. The most favoured applicant was the holder of a Public Service Vehicle Driving Licence who had been driving somebody else's taxi, such person being known generally as a "cosy". In like manner the 1997 Regulations (No 193 of 1997) ensured that "cosies" were to receive an economic benefit by virtue of the new criteria over and above Hackney Licence holders. The economic benefit conferred on this particular section of the community was continued in the 1999 Regulations (SI No 51 of 1999)

which amended the sixth Schedule of the 1995 Regulations.

The Regulations which are the subject to the present judicial review are the Road Traffic (Public Service Vehicles) (Amendment) Regulations (SI 3 of 2000). These Regulations provide that new, additional taxi licences be offered to all individual taxi licence holders in the Dublin Taxi Meter Area; 500 of these licences are to be for wheelchair accessible taxis. A further 500 Taxi Licences (or more to include those declined by the Taxi Licence Holders) are to be granted on the basis of a points assessment system set out in the sixth Schedule referred to above. The Dublin Authority is now in receipt of approximately 2,700 Applications for second taxi licences on foot of these regulations. In the Applicant's submission, the restriction on the number of taxi licences made available within the Dublin taxi meter area prevents the lawful provision of a service by those other than Taxi Licence holders.

The effect of the regulations is to ensure that a person defined therein as a "qualified person" is offered a new taxi licence prior to any other persons being entitled to apply for same. The sole effect of the said regulations is, in the Applicant's submission, to provide for the continued economic well being of present holders of taxi licences and, indeed, to greatly increase their capacity to take economic advantage of their privileged position. These extra licences which are to be awarded to persons who do not presently hold a taxi licence are to be awarded in accordance "with the provisions of a scheme to be determined by the Minister".

The Applicants submit that by virtue of the *ultra vires* doctrine and the principles and policies test that the creation of the present taxi licensing regime is *ultra vires* the first and second named Respondent. This is so because the Road Traffic Act, 1961, does not contemplate what is provided for in the regulations. The nature of the regulations anticipated by the 1961 Act, the Applicants submit, is qualitative and not quantitative.

Under the Constitution (Articles 15.2) there is a limit upon the extent to which

legislative powers may be delegated to subordinate agencies by the Oireachtas. The Oireachtas may delegate administrative, regulatory and technical matters. However, it is for the Oireachtas to establish the principles and policies of legislation. The Applicants refer to Keane J (as he then was) in **Laurentiu -v- Minister for Justice (2000) 1ILRM 1, at 43:**

> *"The increasing recourse to delegated legislation.....has given rise to an understandable concern that Parliamentary democracy is being stealthily subverted and crucial decision making powers vested in un elected officials".*

The Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas and that no other legislative authority has power to make laws for the State.

The first analysis of Article 15.2.1 by Hanna J in **Pigs Marketing Board -v- Donnelly (1939) IR413 at 421** provide the basis for the principles and policies test enunciated by O'Higgins C.J. in **Cityview Press Limited -v- An Chomhairle Oiliúna (1980) IR 381 at 398/99.**

Counsel also refereed to **McDaid -v- Sheehy (1991) 1 IR 1 at 9** where Blaney J applied a principles and policies test to the provisions of the Imposition of Duties Act, 1957, as follows:

> *"Where this test is applied to the provisions of the Act 1957 giving the Government to impose customs and excise duties, and to terminate and vary them in any manner whatsoever, I have no doubt that the only conclusion possible is that such provisions constitute an impermissible delegation of the legislative power of the Oireachtas."*

In **O'Neill -v- Minister for Agriculture and Food (1998) 1IR 539** the Supreme Court held that the power given to the Minister for to make regulations under the Livestock (Artificial Insemination) Act, 1947 to control the practice of Artificial Insemination of Animals was unconstitutional. Murphy J, at 552 observed that

"It is not merely that the lack of policy or principle deprives the Minister of suitable guidance but it also fails to provide any significant restriction on the Ministerial power. This would be a reason for giving a wide construction to the power conferred on the Minister and a consequential doubt as to the statutory delegation".

Murphy J, with whom Hamilton C J agreed, continued at 556 as follows:

"It is not that there is any reason to doubt that the scheme ultimately devised by the (Minister) was desirable, and may well have operated in the national interest, it is simply that such a scheme is so radical in qualifying limited number of persons and disqualifying all others who may be equally competent from engaging in the business (of artificial insemination). It may be that a such far reaching power could not be delegated by the National Parliament at all. Certainly I would be willing to accept that in using general words the Oireachtas contemplated such a far reaching intrusion on the rights of citizens."

Counsel for the Applicants submitted that the above passage is germane to the issues before this Court. Where a licensing regime is to be created by regulation, it is not

permissible, in the absence of express legislative authority so to do, to restrict numbers in order to enforce quality. The Applicants submit that while it is not permissible to restrict numbers in order to enforce quality, it is legitimate to insist on quality as a base requirement in order to obtain a licence. Once the threshold requirement has been reached the Applicant for a licence is entitled to same. The Applicants do not, however, submit that Section 82 of the Act of 1961 is automatically unconstitutional. It is accepted that the terms of the provision do not make it inevitable that a Minister making regulations pursuant to the power therein created must invade the function of the Oireachtas in a manner which would contravene Article 15 of the Constitution. The wide scope and unfettered discretion contained in the section can clearly be exercised by a Minister making regulatory or administrative regulations only. Such discretion can not be exercised where it constitutes the making of a law in a manner which would be invalid having regard to the provisions of the Constitution. The power which Section 82 gave to the Minister, which he subsequently purported to exercise, to determine the policies and principles by reference to which the power already vested in the State to regulate and control Public Service Vehicles should be exercised, is inconsistent with the exclusive role in legislation conferred by the Constitution.

The regime under the 1933 Act was qualitative in nature. Part VII of the Act is headed "Regulation and Control of Public Service Vehicles". If the Oireachtas had intended to facilitate the imposition of quantitative restrictions in the subsequent 1961 Act this would have required express provisions. It was not intended or contemplated that the responsible Minister could take it upon himself to do so. The powers had never existed in legislative form at all. Under the 1961 Act the Minister is entitled to make regulations in relation to the control and operation of Public Service Vehicles. However there is no provision whereby the Minister is entitled to set a numerical limit or even to permit the setting of a numerical limit to the number of taxi licences.

