CO/1922/2015

Neutral Citation Number: [2015] EWHC 4127 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 28 October 2015

B e f o r e:

LORD JUSTICE BEATSON

MR JUSTICE WILKIE

Between:
MEHRDAD KAIVANPOR

Appellant

v

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

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Mr David Lewis-Hall (instructed by Howlett Clarke) appeared on behalf of the **Appellant**
The Respondent did not attend and was not represented

J U D G M E N T
(Approved)

1. MR JUSTICE WILKIE: This is an appeal by way of case stated against the decision of the Sussex Central Magistrates' Court on 28 November 2014 following hearings on 29 October and 25 November 2014 whereby they dismissed Mr Kaivanpor's appeal against a decision of the Brighton and Hove City Council contained in a letter of 1 August 2014, given to him on 4 August 2014, to revoke his private hire driver's licence and hackney carriage driver's licence pursuant to section 61 of the Local Government (Miscellaneous Provisions) Act 1976.

2. The stated case sets out the background. Mr Kaivanpor is Iranian. He was a traffic policeman in Iran and had driven for some 10 years there accident-free. He came to the United Kingdom in about 2010 with his family to seek asylum. Having learned English, attending college to do so, in 2013 he took the taxi drivers' Knowledge tests sponsored by Streamline Taxis and passed. By the date of the events with which we are concerned, he had been driving for some three years in the United Kingdom, apparently without incident.

3. On 12 May 2014, whilst on his way to pick up a fare at 7.08 am, he was driving north up London Road and had to turn right into Harrington Road. As he did so, he drove across in front of a cyclist who was cycling south on London Road in a cycle lane. She had no time or opportunity to stop or avoid a collision with Mr Kaivanpor's vehicle. She collided with his vehicle, was thrown up into the air, landed on the road and was injured and subsequently taken to hospital for treatment.

4. Mr Kaivanpor completed his manoeuvre, driving into Harrington Road, and initially stopped for a short time, then drove on up Harrington road, stopped again for a short time, and then drove off to pick up his fare. He did not at any stage get out of his vehicle in order to ascertain the well-being of the cyclist or to exchange details. However, within an hour of the accident, he reported it to the police and he also informed the owner of his vehicle. In due course, he was charged by the police with driving without due care and attention and failing to stop after an accident. He attended the magistrates' court on 31 July 2014 and pleaded not guilty to both charges. A trial of both charges was fixed to take place on 29 October 2014.

5. In the meantime, on 14 May, the Council received an email from the aggrieved cyclist, which caused them to undertake consideration of whether or not to revoke his licence pursuant to section 61. On 1 August 2014 he attended an interview with a Mr Kennedy, the licensing enforcement officer. Mr Kennedy decided to revoke the licence and, as I have indicated, handed a letter dated 1 August to Mr Kaivanpor on 4 August, upon receipt of which he reacted extremely emotionally.

6. The terms of the letter in so far as are relevant are as follows:

> "As you are aware, the Council's overriding concern must be the protection of the public and it is therefore required by law to ensure that the holder of a hackney carriage or private hire drivers licence is a fit and proper person to hold such a licence.

> The Council has been made aware that you have been charged with the following offences:
>
> Driving without Due Care and Attention whereby you struck a cyclist and failing to stop after an accident."

They then set out briefly the circumstances of the accident:

> "... As you must appreciate the above information is extremely concerning to the Council, which has public safety as one of its highest priorities. We note that you have denied these matters and a trial is set on the magistrates' court for 29/10/2014.
>
> **However given the serious nature of the incident and in particular that you chose to leave the scene of the accident where a cyclist was struck and injured and then failed to notify this office we have no choice but to revoke your Private Hire Drivers licence and Hackney Carriage Drivers licence in the interests of public safety, with immediate effect.**
>
> We have considered whether suspension or revocation is appropriate in this case. However, following the case of Singh v Cardiff City Council we can only do one or the other and given the seriousness of the alleged incident it is felt that revocation is appropriate in these particular circumstances."

