THE SUPREME COURT

[Supreme Court Appeal Nos: 144/2019 and 146/2019]

Clarke C.J.
O'Donnell J.
McKechnie J.
Charleton J.
O'Malley J.

BETWEEN:

ALYSSA REEVES (A MINOR SUING BY MOTHER AND NEXT FRIEND AMANDA REEVES)
AMANDA REEVES

APPELLANTS

- AND –

DISABLED DRIVERS MEDICAL BOARD OF APPEAL, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

BETWEEN:

GEORGE LENNON (A MINOR SUING BY MOTHER AND NEXT FRIEND MARGARET LENNON)
MARGARET LENNON

APPELLANTS

- AND –

DISABLED DRIVERS MEDICAL BOARD OF APPEAL, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Ms. Justice Iseult O'Malley delivered the 18th day of June 2020.

Introduction

1. Both of these appeals relate to the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations, 1994. The regulations are made under s.92 of the Finance Act 1989, as amended, which enables the Minister for Finance to make regulations providing for repayment of excise, road tax and VAT in respect of vehicles and fuel in the case of vehicles used or driven by persons who are severely and permanently disabled.

2. In each of the two cases the parents of the minor concerned applied for a medical certificate in respect of their disabled child, which could have entitled them to some repayments and remissions of motor vehicle costs. Both applications were unsuccessful, as were the appeals to the respondent Board, because the children ("the appellants") were deemed not to satisfy the criteria set out in Regulation 3 of the 1994 regulations. This decision was reached notwithstanding the fact that each of the appellants is agreed by all concerned to be "severely and permanently disabled". The appellants then sought orders of certiorari quashing the decisions of the Board, and a declaration that Regulation 3 is *ultra vires* the provisions of s.92.

The appellants

3. As it is accepted by the respondents that each of the appellants is severely and permanently disabled, it is unnecessary to go into any detail here about their conditions (which are complex in both cases) and will be sufficient to give a brief summary of their needs in respect of mobility.

4. Alyssa, who was two years old when the proceedings were initiated, uses a prone stander to promote weight bearing and manage her risk of hip dysplasia and hip migration. She uses a walker for walking short distances. She will continue to need the help of specialised equipment to walk short distances as she gets older. Otherwise she will require a wheelchair. She needs specialised toileting equipment, and intermittent catheterisation several times a day. As she has outgrown the standard baby changing facilities in public bathrooms, her parents change her in the back seat of the family car rather than lie her down on a toilet floor. The main objective for her parents, if given the tax concession, would be the purchase of a car with a boot large enough to accommodate Alyssa's equipment and a specialised car seat. She is likely to require assistance with mobility and continence issues throughout her life.

5. George was seventeen years old when the proceedings commenced. He has a genetic condition which, in his case, has resulted in longstanding, widespread joint and spinal pain which has progressed into a secondary chronic pain syndrome and is severely disabling. He has "multi system complications". One feature of his condition is that he suffers fluctuations in blood pressure, which causes severe restriction of the use of his lower limbs. A consultant paediatric cardiologist reported that he had significantly limited mobility. George can walk but becomes tired very quickly. A physiotherapy report from March 2017 recorded that he was able to walk 103.5m in three minutes without rest. At the time of assessment, he could walk no more than a few steps on a bad day, and up to half a mile on a good day. However, he is prone to falling, and his parents have been advised by physiotherapists that it is not safe for him to walk outdoors. The HSE has provided him with a wheelchair and he uses it much of the time.

6. George's mother wishes to get an adapted car, as she finds it extremely difficult to get his wheelchair in and out of her un-adapted vehicle and cannot do so on her own.

The Act and Regulations

7. It may be helpful to commence with a reference to the legislation that pre-dated the current scheme. Under s.43(1) of the Finance Act 1968, certain duties were not to be charged in respect of a specially constructed or adapted vehicle used by a person who, in consequence of injury, disease or defect, was "wholly or almost wholly without the use of each of his legs".