Even if the regulations made under the Act could be interpreted as permitting the Minister to impose on local authorities the right to set a limit to the number of taxi licences which might be granted in their area, there is nowhere apparent in Section 82 of the Act of 1961 nor in the Regulations of 1978 (in particular in Article 5 (1)) any criteria which such local authorities should or must take into account in determining the number of new taxi licences which should be granted.

The Applicants submit that by ensuring that the number of taxi licences is strictly limited, the Minister has created a saleable market in taxi licences. The Competition Authority (discussion paper No 6 of November 1998) refereed to taxi plates trading for a sum in the region of £80,000.00. The report estimates further that the monopoly profits arising from the present system as at that date were in the region of £30 million per annum. The Applicant submit based on **Hempenstal -v- The Minister for the Environment (1994) 2 IR 20** that there is not legal obligation upon the Minister to create or to maintain such a market.

The restriction in number envisaged by the 1978 Regulations has meant that no new taxi licences were awarded until recent years. This has prevented persons who were in possession of Public Service Vehicle Driving Licences from operating Public Service Vehicles for Public Hire. In the Applicants submission entry into the taxi market is artificially restricted by the said regulations. Leaving aside legislation and regulations, the practice of the carriage of persons for reward is a lawful one. Accordingly it would seem *prima facie* that any person who can satisfy the Minister as to that persons technical qualifications and who is willing to comply with requirements is entitled as a matter of right to a licence.

In **East Donegal Co-operative Livestock Mart Limited -v- Attorney General (1970) IR317 at 344 Walshe J** stated:

"All the powers granted to the Minister..... which are prefaced or

followed by the words "at his discretion" or " as he shall think proper" or "if he so thinks fit" are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of Constitutional Justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits, to hear what the Applicant or the Licensee (as the case may be) had to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be".

The Applicants submit that the Minister is not entitled to pursue his own policy in relation to the control and operation of public service vehicles other than as provided in the Act. The Minister gave no indication to the local authorities, to whom he delegated the function, of the factors to be considered in limiting the numbers of taxis. Moreover the local authorities to whom the function of determining fees was delegated were left at large in relation to same and in relation to relevant considerations justifying the expansion of their particular taxi meter areas. They were not requested to undertake economic analysis of their respective areas.

The Applicants further submit that the maintenance of the monopoly created and fostered since 1978, has, in fact, operated contrary to the common good. Even if the Courts were satisfied on the basis of economic evidence that the result created was laudable, the Applicants contend that this was not identified in the principle act as an objective to be achieved by way of regulations.

Moreover it submitted on behalf of the Applicants that it was not intended by the Oireachtas that the powers conferred on the Minister by virtue of Section 82 of the Road Traffic Act, 1961 could be further delegated by him to local authorities. By permitting Dundalk UDC, and other local authorities, to set their own fees, the Ministers acting *ultra vires*. The Oireachtas has no opportunity whatsoever of revoking same.

The power to impose charges in respect of taxi and hackney licences derives from Section 82 (2) of the 1961 Act as amended by Section 57 of the 1968 Act. This provides that the Minister may by way of regulation make provision for payment of specified fees in respect of licences etc. The Act does not confer this power on local authorities nor does it provide for its conferral on them. The Applicants submit that in the **Cityview Press case** O'Higgins C J observed that the relevant act contained clear declarations of policies and aims in relation to the making of an industrial levy and its collection by An Chomhairle Oiliúna (AnCO). The only matter left over for determination by AnCO was the manner of collecting this levy in relation to a particular industry and this did not amount to more than a "mere giving effects to principles and policies" contained in the parent act.

If the imposition of a licence fee is a form of tax then the Act must be construed strictly. **CAG -v- Wilts United Dairies Limited (1921) 37TLR884 at 886 and Gosling -v- Veley (1850) 12QB328** at 407.

The Applicant submits that if the imposition of a licence fee is not the exercise of power to raise tax but of the power to regulate and control the said licences then the Respondents have failed to show how the imposition of such a licence fee contributes to the regulation and control of licences. The only effect, it is submitted, is to limit the number of possible Applicants to wealthier members of the public, which cannot have been contemplated by the Oireachtas in delegating the power.

The Applicants reject the contention that they are out of time in making the

Application. Delay should not protect regulations which are *ultra vires*. The Applicants were unaware of the possible illegality of the various regulations until Statutory Instrument 3 of 2000 exacerbated the situation. Moreover no party to the proceedings has altered its position to its determent on foot of the delay in bringing the proceedings. The only consequence of a finding of invalidity is that the current holders of taxi licences will be deprived of the future benefit of that invalidity.

4.2 **SubmissionS of the State**

Mr. Paul O'Higgins SC on behalf of the State referred to a wide range of licensing procedures. Some are of a quasi judicial nature and others are administrative or executive. Insofar as the licensing authorities are required by the Courts to observe the Rules of Natural Justice, the Application of those Rules must be flexible. **De Smith, Woolf and Jowell** (Judicial Review of Administrative Action, 4th ed. at 222) poses the question whether licensing authorities are under any implied duty at all to act judicially. The precise requirements of procedure of fairness will depend very much on the particular context. As a general principal a decision to require an executive authority to act judicially when dispensing discretionary benefits partly on the basis of policy factors ought to be taken by politicians rather than Judges. The author continues at page 223 as follows:

> *"Nonetheless the persuasive duty to act fairly makes prediction difficult. For example, the imposition of procedural duties would not be entirely surprising when policy guidelines have been established (especially, if published) within which discretion would normally be exercised. First, they may raise an expectation of benefit in those who believe that they fall within the guidelines. Secondly, their existence may decrease the policy element in the disposition of individual cases. Thirdly, an opportunity to be heard, both in the Application and the merits of the policy, may be required in order to prevent a fettering of discretion. Moreover, when a refusal of a licence casts a slur on the Applicant's reputation or financial stability the duty to act fairly may well require that the body should offer an opportunity for a hearing".*

The State regards that decision as very significant. The Court recognised an important legal consequence of the structure of the market - the right of the Minister to discriminate as between taxi drivers and hackney drivers so as to accommodate the side effects of the market which exist for the former.

The State Respondents believe that the above mentioned decision is critical in appraising the challenge of the Applicants to regulations 3 of 2000.

The circumstances in which the Courts will declare invalid regulations duly made pursuant to statutory instruments were expressed by Diplock LJ in ***Mixnams Property Limited -v- Churtsey Urban District Council*** (1964) 1QB 214 at 237 and approved by Henchey J in ***Cassidy -v- Minister of Industry and Commerce*** (1978) IR297 at 311 as being:

"...such manifest arbitrariness, injustice or partiality... that parliament never intended to give authority to make such rules; they are unreasonable and ultra vires."

