

Neutral Citation Number: [2013] EWHC 2360 (Admin)

CO/7175/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 18 June 2013

B e f o r e:

MRS JUSTICE CARR

Between:

CANTERBURY CITY COUNCIL_

Appellant

v

ALI_

Respondent

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Mr J Bishop (instructed by Sharpe Pritchard) appeared on behalf of the **Appellant**
The **defendant** did not attend and was not represented

J U D G M E N T
(As approved by the Court)

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Introduction

1. MRS JUSTICE CARR: This is an appeal by way of case stated brought by Canterbury City Council against the decision of the lay magistrates sitting at Canterbury Magistrates' Court on 9 March 2012. By that decision, the Magistrates allowed the appeal of the respondent, Mr Monshad Ali, against the council's decision of 6 October 2011 to revoke his Hackney Carriage Licence, pursuant to section 61 of the Local Government (Miscellaneous Provisions Act) 1976 ("the Act"). The revocation was based on grounds of public safety. Mr Ali had been involved in a head-on collision involving another taxi in the early hours of the morning of 18 September 2011.
2. On his own case, Mr Ali had been overtaking another vehicle and was on the wrong side of the road at the time of the accident. Photographs of the scene of the accident are and were available to the Magistrates.
3. The Council also challenges by way of case stated the subsequent decision of a differently constituted bench of lay magistrates, again sitting at Canterbury Magistrates' Court, this time on 2 April 2012, to order the Council to pay costs to the respondent in a sum of just over £4,000.
4. The Council was represented both in this court and below by Mr John Bishop. Mr Ali was neither represented nor present at the hearing before me. He was, however, represented and present at the hearing before the Magistrates.
5. I have been informed that his solicitors have been informed by the court of today's hearing date and Mr Bishop has informed me that all of the Council's papers have also been served on Mr Ali's solicitors. The hearing has in those circumstances proceeded. The facts as found by the Magistrates in the case stated I will shortly set out. It is, however, important to record that those facts are either not entirely correct, or materially correct, or complete. I will identify material errors as I go along.

The Case Stated and Relevant Factual Background

6. The Magistrates in their case stated state that the Council licenses Hackney Carriage and private hire taxi drivers pursuant to the 1976 Act, and that section 61 sub-paragraph 2(b) allows revocation of licences with immediate effect if this appears to be in the interests of public safety, and a statement is given to the driver and an explanation why. The Council has policies and procedures including a policy that revocation should be dealt with at an oral hearing of a licensing committee at which the driver can attend.
7. Internal guidance gives the committee discretion as to whether to revoke a licence on the grounds of public safety, so held the Magistrates.
8. In fact, that is not correct and on my reading of the relevant policy and rules, there is in fact no discretion not to disbar if it is the case, as here, that the Council believes that the licence holder is not a fit and proper person. The Magistrates state in their case that Mr Ali held a UK driving licence since 1990 and that it was a clean driving licence. He had licensed for some 8 years as a private hire and Hackney carriage user.