8. That provision was repealed by virtue of s.92(1) of the Finance Act 1989. The section, as amended, currently provides as follows:

> *92. – (1) Notwithstanding anything to the contrary contained in any enactment, the Minister for Finance may, after consultation with the Minister for Health and the Minister for the Environment, make regulations providing for –*

(a) the repayment or the remission of excise duty and value-added tax and the remission of road tax in respect of a motor vehicle used by a severely and permanently disabled person –

(i) as a driver, where the disablement is of such a nature that the person concerned could not drive any vehicle unless it is specially constructed or adapted to take account of that disablement, or

(ii) as a passenger, where the vehicle has been specially constructed or adapted to take account of the passenger's disablement.

9. Section 92(2) deals with the content of the regulations to be made, should the Minister choose to implement the section. Paragraph (a) states that regulations **shall** provide for

> *"the criteria for eligibility for the remission of the taxes specified in subsection (1),* ***including such further medical criteria in relation to disabilities as may be considered necessary****."*

10. The words highlighted here are the main source of the dispute between the parties.

11. Pursuant to s.92(2)(b), (c), (d), (e) and (f), any regulations introduced are required to provide for:- the procedures for medical certification and appeals therefrom; the certification of vehicles; the amount of VAT and excise duty to be repayable; the maximum engine size of vehicles; and limits on the frequency of renewal of vehicles. Subparagraph (g) requires the regulations to provide for, in the case of disabled drivers, evidence that the vehicle is for personal use and evidence of driving capacity. The subsection then provides that the regulations "may" provide for such other matters as the Minister considers necessary or expedient for the purpose of giving effect to the section.

12. The Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations 1994, (S.I. 353/1994 as amended) define a disabled driver as meaning a severely and permanently disabled person who has the required medical certificate (provided for in Regulation 4) "and whose disablement is of such a nature that the person concerned could not drive a vehicle unless it is specially constructed or adapted to take account of that disablement".

13. A "disabled passenger" is a "severely and permanently disabled person" who has the required certificate, and for whom a vehicle has been specially constructed or adapted to take account of his or her disablement.

14. A "disabled person" means "a person who is severely and permanently disabled, fulfilling the medical criteria set out in Regulation 3".

15. Regulation 3 provides that for the purposes of s.92 of the Act, the eligibility on medical grounds of disabled persons who are severely and permanently disabled is to be assessed by reference to any one or more of the following medical criteria:

(a) Persons who are wholly or almost wholly without the use of both legs;

(b) Persons wholly without the use of one of their legs and almost wholly without the use of the other leg such that they are severely restricted as to movement of their lower limbs;

(c) Persons without both hands or without both arms;

(d) Persons without one or both legs;

(e) Persons wholly or almost wholly without the use of both hands or arms and wholly or almost wholly without the use of one leg;

(f) Persons having the medical condition of dwarfism and who have serious difficulties of movement of the lower limbs.

16. Regulation 4 stipulates that a claim by an individual for repayment or remission under the regulations shall be allowed only where the person has been provided with a medical certificate, referred to as a primary medical certificate, as evidence of qualifying disablement. Certificates must be signed by an appropriate medical officer within the public health system.

17. A refusal of the primary medical certificate can be appealed to the respondent Board, which is made up of medical doctors. The Board may issue an appropriate certificate if the appeal is successful. The evidence in the cases before the Court indicates that the assessment includes consideration of relevant reports and a physical examination by the members of the Board, in the course of which questions are asked and the person's medical history is reviewed.

18. The Board does not appear to have a practice of giving a narrative explanation for a refusal. An unsuccessful appellant receives a one-page document which states that the medical criteria for the Scheme are "*that the person must be severely and permanently disabled and come within at least one of the following categories*", the categories being those set out in Regulation 3. (The use of the word "and" should be noted here.) A circle is placed around each category considered to be potentially relevant to the claim, coupled with a letter signed by the doctor acting as chairperson stating that the relevant criteria have not been met.