7. He was then in the letter informed of his right to appeal against the decision under section 61(3) of the Local Government (Miscellaneous Provisions) Act 1976 to the magistrates' court, notice of which has to be given within 21 days of the receipt of the notice.

8. Mr Kaivanpor duly exercised his right of appeal. On 25 September 2014 there was a case management hearing in respect of Mr Kaivanpor's appeal, conducted by a district judge magistrates' court, who gave a direction that his licensing appeal should be heard by the same bench as was to hear the criminal trial, that appeal hearing to take place immediately after the criminal trial scheduled for 29 October 2014.

9. On the occasion when those directions were made, opposition to those directions that the appeal should be heard by the same bench as would conduct the criminal trial was made on behalf of Mr Kaivanpor by his then counsel. Those submissions were not successful and a direction was made, as I have indicated. That decision was not then the subject of any challenge.

10. On 29 October 2014 the criminal trial took place. On that occasion Mr Kaivanpor pleaded guilty to the offence of failing to stop after the accident, but contested the offence of driving without due care and attention. The criminal trial therefore proceeded. The prosecution called evidence from the cyclist, Ms Gargan, and from an eyewitness, Ms Carter-Owen, and a section 9 statement from a police officer was read. Mr Kaivanpor gave evidence in his own defence. He was represented for that trial,

but not by the same advocate as was subsequently to represent him in relation to the regulatory appeal hearing.

11. The magistrates found him guilty of the offence of driving without due care and attention. They imposed punishments including endorsing his licence with nine points.

12. The magistrates then were about to proceed to decide his appeal against the revocation of his licence. However, further submissions were made on his behalf by counsel who was representing him in respect of that appeal hearing that the magistrates should recuse themselves and that they should not hear the regulatory appeal. It became apparent that another court in the same building was offering to assist the magistrates by hearing the regulatory appeal if the magistrates were minded to transfer the case, and in any event it became apparent that the length of the regulatory appeal hearing was such that it would not be completed on that date, but that if it were started on that date the appeal would have to go part-heard to another date, a circumstance which, by way of general guidance and practice, magistrates are not encouraged to adopt. However, the magistrates decided that they would not recuse themselves and that they would immediately proceed to start hearing the regulatory appeal. They adjourned it part-heard to 25 November when the remainder of the evidence and argument was heard, and on 29 November they gave their decision together with their reasons.

13. On 29 October, in the course of the regulatory appeal hearing, they heard further evidence from Ms Carter-Owen because Mr Kaivanpor's then advocate wanted the opportunity to ask her some further questions. They also heard from a character witness called by Mr Kaivanpor. It is correct to say that there was a factual dispute in relation to the way the accident occurred which had to be resolved in respect of the offence of driving without due care and attention. Mr Kaivanpor's account of the accident was that there was a white van driving south along London Road who had flashed him, permitting him, Mr Kaivanpor, to turn right into Harrington Road in front of the white van, and either expressly or by implication that he could not therefore see the cyclist approaching, as her approach was masked by the white van, and that accordingly, for that reason, he did not drive without due care and attention in attempting that manoeuvre. By way of contrast, Ms Carter-Owen, who had been standing very close to the accident, said that there was no such white van, there was no white van flashing his lights beckoning Mr Kaivanpor to cross in front of him, and that Mr Kaivanpor had simply driven across in front Ms Gargan whom he could see and who could not avoid a collision.

14. The magistrates appear to have taken that evidence that they had heard in the course of the criminal trial into account when they were determining the regulatory appeal, albeit they had given Mr Kaivanpor's counsel the opportunity further to question Ms Carter-Owen in those proceedings. The fact that they convicted Mr Kaivanpor of the offence of driving without due care and attention by implication involves that they accepted as truthful and accurate the evidence of Ms Carter-Owen about the circumstances of the accident and did not accept the account of the white van given by Mr Kaivanpor.

15. The magistrates have posed three questions for us to answer. They are as follows:

> "1. Were we right in all the circumstances:
>
> (a) not to recuse ourselves;
>
> (b) to place the burden on the Applicant to show that he was a fit and proper person when considering his appeal under section 61(3)...
>
> 2. Was our decision to dismiss the Applicant's appeal perverse?"