9. The Magistrates in their case stated refer to a prior incident, this time on 24 April 2009, when a passenger had complained of being locked in Mr Ali's taxi and being verbally abused by him. This had led to a suspension in 2009 for some 3 months, followed by a requirement for retraining. The respondent had been provided with the full reasons in relation to this incident in a previous letter.
10. I record, however, that it was common ground at the hearing below that this previous incident was in fact irrelevant to the issues before the Magistrates because the decision, as I have already identified, to revoke was taken in relation to the accident of 18 September 2011 and that alone.
11. The Magistrates went on to state in relation to the incident of 18 September that, as was the case, Mr Ali had been involved in a road traffic accident on the A28 in Chartham, Canterbury. He had been driving a licensed taxi, himself having no passengers. He collided with another licensed taxi, driven by a Mr Correr carrying three passengers. The respondent was alleged to have overtaken another vehicle on a bend and collided head on with Mr Correr's vehicle. Mr Korra and his passengers received slight injuries. Mr Ali himself was not injured. Mr Korra took photographs of the scene. The Council took statements from Mr Korra and his passengers and compiled a report. The Magistrates record in their case stated that police attended the scene. That appears to be correct. It is also stated that the police decided not to bring a prosecution. However, it was common ground as I understand it, as a result of objection taken by Mr Bishop at the hearing below, that it could not be said that the police had decide not prosecute. The reasons for the lack of prosecution were in fact unknown.
12. The Magistrates went on to deal with an incident on 21 September 2011, namely, the suspension of the respondent's licence on the ground that his fitness was being called into question, that suspension being with a view to a hearing before a Licensing Committee. The Magistrates then referred to a report prepared on behalf of the Council attaching the statements of Mr Korra and his passengers. That report also went on to describe the previous incidents of April 2009, and also attached statements from 2011 dealing with other unidentified occasions. Again, I record, although this is not apparent from the case stated by the Magistrates, that it was agreed that these matters were irrelevant in relation to the revocation, the subject of the appeal.
13. The report prepared by the Council advised that the committee had to have consideration to any representations by Mr Ali, and that the Committee had to ensure so far as possible that any hearing was fair to both the licence holder and those complaining of his conduct; and that the committee had to consider the effect on the right to family and private life, including Mr Ali's right to make a living.
14. On 6 October 2011, it is recorded in the case stated that the Council's Commercial Health Manager, acting on the advice of the Council's Legal Department, revoked Mr Ali's licence on the ground that he was not a fit and proper person to hold a licence. As I have said, the sole reason given was public safety and the letter referred to the accident on 18 September 2011.

15. Mr Ali was advised of his right of appeal and the letter was sent in purported compliance with section 61 of the 1976 Act. The case stated goes on to refer to a lack of record of reasoning by the Council's Committee. However, as a matter of fact, as I have made clear, there was never a committee decision or a committee meeting to reach the decision. The reference to a lack of record is therefore somewhat misleading. The revocation was dealt with by Council officers under Section 61 of the Act and delegated powers. The case stated went on to record that an incorrect letter on a date unknown was sent to Mr Ali and it concluded with the sentence that the Council did not follow its own policies and procedures on its decision to revoke.
16. As to the Magistrates' conclusion on the appeal, the case stated bears some consideration. I should, however, record that it is notable that the judgment delivered at the end of the hearing before the Magistrates itself, was extremely short. Both counsel present at the time appear to have a similar note which says roughly the following:

"Ali had his licence revoked for reason of public safety. Had the matter been taken to the full Licensing Committee they would have had to give reasons but we have been given no record of the decision, nor how it was reached. Ali was not given any indication of it either.

"We suspect that the decision was based in part on witnesses that were not tested in cross-examination and to which we have attached little weight because they were unsigned. The appeal is allowed."
17. That reasoning is considerably expanded upon in the case stated. In summary, the case stated prepared by the Magistrates concluded as follows on the substantive appeal:
 - 1) That the Council had breached its own procedures and policy and the rules of natural justice in failing to give Mr Ali the opportunity to appear at an oral hearing before the licencing committee.
 - 2) That the Council had acted unreasonably in relying on unsigned and unchallenged witness statements about previous alleged bad driving.
 - 3) That the Council had placed undue weight on the evidence of the accident on 18 September 2011, which had not led to any criminal prosecution despite police attendance and given that Mr Ali held a clean driving licence.
 - 4) That the Council in breach of its own procedures and policy and the rules of natural justice failed to give reasons for its decision.

The Magistrates also concluded, according to the case stated, that there was insufficient evidence of dangerous driving on 18 September 2011 in all of the circumstances, and that:

"No reasonable tribunal could have concluded that the respondent had driven dangerously and was not therefore a fit person to hold a licence".