19. It may be noted that in George's case the Court has the benefit of a letter written by a HSE doctor to George's physiotherapist in order to request a report for the purposes of the appeal. By way of explanation for the request, the letter states:

> *Normally the Primary Medical Certificate is awarded to those who have a permanent difficulty walking and reach grade 7 on the enclosed Hauser Ambulation Index. Walking at grade 7 is limited to a few steps with bilateral support and unable to walk 25 feet. They usually use a wheelchair for most activities."*

20. The appeal to the Board lodged on behalf of George was refused by letter dated the 29th January 2018 from the acting chairperson. It was stated that in the Board's opinion he did

not meet "the strict medical criteria laid down in the current regulations". Under a paragraph headed 'medical criteria', an accompanying document listed the six categories set out in Regulation 3. The potentially relevant categories (a), (b) and (e) were circled.

21. The appeal lodged on behalf of Alyssa was refused by letter dated the 23rd May 2018. Again, it was stated that the Board considered that she did not meet the criteria. The accompanying document, again, set out the six criteria of which (a) and (b) were circled.

The High Court

22. In their judicial review proceedings the appellants pleaded that the respondent Minister had, in making the regulations, unlawfully circumscribed the parameters of s.92 of the Act of 1989. They also pleaded that the Board had not given adequate reasons for its decisions. The applications were heard together in the High Court. O'Regan J. delivered judgment on the 31st July 2018 (see [2018] IEHC 465), refusing the claims for relief. She found that the statutory scheme permitted the Minister to make regulations and that he had not exercised his powers outside of the limitations provided in the statute. She also held that the appeal process had been fair and that sufficient reasons for the decision had been provided.

The Court of Appeal

23. The sole judgment in the Court of Appeal was delivered by Costello J. (see [2019] IECA 61). In approaching the first question – whether what had been done by Regulation 3 was within the Minister's powers under s.92 of the Act – she noted that the section was permissive and did not oblige the Minister to introduce regulations. It followed, in her view, that the Act did not confer a right to concessions on severely and permanently disabled persons.

24. If regulations were made, they had to provide for the criteria for eligibility. Further, they had to provide such "further" medical criteria in relation to disabilities as might be considered necessary. Costello J. then continued:

> *"This begs the question: further to what? In my opinion, it must be in relation to a disability suffered by a severely and permanently disabled person. The Act leaves to the Minister, after consultation with the Minister for Health and the Minister for the Environment, the discretion to determine what criteria are necessary. This means that the section permits the Minister to choose the sub set of severely and permanently disabled persons who may benefit from the concession on medical grounds."*

25. In that context, the submission on behalf of the appellants was summarised in the judgment as follows:

> *…So, the issue in this case is not the entitlement of the Minister to make regulations which confine the concession provided by s.92 to some severely and permanently disabled persons, while inevitably excluding other severely and permanently disabled persons from the benefit. The appellant's argument is that the regulations exclude "a significant cohort" of severely and permanently disabled*

persons from the benefit. They submit that this does not reflect the intention of the Oireachtas as expressed in s.92. While it was conceded that the section allowed for some limitation, it is submitted that Regulation 3 was unlawfully narrow. The essence of the appellants' case was that the limitation was not what was contemplated by the Oireachtas."

26. Costello J. then considered the judgments of this Court in *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297 and *Island Ferries Teoranta v. Minister for Communications* [2015] 3 I.R. 637. She relied, in particular, on the statement by Charleton J. in the latter case that where discretion is permitted as to the measures to be taken in subordinate legislation, then, provided that what is involved fits within the purpose and boundaries of proper delegation, it is not the function of any court on judicial review to substitute a different view. In this case, she found that the Oireachtas had delegated to the Minister a discretion as to the criteria to be adopted. Therefore, she considered that the exercise of that discretion was within his powers. She also found that he had not exercised it capriciously, arbitrarily or in a manner not contemplated by the Oireachtas.