16. I first address question 1(a): recusal. The prior history of the appeal proceedings was set out in paragraphs 1 and 2 of the case stated, and I need not repeat them. Paragraph 5 of the case stated says as follows:

> "5. The court then moved on to the question of whether they should continue to deal with the applicant's appeal under section 61(3)...
>
> 6. Mr Hussain [Mr Kaivanpor's counsel] argued that we should recuse ourselves from dealing with the appeal given that we had earlier that day made findings against the Applicant by finding him guilty of a charge to which he had pleaded Not Guilty. He argued that a member of the public sitting at the back of court would take the view that we could not be impartial in our future deliberations given what we had already heard in respect of the criminal matters and our ruling. He also argued that as we have disbelieved the Applicant with regards to the existence of a white van that the Applicant would feel that we were biased against him and that it would affect the way in which we conducted his appeal."

17. The representative of the Council's arguments are then recorded in paragraph 7, and in paragraph 8 the magistrates record that they became aware that another court was able to offer them assistance, either with the applicant's case or with an unrelated criminal trial which was also listed, and that Mr Kaivanpor's advocate submitted that this was another matter to be taken into account when deciding whether to recuse themselves. They then recorded their decision in paragraph 9 in the following terms:

> "Having heard submissions from the Applicant and the Council we decided in favour the Council's arguments and declined to recuse ourselves. Although we did not give reasons for our decision it is implicit we felt we could sit on the case and exercise impartiality in doing so despite having heard evidence in respect of a criminal charge. The facts and circumstances of the conviction would be before any court dealing with the appeal. Although we could have released the case we had decided that there was no prejudice to the Applicant in adjudicating on the appeal. We were also aware that we were flexible in respect of dates we could offer for future part heard hearings."

They then proceeded to deal with the way in which they then heard the regulatory

appeal.

18. It is to be observed that Mr Hussain had given a reasonably accurate summation of the approach or the formulation of the approach to issues of recusal which has been the subject of development over a number of years, so it is clear that the magistrates did have that formulation before them, understood it and had recorded it. We have been referred to an earlier decision of R v Gough [1993] AC 646, where the court gave a different formulation, a formulation which has subsequently been developed. It is set out in the speech of Lord Goff of Chieveley at page 670F:

> "[T]he court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

19. That is not, however, the last word, and it is also to be observed that the then current edition of Stone's Justices' Manual 2014 Vol I at paragraph 1.39 accurately sets out the law as it has developed and draws the reader's attention to the more recent authorities which have resulted in the development of that formulation. It reads as follows:

> "**Apparent bias**. The same test is applicable in all cases of apparent bias, whether concerned with justices or other members of other inferior tribunals, or with jurors, or with arbitrators. The test of under Article 6(1) of the European Convention on Human Rights requires a determination whether, quite apart from a magistrate's personal conduct, there are 'ascertainable facts which may raise doubts as to his impartiality'. While not determinative, the standard point of the defendant is important in this assessment. In the light of European jurisprudence, the Court of Appeal and the House of Lords has reviewed earlier authorities and the test to be applied is, having ascertained all the circumstances which have a bearing on the suggestion that the judge or justice was biased, would those circumstances lead a fair-minded and informed observer to conclude that there was a *real possibility* that the tribunal was biased. The informed observer is not restricted to publicly available information when deciding whether there appeared to be a real risk of bias and would seek to obtain the full facts and any explanation put forward by the tribunal. Bias in this sense means that the judge might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him. If there are legitimate reasons to fear impartiality, a magistrate must withdraw. The Court of Appeal has said that in considering whether there is a real danger of bias on the part of the judge, everything depends on the facts, which may include the nature of the issue to be decided..."