Moreover as is stated by Finley CJ in **O'Keffee -v- An Bord Pleanala** (1993) 1IR39 at 71 that the circumstances under which the Court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare.

The passage which followed, which was cited by all parties is that :

"The Court cannot interfere with the decision of an administrative decision making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."

Mr. O'Higgins SC on behalf of the State submitted on the basis of Mr. Weafer's Affidavit that the decision to issue new licences in the Dublin area was prompted by widespread public concern as to the availability of taxis in the city. At the same time existing taxi licence holders were in a situation in which taxi licences were being exchanged in Dublin for very substantial sums of money. Accordingly, the decision to offer those licences in the first place to existing taxi licence holders was prompted by the dual concern to ensure that the licences were issued in such a manner as to facilitate their being rapidly mobilised, and to operate in a manner which was in all the circumstances fair and reasonable having regard to these considerations. Indeed in the case of **R-v- Manchester City Justices**, ex parte McHugh (1989) RTR 285 the Respondent would only grant new hackney licences in respect of vehicles which had been generally adapted to carry wheelchair bound passengers. It was held that the Council was entitled to impose the condition upon new licensees and not upon the existing licence holders simply in recognition of the impact of the new licences upon the value of the old ones.

More recently in ***O'Dwyer and Others -v- Minister for the Environment and Others***, unreported High Court 27th March 1998 when the Plaintiffs complained that, as hackney drivers, they could not radio into another hackney car while on a public road or in a taxi meter area with information as to new work nor could the driver telephone or radio back to headquarters on the public road. This obvious restriction which the Plaintiff sought to have removed was referred to by Geoghegan J, at page 5, as follows:

"It is no function of the Court to interfere with that policy decision and regulation made pursuant thereto unless the regulation was wholly unreasonable or clearly unconstitutional. In my view it was neither. I therefore

consider that on that part of their case the Plaintiffs must fail."

The submission of the State is that the Minister has, indeed, recently permitted hackneys to use radios in the manner contended for in that case therefore conferring a substantial advantage upon them. However, there is no obligation on the Minister to create such an advantage.

Counsel for the State submits that there is a critical difficulty facing Applicants who seek to raise objections to regulations over a period in excess of 20 years in circumstances in which all of the Applicants have been hackney drivers during that period. They have derived financial benefits from the limitation of taxi licences.

The Applicants contend that the power conferred by Section 82 of the 1961 Act is insufficient to enable a quantitative restriction to be made on the number of taxi licenses to be issued. Counsel for the State says, in this regard, that the control and operation of Public Service Vehicles implies and entails the imposition of limitations and restraints. Moreover, the issue whether the statute sets forth principles and policies do not, in their submission, arise. Even if they were to arise the Applicant has failed to identify what those principles and policies might be. For this reason, cases such as ***Laurentiu -v- The Minister for Justice*** (2000) ILRM 1 are not directly in point. The Minister has been granted the power to control and he can achieve that control through licensing. He does not have to be told in the legislation how he can control and accordingly ***Cityview Press -v- An Comhairle Oilúna*** (1980) IR381 and Laurentiu are not apposite. The statute is not one which simply confers upon the Minister the power to grant licences. The general power to control is wider than the specific power to licence. Accordingly, the facts in this case are plainly distinguishable from those of ***O'Neill -v- Minister for Agriculture*** (1998) 1IR539.

In relation to delegation, the Applicants, in contending that the Minister acted

ultra vires in delegating to Local Authorities the power to impose quantitative restrictions on taxi licences, misunderstands the nature and the effect of the prohibition on delegation. Counsel for the State says that the Minister is empowered to make regulations in relation to the control and operation of Public Service Vehicles. These regulations allow the minister to "make provision" for the licensing of vehicles. The legislation does not expressly or impliedly provide, that the Minister must conduct the exercise of licensing. The vesting of these powers on the Local Authority is not prohibited. Moreover, there is no requirement imposed by the Act that the fees for licensing be specified by the Minister himself.

4.3 SUBMISSIONS ON BEHALF OF DUNDALK:

The fifth named Respondent, Dundalk Urban District Council, decided on the number of taxis and the extent of the taxi meter area in Dundalk and the appropriate fee to be charged. The resolution of the 11th of January 2000 was a decision in principle as to the number of taxi licences to be put in place following ratification of the decision regarding the taxi meter area.

Dundalk UDC accepted that the required statutory notice of one month for public consultation was not met but that it was its intention to remedy this by advertising a fresh and holding further ratification meeting in relation to taxi numbers and the area to be covered by the taxi meter licensing. Mr. James Connolly SC, on their behalf, submitted that there is no public consultation process required in relation to the fixing of the taxi licence fees. This was fixed at £25,000 at the Council meeting of the 11th of January 2000. Mr. Connolly submits that it is not incumbent on the authority to use those funds solely and exclusively for the monitoring or supervision of the operation of taxi services or licences issued thereunder. It is sufficient that the funds be paid into the municipal fund and be used for designated Local Authority requirements.

In relation to reasonableness the Urban District Council relied on Section 82 and on judicial authorities already opened by the State parties. In addition to those cases Dundalk UDC relied on ***Central Dublin Development Association -v- AG*** (1975) ILTR69 where Kenny J, in relation to the Dublin Development Plan stated that "the making of a plan will necessarily decrease the value of some property but I do not think that the Constitution requires that compensation should be paid for this as it is not an unjust attack on property rights". Similarly any diminution in the opportunity of any of the present Applicants to earn a living by virtue of the increase in the number of taxi licences does not, in itself, amount to an unconstitutional or illegal restriction which cuts across their property rights. It is for the Minister to determine what is in the best interests of the public as to how many taxis and hackneys should be available at a given time.

Counsel on behalf of the Dundalk UDC also submit that is is in the best interests of the public that the Minister should delegate the decision as to how many taxis should be available in any Local Authority area and what areas are to be covered by the taxi meter regulations. In ***Shanley -v- Galway Corporation*** (1995)1IR396 McCracken J dismissed a constitutional challenge to the Casual Trading Act, 1980 which gave the Local Authority a wide discretion for the imposition of conditions on the granting of permits. (See also ***Hand -v- Dublin Corporation*** (1991) 1IR409 at 419 per Griffin J)

Moreover in ***Pigs Marketing Board -v- Donnelly (Dublin) Limited*** (1939) IR413 at 422 Hanna J stated, in relation to the delegated powers of the Pigs Marketing Board that:

"... the legislator, being unable to fix such a price itself, is entitled to say: "we shall leave this to a body of experts in the trade who shall in the first place determine what the normal conditions in the trade would be apart from the abnormal

conditions prescribed by statute, and then form an opinion as to what the proper price (..) would be under such normal conditions." The Pigs Marketing Board in so doing, is not making a new law; it is giving effect to the statutory provisions as how they should determine that price."

