

THE HIGH COURT

Record No. [REDACTED]

Between:-



[REDACTED] and

Applicants

And

ROAD SAFETY AUTHORITY,
THE MINISTER FOR TRANSPORT, TOURISM AND SPORT,
THE ATTORNEY GENERAL AND IRELAND

Respondents

and

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

OUTLINE LEGAL SUBMISSIONS ON BEHALF OF THE IRISH HUMAN RIGHTS
AND EQUALITY COMMISSION

I. INTRODUCTION

1. On 14 July 2020, the Court granted the Irish Human Rights and Equality Commission (**'the Commission'**) liberty to appear as *amicus curiae* in these proceedings.
2. In these proceedings, the Applicants seek *certiorari* of the decisions by the Road Safety Authority to refuse their applications to exchange their [REDACTED] driving licences for Irish driving licences on the basis that they are not normally resident in the State. In addition, the Applicants seek declaratory relief in relation to the interpretation and, if necessary, validity of the relevant provisions of the Road Traffic (Licensing of Drivers) Regulations 2006, as amended (**'the Driving Licence Regulations'**).¹ The net issue

¹ Road Traffic (Licensing of Drivers) Regulations 2006 (S.I. No. 537/2006) ("the 2006 Regulations"). The amendments of primary relevance for present purposes are introduced by the Road Traffic (Licensing of Drivers) (Amendment) (No. 3) Regulations 2013 ("the 2013 Regulations") the Road Traffic (Licensing of Drivers)(Amendment)(No. 2) Regulations 2016 (S.I. No. 656/2016)("the 2016 Regulations").

before the Court is whether, in refusing the applications of the Applicants herein, who are applicants for international protection in the State, the Road Safety Authority acted lawfully.

3. In applying to join the proceedings pursuant to s.10(2)(e) of the Irish Human Rights and Equality Commission Act 2014, the Commission considered that the proceedings raise important issues of principle relating to the exclusion of applicants for international protection from access to driving licences in the State. Because these issues have the potential to affect all applicants for international protection, the significance of the proceedings goes beyond the facts of this particular case. In appearing as *amicus curiae*, the Commission seeks to assist the Court in resolving these issues before it.²
4. In the Commission's submission, the Road Safety Authority has erred in law in interpreting and applying the Driving Licence Regulations in such a way as to impose additional – and discriminatory – requirements on applicants for international protection which go beyond what is required under the Driving Licence Regulations themselves.
5. Without prejudice to this primary submission, if and insofar as the Driving Licence Regulations, properly interpreted, do permit the exclusion of persons in the position of the Applicants from access to driving licences, the Commission submits that the Driving Licence Regulations would, to that extent, be *ultra vires* and/or contrary to European Union law, and/or the Constitution.
6. Before addressing these legal issues in more detail, it is helpful to consider the relevant provisions of the Regulations at issue in these proceedings and the manner in which they have been interpreted and applied over time.

² In *Re J.J.* [2021] IESC 1, the Supreme Court “encourage[d] intervening parties to go further in explaining how the approach they assert would likely resolve the particular case”: Judgment §178.

II. THE DRIVING LICENCE REGULATIONS

7. The requirements for access to driving licences and learner permits are set out in Regulations 12 and 20 of the Driving Licence Regulations.
8. These Regulations were made pursuant to the Road Traffic Act 1961 (as amended). Under s.22, a person may apply to a licensing authority for a licence in accordance with the regulations made under section 42(2)(c).
9. Section 2 of the Road Traffic Act 2006 provides that the power to make Regulations includes the power to make provision in such regulations to give effect to, *inter alia*, an act adopted by an institution of the European Union.
10. There is no requirement of normal residence or residency entitlement provided for in the Road Traffic Acts.
11. Regulations 12(1) and 20(1) require that an applicant for such a licence or permit “*shall have his or her normal residence in the State*”. The term “*normal residence*” is defined in Regulation 3(1) as meaning:

“...the place where a person usually lives, that is for at least 185 days in each year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place where he or she is living. However, the normal residence of a person whose occupational ties are in a different place from his or her personal ties and who consequently lives in turn in different places situated in 2 or more Member States shall be regarded as being the place of his or her personal ties where the person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school does not imply transfer of normal residence...” [Emphasis added]

This definition transposes the definition of “*normal residence*” in EU law, as now enshrined in Article 12 of the Recast Driving Licences Directive.³

