

THE HIGH COURT

1995 No. 8112p

BETWEEN

MICHAEL O'DWYER, ANTHONY O'SULLIVAN AND

ANDREW QUELLY

PLAINTIFFS

AND

THE MINISTER FOR THE ENVIRONMENT, IRELAND

AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Geoghegan delivered the 27th day of March, 1998.

This is an action in which the Plaintiffs who are owners of hackney licences, are essentially complaining about two separate aspects of the regulatory regime governing taxis and hackneys. Specifically, the Plaintiffs are claiming:-

- (a) A Declaration that Article 2 of the Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1983 (S.I. No. 273 of 1983) is unreasonable and/or unlawful and/or ultra vires the powers to make regulations granted under Section 5 and Section 82 of the Road Traffic Act, 1961 and/or is unconstitutional in so far as it

inserted an additional category of use as a defining factor of a taxi, that is to say the use specified at paragraph (f) in the newly inserted Sub-Article (2) of Article 3 of the Road Traffic (Public Service Vehicles) Regulations, 1963.

- (b) A Declaration that Article 18 of the Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1995 (S.I. No. 136/1995) is unreasonable and/or unlawful and/or ultra vires the powers to make regulations granted under Section 5 and Section 82 of the Road Traffic Act, 1961 and/or is unconstitutional.
- (c) Damages for breach of constitutional duty owed by the First and Second named Defendants to the Plaintiffs."

The scheme of the statutory regulations is to define a taxi by reference to certain types of use of a small public service vehicle and to define a hackney by reference to types of use of a small public service vehicle otherwise than by any of the categories of use of a taxi. By the regulations made in 1983, an additional category of use was added to the categories of use defining a taxi. That additional category of use is set out in the new paragraph (f) of Sub-Article (2) of Article 3 of the 1963 Regulations and reads as follows:-

"In pursuance of a contract of hiring for the carriage of persons for reward other than in connection with the funeral of a deceased person, initiated or facilitated by means of a telephonic or radio communication with the vehicle while such vehicle is in a public place in a taximeter area."

The effect of that additional characteristic being added to the regulatory definition of taxi, is that

a hackney owner can no longer use a telephone or radio communication to make contact with a hackney driver while on the public road in a taximeter area. Between 1963 and 1983 hackney owners suffered no such restriction but of course the use of radios would have been uncommon until the latter part of that period. The Plaintiffs are hackney owners claiming that that amendment to the 1963 Regulations effected by the 1983 Regulations, is wholly unreasonable and/or unconstitutional as being arbitrary, discriminatory and unjust and an unjustified attack on their livelihood.

The Plaintiffs are faced with an immediate and well nigh insuperable difficulty in making this case in the High Court at least. The Defendants are relying on and very understandably relying on the decision of the Supreme Court in Minolta Limited -v- The Minister for the Environment, unreported case, (Murphy J., Lynch J. and Barron J. with ex-tempore concurring judgments of Murphy J. and Lynch J. and Barron J. also concurring). This was an appeal from an unreported judgment of Costello P. and perhaps understandably Counsel for the Plaintiffs were unaware of the case until it was put forward on behalf of the Defendants at the hearing. Be that as it may, the same issues essentially arose in the Minolta case as arose in this case in relation to the use of radios and telephones by hackney drivers. But it is only fair to say that the point arose in a slightly different procedural context. In the Minolta case the High Court and Supreme Court were dealing with an application for an interlocutory injunction and the entitlement to use radios and telephones was being pleaded on two other grounds besides the ground that the regulation was arbitrary and unreasonable and ultra vires. Nevertheless, it is perfectly clear from the judgment of Costello P. that he held that the regulation was not ultra vires in the sense that the relevant section in the Road Traffic Act, 1961 did not empower the making of the regulation and was not ultra vires either in the broader sense of the regulation being unreasonable, arbitrary or illogical. The former President is upheld by the Supreme

Court, the principal judgment being delivered by Murphy J. Murphy J. makes it clear that in his view, with which the other members of the Court concurred, the regulation was clearly *intra vires* and although he does not expressly go into any distinction between *ultra vires* in the narrow sense of compliance with the empowering section and *ultra vires* in the broader sense of unreasonableness or unconstitutionality of one kind or another, it is obvious that he is nevertheless endorsing the views expressed by Costello P. and it must be remembered that the Supreme Court judgments were *ex-tempore*. This view is re-enforced by a reading of the principal grounding affidavit in the application for the Interlocutory Injunction where all the various arguments are made on the "*ultra vires*" issue. Furthermore, those points are made in the Affidavits in the context of evidence set out in the Affidavits somewhat similar to the evidence in this case.