27. The Court of Appeal rejected the argument that the result was arbitrary, unjust or partial. The criteria were based upon objective physical and medical facts and applied to all applicants for a certificate.

"It is not correct to say, as was argued by the appellants, that the regulations negate the intention of the enactment as a whole. There are unfortunately limits to claims on the public purse. The Oireachtas did not give the concession to all severely and permanently disabled persons. It gave the Minister power to decide to whom, amongst that body of people, the concession should be given. Inevitably, very deserving persons will fall outside the criteria established by the regulations."

28. Turning to the second limb of the appeal, Costello J. rejected the argument that the decisions in the appellants' cases had been "wholly devoid of reasons". She quoted the following passage from the judgment of Fennelly J. in *Mallak v. Minister for Justice* [2012] 3 I.R. 297:

"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of compliance with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

29. The Court of Appeal concluded that this was one such situation. The decision-making process had been fair, open and transparent. The appellants had been aware of the

criteria that required to be satisfied, had furnished all relevant reports, and had attended the appeal hearing. It was found to be important that the criteria created what was, in effect, a negative test. An applicant failed to meet them if able to use both legs, even to a limited extent, and that was the case with both of the appellants. Although the reasons had been briefly stated, the obligation to give reasons had been satisfied and neither appellant had said that they did not understand why their appeal had been disallowed.

Leave to appeal

30. Leave to appeal to this Court in respect of both issues in the case was granted by determinations dated the 9th October 2019 (see [2019] IESCDET 211 and [2019] IESCDET 213).

Submissions in the appeal

31. The appellants accept that there was no obligation to implement s.92 of the Act. They also accept that its implementation involved the delegation of limited legislative powers by the Oireachtas to the Minister. However, as discussed in *Cassidy v. The Minister for Industry and Commerce* [1978] 1 I.R. 297, *Minister for Industry and Commerce v. Hales* [1967] I.R. 50, *Kennedy v. Law Society of Ireland* [2002] 2 I.R. 458 and *Island Ferries Teoranta v. Minister for Communications, Marine and Natural Resources* [2015] 3 I.R. 637, that power must be exercised within the express or necessarily implied limitations of the delegation. It must not be exercised in such a manner as to negative the provisions and intention of the statute or to otherwise bring about a result not contemplated by the Oireachtas. It must also be exercised reasonably in the sense that the result is not manifestly arbitrary, unjust or partial, since it is to be presumed that the Oireachtas did not intend such a result.

32. The appellants also refer to the authorities on the constitutional reservation of legislative power to the Oireachtas pursuant to Article 15.2.1, and the concomitant confinement of delegated legislation to administrative, regulatory and technical matters in the implementation of principles and policies established by the Oireachtas. It is not suggested that s.92 of the Act is unconstitutional – rather, the argument is that the construction of the section by the Court of Appeal would render it a "Henry VIII" provision enabling the Minister to invade the power of the legislature.

33. Particular reference is made to *Cooke v. Walsh* [1984] I.R. 710, where a statutory power to make regulations was held to authorise exclusions from the benefit of services provided under the Health Act 1970 only to the extent contemplated by the Act itself.

34. It is submitted that the legislative intention behind s.92 was the provision of support to severely and permanently disabled persons, as drivers or passengers, and that the Act did not contemplate the narrowing of this category to the extent provided for in Regulation 3. The effect of the regulation is described as a radical alteration of the statutory concept of "severely and permanently disabled" and as negativing the intent of the Oireachtas, by excluding a significant cohort of permanently and severely disabled persons from entitlement to support. Further, it is said to be manifestly arbitrary, unjust and partial.