In his submission, Mr. Connolly urged that a law making function to be exercised by the Minister according to his discretion from time to time could not properly be described as a policy in itself but amounted to the delegation of a policy making role of the Oireachtas to the relevant Minister. In relation to the 1995 regulations, Counsel submits it is a long way from the **Laurentiu** case.

4.4 SUBMISSIONS OF DUBLIN CORPORATION

Mr. Conleth Bradley BL for the Corporation submits that the Applicants case is essentially based on the principles and policies argument outlined in **Cityview Press (1980)** and expanded further in **Laurentiu -v- Minister for Justice (2000).** He submits that the statutory regulations impuned in these proceedings do not offend the principles and policies tests.

In relation to quantitative restrictions **O'Neill -v- The Minister for Agriculture** should be distinguished insofar as it dealt with the division of the State into nine areas with one licence in each area.

Counsel submits that the decision in the **State (Lynch) -v- Cooney (1982) IR337 at 380** has application insofar as Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design:

"This means, among other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as a pre condition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful - such as by misrepresenting the law, or by misapplying it through taking into consideration irrelevant matters of fact, or through ignoring relative matters. Otherwise, the exercise of the power would be held to be invalid for being ultra vires."

In his submission the regulations sought to be impuned do not lack legal certainty. Indeed, in a judicial review context, Counsel submits, the principle of legal certainties is closely aligned to the rule against the decision maker fettering his or her discretion. He refers to the **De Smyth**, **Woolf** and **Jowell** in *Judicial Review of Administrative Action* (fifth ed., 1995 at 506) where it is exhorted that:

"the full rigor of certainty and consistency be tempered by the willingness to make exceptions, to respond flexibly to unusual situations and to apply justice to the individual case".

Counsel submits that the grant of a new licence to current holders to the exclusion of others does not amount to a breach of Article 40.1 as the provision can not be equated with objectives of uniformity or homogeneity.

Moreover, Counsel submits, that the Court's supervisory jurisdiction with regard to discretionary relief should be applied by denying the Applicants relief because of their failure to comply with the requirements of promptness in seeking judicial review.

4.5 SUBMISSIONS OF THE NATIONAL TAXI DRIVERS UNION

The National Taxi Drivers Union and Thomas Gorman, the General Secretary of that Union, were joined by Order of the High Court.

In his Affidavit Thomas Gorman outlines the recent history and development of the licensing of Public Service Vehicles and, to that extent, overlaps with the Affidavit of Mr. Weafer in respect of that development and in the statutory framework underlying the development. Mr. John Rogers SC for the seventh and eight named Respondents, the Taxi Drivers Union and its General Secretary, submitted that there was no radical limitation of licenses or an exclusivity regime operated by the Minister unlike in ***O'Neill -v- The Minister for Agriculture*** and ***Carrigaline Community Television Broadcasting Limited -v- The Minister for Transport, Energy and Communications.*** The language of Section 82 of the 1961 Act was clearly introduced with a view to permitting the Minister to regulate for policy appropriate to the proper control and operation of Public Service Vehicles. This power expressly included a power to regulate in relation to the licensing of Public Service Vehicles. There was no such regulatory power vested in the Minister under the Act as was subject to challenge in the **O'Neill** case. In relation to the **O'Neill** case Murphy J said at 553 that:

"..the Act of 1947 provides little guidance as to the policy and principles to be implemented by the first Respondent or the regulations contemplated by the Oireachtas. It is not merely that the lack of policy or principles deprives the first Respondent of suitable guidance but it also fails to provide any significant restriction on the ministerial power."

In relation to the delegation of powers Mr. Rogers submits that the Minister is

not in reality delegating a power vested in him but is simply regulating, as he is permitted to do by Section 82, for a power to impose quantitative restrictions in relation to licenses which he determines should properly be exercised by the licensing authorities in accordance with the purpose and objectives of that section. Moreover Section 82 (3) expressly authorises the making of "different regulations" for "different circumstances and for different areas". Accordingly, it is clear that when the Minister authorised quantitative restrictions of taxi licenses by Local Authorities, he was acting within the express power given by the Section.

Mr. Rogers submitted that the regulations sought to be impuned by the Applicants were within the four corners of the regulatory power vested in the Minister by the Oireachtas.

In particular, the decision to introduce regulation 3 of 2000 was arrived at for a purpose which, in his submissions, were consistent with the principles and policies set out in the Road Traffic Act of 1961. The determination to issue licences was prompted by widespread public concern as to the number of taxis available in the Dublin area. Regard was had to the fact that the solution proposed to the problem of the number of taxis in Dublin should be fair to the investment made by taxi license holders. This was clear from the Affidavit of Mr. Weafer. It is not improper for the Minister to have regard to the significant investment of taxi drivers in the industry in deciding how to respond to the need for additional taxi plates. This decision, in Mr. Rogers submission, did not entail unfairness to hackney drivers. The mechanism selected by the Minister mitigates the risk of destabilisation of the business and, in this regard the evidence of Mr. Brendan Lynch as to the economic effects of such a decision, is significant. Mr. Lynchs' evidence was that the best way of limiting disruption to the trade, the public and the economy is to focus on existing operators in the trade as this makes it more likely that there would be a seamless continuation of business without a deterioration in the quality, reliability or safety of the service. This is clearly consistent with the matters which fall

within the contemplation of the Oireachtas in enacting the powers vested in the Minister in Section 82 of the 1961 Act. It is not either irrational or unreasonable.

The Applicants complained that the regulations unlawfully discriminate against persons other than current holders of licences and does so in an invidious fashion. However, the Minister was given express power under Section 82 to differentiate by regulation between different types of licences, different classes of vehicles and for different circumstances and for different areas. The Applicants have not been prevented from working or earning a livelihood. In any event that right is not an unqualified right to any particular means of livelihood.

The maintenance of two assessment systems for the allocation of taxi licences and wheelchair assessable licences, according to Mr. Rogers submissions, is clearly contemplated by Section 82 of the Act.