Even if it could be argued that the doctrine of *Stare Decisis* did not apply to this Court because the earlier case was an application for an Interlocutory Injunction and not a final hearing, I would be extremely slow to allow myself come to a view different from a common view expressed by the former President of the High Court and three Judges of the Supreme Court. But at any rate, having heard the full oral evidence, I have come to the same conclusion myself.

Essentially, the Plaintiffs' complaint is that they cannot radio into one of the hackney cars while it is on the public road in a taximeter area with information as to new work nor can the driver telephone or radio back to headquarters from the public road. If the hackney driver wants to make or receive calls he has to drive into private property which may of course involve trespass in order lawfully to make or receive the calls. This undoubtedly is a restriction on business which any owner of a hackney fleet would want to see removed. But the prohibition was introduced into the 1983 Regulations in the context of maintaining a viable and

well-regulated taxi service separate from the private car hire or hackney business. One suspects that there would have been lobbying to the Minister by both sides at that time but the Minister was obviously persuaded or at least was prepared to accept the view that being able to telephone or radio into a driver was so close to the essential nature of taxi business that the right to do so should be confined to the taxi business and should be made a defining characteristic along with the other prescribed characteristics of a taxi service. One could agree or disagree with that view but how could anyone say that it was wholly irrational or unreasonable? The regulation sought to be impugned was made pursuant to a policy decision by the Minister and it was apparently a policy decision in line with what some urban authorities at least in the U.K. prescribe. It is no function of the Courts 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.

I now turn to the second complaint of the Plaintiffs. This is that they are allegedly prevented by ministerial regulation from selling or disposing of to their family or others their hackney licences whereas, by the same token, taximen are entitled to sell and dispose of their taxi licences and such taxi licences have substantial market value. For all practical purposes this aspect of the Plaintiffs' case is based on the wording of Article 18(1) of the Road Traffic (Public Service Vehicles) (Amendment) Regulations, 1995 (S.I. No. 136 of 1995). That sub-article reads as follows:-

"(1) Subject to Sub-Articles (5) and (6), a person to whom a vehicle, in respect of which a taxi licence or a wheelchair accessible taxi licence has been granted, is being sold or otherwise transferred may apply to the licensing authority which

granted the licence to have the said licence continue in force."

In paragraph 6 of the amended Statement of Claim it is alleged that under Articles 17 and 18 of the said Regulations of 1995:-

"there is effectively operating a restriction on the disposal or transfer of 'hackney' licences available to and enjoyed by the Plaintiffs herein in comparison to the rights of transfer or disposal of taxi licences available to taxi drivers, which discrimination and uneven treatment of the Plaintiffs as against taxi drivers who have the benefits of selling their licence or selling same to a member of their family".

It is further alleged that:-

"The system operates specifically in areas where there is a ceiling on the number of hackney and taxi licences granted by a relevant local authority with the effect of premium value on hackney and taxi licences in such relevant local authority areas. The Plaintiffs operate their hackney licences in an area where there is a ceiling on the number of hackney and taxi licences available but they are unable to pass on their hackney licences to a member of their family in the same way as a taxi driver can do under the relevant operating provisions of the said statutory instrument".

This allegation in a number of respects is inaccurate. Although a local authority may limit the number of taxi licences to be issued, it is not in fact entitled to limit the number of hackney licences but it may impose a moratorium for a period on the granting of any hackney licence.