12. Regulations 12(2) and 20(2) address the manner in which an application for such a licence or permit is to be made. An application shall be made on a designated form scheduled to the Regulations, contain the information required, and contain the required declarations or medical reports if required. The scheduled form applicable at the time of the Applicants’ applications was that substituted by the 2016 Regulations.
13. In the Driving Licence Regulations, as originally adopted in 2006, the scheduled forms required applicants to provide their address and to make a declaration as to his/her normal place of residence.⁴
14. In the Driving Licence Regulations, as amended in 2016, the scheduled forms continued to require applicants to provide their address and make a declaration as to their normal place of residence. However, in the application checklist for a learner permit or driving licence (or to exchange a foreign licence), it also provided that applicants must supply “*evidence of residency entitlement*”, with a reference to “*page 2 of the guidance notes*”. According to the Affidavit of [REDACTED] in the Road Safety Authority, the Authority interprets “*the requirement that an applicant have his normal residence in the State as requiring that person who is a non-EEA national have a regular immigration status in the State*”.⁵
15. The RSA’s guidance notes form no part of the Driving Licence Regulations. [REDACTED] has exhibited at [REDACTED] a copy of the guidance notes applicable as of November 2018. Under the ‘Residency Entitlement’ on page 2 of the guidance notes, it is stated as follows (emphasis added):

³ Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast).

⁴ Schedule 1, 2006 Regulations.

⁵ Affidavit of [REDACTED], paragraph 5.

*To make an application for a driving licence or learning permit, you must be able to show that you are a national of the European Union, the European Economic Area or Switzerland or **have leave to remain in Ireland**.*

You may present our Irish driving licence or learner permit where your place of birth recorded on it is within the EU, EEA or Switzerland or a Public Services Card where your place or [sic] birth or nationality are recorded as within the EU, EEA or Switzerland.

Please see list 4 on page 4 of the application guidance notes for the full list of documents which can be accepted as evidence of residency entitlement.

16. List 4 on page 4 of the Guidance Notes is entitled ‘Evidence of residency entitlement’ and sets out a list of documents which will be accepted by the RSA. In the case of non-EU/EEA/Swiss nationals, it provides:

- *Current certificate of registration (Garda National Immigration Bureau/GNIB card) or Irish residence permit (IRP) for non-EU/EEA/Swiss citizens (The GNIB and IRP cards must be presented with a current passport valid for international use or a Public Services Card).*

17. Following the substitution of the application form in the 2016 Regulations, the Road Safety Authority purported to impose a requirement on applicants *via* non-statutory guidelines to prove “*residency entitlement*” and further to provide that this requirement could be satisfied only by the provision of certain types of proof of residency entitlement listed in the RSA’s Guidance Notes.

18. The Road Safety Authority did so notwithstanding the fact that the requirement under the Driving Licence Regulations themselves – transposing EU law – was that applicants have their “*normal residence*” in the State.

19. As a result of this significant change in approach, for applicants who are not nationals of the EU, the EEA or Switzerland, the Road Safety Authority would only accept a GNIB or IRP card, alongside a current passport valid for international use or a Public Services Card.

20. By virtue of their status, applicants for international protection, no matter how long they have been resident in the State, cannot not have such a GNIB card or Irish residence permit. Instead, they receive a Temporary Residence Certificate which is renewed from time to time pending the determination of their application for international protection.⁶ During this time, applicants for international protection are lawfully resident in the State.⁷

21. Pursuant to Article 7(1) (dealing with “Residence and freedom of movement”) of Directive 2013/33/EU of 26 June 2013, the recast Reception Conditions Directive:-

“Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State.”

22. For diverse reasons, an applicant for international protection may hold a Temporary Residence Certificate for a number of years. In the September 2020 *Report of the Advisory Group on the Provision of Support including Accommodation to Persons in the International Protection Process*⁸ it was stated at p.84 that, as of July 2020, c.3,590 people had spent more than 2 years in the international protection process.

23. In the case at hand, it does not appear to be in dispute that the Applicants have resided in Ireland since September 2019 on a lawful basis, pursuant to section 16 of the International Protection Act 2015, for the purposes of seeking a declaration as to international protection and have been unable to reside anywhere else since that time.⁹

24. Section 5(1) of the Immigration Act 2004 provides that:

“No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a

⁶ In this regard, it is relevant to note that Regulation 54 of the Driving Licence Regulations accepts residence certificates as proof of identity for the purposes of the Regulations.