Secondly, that there was therefore insufficient reliable evidence that Mr Ali was a danger to public safety and not a fit person to hold a licence. Further, no reasonable tribunal could have reached that decision on the disclosed evidence having regard to its own guidance and in the absence of Mr Ali being convicted of any motoring offence.

18. As to costs, according to the case stated the Magistrates concluded that they have a broad discretion to make an order for costs. In general costs should follow the event but there were circumstances when that would not be just and reasonable. Costs should not be awarded against the Council if it had acted reasonably, properly and honestly and on grounds that were sound; but the Council had not acted reasonably in revoking Mr Ali's licence without giving him an opportunity to put his case forward and to challenge the evidence against him. There are some further errors in relation to the magistrate's recording of the facts and/or law in relation to the position on costs but I will identify them later so far as they may be relevant.

Scope of the appeal

19. This is an appeal by way of case stated. In the case put before me at the end, there are two questions set for my opinion. The questions read as follows:
 - "1. Did we err in law in both the decision to allow the appeal and the decision to order the appellants to pay costs by basing our decision on an adverse review of the appellant's decision-making process, rather than looking at the case anew as to whether Mr Ali was a fit and proper person to hold a licence?
 - "2. Did we err in law in both the decision to allow the appeal and the decision to order the appellant to pay Mr Ali's costs by taking into account the appellant's decision-making process and looking at the case anew as to whether Mr Ali was a fit and proper person to hold a licence?"
20. A moment's consideration reveals that these two questions are mutually inconsistent. The second one, as I am informed by Mr Bishop, appeared in a second draft not the first draft. It seems to me that it may well have been included in error or as part of a draft which was not completed or mistakenly still included.
21. In my judgment, the only question for this court must be the first one. That is the one and only question for the opinion of this court. Moreover, if I had to decide what the Magistrates had in fact done on the face of their case as stated, the burden of their reasoning (although not entirely clear) is that the Magistrates were reviewing the appellant's decision as to opposed to looking at the case anew. It is clear from the magistrate's reasons that their focus was on the approach of the Council and perceived procedural deficiencies rather than a substantive review or rehearing of the case anew.

22. In those circumstances, my conclusion that it is the first question that falls for me to answer is fortified by the facts as they appear to me from the face of the case stated.
23. The appellant council's case is short and simple. It is submitted that the magistrate's decision was based on an adverse but irrelevant view of the council's procedures with the result that the Magistrates failed to address the correct issue. Secondly, it is said that insofar as the Magistrates considered the facts, they applied the wrong burden and the wrong standard of proof.

The Law

24. There are three fundamental submissions of law which lie at the heart of this appeal. The first is that the proceedings before the Magistrate should have been by way of a rehearing. I am satisfied by reference to the case of Sagnata Investments Limited v Norwich Corporation [1971] 2 QB 614 at 636 G and 637 A and B per Lord Justice Edmund Davies' judgment, that the correct approach of the Magistrates would be, and should have been, proceedings by way of a rehearing. Of direct additional relevance is the authority of John John McCool v Rushcliffe Borough Council [1998] EWHC (Admin) 695 at paragraph 8, per the Lord Chief Justice Bingham, where he said this:

"It is accepted that the role of the justices on the hearing of the complaint was to form their own independent judgment of the question at issue and not simply review the decision of the borough Council."