20. We were also referred to the decision in R v A Metropolitan Stipendiary Magistrate ex p Gallagher (1972) 136 JP Jo 80. That is a very brief note of a decision of the Divisional Court delivered by Widgery LCJ. The issue there was whether or not a

bench of magistrates who had prior knowledge of the previous criminal record of a defendant could nonetheless conduct a trial of a new matter with which he is charged. The Lord Chief Justice said this:

> "It is a commonplace that in magistrates' courts the court may have knowledge of the accused's previous record simply by virtue of the fact that the court may have sat to determine previous charges against him. It is no doubt desirable in many instances that an accused person should come before a magistrate who does not have an intimate knowledge of his record. But that desirability cannot be elevated to a proposition of law sufficient to deprive the magistrate of jurisdiction and thus to justify an order of prohibition going in a case of this case kind. Having said that, the court would, however, stress the desirability that a magistrate should not try an information when he has an intimate knowledge of the accused's background, and no doubt in this case consideration will be given to the possibility of some other magistrate dealing with the matters in question."

The other two judges, Bean and Lawson JJ, agreed.

21. It is said that this authority is particularly apposite in circumstances where the magistrates were aware that there was another court available offering to assist. However, it is to be observed also that what was there described as a "desirable practice" was specifically not said to amount to a rule of law.

22. Mr Lewis-Hall has argued before us that a fair-minded informed observer sitting in the back of the court would have observed this magistrates' court, having conducted a criminal trial and decided adversely to Mr Kaivanpor, then proceeding to hear the regulatory appeal, in the teeth of opposition from Mr Kaivanpor's counsel and in circumstances where they were aware both that there was another court available to hear the regulatory appeal and that they were aware that they would not be able to conclude the regulatory appeal on the same day but would have to adjourn part-heard, a practice which is discouraged as an efficient and effective way of organising the magistrates' courts.

23. However, the fair-minded and informed observer would also be aware of the fact that one of the core issues in the regulatory appeal was the fact that this appellant had pleaded guilty to an offence of failing to stop after an accident and had been convicted after a trial of driving without due care and attention, in circumstances where he had given evidence in his defence, where it had been contradicted by the evidence of an eyewitness, and where the court hearing the criminal trial had disbelieved him in respect of that. The well-informed, fair-minded observer would also be aware of the fact that it had a month previously been directed that it was convenient for the regulatory appeal to be heard immediately after the criminal trial by the same bench and that that decision had not been challenged. They would also be aware of the fact that, as Mr Lewis-Hall has accepted, the proceedings in the criminal trial had been carried out in such a way as not to attract any criticism whatever. They would also be aware that the evidence to be called in relation to the regulatory appeal included the

evidence of the eyewitness, Ms Carter-Owen, who was at court, and also a character witness for Mr Kaivanpor, who was also at court, and that were the matter to be put off to another day then those witnesses would have to attend a second time; and if the case had been sent off to another bench of magistrates, no doubt the questioning and the evidence of Mr Carter-Owen would have to have been considerably longer than that which was required from the bench that had already heard her evidence in relation to the accident and/or would be given on a separate occasion when she would have to return to court to give it.

24. Inevitably, the well-informed, fair-minded observer would be aware of the fact that the magistrates dealing with the regulatory appeal would have to have regard to all of those factors relating to the criminal trial and the conviction, matters which this magistrates' court had decided having heard the evidence, and that their knowledge of the circumstances of the conviction was, if anything, superior than that of any bench of magistrates hearing the regulatory appeal. At one point it seemed that Mr Lewis-Hall's objection was that the magistrates considering the regulatory appeal would be better informed than another bench hearing the regulatory appeal who had not heard the criminal trial.

25. In my judgment, given that there was no criticism whatsoever of the way in which the magistrates conducted the criminal appeal, and no questioning of their entitlement on the evidence presented in the criminal trial, they were entitled to conclude as they did on grounds of credibility. There can be said to be no disadvantage to the appellant in the same court conducting the regulatory appeal. The fact is that the issues in the regulatory appeal were different from the issues in the criminal trial, but the findings that they made and the evidence that they had heard still went to the core of one of the major issues on the regulatory appeal, and there is absolutely no reason to suppose that in dealing with the regulatory appeal they would in any way be unduly biased one way or another by reason of what they had heard and the conclusions to which they had been entitled to come.