⁷ International Protection Act 2015, section 16.

⁸ <https://www.gov.ie/en/publication/634ad-report-of-the-advisory-group-on-the-provision-of-support-including-accommodation-to-persons-in-the-international-protection-process/#>

⁹ See Statement of Grounds, paragraph e (ii), and the Statement of Opposition, paragraph 10. In this regard, it is relevant to note the terms of section 16(5) of the International Protection Act 2015 according to which applicants for international protection shall not leave or attempt to leave the State without the consent of the Minister for Justice.

permission given under this Act after such passing, by or on behalf of the Minister.”

That section does not apply to Applicants for international protection.

25. As a matter of factual residence, they are *normally resident* in the State. They are lawfully in the State. In support of their applications to exchange their driving licences, the Applicants submitted their PPSNs, copies of their [REDACTED] driving licences and their Temporary Residence Certificates. Notwithstanding the fact that they are normally resident in the State and that their residence is lawful, their applications were refused on the basis that they had not provided valid evidence of “*residency entitlement*”.
26. The effect of this change on the part of the Road Safety Authority is to exclude applicants for international protection from access to driving licences in the State, even where they in fact satisfy the requirement of “*normal residence*” laid down in the Driving Licence Regulations.
27. In proceedings under the Equal Status Acts 2000-2015, a number of complainants – assisted by the Commission – argued that the manner in which the Road Safety Authority interpreted and applied the requirement of “*normal residence*” constituted unlawful discrimination on the ground of race. The Workplace Relations Commission upheld these complaints, concluding that the practice of the Road Safety Authority constituted indirect discrimination on the ground of race. On appeal, the Road Safety Authority argued *inter alia* that it was required by law to seek proof of residency entitlement by reason of the amended form scheduled to the 2016 Regulations and the guidance notes referred therein. In making this argument, the Road Safety Authority relied on section 14(a)(i) of the Equal Status Acts, under which nothing in the Acts shall be construed as prohibiting “*the taking of any action that is required by*” any enactment. This argument was accepted by the Circuit Court and, on further appeal on a point of law, by the High Court. In her judgment, Creedon J. found that “*the actions of the*

Respondent as they relate to the Appellant are required by legislative enactment and cannot be the subject of an adverse finding pursuant to the Equal Status Acts".¹⁰

28. In these proceedings, the Road Safety Authority maintain the argument that, by reason of the form scheduled to the 2016 Regulations, an applicant is required to provide evidence of "*residency entitlement*",¹¹ but contends that this is "*not a separate or an additional requirement to that of normal residence*".¹²
29. However, the Road Safety Authority expressly acknowledges that the Guidance Notes "*are not and are not intended to be legally binding*".¹³ It is stated that the Road Safety Authority "*has, and continues to update the guidance notes to ensure that applicants are properly informed of the type of documents that can evidence their application is duly made in accordance with the Regulations*".¹⁴ It appears that in the updated guidance provided on the RSA's National Driver Licence Service website, the references to "*residency entitlement*" have been replaced with references to "*normal residence*", albeit that the forms of proof accepted are the same as those in the earlier Guidance Notes.¹⁵
30. In conclusion, although the Regulations simply require that an applicant for a driving licence be *normally resident* in the State, in practice, the Road Safety Authority now requires applicants to provide proof of *residency entitlement* and accepts only certain limited types of proofs for this purpose, thereby excluding as a matter of course applicants for international protection regardless of the amount of time they may have been lawfully resident in the State. It is against this backdrop that the legal issues in these proceedings must be assessed.

¹⁰ *A.B. v. Road Safety Authority* [2021] IEHC 217, paragraph 102.

¹¹ Affidavit of [REDACTED] paragraph 8.

¹² Statement of Opposition, paragraph 12.

¹³ Affidavit of [REDACTED] paragraph 11.

¹⁴ Affidavit of [REDACTED] paragraph 11.

¹⁵ See the Learner Permit and Driving Licence Guidance Notes at the following links:

- https://www.ndls.ie/images/Documents/Forms/170552_NDLS_LEARNER_LICENCE_GUIDE_NOTES_JUNE_2021_WEB_HR_-_Front_Office.pdf;
- https://www.ndls.ie/images/Documents/Forms/170552_NDLS_FULL_LICENCE_GUIDE_NOTES_JUNE_2021_WEB_HR_-_Front_Office.pdf (last accessed 27 September 2021).