25. The second proposition is that the onus of proof, the burden of proof, was at all material times on Mr Ali not the Council and the standard of proof was the civil standard. Again, in McCool it is clear from in particular paragraphs 21 and 23 of the Lord Chief Justice's judgment that the onus of establishing on the balance of probabilities that he was a fit and proper person lay on Mr Ali here. The onus on the Council was to do no more than by reference to the civil standard of proof rebut that proposition, even if the substance of what the Council was seeking to allege amounted to a criminal offence.
26. Thirdly, the proper role of the justices was to make the decision anew and not to base their decision on an adverse review of the approach of the local authority. For that proposition reliance is placed, and I accept the proposition, reliance is placed on R (on application of South Northamptonshire Council) v Towcester Magistrates' Court [2008] EWHC 381 (Admin) at paragraphs 27, 30, 31 and 35.
27. I have asked Mr Bishop and he would in any event no doubt have drawn to my attention whether there are any authorities which contradict these three basic fundamental propositions and he has informed me that he is not aware of any. Moreover, no other authorities were produced on behalf of Mr Ali to the contrary at the Magistrates' hearing below. I am told that it was essentially common ground before the Magistrates that the function of the Magistrates was to carry out a hearing de novo.
28. The correct test on the facts as I see them was for the magistrate this: has Mr Ali shown on a balance of probabilities that he is a fit and proper person to hold a taxi licence and were the Magistrates therefore satisfied that the council's officers were wrong? If the Magistrates failed to apply this test to the facts then in my judgment they erred in law.

29. I should say that the authorities do consider the question of the extent to which the original authority or licencing authority's decision should be taken into account by the Magistrates or a tribunal in the Magistrates' position. It is clear that in appropriate circumstances considerable weight should be given to the original decision.
30. It seems to me that in this case the relevance of perceived procedural errors on the part of the Council, if there were any, were that they might go to the weight to be attached by the Magistrates to the original decision. However, in my judgment procedural errors in the Council's procedure were not a proper basis by themselves for allowing the appeal.

Findings

31. Against that expose of the law, I turn to my findings on the substantive issue on this appeal. In my judgment, it is clear from the case stated that the Magistrates made their decision partially, if not primarily, on the basis of their negative view of the Council's performance procedurally.
32. The case stated at paragraph 2 is notable for the fact that only sub-paragraphs (e) and (h) deal with the index facts relating to the accident on the 18 September 2011. Equally, from paragraph 6 of the case stated, only sub-paragraphs (i) and (j) deal with the facts relating to the incident on 18 September 2011. There is no material before me upon which I could conclude that there was consideration by the Magistrates properly, de novo, of this matter. There are no real findings of fact on the evidence. I note in passing, for example, that Mr Ali gave evidence himself and was cross-examined. Where the Magistrates do allude to evidential matters, such findings as they may be making are far from clear.
33. There is no material before me to suggest that the Magistrates applied what I have found to be the correct test to such facts as they did find. Such reference to the test as they did apply for example, reference to "no reasonable tribunal being able to make a certain finding", is simply not an application of the right test. As I have said, the Magistrates should have fairly and squarely posed themselves the question of whether or not Mr Ali had shown on a balance of probabilities he was a fit and proper person. Mr Bishop, for the Council, submits that the magistrates' finding that no reasonable tribunal could have found Mr Ali not to be a fit and proper person was perverse. I do not find it necessary to resolve that question here.
34. Moreover, the wording of the case stated, and in particular the wording of paragraph 6 sub-paragraph (i) and 6 sub-paragraph (j), suggests that the Magistrates were under the impression that the burden lay on the Council to prove that Mr Ali was driving dangerously. As I have already indicated, that is not the correct position in law.
35. It follows that in my judgment the Magistrates below erred in law in basing their decision on an adverse review of the council's decision rather than looking at the case anew. The case stated must be answered in the affirmative. It follows from that that the appeal on costs simply follows the results on the appeal on the substantive point and the costs order made by the Magistrates must also fall away.