26. In my judgment, therefore, there is no merit whatsoever in the contention that a fair-minded and informed observer would have formed the view that there was a real possibility of bias as described in the authorities. It therefore follows that the answer to question 1(a) is yes. I reach that conclusion notwithstanding the fact that the magistrates, in giving their decision, appear not to have applied the correct test, even although they had been informed of it by Mr Hussain and had recorded it, but in my judgment, applying the correct test, the answer to question 1(a) is plainly yes, they were entitled not to recuse themselves from hearing the regulatory appeal by reason of the fact that they had just heard to a conclusion the criminal trial.

27. I now turn to question 1(b): "Were we right in all the circumstances to place the burden on the applicant?" This turns on the provisions of the Local Government (Miscellaneous Provisions) Act 1976 which deals with the issue of hackney carriage licences and private hire licences. Section 51(1) of that Act provides, as far as is relevant, as follows:

> "Subject to the provisions of this Part of this Act, a district council shall,

on the receipt of an application from any person for the grant to that person of a licence to drive private hire vehicles, grant to that person a driver's licence:

Provided that a district council shall not grant a licence—

(a) unless they are satisfied that the applicant is a fit and proper person to hold a driver's licence..."

28. By way of contrast, section 61 of that Act provides for revocation, and it reads:

"Notwithstanding anything in the Act of 1847 or in this Part of this Act, a district council may suspend or revoke or (on application therefor under section 46 of the Act of 1847 or section 51 of this Act, as the case may be) refuse to renew the licence of a driver of a hackney carriage or a private hire vehicle on any of the following grounds—

(a) that he has since the grant of the licence—

(i) been convicted of an offence involving dishonesty, indecency or violence; or

(ii) been convicted of an offence under or has failed to comply with the provisions of the Act of 1847 or of this Part of this Act; or

(b) any other reasonable cause."

29. In order to assist them in determining the question of the burden of proof, Mr Hussain, for Mr Kaivanpor, made certain submissions which are recorded in the stated case. Mr Hussain referred the magistrates to a Court of Appeal decision in Re Muck It Ltd v Merritt & Ors v The Secretary of State for Transport [2005] EWCA Civ 1124. That was a case in which the question of the burden of proof was called into issue. Mr Hussain relied on it as authority for the proposition that the burden of proof was on the Council to demonstrate that there was (using the terms of section 61) "any other reasonable cause" for them to suspend or revoke the licence. In Re Muck It, it concerned a different but in many ways similar statutory regime: it concerned the Goods Vehicles (Licensing of Operators) Act 1995. Under that statutory scheme, there was a similar dichotomy between the statutory provisions for applications for a licence and for their revocation. Section 13 of that Act provided, in so far as was relevant, as follows:

"1. ... on an application for a standard licence a traffic commissioner shall consider—

(a) whether the requirements of subsections (3) and (5) are satisfied, and

(b) if he thinks fit, whether the requirements of subsection (6) are satisfied..."

30. Section 3 provided:

> "For the requirements of this subsection to be satisfied the traffic commissioner must be satisfied that the applicant fulfils the following requirements, namely—
>
> (a) that he is of good repute
>
> (b) that he is of the appropriate financial standing, and
>
> (c) that he is professionally competent..."

31. The parallel provisions of section 13 and the way they are set out are, of course, similar to section 51 relating to applications for a hackney carriage vehicle driver's licence, where the burden is clearly on the applicant to satisfy the giver of the licence that the applicant is a fit and proper person. Section 26 of that 1995 Act provides as follows:

> "(1) Subject to the following provisions of this section and the provisions of section 29, the traffic commissioner by whom an operator's licence was issued may direct that it be revoked, suspended or curtailed ... on any of the following grounds."

There are then set out a series of specific grounds which end with:

> "(h) that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence."

Section 27 of that Act provides for mandatory revocation in the following terms:

> "(1) The traffic commissioner by whom a standard licence was issued shall direct that it be revoked if at any time it appears to him that the licence-holder is no longer—
>
> (a) of good repute
>
> (b) of the appropriate financial standing, or
>
> (c) professionally competent."