The documentation is freely available on the NDLS website but, subject to the Court, the Commission can place a copy of these guidance notes on affidavit if and insofar as this may be necessary.

III. THE ROAD SAFETY AUTHORITY HAS ERRED IN LAW IN ITS INTERPRETATION AND APPLICATION OF THE DRIVING LICENCE REGULATIONS

31. Regulations 12 and 20 of the Driving Licence Regulations require applicants for driving licences and learner permits respectively to have their “*normal residence*” in the State.
32. The term “*normal residence*” is defined in Regulation 3(1) – in terms identical to those of Article 12 of Directive 2006/126/EC – as meaning “*the place where a person usually lives, that is for at least 185 days in each year, because of personal and occupational ties*. The requirement of “*normal residence*” is of general application. Contrary to what is pleaded in the Statement of Opposition, the definition is not confined to situations “*where a person’s normal residence will be when he lives in more than one place*”.¹⁶
33. While the interpretation of the concept of ‘residence’ may depend on its specific statutory context, the concept of normal residence in the Driving Licence Regulations must be interpreted first and foremost in accordance with its plain meaning. In accordance with its plain meaning, a person’s normal residence for the purposes of the Regulations is a question of fact.¹⁷ It is “*the place where a person usually lives*”. The definition does not make any reference to the particular legal status or character of that residence or the nature or form of a person’s “*residency entitlement*”, still less to particular forms of proof which are essential proofs for this purpose.
34. The purpose of the Driving Licence Regulations is to regulate access to driving licences. Access to driving licences is wholly different in character to access to permanent residence or citizenship in the State. For this reason, the interpretation of ‘normal residence’ for the purposes of the immigration code cannot simply be transposed to the Driving Licence Regulations. Under the immigration code, the particular character of a person’s residence – including specifically whether it has been lawful or unlawful – will often be material to determining a person’s entitlement to be present in the State or whether a person is entitled to be present in the State or whether

¹⁶ Statement of Opposition, paragraph 9.

¹⁷ *Mohamed v. Hammersmith and Fulham LBC* [2002] 1 AC 547, paragraph 18; *UM (A Minor) v. Minister for Foreign Affairs and Trade* [2020] IECA 154, paragraph 40.

a person has sufficient reckonable residence in order to apply for naturalisation.¹⁸ Moreover, in more recent jurisprudence, there has been a recognition that it is “*perhaps not helpful to try and shoe-horn particular categories of migrants into one of a number of differently labelled boxes in order to discover the extent of rights to which they may be entitled*”.¹⁹

35. In this case, there does not appear to be any dispute that the Applicants are in fact resident in the State. If and insofar as it may be relevant for this purpose, it also does not appear to be in dispute that the Applicants are lawfully resident in the State.

36. In *A.B. v. Road Safety Authority*, the High Court (Creedon J.) concluded that the Circuit Court had not erred in law in concluding that the Driving Licence Regulations imposed a “*requirement to provide evidence of residency entitlement in Ireland*”.²⁰ While, by implication, the Court has interpreted the requirement for ‘normal residence’ as encompassing a requirement to provide evidence of residency entitlement, neither in the judgment of the High Court nor of the Circuit Court is there any detailed or reasoned engagement with the concept of ‘normal residence’. Moreover, in both judgments, the Court emphasised that the issue before the Court was a claim under the Equal Status Acts, as opposed to a challenge to the lawfulness of the Regulations (of the kind before the Court in these proceedings).²¹ In the circumstances, the judgments cannot be regarded as providing a definitive interpretation of ‘normal residence’ for the purposes of the Driving Licence Regulations.

37. While there has been no definitive interpretation of ‘normal residence’ by the Irish courts, the Court of Justice of the European Union has provided detailed and binding

¹⁸ See e.g. *G.A.G. v. Minister for Justice* [2003] IR 442 see e.g. *Sofroni v Minister for Justice and Equality and Law Reform* (Unreported, High Court, Peart J, 9 July 2004); *Simion v Minister for Justice, Equality and Law Reform* [2005] IEHC 298.

¹⁹ *Rughnoonauth v The Minister for Justice* [2018] IECA 392, paragraph 59; *Luximon v. Minister for Justice* [2018] 2 IR 542, 550.

²⁰ *A.B. v. Road Safety Authority* [2021] IEHC 217, paragraph 103(i)(a).