35. The second issue in the appeal is the adequacy of the reasons given by the respondent Board. Here, the case made by the appellants is that the reasons offered are inadequate, unintelligible, and do not establish that the decision makers directed their minds to the issues they were obliged to consider. There was no analysis of the medical evidence furnished on behalf of the appellants. The averment on affidavit by the Chairperson that "all relevant information" had been considered is insufficient for this purpose.

36. The respondents submit that the authorities relied upon by the appellants are not of assistance when the section in question is properly construed. They argue that it does not itself grant any concession, but empowers the Minister to make regulations providing for the grant of concessions to severely and permanently disabled persons who meet the criteria specified in such regulations. It cannot, therefore, be said that the section represents a policy choice by the Oireachtas that all persons who meet the criteria of being severely and permanently disabled should benefit.

37. This interpretation is said to be bolstered by the fact that the Oireachtas did not oblige the Minister to make any regulations, and by the use of the phrase "further medical criteria". The word "further" is taken to mean that the medical criteria will be additional to the statutory criterion of severe and permanent disability. It is for this reason that the letter from the Board to the unsuccessful claimants in this case states that a person must be severely and permanently disabled *and* meet the Regulation 3 criteria. To interpret the section as applying to all severely and permanently disabled persons would mean that there was no requirement for further criteria.

38. The respondents deny that the result is arbitrary, unjust or partial, arguing that the criteria are based on objective medical facts, and apply to everyone. The fact that some disabled people will not qualify does not in itself mean that the regulation is unfair. In any event, a regulation cannot be held to be *ultra vires* simply because the court considers it unfair, if the legislature intended to leave the choice of criteria to the Minister. This, it is submitted, distinguished the case from *Cooke v Walsh* [1984] I.R. 710 and similar cases – under s.92, no person is entitled as of right to benefit, and so the regulations do not deprive any persons of an entitlement.

39. It is submitted that the appellants' invocation of the concept of a "Henry VIII" clause, in discussing the Court of Appeal judgment, is inapposite. Such a clause authorises an administrative body to make delegated legislation which may amend primary legislation. The respondents contend that the Court of Appeal recognised clearly (in the passage quoted at paragraph 24 above) that the power under s.92 had to be exercised in accordance with the provisions of that section.

40. The respondents support the reasoning of the Court of Appeal in relation to the adequacy of the reasons given by the Board, reiterating that the decision-making process was fair and transparent. It was in the nature of the process that there was ultimately little to be offered by way of reasons, in that an applicant falls either within or outside the criteria, and both appellants were aware of the criteria throughout.

41. The respondent suggests that it is significant that there is no further appeal from the Board's decision. As it is the final step in the process, with no appellate body to consider the merits of the decision, it is not necessary to give detailed reasons. The appellants had sufficient information to be able to make a decision to take judicial review proceedings.

Discussion

42. There is no dispute between the parties as to the principles applicable to the interpretation of the statute and it is unnecessary to set out the authorities on that issue.

43. Equally, it is not necessary here to consider in any great detail the long line of authority dealing with Article 15.2.1º of the Constitution, which vests the sole and exclusive power of making laws in the Oireachtas. In broad terms, a statute may validly confer a power to make rules that give effect to the policies and principles of the legislation. If, however, the statute delegates a rule-making power that is so wide as to permit the delegate to trespass on the area reserved to the Oireachtas, the enabling provision will be invalid.

44. However, the appellants' complaint here is that the Minister has failed to give effect to the statute, rather than claiming that s.92 of the Finance Act 1989 is invalid on account of an over-broad delegation. In analysing this contention, the Court should act on the presumption that the legislature intended that, in exercising the powers conferred by the section, the Minister would not contravene the provisions of Article 15.2.1º (see, *inter alia*, *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317).