Mr. Rogers finally submitted that the Applicants had failed to establish that they had the necessary standing to mount the present challenge. He submits that the Applicants had failed to show a personal interest in the challenge to the regulations while their evidence was that they wished to apply for a taxi licence in Mr. Rogers submission it was clear that neither would be available to drive a taxi and could not, accordingly, be genuine Applicants for such a licence.

DECISION

5.1 In relation to the in applying for judicial review, Order 84 Rule 21(1) provides as follows:

> *"An Application for leave to apply for judicial review should be made promptly and in any event within 3 months from the date when grounds of the*

Application first arose, or six months where the relief sought is Certiorari, unless the Court considers there is good reason for extending the period within which the Application shall be made."

The Applicants say they were unaware of the possible illegality of the various regulations until recently when Statutory Instrument No 3 of 2000 "exacerbated the situation." Moreover, they argue that delay should not protect regulations which are *ultra vires.*

It seems to me that such delay may indeed be a ground for acquiescence and laches in respect of earlier regulations which, on the Applicants own arguments, are defective without reference to the most recent statutory instrument. Accordingly, the Court cannot, it seems to me, extend the period within which Application should be made in respect of those regulations unless there was a good reason for so doing. The reasons given do not justify an extension of the period as requested. However, it is clear that the Applicants are within time to seek judicial review in relation to the Statutory Instrument No 3 of 2000.

5.2 In ***O'Dwyer -v- the Minister for the Environment*** (unreported) High Court 27th March 1998 Geoghegan J held that the position regarding Taxis and Hackneys are quite different:

> *"The Minister's duties under the Road Traffic Acts are to provide for public transport services. Under the scheme which he has traditionally operated there are two types of small Public Service Vehicles: the Taxi and the Hackney. As a side effect of the manner in which taxis are regulated there is practice a saleable market in taxi licences...*
>
> *Hackney licences are regulated quite differently and the mere fact that the*

regulation of hackneys does not produce similar side effects as the side effect produced by the regulation of taxis does not in any way render the regulatory scheme discriminatory.

Indeed, subsection 3 of Section 82 of the Road Traffic Act 1961 allows different regulations to be made under the Section in respect of different classes of vehicles and for different circumstances and for different areas".

It follows that regulations may differentiate between both categories. Can regulations differentiate in relation to fees and quantative restrictions in respect of different Applicants?

3. The Statutory Instrument proposes to delegate to the local authorities the power of raising of fees which go beyond the economic cost of control and operation.
Section 82(2) of the Act of 1961, as amended by Section 57 of the Road Traffic Act of 1968, provides that the Minister may by way of Regulation make provision for the payment of specified fees in respect of licences, badges or plates granted or applied for. The Act does not confer this power on local authorities.

The provisions of the Local Government (Financial Provisions) (No 2) Act, 1983 does not seem to me to answer this question. That act was introduced to permit local authorities to make certain charges consequent on the abolition of rates on domestic dwellings and agricultural land. Section 2 of that Act empowers the authority to charge for the provision of services notwithstanding that it may be precluded from doing so or required to do so free of charge under any enactment.

In AG -v- Wilts United Dairies Limited (1921) 37TLR 884 at 886 Atkin LJ declined to infer that a power expressed in wide terms included the right to raise charges:

"... the circumstances would be remarkable indeed which would induced the Court to believe that the legislator had sacrificed all the well known checks and precautions and, not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department."

In ***Gosling -v- Veley*** (1850) 12QB328 at 407 Wilde C.J. stated:

> *"The rule of law that no pecuniary burden can be imposed upon the subjects of this country, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it."*

It seems clear to me that the imposition of a licence fee in the case of Dundalk Urban District Council where such a fee is related to the capital value of the subject of a licence is indeed in the nature of a tax. It is clearly not limited to the administration of the licence or to the regulation and control of same. It does not seem to have been in the contemplation of the legislature to delegate to the Minister such a right let alone allow the minister to delegate to a local authority. Indeed such a right is more properly reserved to the Oireachtas.

5.4 It is conceded by Counsel on behalf of the fifth named Defendant, Dundalk

Urban District Council, that the resolutions passed on the 11th of January last are ambiguous insofar as they purport to be a final decision and yet maintain that they are preliminary to advertising and consultation. The Council accept that the required statutory notice of one month for public consultation was not met by virtue of a shortfall in the appropriate notice of four days. The intention is to remedy this by advertising fresh and holding a further ratification meeting in relation to taxi numbers and in relation to the area of taxi metre licensing. It seems to me that the resolution of 11th January is invalid Applications for taxi licences which were invited and received can not be deemed closed.

5.5 In relation to the power of the Minister to delimit the issue of licences raises complex legal as well as economic issues. The extensive pleadings, the evidence including the expert evidence and the legal submissions of the State, local authorities and the National Taxi Drivers' Union in response to the equally extensive submissions of the Applicants, are evidence of that complexity and of the competing rights of the public and of the industry.

It is remarkable that little evidence was given as to the rights of the public and to the level of unmet ``demand. The concept of public service in exchange for quasi monopolistic privileges received scant mention.

The Court has to be mindful that, in judicial review proceedings it is not a Court of Appeal. Moreover, no matter how compelling the economic arguments are, the issue being reviewed are fundamentally political decisions made within the parameters of legislative discretion.

Judicial Review is, of course, not a matter of reviewing the decision itself but rather of the power to decide and of the procedure adopted in making that decision.

The Courts have only a supervisory as opposed to an appellate jurisdiction. It is concerned with the powers conferred by the Oireachtas and the manner by which the Minister

has exercised those powers rather than with the merits of the decision itself. (See MurphyJ in **Devlin -V- Minister for Arts, Culture and the Gaeltacht (1999) 1 ILRM 462 at 474)**

The decision maker must act within jurisdiction. The doctrine of Ultra Vires allows a Court to annual decisions made by public bodies acting outside their powers.

5.6 The central issue for judicial review is whether the Minister is empowered under Section 82 of the Road Traffic Act to restrict the number of taxi licences, to favour incumbents already holding taxi licences and whether he has the power to delegate to local authorities the power to restrict and the power to set a licence fee.

That key section does allow the Minister to make regulations in relation to the control and operation of public service vehicles. The regulations make provision of the licensing of different classes of vehicles.

Moreover, the regulations made under that section - eleven in total - have not up to now been the subject to any challenge such as the present one. The challenge to the Road Traffic (Public Service Vehicles) (Amendment) Regulations, S.I. No. 3 of 2000 is within the requisite time for judicial review (see 5.1. above).