²¹ *A.B. v. Road Safety Authority* [2021] IEHC 217, paragraph 84; *Road Safety Authority v. A.B.* [2021] IECC 3, paragraph 51.

guidance on the proper interpretation of that term in this context.²² The Driving Licence Regulations give effect to the State's obligations under EU law. The concept of 'normal residence' in the Regulations must be interpreted in a manner consistent with EU law.

38. In its most recent judgment on this issue in Case C-664/13 *Nīmanis*, the CJEU observed that, while Article 12 defined the criteria for determining what is meant by 'normal residence' for the purposes of the application of that directive, the Directive does not specify the conditions for proof of normal residence. While the conditions for proving compliance with the normal residence condition come within the powers of the Member States and the Directive sets only the minimum conditions, the CJEU held that it followed from Article 12, read in conjunction with Article 7, that "*the result to be achieved by the Member States, in accordance with those provisions, is to determine whether the criteria for establishing that a person has his normal residence in their territory, listed in Article 12, are satisfied, in order to establish whether that person meets the normal residence condition*". On this basis, the Court continued:

*Accordingly, the conditions for proving compliance with the normal residence condition must not go beyond what is necessary to enable the Member State authorities responsible for issuing and renewing driving licences to satisfy themselves that the person concerned meets that condition in the light of the criteria set out in Article 12 of Directive 2006/126.*²³

According to the Court, Article 12 "*sets out, in relation to the normal residence condition, a set of objective criteria for determining whether the applicant has his normal residence in that territory*".²⁴ In the particular case, the Court concluded that an absolute obligation to have a declared place of residence in the territory of the Member State in which the application was made went beyond what was necessary "*to enable the competent authorities to satisfy themselves that the person concerned complies with*

²² Case C-664/13, *Nīmanis*, EU:C:2015:4. See also *Grasser*, C-184/1, EU:C:2011:324; *Hofmann* C-419/10, EU:C:2012:240; *Zerche and Others*, C-334/06 to C-336/06, EU:C:2008:367; *Wiedemann and Funk*, C-329/06 and C-343/06, EU:C:2008:366.

²³ *Nīmanis*, paragraph 46.

²⁴ *Nīmanis*, paragraph 47.

the normal residence condition".²⁵ In other words, the Member States could not impose additional formal requirements which go beyond the definition in Article 12 of the Directive. It follows that normal residence is not only a question of fact; it is also a question of substance over form.

39. While the facts of this case are different from *Nīmanis*, the Court's interpretation of 'normal residence' is of general application and is binding on Member State courts in their implementation of the Directive.
40. The Directive applies to Member States' systems of issuing of driving licences generally; it does not differentiate according to whether those licences are issued to a Member State's own nationals, other EU nationals or third country nationals. Accordingly, the legal definition of 'normal residence' for the purposes of the Directive does not change according to the particular type of applicant.
41. It is submitted that, both on the basis of its plain meaning and the binding interpretation of that term by the CJEU, the requirement of "*normal residence*" is a question of fact and does not imply a particular type of lawful residence or residency entitlement, still less only the specific types of lawful residence which, in the case of non-EU/EEA/Swiss nationals, could only be satisfied by producing a GNIB or IRP card.
42. Finally, if there were any remaining doubt as to the proper interpretation of this term, in accordance with well-established principles, the Regulations, and the legislation under which they have been adopted which enjoys the presumption of constitutionality, must be interpreted in a manner consistent with the Constitution and the Charter of Fundamental Rights.²⁶ If applicants for international protection are, as a matter of course, excluded from access to driving licences in the State no matter how long they have resided in the State, this would constitute a serious interference with the right to

²⁵ *Nīmanis*, paragraphs 46-49.

²⁶ In respect of the double construction rule under the Constitution, see *McDonald v Bord na gCon* [1965] IR 217, 239; *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] IR 317, 341. See also *The State (Lynch) v. Cooney* [1982] IR 337, 380. In the context of the analogous principle of legality under EU law, see e.g. judgment of 14 May 2019 in Joined Cases C-391/16, C-77/17 and C-78/17, *M & Others*, EU:C:2019:403, paragraph 77.

equality before the law under Article 40.1 as well as the right to earn a livelihood guaranteed under Article 40.3,²⁷ and the analogous rights protected under Articles 15 and 21 of the Charter. Applicants for international protection would be deprived of access to a basic service which in many cases may in turn significantly limit their access to the labour market.