45. That being so, the question, as with any delegated legislation, is whether the terms of regulations are authorised by the Act. In the words of O'Higgins C.J. in *Cityview Press v. An Chomhairle Oiliúna* [1980] I.R. 381:

> *"In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power."*

46. Delegated legislation can clearly be *ultra vires* if it creates a regulatory scheme that goes beyond the principles and policies of the statute and thereby brings about something not intended by the Oireachtas. Equally, the legislative purpose may be wrongfully thwarted if the intended scope of operation of the statute is curtailed by reason of a failure to fulfil the statutory principles and policies. The classic example of the latter is *Cooke v. Walsh* [1984] I.R. 710, which concerned certain provisions of the Health Act 1970. The Act provided, in effect, that health boards were to make available in-patient and out-patient services for persons with full and limited eligibility. No charge could be imposed for out-patient services but s.53(2) empowered the Minister to make regulations providing for the

imposition of charges for in-patient services, in specified circumstances, on persons who did not have full eligibility, or on specified classes of such persons.

47. Section 72(1) of the Act empowered the Minister to make regulations regarding "the manner in which and the extent to which the board or boards shall make available services". Section 72(2) stated that such regulations might provide for any service being made available only to a particular class of the persons who have eligibility for that service. The Minister made regulations which excluded from entitlement to services persons who required treatment as a result of road traffic accidents, unless the health board in question was satisfied that such person had not received and was not entitled to receive damages in respect of their injuries.

48. The infant plaintiff in the case was injured in a road traffic accident. He had full eligibility under the Act, but was excluded under the terms of the regulations and was charged for hospital treatment. He therefore claimed the cost of the treatment as part of his case against the defendant. The latter, in turn, raised a special plea as to the validity of the regulations.

49. The Court held that the reference in s.72(1) to regulations "regarding the manner in which and the extent to which the board or boards shall make available services" must not be taken as meaning that such regulations could remove, reduce or otherwise alter obligations imposed on the boards by the Act. To attach such a meaning would be to attribute to the Oireachtas, unnecessarily, an intention to delegate in the field of lawmaking in a manner not contemplated or permitted by the Constitution. Accordingly, the words must be taken as applying only to standards, periods, places, personnel or such other factors which might indicate the nature and quality of the services to be made available.

50. Similarly, s.72(2) had to be interpreted in such a way as to "absolve the National Parliament from any intention to delegate its exclusive power of making or changing the laws". That entailed reading it as authorising only exclusions which the Act itself contemplated. The Act did not authorise the exclusion of a category of persons who had full eligibility and full statutory entitlement to avail of services without charge.

Conclusions

51. Returning to s.92 of the Finance Act 1989, it is clear that in the first instance it was left to the discretion of the Minister (having consulted with two other relevant departments) to decide whether or not a scheme of concessions should be introduced. The Minister could not have been compelled to introduce the scheme, for the reasons discussed in *The State (Sheehan) v. The Government of Ireland* [1987] I.R. 550. However, it would not be correct to conclude from that proposition that the section itself confers no rights upon severely and permanently disabled persons. Once the Minister exercised his power to make regulations, he was bound by the terms of the statutory provision. Any person having the appropriate *locus standi* may argue that he or she is entitled to the benefit of the section, having regard to the principles and policies therein, and to challenge the Minister's interpretation of it.

52. In considering what those policies and principles are, it may be helpful to point out that in the first instance the section is concerned with vehicles, rather than people. The scheme will apply only to vehicles that are specially constructed or adapted to take account of the disablement of the applicant. The purpose is not, therefore, to provide a general financial grant to assist disabled persons, but to facilitate severely and permanently disabled persons in the use of a particular means of transport.

53. In the case of drivers, the section envisages severely and permanently disabled persons who can drive a vehicle, but only if the vehicle is specially constructed or adapted to take account of their particular disablement. The concessions will be available if the vehicle is for the personal use of the applicant driver. The provision in respect of disabled persons carried as passengers differs, in that the Act does not restrict its operation to severely and permanently disabled persons who could not be carried as passengers except in vehicles that have been specially constructed or adapted. Nor is it necessary that the vehicle should be intended only for the transport of a particular disabled person, but only that it has in fact been specially constructed or adapted to take account of his or her disablement.