36. In conclusion, I answer the question posed for this court as I have identified it in the affirmative. In my judgment the error was material. In my judgment justice to all concerned requires a fair hearing before a fresh tribunal applying the proper test. I will allow the appeal and I will remit this matter to a differently constituted bench for a rehearing. Thank you very much, Mr Bishop.
- 37.
38. MR BISHOP: My Lady, I feel bound to mention the question of costs, if only to be able to take back an answer to those who instruct.
39. MRS JUSTICE CARR: Yes. I have thought about costs. Let me tell you what my thinking is and you can share your thoughts with me. Of course you have been successful on appeal. On the other hand, Mr Ali has not contributed to, or caused any additional cost in the sense that while he has not conceded the appeal he has not put forward a positive challenge to it.
40. I also understand very fairly, if I may say so Mr Bishop, Mr Ali did not, as it were, encourage the Magistrates to take the course which they have. I understand that Mr Ali placed reliance on the procedural points, who would not, but he did not suggest that the Magistrates could use those procedural points as a basis for allowing the appeal. He did not dissent from your submission on the law to the Magistrates that they should be hearing this de novo.
41. In those circumstances, I am hesitant to make a cost order against Mr Ali because he is not responsible in a sense for the Magistrates erring in law. Although he has not conceded the point he appears now, at least potentially, to be acting in person. He has not prolonged matters or exacerbated them. Now, tell me if I am being unfair to your clients?
42. MR BISHOP: My Lady, no. Funnily enough, I looked at my notes from Stones' to see if there was anything on the point that your Ladyship mentioned, but I could not find anything.
43. MRS JUSTICE CARR: Yes, all right.
44. MR BISHOP: I did see a passage, and I can show your Ladyship if need be, that says that although courts in the past have been reluctant to prosecute absent respondents, that has changed somewhat in recent years; in view of the fact that in a sense Mr Ali by taking the point in the first place, or taking the case in the Magistrates' started the ball rolling, as it were but beyond that I cannot take it any further and I accept what your Ladyship says.
45. MRS JUSTICE CARR: He was privately paying, was he, before the Magistrates?
46. MR BISHOP: Yes.
47. MRS JUSTICE CARR: Does your client still know if he is working at the moment?

48. MR BISHOP: We do not know.
49. MRS JUSTICE CARR: You just do not know.
50. MR BISHOP: No, and I am bound to say, my Lady, I accept your point that he cannot be perhaps responsible for the line that the justices took.
51. MRS JUSTICE CARR: Is there a statement of costs for today?
52. MR BISHOP: There is not, in fact, in any case.
53. MRS JUSTICE CARR: So I could not summarily assess --
54. MR BISHOP: -- no --
55. MRS JUSTICE CARR: -- which I ought to be doing for a hearing that lasts for less than a day?
56. MR BISHOP: Yes, with great respect.
57. MRS JUSTICE CARR: I have sympathy for both sides, actually, on this point. I do not think anybody is to blame for what has happened. I have reached the view that there was a clear misdirection and a malfunction in terms of what the Magistrates were doing, and I think I am inclined to make no order for costs in all the circumstances.
58. MR BISHOP: Very well.
59. MRS JUSTICE CARR: Is there anything else that we can address. I did not canvas with you whether or not we should have a differently constituted bench but it seems to me this was not a particularly long hearing, there is no great inconvenience in convening a new bench. I do not think we are going to be losing a great deal of knowledge or understanding of the case and it is easier and cleaner if possible.
60. MR BISHOP: My Lady, yes.
61. MRS JUSTICE CARR: It is clearly an important matter for Mr Ali. It is an important matter for the public and your client.
62. MR BISHOP: Yes. Well, you know, in fact I do not think -- if anything, it is virtually impossible to get an identical bench back again anyway.
63. MRS JUSTICE CARR: Quite, quite, quite. I have not ordered that nobody on the original bench should sit because my order does allow a different combination that could include two of the original Magistrates. Perhaps I should make it clear that I think given the brevity of the case below and therefore the lack of inconvenience that the new bench should be entirely fresh.
64. MR BISHOP: Very well.

65. MRS JUSTICE CARR: I think that is easier, so not just differently constituted, but an entirely fresh constitution.
66. MR BISHOP: Very well.
67. MRS JUSTICE CARR: Is there anything else that I can deal with or that I should have dealt with, that I have not?
68. MR BISHOP: Not that I can think of, my Lady.
69. MRS JUSTICE CARR: No, well thank you very much for your assistance.