43. At a minimum, such an interference would require clear and unambiguous legislation, As matters currently stand, the Commission submits that, if and insofar as more than one reasonable interpretation is open on the text of the Regulations, the Court should adopt that interpretation which is consistent with the protection of the rights under the Constitution and the Charter.

44. For these reasons, it is submitted that the Road Safety Authority erred in law in its interpretation and application of the requirement for ‘normal residence’ under the Driving Licence Regulations as requiring proof of a lawful residence or residency entitlement.

²⁷ *NHV v. Minister for Justice* [2018] 1 IR 246.

IV. THE RESPONDENTS ACTED UNLAWFULLY BY EXCLUDING APPLICANTS FOR INTERNATIONAL PROTECTION FROM ACCESS TO DRIVING LICENCES

A. Imposition of Additional Requirements on Certain Classes of Applicants is *Ultra Vires* the Driving Licence Regulations

45. For the reasons explained above, despite the plain meaning of Articles 3, 12 and 20 of the Regulations, the Road Safety Authority has interpreted the concept of “*normal residence*” so as to impose additional discriminatory requirements on applicants for international protection, with the effect of excluding them from access to driving licences.
46. While the amended form appended to the 2016 Regulations makes reference to ‘*residency entitlement*’, such a form cannot serve to amend the requirement of ‘normal residence’ laid down in the Regulations themselves.
47. It is also relevant to note the important role of the Guidance Notes in the practical application of the Regulations. While, in these proceedings, the Road Safety Authority expressly acknowledges that the Guidance Notes “*are not and are not intended to be legally binding*”,²⁸ on the basis of the evidence before the Court, it nonetheless appears that the Guidance Notes – and the specific forms of proof – are treated as if they are binding. Thus, even where an applicant for international protection can provide an alternative form of proof that he/she is in fact resident in the State and lawfully resident in the State, including by presenting a form of proof that is recognised as valid for other purposes under the Regulations,²⁹ such an application is not accepted.
48. In the Commission’s submission, the imposition of an additional requirement of this kind and in this way, which goes beyond the requirements actually laid down in the Regulations themselves, is unlawful.

²⁸ Affidavit of [REDACTED] paragraph 11.

²⁹ See e.g. Driving Licence Regulations, Regulation 54, which recognises a ‘registration certificate’ as a valid evidence of identity.

49. First, there is a fundamental lack of legal certainty in the legal basis for the purported exclusion, which interferes with the fundamental rights of applicants for international protection.

50. Secondly, as a matter of Irish law, the imposition of an additional restriction of this kind is *ultra vires* the powers of the Respondents in adopting and applying the Regulations.³⁰

51. Thirdly, as a matter of EU law, neither the Minister nor the Authority is entitled to impose additional requirements in respect of normal residence which go beyond those provided in Article 12 of the Directive.³¹ Even if the Regulations, properly interpreted, imposed such an additional requirement, the Road Safety Authority would be bound to disapply such a requirement insofar as it went beyond what was permitted under Article 12 of the Directive.³²

B. If and insofar as they exclude applicants for international protection from access to driving licences, the Driving Licence Regulations are not compatible with the Constitution and/or EU Law (including the Charter of Fundamental Rights)

52. If, contrary to the Commission's primary submission, the Road Safety Authority has not erred in law in its interpretation and application of the Regulations, it is submitted that the Regulations are not compatible with the Constitution and/or the State's obligations under EU law, including the Charter of Fundamental Rights insofar as they amount to an absolute exclusion of applicants for international protection from access to driving licences.

53. In *NHV v. Minister for Justice*, the Supreme Court confirmed that, in light of the guarantee of equality before the law under Article 40.1, the fundamental right to work, guaranteed under Article 40.3, could not be "*withheld absolutely from non-citizens*".³³ While the difference between citizens and non-citizens could justify significant

³⁰ See, by analogy, *Kinsella v. Dun Laoghaire Rathdown County Council* [2012] IEHC 344, paragraph 19.

³¹ *Nīmanis*, paragraphs 46-49.

³² Case C-378/17, *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission*, EU:C:2018:979, paragraph 45.