Section 82 of the Road Traffic Act, 1961 provides as follows:

"82. - (1) The Minister may make regulations in relation to the control and operation of public service vehicles.

(2) Regulations under this section may, in particular and without prejudice to the generality of sub-section (1) of this section, make provision in relation to all or any of the following matters:

(a) the licensing of public service vehicles;

.....

(c) the payment of specified fees in respect of licences ...

granted under the regulations and the disposition of such fees;

....

(h) the authorising of the fixing of maximum fares for street service vehicles;

....

(3) Different regulations may be made under this section -

(a) in respect of different classes of vehicles,

(b) for different circumstances and for different areas."

The Applicant says that the word *control* and *operation* contained in sub-section (1) of the above section does not extend to numerical restrictions.

The Applicants have submitted that the Road Traffic Act, 1961, does not contemplate what is provided for in the regulations restricting the issue of licences and, in particular in S.I. No. 3 of 2000.

The Applicants say that where a licensing regime is to be created by regulation, it is not permissible, in the absence of expressed legislative authority so to do, to restrict numbers in order to enforce quality. The Applicants say that the regime under the 1961 Act is qualitative and not quantitative in nature.

It is necessary to consider the dictionary definition of both terms as they are not defined in the legislation itself nor, indeed, are they given any precise meaning in the context of licensing in Butterworths *"Words and Phrases Legally Defined"* (3rd edition, 1988).

The second edition of the Oxford English Dictionary (1989) gives a derivation from the French *controle* (earlier *contrerolle) "the copy of a role (of account, etc) a parallel of the same quantity and content with the original; also, a controlling or overseeing."*

A primary meaning is given as follows: *"The fact of controlling, or of checking and directing action; the function or power of directing and regulating; domination, command, sway."*

A secondary meaning is given as follows: *"restraint, check,"* and *"a method or means of restraint; a check. Also, a means adopted esp. by the Government, for the regulation of prices, the consumption of goods, etc; a restriction, usually in pl."*

The word would, accordingly, appear to have quantative as well as qualitative meanings as are indeed evident from the examples given in relation wartime consumption controls: *"after the war when consumption controls are relaxed"* (1941 : New Statesman 26 Apr. 31).

According to the same edition of the Oxford English Dictionary, the word operation, from French and Latin, is defined, *inter alia*, as manner of working, the way in which anything works (see 2a).

In Australia, Dixon J. said in relation to the word control: *"An unfortunate word of such wide and ambiguous import that it has been taken to mean something weaker than 'restraint', something equivalent to 'regulation' (**Bank of New South Wales -v- Commonwealth** [1948] 76 CLR 1 at 385).* In other contexts it is defined as possession, management, carrying on business.

If it is weaker than restraint and something equivalent to regulation then it seems to me that the word control may not be wide enough to include quantitative control.

The reference to a Minister making regulations for control arose in ***O'Neill -v- The Minister for Agriculture and Food*** (1988) 1 IR 539

In that case the Oireachtas attempted to control the practice of artificial insemination by Section 3 of the Livestock (Artificial Insemination) Act, 1947 which provides as follows:

> *"(1) The Minister may make regulations for controlling the practice of artificial insemination of animals to which this Act applies and, in particular, for prohibiting the distribution and sale of the semen of animals to which this act applies except under and in accordance with a licence."*

The Supreme Court (at 550) found very little guidance in the regulations which followed as to the persons to whom a licence to distribute or sell might be granted or the conditions which might be imposed in any such licence. The Minister had adopted a licensing scheme based on the division of the State into nine areas and had granted only one licence in each area on the basis that the licensee was obliged to provide an appropriate service for that area. The exclusivity scheme was carried into effect by way of administrative decisions rather than by way of regulations made under the section.

In his judgment Murphy J. (at 551 to 556) stated that the power conferred on the Minister to make law by way of regulation in any given case is primarily to be determined by the interpretation of the legislation purporting to confer the power. Having referred to Article 15.2 of the Constitution, ***City View Press*** and other authorities he stated:

> *"It is the scope of such regulations and above all the manner in which they*

affect or touch upon the property or other constitutional rights of the citizen which may raise doubts as to how far they were within the contemplation of the Oireachtas. Whether the Oireachtas itself would have agreed to the division of the State into nine identified areas for the allocation of a single licence for the sale and distribution of semen may be open to doubt but I find it inconceivable that the legislature would have contemplated or authorised the creation of such a scheme by the executive. The scheme manifestly affects the right of citizens to work in an industry for which they may be qualified and the rights of potential customers to avail of such potential services. It is not that there is any reason to doubt that the scheme ultimately devised by the first Respondent was desirable, and may well have operated in the national interest, <u>it is simply that such a scheme is so radical in qualifying limited number of persons and disqualifying all others who may be equally competent from engaging in the business</u>. It may be that such a far reaching power could not be delegated by the national parliament at all. Certainly I would be unwilling to accept that an issue in general words the Oireachtas contemplated such a far reaching intrusion on the rights of citizens."

(underlining supplied)

Counsel for the Taxi Union submitted that there is no radical limitation of licences or an exclusivity regime operated by the Minister. Counsel for the State submits that the Minister has power to Control by limiting numbers.

In the main, new licences are to be issued exclusively to existing licence holders. While there may not be a radical limitation it is clear that the increase is limited both quantitatively and personally.

While the Minister was given express power to differentiate between taxi and

hackney licence holder, Section 82 does not expressly or necessarily give power to restrict numbers.

5.7 The Applicants have also referred to the lack of policy or principles guiding the Minister. This was also an important element in the decision of the Supreme Court in **O'Neill** referred above. Murphy J, 552, observed that:

> *"It is not merely that the lack of policy or principles deprives the Minister of suitable guidance but it also fails to provide any significant restriction on the Ministerial power"*

While some distinction might be made in relation to the Minister making regulations for controlling the practice of artificial insemination of animals (Section 3 of the Act of 1947) and the Minister making regulations in relation to the control and operation of Public Service Vehicles (Section 82 (1) of the 1961 Act), what is common is the provision of a regulated service through a defined licensing system for the benefit of customers.