54. The objective of the provision, if implemented, is therefore to facilitate the transport of a potential class of beneficiaries, being persons whose severe and permanent disability is of a kind that makes expenditure on construction or adaptation of a vehicle either essential, in the case of drivers, or rationally justifiable, in the case of passengers.

55. In neither case does the Act refer to the cause of the disability as having any relevance. The question then is whether the power of the Minister to make regulations under s.92(a) "including such further medical criteria in relation to disabilities as may be considered necessary" permits the designation of a sub-set of severely and permanently disabled persons who will be eligible for the concessions to the exclusion of other severely and permanently disabled persons.

56. The Court of Appeal considered that the words meant that any criteria adopted, by reference to the cause would be "further" to the general classification of severe and permanent disability referred to in the section, and therefore permitted the selection of a smaller category of persons, by reference to medical criteria, within that classification. On this view, the subsection amounted to the conferral of a discretion on the Minister to choose who, among the body of severely and permanently disabled persons, should benefit. Counsel for the respondents is correct in pointing out that this understanding of the legislation is embodied in the letter issued by the Board to the appellants, with its statement that an applicant must be severely and permanently disabled *and* come within one or more of the categories listed.

57. I respectfully disagree with this analysis.

58. The first point to make here is that the "further" medical criteria are to be provided by the Minister only if considered "necessary". There is nothing within the terms of the section either to suggest that a narrowing-down of the potential class of beneficiaries described

therein could in itself be considered necessary, or to provide any guidance, by way of policy or principle, by reference to which the Minister could carry out such an exercise. To construe the provision as permitting the Minister to make what could, in effect, amount to a personal choice as to the qualifying conditions would be to fall foul of the principles identified in the authorities on Article 15.2 and delegated legislation.

59. I would emphasise here the absence of any reference in the section to the nature or cause of any particular form of severe and permanent disability, or any suggestion that it would be permissible to discriminate between persons suffering the same level of restriction in terms of mobility but whose disabilities stem from different causes. It would, for example, be clearly *ultra vires* the Minister to make regulations prescribing that only persons suffering from a specified medical condition such as cerebral palsy could qualify – not just because this could be seen as arbitrary and unjust, but also because such a discriminatory distinction could not be seen as "necessary" for the purpose of giving effect to the section.

60. Indeed, one would have to ask what the purpose of the legislature might be, if it permitted such discrimination. The Court of Appeal referred in this context to the need to protect "the public purse". However, one might observe that the protection of public monies is already provided for by giving the Minister a discretion, firstly, as to whether or not the scheme of concessions should be introduced at all; secondly, to prescribe the kind of vehicles covered; and, thirdly, to fix the amounts of tax that will be repayable.

61. However, it is perhaps more relevant here to note that there is nothing in the section to suggest that the cost of the scheme is relevant to the formulation of medical criteria, and to authorise its consideration should such criteria be thought necessary. In those circumstances, if the motivation behind the criteria adopted was the saving of public money by reducing the numbers of people entitled to benefit (and it should be stressed that there is no evidence that such was in fact the motivation) it would not be authorised by the section. The analogy here would be with the harbour charges imposed by the Minister for Communications, Marine and Natural Resources in *Island Ferries*. In that case the Minister was acting under a power to fix rates, tolls and other charges for harbour facilities pursuant to the Fishery Harbour Centres Act 1968. In brief, this Court upheld the finding of the High Court that the purpose behind the figure set by the Minister (to make up a deficit in a fund for which he had responsibility under the Act) was not authorised by the terms of the Act.