³³ *NHV v. Minister for Justice* [2018] 1 IR 246, 315-316.

distinction on the part of the State in the field of employment, the Court concluded that it could not justify an absolute prohibition on employment, particularly where there was no temporal limit on the asylum process. On this basis, the Supreme Court concluded that the prohibition on asylum seekers seeking employment under section 9(4) of the Refugee Act 1996, and re-enacted in section 16(3)(b) of the International Protection Act 2015, was contrary to the constitutional right to seek employment.³⁴

54. The general principles laid down in *NHV* are equally relevant in this context. In the application of the Regulations, there is a clear difference of treatment in respect of a vulnerable group of non-citizens, applicants for international protection, compared to other groups of non-citizens lawfully resident in the State. While the requirement of ‘normal residence’ may be neutral on its face, the requirement, as interpreted and applied by the Respondents, excludes this category of non-citizens – very many of whom are likely to be of a different race or ethnicity – from access to a basic public service. As O’Donnell J. stated in *Minister for Justice and Equality v. O’Connor*, “*differences of treatment referable to immutable human characteristics such as race, gender or sexual orientation ... are to be carefully scrutinised*”.³⁵

55. Although the Supreme Court in *NHV* recognised that the State may distinguish between citizens and non-citizens where there are legitimate grounds for doing so, the Respondents have not put forward any justification for the differential treatment at issue in these proceedings.³⁶ It is particularly telling that, while a person who has been studying in the State “*for at least 6 months*” may apply for a driving licence,³⁷ an applicant for international protection is entirely excluded from access to this basic service, even he/she has been lawfully resident in the State for a number of years pending the determination of his/her application.

³⁴ *NHV v. Minister for Justice* [2018] 1 IR 246, 317.

³⁵ *Minister for Justice and Equality v. O’Connor* [2017] IESC 21, paragraph 20.

³⁶ While it is pleaded in the Statement of Opposition that there is “*a justified and legitimate distinction*” (paragraph 18), no objective rationale or justification, or evidence to this effect, has been put forward. At paragraph 21 of the Statement of Opposition, it is denied that “*to negate alleged discrimination it is incumbent on the Respondent as a matter of law to advance an objective, reasonable or proportionate justification for treating the Applicants differently from such persons*”.

³⁷ Regulations 12 and 20 (as amended by the 2013 Regulations).

56. The Respondents describe a driving licence as a “*privilege*”.³⁸ However, in a society based on the rule of law such as this State, access to basic public services, including driving licences, is governed by a detailed legal framework which must itself respect fundamental rights. Like other non-citizens lawfully residing in the State, applicants for international protection, particularly where they are resident in the State for a lengthy period of time, may wish to access a driving licence in order to learn or maintain an important life skill, to travel within the State, to access other basic services, or to access education or employment.
57. For many applicants for international protection, the ongoing exclusion from access to driving licences represents a significant limitation on their ability in practice to access employment. In this way, the exclusion from access to driving licences can interfere with the other fundamental rights of applicants for international protection, including the right to work recognised in *NHV* and as legislated for in the European Communities (Reception Conditions) Regulations 2018 (S.I. No. 230 of 2018) when the State agreed to be bound by the recast Reception Conditions Directive.
58. The Commission submits that, insofar as the Driving Licence Regulations absolutely exclude applicants for international protection from access to driving licences, the Regulations are based on legal uncertainty, contrary to the guarantee of equality before the law under Article 40.1 and additionally, to the extent that they may in effect exclude such persons from access to employment, the right to work guaranteed under Article 40.3.
59. The Commission submits that the Regulations, as interpreted and applied by the Respondents, run contrary to the right to work and the prohibition on discrimination enshrined in Articles 15 and 21 of the Charter of Fundamental Rights.
60. In particular, a policy of excluding applicants from international protection from access to driving licences is, by its nature, liable to place a particularly vulnerable category of non-citizens – very many of whom will be of a different race or ethnicity – at a

³⁸ Statement of Opposition, paragraph 13.

particular disadvantage compared to other person, including other non-citizens who are lawfully resident in the State.³⁹

³⁹ See e.g. C-54/07, *Firma Feryn*, EU:C:2008:155; C-83/14, *CHEZ Razpredelenie Bulgaria*, EU:C:2015:480.

V. CONCLUSION

61. For these reasons, and such further reasons as may be offered in oral submission, the Commission submits that the Road Safety Authority erred in law and/or acted unlawfully in refusing the Applicants access to driving licences by reason of their status as applicants for international protection.

**7 October 2021
(4,970 words)**

**David Fennelly BL
Conor Power SC**