There are some licensing regimes where issues of policy and principle do not arise. Keane J in ***Carrigaline Community TV Broadcasting Company Limited -v- Minister for Transport (1997)*** 1ILRM 241 at 284 refers to Television and Driving Licences. He continues:

> *"At the other extreme, question of policy must obviously affect the granting or refusal of planning permission and indeed in that area the authorities obliged by statute to adopt a specific set of policy objectives in the form of a development plan.*
>
> *The licensing regime under the Act of 1926 as amended by subsequent*

legislation belongs to an intermediate category. In the case of this and similar licensing regimes, the adoption by the licensing authority of a policy could have the advantage of ensuring some degree of consistency in the operation of the regime, thus making it less likely that decisions might be categorised as capricious or arbitrary. But it is also clear that inflexible adherence to such a policy may result in a countervailing injustice."

It seems to me that the licensing regime under the 1961 Act is at most of a similar order to that of the broadcasting regime but more likely of a much less order in terms of numerical regulation. There is no legislative basis for exclusivity.

In **O'Neill** Keane J and Hamilton CJ held that, even if the Oireachtas had envisaged the adoption of an exclusivity scheme, it was highly improbable that they intended the scheme to be established by a series of administrative decisions (thus avoiding legislative supervision and accessibility to the public) rather than by way of regulations. Moreover, Murphy J and Hamilton CJ held that whether the Oireachtas would have agreed to such an exclusivity scheme might be open to doubt but it was inconceivable that the legislator would have contemplated or authorised the creation of such a scheme by the executive.

In the present case the intended scheme is to be established by regulation and administered by the relevant local authorities.

However the import of **O'Neill** to the present case is relevant nonetheless. Keane J (then a Judge of the High Court) posed the question apart from legislation and regulations in the following terms:

"Since ..... the practice of artificial insemination of cattle was a lawful one, it would seem prima facia that any person who can satisfy (the Minister) that he

has whatever technical qualifications appear appropriate and is in a position to comply with whatever other requirements might reasonably be imposed on him by the (Minister) is entitled as a matter of right to a licence. That, however, inevitably raises the question as to whether (the Minister), in considering applications for licences under the Act of 1947, was entitled to adopt a particular policy which might mean that Applicants, such as the Applicant in the present case, who appeared to be in a position to comply with such threshold requirements, would nonetheless not automatically receive a licence. (at 443/4)."

The Applicants have made a case, which I accept, that they are in a position to comply with threshold requirements. Under the Regulation of February last they are unlikely to receive a licence.

It is clear that operation and control can indirectly extend to numerical control insofar as the Minister is clearly empowered to accept or reject applications whether, by himself, or through powers delegated to local authorities.

The real issue is the manner in which control and operation is exercised. In this regard the decisions of O'Neill and Carrigaline together with Regina -v- Port of London Authority are clearly relevant. The question is whether the Minister's exercise of control and operation is valid and lawful. R. -v- Liverpool Corporation ex. P. Taxi Fleet (1972) QB 22 g and R -v- Manchester City Justices (1989) RTP 285 were decided on the basis of s.37 of the Town Police Clauses Act, 1847 which expressly provides for the limitation of numbers.

In O'Neill nothing was said as to whether control and Section 3 of the 1940 Act referred to above extended to quantitative control. MurphyJ held that a manner in which the Minister had exercised his powers under Section 3 was *Ultra Vires*. By conferring a power of

control, the Oireachtas could not have contemplated that the Minister would put in place a scheme which *(M) ''manifestly affects the rights of citizens to work in an industry for which they may be qualified and the rights of potential customers to avail of such potential services''.* ***[O'Neill]***.

The Constitutionality of any delegation by the Oireachtas of a power to institutionalise such a scheme was; *''so radical in qualifying a limited number of persons and disqualifying all others who may be equally competent from engaging in the business''* ***[O'Neill]*** must be questionable. While O'Neill is not an authority for the proposition that the Minister can not exercise quantitative control over the number of taxi licenses issued, his authority insofar as that relates to the manner in which the Minister can exercise control over the taxi licence scheme.

The relevance of O'Neill lies in its unambiguous rejection of the possibility of the Minister fettering his discretion under the Act and the doubt which its casts on the Constitutionality of any scheme which would have the effect of excluding persons from an industry for which they may be perfectly well qualified.

In relation to Carrigaline some doubt is cast on the possibility of the Minister institutionalising a policy under such a scheme and inveterately adhering to that policy to the extent that the merits of an individual application may not be considered.

5.8 Having referred to his decision in ***Carrigaline*** to and in ***R -v- Port of London Authority***, ex parte Kynoch (1919) 1KB 176 at 184 and other authorities Keane J. held it unquestionably a case that the Minister had fettered the exercise of the discretion conferred on him by the Act of 1947 by excluding the possibility of granting
a licence which would conflict with the exclusivity scheme.

It seems to the Court that the Minister, in restricting the numbers for reasons unrelated to qualitative standards of the vehicles and of drivers has fettered the exercise of the

discretion conferred upon him by Section 82 of the 1961 Act. A quantitative restriction not alone affects the rights of citizens to work in an industry for which they may be qualified but it also manifestly affects the right of the public to the services of taxis and, indeed, restricts the development of the taxi industry itself.

Regulations which restrict the number of public hire vehicles contradict the very concept of public service. It is, of course, open to the relevant authority to insist on quality as the base or threshold requirement in relation to a vehicle license as well as a drivers license. The 1961 Act does not contemplate the restriction of numbers in order to enforce standards. Moreover, there would appear not to be any criteria in the Act, nor in the regulations, by which a determination should be made on the number of new licenses to be granted. Indeed, no indication has been given to the local authorities to whom the Minister purports to delegate the function of the factors to be considered in limiting the number of vehicles.

The policies and principals contained in Section 82 of the Road Traffic Act, 1961 do not provide a basis upon which the Minister can require local authorities to impose a quantitative restriction on the issuance of new taxi licenses within their respective areas.

In arriving at such a conclusion the Court is not attempting to interfere with the Minister's right to make regulations for the control and operation of taxis. That right does not appear to extend to the limitation of number or to discriminate in favour of existing taxi licence holders.

To recapitulate, then, on this portion of my judgment, I have held the following:

(i) The words *"control and operation"*, as they appear in S. 82 of the Road Traffic Act, 1961, do permit the Minister in question to exercise a measure of numerical or quantitative control over the licensing of public service vehicles. That this is so is apparent simply from the fact that the Minister is empowered to grant

licences. By granting or, indeed, by refusing any application for a licence, the Minister is *ipso facto* exercising quantitative control over the licensing of such vehicles. This fact is not challenged by the fact that a licence may have been granted for qualitative reasons relating to the condition of a particular vehicle or the extent to which the applicant for the licence is qualified to hold a licence.