However, there is neither a power nor a duty to impose any restriction on numbers if there is no moratorium. As will be noted from the passage in the Statement of Claim which I have cited, the pleaders have used the word "effectively" as qualifying the words "operating a restriction on the disposal or transfer of hackney licences". This of course has been advisedly done because Article 18(1) of the 1995 Regulation is totally silent about hackney licences and therefore it is inaccurate, notwithstanding the admission in the Defence, to suggest that by that article, transfer of hackney licences is prohibited. It is simply that there is no specific provision permitting a continuance in force of a hackney licence in the situation of sale or transfer. As Mr. Weaver, Principal Officer in the Department explained, at that time the restriction on numbers of hackney licences was removed. As long as there is no moratorium this does not matter because there is then no need for a licence to be kept in force. A new licence can be applied for. But if the Plaintiffs had a legitimate complaint that there was no provision permitting the continuance of a licence in force in areas where there was a moratorium on the issuing of hackney licences, there is, in my opinion, no legal redress open to them. A Court cannot order the Minister to make some new regulation and there would on the other hand be, in my view, no justification in treating the existing sub-article as being in some way ultra vires the Minister because of the exclusion of any reference to hackney licences. The position regarding taxis and the position regarding hackneys are quite different. In each taximeter area there is a limit on the number of taxi licences which can be issued. It is because of that restriction which is contemplated by the regulations that Article 18(1) came to be enacted. That provision, therefore, was to deal with the problem of restricted numbers of licences and not with the problem of a moratorium. It was entirely reasonable that such regulation should be made and it was certainly intra vires the Minister. The only conceivable legal grievance, therefore, which the Plaintiffs could have is the absence of a further regulation dealing with the

rather different problem of hackney owners operating in an area where there is a moratorium which presumably would normally be temporary. I accept the evidence of Mr. Weaver, Principal Officer in the Department of the Environment and in charge of the relevant section, that the reason why hackney licences were not mentioned in Article 18(1) was because it would not have been considered that it was necessary as there was then no restriction by the Regulations on the granting of hackney licences and no power conferred on the local authorities to restrict numbers, although there was the power to impose a moratorium. I also accept Mr. Weaver's evidence which was not seriously disputed that the only period during which there was a saleable market in hackney licences was a short period in 1991/1992 when there was a total moratorium on the granting of such licences. That moratorium was subsequently removed.

It would appear that under Article 10 of the Road Traffic (Public Service Vehicles) (Licensing) Regulations, 1978, (S.I. No. 292 of 1978) on the death of the holder of a public service vehicle licence, the licence shall devolve on his personal representative. This particular provision still stands as I understand it and it would cover hackneys. Curiously, none of the regulations seem to prescribe, expressly at least, what happens the licence when the personal representative winds up the administration of the estate. Mr. Weaver seemed to suggest that there may be a practice whereby the local authority operating a moratorium does in fact treat the member of the family inheriting the vehicle as continuing to hold the licence but I do not think he was too clear about what the exact position was and this quite frankly remained a grey area throughout the case. If in a local authority area where there is a moratorium, it is not possible to permit the inheriting member of the family or indeed inheriting stranger to continue the licence in force, the position in practice would normally be that it would remain in the name of the personal representative and would not therefore be lost.

I have already demonstrated why, in my view, the Plaintiffs, even if their complaint was legitimate, would have no legal redress because the Courts cannot direct the Minister to introduce some particular regulations. But even if there was such a power, I do not think it would be exercised in this case or in other words I do not think that the Plaintiffs have a legitimate complaint. 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 in practice a saleable market in taxi licences but there was and is no legal obligation on the Minister whatsoever to create or maintain such side effect. (See **Hempenstall -v- Minister for the Environment**, [1993] I.L.R.M. 318). Hackney licences are regulated quite differently and the mere fact that the regulation of hackneys does not produce a similar side effect as the side effect produced by the regulation of taxis, does not in any way render the regulatory scheme discriminatory. In each case there are side effects which are really of no interest to the Minister in his statutory obligations to regulate appropriate services for the public. Furthermore, in the very short period when there was a market in the sale of hackney licences because of the national moratorium, the licences sold at prices in the range of £20,000 while during the same period taxi licences sold in Dublin at about three times that price. Because of the long established policy of restricting the number of taxi licences issued in taximeter areas, there has for many years past been a saleable market in taxi licences but there was never such a market in hackney licences except during that very short period in 1991/1992. There could not be an obligation on the Minister to create such a market.

It follows therefore that the Plaintiffs must fail on this aspect of their claim also.

I must therefore dismiss the action.