62. In considering the scope of the Minister's power to introduce, if necessary, "further medical criteria" it is in my view essential to keep in mind the purpose of the section. The legislative intent of s.92 is, obviously, to assist with the transport of severely and permanently disabled persons whose disability is such as to cause them difficulty (in the case of drivers, insurmountable difficulty) in using unadapted vehicles. In this context it seems to me that if "further medical criteria" are set out in the regulations, they must be such as can reasonably be described as necessary in relation to a scheme dealing with the construction and adaptation of vehicles.

63. Looking again at the categories set out in Regulation 3, it is difficult to avoid the impression that the focus of the Minister was on drivers, with the consequence that sight may have been lost of the needs of disabled passengers. Each of the conditions identified in the Regulation is likely to necessitate the adaptation of the driver's controls in a standard car, and it can certainly be said that, so far as they go, they come within the policy of the statute. However, they may be of limited relevance to the type of adaptation of a vehicle required for use by a disabled passenger, whose needs are more likely to involve issues about, for example, access to the interior of the car or the transport of a wheelchair or other specialised equipment.

64. In the two instant cases, it bears repeating that the undisputed evidence is that Alyssa can walk only short distances, and only with the aid of special equipment, while George can (sometimes) walk slightly longer distances but cannot walk safely outside his home because of his risk of falling. It seems clear enough that the Board considered neither of the appellants to be wholly or "almost wholly" without the use of one or both legs. There is no explanation as to the medical understanding of what it means to be "almost wholly" without the use of both legs.

65. Assuming, for the purposes of this discussion, that the Board applied the Hauser Ambulation Index referred to in the letter to George's physiotherapist (although the Court does not have any evidence on this point from the Board), it would seem that the appellants failed because Alyssa could walk more than 25 steps with bilateral support and George could (on a given day) walk 100 metres before needing to rest. The first point to make here is that the letter of decision does not explain this. A layperson is left, therefore, with no explanation as to the Board's thinking. It cannot fairly be said that that the Index in question is a matter of common knowledge.

66. A second issue might arise if the Board does, as a matter of practice, rely upon the Index or any similar classificatory aid. The problem here would be that the Board might be said to have added a further level of criteria to that set out in the regulations, without any legislative authority for so doing. However, in the absence of any sufficient evidence or argument on the point it would not be desirable to make any finding in this regard.

67. The failure to explain the decision could in my view be sufficient to dispose of the case, having regard to the considerations identified in *Mallak*. However, the decisions also raise a more fundamental question so far as the substantive issue relating to the regulations is concerned – in the context of a statutory scheme of assistance in respect of the *adaptation of vehicles* to the needs of the seriously and permanently disabled, what is the relevance of the ability to walk 25 steps with a walker, or to walk 100 metres before needing to rest? The undisputed evidence establishes that the individuals concerned cannot, as a matter of practical reality, get around outside their homes without a wheelchair, and it is accepted that the wheelchairs will be necessary for their mobility on a permanent basis. If it is not suggested that this level of mobility makes the use of motorised transport unnecessary, the key issue in terms of the statute is whether there is a need to adapt such transport to take account of the particular forms of disablement.

68. These considerations, in the circumstances of this case, go well beyond the question of fairness and are directly relevant to the legal adequacy of the regulations. The issue can be put this way – the regulations exclude some persons who have a severe and permanent disability that greatly limits their mobility and that creates a need for the adaptation of a car used for their transport. Given the terms and intent of s.92, I cannot see that this result was within the contemplation of the legislature, or that it comes within the scope of the Minister's power to formulate "necessary" criteria for the implementation of the section.

69. In the circumstances I would allow the appeals. However, I would not hold the regulation to be invalid in circumstances where the problem is not with what Regulation 3 sets out, but with its under-inclusive nature. I would prefer in each of these appeals to quash the refusal of the Board to grant a medical certificate, and to grant a declaration that, in applying the criteria set out in Regulation 3 to the appellants, the respondents failed to vindicate their rights under s.92 of the Finance Act 1989 as amended.