(ii) To frame the central legal question which has been thrown into focus by these proceedings as being that of whether the Minister in question is empowered under the 1961 Act to exercise numerical control over public service vehicles is largely unhelpful at all events, insofar as it deflects the mind from the real issue, which is that of whether the Minister in question is empowered to exercise numerical control over such vehicles *in the manner in which he has purported to do under the impugned Statutory Instrument*.

(iii) The **O'Neill** case, to which the parties have already referred and to much already made abundant reference in the course of this judgment, is relevant not because it provides authority for the proposition that the Minister may not exercise quantitative control over public services vehicles, which it does not, but rather because:-

(a) it unambiguously rejects the possibility of the Minister fettering his discretion in purporting to exercise quantitative control under the Act;

(b) it casts serious doubt on the constitutionality of any scheme authorised by the Oireachtas which would have the effect of excluding persons from working in an industry for which they may be perfectly well qualified. The scheme at suit in **O'Neill**, like the scheme at suit before the Court, was *"so radical in*

qualifying a limited number of persons and disqualifying all others who may be equally competent from engaging in the business" that *"*[*i*]*t may be that such a far reaching power could not be delegated by the national parliament at all."*

Murphy, J., *op. cit.*

(iv) The Minister, in restricting the number of licences in the manner under consideration, has fettered the discretion conferred upon him by s. 82 of the Act of 1961. The scheme ostensibly put in place by SI 3 of 2000 represents an exercise of quantitative control and there can be little objection to that *per se*. However, it is also a blanket restriction which renders nugatory applications from parties other than current taxi licence holders. It represents a fettering of the Minister's discretion which affects the rights of citizens to work in an industry for which they may be qualified and, further, which affects public access to taxis and restricts the development of the taxi industry.

The foregoing is, to my mind, sufficient to dispose of this matter.

However, beyond these considerations, I feel bound to add a further point which is of no little importance. I was not addressed by Counsel in the course of these proceedings on the issue of the extent to which European Community law affects the scheme put in place by the Minister. Nevertheless, I consider that European Community law is relevant to these proceedings and may also be fatal to the scheme whereby additional taxi licences will only issue to current holders of licences.

The argument is just this. Non-discrimination is a general principle of Community law and, as such, it is a principle which is binding upon this State as a Member State of the European Union. It is no less binding upon this Court than it is upon the Executive and the Legislature. It need hardly be observed here that this principle has informed the development of

Community Law as a whole and has found expression in fields of that law as diverse as nationality and sex equality. Most recently, the Amsterdam Treaty has inserted a new Article 13 EC which provides a legislative basis for Community measures aimed at combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Discrimination on grounds of nationality is expressly proscribed by Article 12 of the EC Treaty (formerly, Article 6 EC). It is trite law that this prohibition extends also to *indirect* discrimination on grounds of nationality. Such a case of indirect discrimination would arise where, as in the case before me, a national rule which appears on its face not to discriminate on grounds of nationality *in practice* affects nationals of other European Union Member States to a greater degree than nationals of Ireland. In this regard, it is not necessary for it to be established that the national measure in practice affects a higher proportion of foreigners, but merely that the measure is *"intrinsically liable"* to affect nationals of other Member States more than Irish nationals: see, in the context of Article 39 EC (formerly, Article 48 EC) **Case C-237/94, O'Flynn v. Adjudication Officer [1996] ECR I-2617**.

Article 12 EC is directly effective and can be relied upon before this Court without the necessity of relying on any other Treaty article: **Case C-92/92, Phil Collins v. Imtrat Handelsgesellschaft mbH [1993] ECR I-5145, [1993] 3 CMLR 773**.

I have come to the conclusion that the scheme purportedly put in place by SI 3/2000 may very well indirectly discriminate against Member States of the European Union other than Ireland in a manner which is prohibited by Article 12 of the EC Treaty. I venture that all and, if not, the great majority of current taxi licence holders are Irish nationals. By restricting the grant of new licences to this category of persons, the Minister is effectively precluding nationals of other EU Member States from becoming the owners of new taxi licences in Ireland. That those nationals could purchase the licences at the market rate is no defence. It is true that Irish

persons who are not taxi licence holders are equally negatively affected, but the favouring of one group. all or most of the members of which are Irish nationals, remains.

I am guided, in reaching this conclusion, by such seminal European Court of Justice cases as **Case C-279/93, Finanzamt Koln-Altstadt v. Roland Schumacker [1995] ECR I-225** and, in applying such principles in the Irish context, by such cases as **Bloomer v. Law Society [1995] 3 IR 14**.

Even if my interpretation of Article 12 EC is misguided because of the equal exclusion of Irish nationals who are not taxi licence holders, Article 86 EC (formerly Article 90 EC) has to be considered, which provides, in relevant part that:

> *"1. In the case of ... undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89."*
>
> **[Emphasis added]**

Wyatt and Dashwood, **European Community Law** (Sweet and Maxwell, 3rd edn., 1993), 551, explain that the rationale behind the portion of Article 86 EC quoted above is *"the fact that the State has deliberately intervened to relieve the undertaking concerned wholly or partially from the discipline of competition, and must bear the responsibility for the consequences."*

It is my view that the taxis must fall within the regulatory framework of Article 86 EC, as *"undertakings to which* [the State] *grant*[s] *special or exclusive rights"*.

The scheme might further be impugned under Article 86 on the ground that it might lead taxi drivers to abuse Article 82 EC, which is the Treaty provision dealing with abuses of dominant positions. This might seem a little extreme, but the jurisprudence of the European

Court of Justice has established that the grant of exclusivity, such as in the present case, may infringe Articles 86 and 82 either when the exercise of the exclusive rights cannot avoid being abusive (**Case C-41/90, Hofner and Elser v. Macrotron GmbH [1991] ECR I-1979, [1993] 4 CMLR 306**), or where such rights are liable to create a situation in which the undertaking is induced to commit an abuse (**Case C-260/89, Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis (DEP) and Sotirios Kouvelas [1991] ECR I-2925, [1994] 4 CMLR 540**). Also instructive in this regard is **Case C-179/90, Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA [1991] ECR I-5889, [1994] 4 CMLR 422**, as to which, see Craig and de Búrca, **EU Law**, 2nd ed., Oxford, 1998. Taxis may very well be induced to commit abuses of their dominant position in Ireland by the scheme purportedly put in place by SI 3/2000.

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