

Disqualification Under the Totting Up Provisions and Arguments of Exceptional Hardship

“Road traffic legislation is considerable, technical and complex.... With a plethora of offences created”

Smith and Hogan, *Criminal Law*, 12th Edition

Disqualification under the totting up provisions is an area of the criminal law that affects large numbers of the population. For many it will be their only experience of this branch of the justice system and they may find the disparate band of provisions and principles bewildering.

For a significant number of ‘totters’ their driving licence is a necessity in their everyday lives, vital to them in matters of work, health and family. It is for this constituency that the Road Traffic Offenders Act 1988 (The Act) allows for the possibility that the mandatory six-month ban may be reduced or withheld altogether.

In 2009 the figure for drivers disqualified upon accumulating 12 or more penalty points stood at 31,110. At least one third of these made an application to reduce their disqualification period due to mitigating circumstances, “exceptional hardship” being the argument most commonly presented.

What follows is an overview of some of the practical considerations that arise where a totting up disqualification looms as a possible sanction for a defendant.

Step 1 – Avoid reaching the 12 Point threshold:

Clearly the most desirable starting point is to avoid reaching the 12 point threshold for a mandatory disqualification under the totting up provisions. In many cases the offender may only be on the cusp of reaching 12 points: in such circumstances an effective plea in mitigation may be the key to avoiding a totting up ban.

Take for example an hypothetical defendant who has 6 penalty points on his/her licence for an offence of driving without insurance in 2010. This defendant comes before the Court in

2011 for sentence, having being found guilty of speeding. The facts of the new offence place it in the Sentencing Guideline suggesting an endorsement of between 4 and 6 penalty points. Given that both offences have been committed within a three-year period, the possibility of the mandatory disqualification arises should the defendant receive 6 penalty points.

It is at this time that the only opportunity to mitigate regarding the facts of the offence arises, this area of mitigation being specifically precluded in law from being used as part of any argument on 'mitigating circumstances' relating to the reduction of a mandatory disqualification.

It is also at this point that the defendant's previous convictions are of relevance. S31 of The Act requires the Court to look at the defendant's licence before sentencing and, in the normal way, to treat previous convictions for similar offences as a potential aggravating factor. But here it is submitted there is the potential for some confusion. Take our defendant who stands before the Court for speeding: it is right to say that he/she has a previous conviction for a road traffic offence, namely driving without insurance but given that this is an offence where a person has omitted to perform an act required of them, it can arguably be distinguished from the speeding offence that is now before the Court – the latter being of a sufficiently different nature not to be aggravated by the former.

Moreover the very presence of the totting up provisions provides a powerful argument to suggest that the aggravating effect of previous convictions ought to be minimal. The fact that Parliament has enacted a scheme where frequent low-level offenders face a threshold above which they face automatic disqualification suggests that the sentencing Court should focus primarily on the gravity of the offence before it and not the overall picture of offending. This is addressed by the operation of the consequences of the accumulation of points on the licence.

Therefore in our example of the hypothetical speeder, one would hope to avoid reaching a totting up disqualification altogether.

Step 2 –The possibility of Discretionary Disqualification:

A defendant before the Court for one offence cannot receive a discretionary disqualification *and* a points endorsement at the same time. This means that a defendant cannot face a 'double disqualification' . This can lead to the rather unusual scenario of a defendant before the Court seeking to receive a discretionary disqualification instead of a points endorsement.

Once again let us turn to our defendant who faces sentence for a speeding offence. As an alternative to the imposition of 4 to 6 penalty points, the same Sentencing Guideline proposes the imposition of a discretionary disqualification of 7-28 days.

In these circumstances the defendant may prefer a short discretionary disqualification that attracts no penalty points to the possibility of a points endorsement and consequent mandatory 6 month ban (subject to the possibility of an exceptional hardship application).

The ultimate discretion as to which course to take remains with the Justices – *Jones v DPP* [2001] R.T.R. 80 - in making their decision they may take into account the record of the defendant should they wish. To this extent the exercise of the discretionary disqualification remains something upon which the defence has only a limited influence.

Step 3 – Grounds for an Exceptional Hardship argument:

If the defendant is sentenced in such a way that his licence carries twelve or more penalty points, he/she becomes a 'totter' and falls to be disqualified unless there are mitigating circumstances not prohibited from consideration under 35(4) of The Act.

Under these provisions neither the facts of the offence nor ordinary hardship can be taken into account as a mitigating feature. Exceptional hardship can be taken into account and so the distinction between 'hardship' and 'exceptional hardship' becomes important.

The Courts tend to find that the hardship must be "something out of the ordinary". For example in *Brennan v McKay* (1996) 1997 S.L.T 603 a taxi driver faced disqualification as a totter following a conviction for speeding. He submitted that there was the possibility of losing his job and suffering financial difficulties. The Court accepted that the appellant would suffer hardship but did not believe that this hardship would be exceptional. Therefore the mandatory ban remained.

However this example cannot be said to have laid down any particular rules regarding the application of this principle. Indeed it would seem that Parliament has intentionally chosen this imprecise concept of exceptional hardship so as to give the Magistrates' Court a broad scope to assess applications. This tacitly empowers advocates to make submissions over diverse and innovative areas, drawing together the strands in such a way that the 'exceptional' threshold is passed.

While it may not be enough in itself that a defendant faces losing his job, the implications of this may increase the strength of the argument: if, for example, the defendant would thereby face the prospect of bankruptcy or defaulting on a mortgage, the hardship may be the greater.

Further, as *Cornwall v Coke* 1976 Crim L.R 519 makes clear, the Courts have a duty to assess the implications of a disqualification upon persons other than the defendant, bearing in mind that such persons are effectively innocent and will be punished irrespective of this. This can be a crucial factor in an exceptional hardship argument.

Step 4 - Making an Exceptional Hardship argument:

The procedure for making an exceptional hardship argument varies from Court to Court. In some Courts the defendant is required to take the oath and give evidence of their circumstances before the tribunal. They can be cross-examined by the Crown about their evidence if the prosecutor so wishes, though in practice this is rare.

However in other Courts the procedure is for the advocate to present the evidence for the argument in their submissions and then the defendant is asked on oath to confirm the truth of those submissions.

In both scenarios it is important that comprehensive evidence is presented of the exceptional hardship that the defendant faces. Defence witnesses other than the defendant can be called and exhibits may be put before the Court.

Step 5 – Possible outcomes:

A) If the exceptional hardship argument is successful, the sentencing Court can either reduce the period of mandatory disqualification or make no disqualification order at all.

It is notable that where the application is successful on an appeal to the Crown Court, the Court is entitled to refuse to make a defendant's costs order. This principle arises from the case of *R. (on the application of Pluckrose) v Snaresbrook Crown Court*, where it was established that the finding by a tribunal of exceptional hardship is an act of mercy and therefore the Court has a discretion not to award costs. However, it is submitted that a costs application should be made in the normal way.

If the argument is successful the defendant should be informed that the successful grounds of the argument are precluded from being put before the Court again for the next three years. The Court Clerk should note the grounds for allowing the argument so that they can be checked at any future hearings.

B) If the exceptional hardship application is unsuccessful, the defendant will be banned for the minimum mandatory period of six months. Some consolation can be found in the fact that the totting up ban has the effect of “wiping the slate clean”. In other words, once the ban has ended the defendant will have all of the penalty points that resulted in the disqualification removed from their licence.

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