32. Mr Hussain argued, and Mr Lewis-Hall argues before us, that there are clear parallels in the two statutory schemes whereby the provisions plainly provided that on application for a licence it is for the applicant to satisfy the giver of the licence that certain matters are satisfied, including that they are a fit and proper person or, in the 1995 case, persons of good repute. By way of contrast, when it comes to revoking the licence both schemes provide that the licence may be revoked or must be revoked if the giver of the licence is satisfied that one or other of certain things has happened or that circumstances have changed. The use of the words "any reasonable cause" in the

1976 scheme and the use of the words "has been a material change" in the 1995 scheme being effectively parallel.

33. In Re Muck It, the Court of Appeal was concerned with the burden of proof where what arises is the question of revocation of a licence. On that issue Rix LJ, who delivered the lead judgment, said as follows at paragraph 60:

> "It will have been observed that the critical language under section 26 is that a commissioner may direct that a licence be revoked 'on any of the following grounds'; and under section 27 that a commissioner shall direct that a licence be revoked 'if at any time it appears to him that' the licence holder 'no longer' meets any of the three fundamental requirements. Those expressions do not replicate the language of section 13, namely that the commissioner 'must be satisfied' that an applicant meets the three requirements, and the contrast has led to the current dispute between Muck It and the Secretary of State."

34. The Secretary of State in that case was arguing that the burden of proof remained on the applicant when he became the holder of the licence to demonstrate that he was still of good repute. Rix LJ went through the European legislation which was the trigger for the domestic legislation. He came to his conclusions on this issue as follows at paragraph 68:

> "68. Article 6.1 clearly relates to applications and article 6.2 clearly relates to revocations. Article 6.1 is neutral as to where the burden of proof lies, but of course in the case of applications it is natural to think that it lies on the applicant. Article 6.2, however, dealing with the case of revocation, expressly states that this shall follow 'if [the competent authorities] establish…' That seems to me to be language inconsistent with a conclusion that the burden of satisfying the authorities remains on the licence holder...
>
> 69. Turning back to sections 26 and 27 of the 1995 Act, I would conclude that for revocation to be possible under the former or mandatory under the latter, it is the commissioner who must be satisfied of the ground of revocation, and not the licence holder who must satisfy him to the contrary. That seems to me to be the natural way to regard both the language of those sections, and the situations contemplated in them. The context is that of a licence holder and the possible revocation of his licence. Revocation can only be done on some specified ground (section 26) or because one or other of the three fundamental requirements is no longer satisfied (section 27). Under section 26(4), the commissioner can only act if 'the existence of' a ground comes to his notice. It is counter-intuitive to think of a licence holder being required to negative the existence of a ground raised against him. So with section 27. The commissioner must revoke if 'it appears to him' that the licence holder is no longer of good repute or of appropriate financial standing or professionally competent. That seems to me to mean that the

> commissioner must be satisfied that the requirements are no longer fulfilled. If it had been intended to place the same burden on the licence holder as had been placed on the original applicant, then the same language as that found in section 13 would have been used."

35. The Council relied on a decision of the Administrative Court subsequent to the case of Re Muck It, namely Canterbury City Council v Ali [2013] EWHC 2360 (Admin) . That was an appeal by way of case stated from magistrates concerning the revocation of Mr Ali's licence as a hackney carriage and private hire vehicle driver. He had, after 8 years as a licence holder, been involved in an accident where the other party was also a taxi driver. The police had taken no further action, but a complaint was made by the other driver to the Council and, as a result, revocation of Mr Ali's licence became an issue. The relevant committee of the Council was given advice by officers as to how they might fairly and properly approach the determination of the question of revocation. It appears, however, that the Council failed to follow that advice in a number of significant ways, and in fact the licence of Mr Ali was revoked on the ground that he was not a fit and proper person to hold a licence, the sole reason given being public safety referable to the accident. But there was never a committee hearing, and Mr Ali was not given the opportunity of an oral hearing at which he might explain himself.

36. He then appealed that decision to the magistrates' court, which upheld his appeal. The Council then appealed further from that decision of the magistrates' court to the Administrative Court, where Carr J gave judgment. It is to be observed that the defendant, Mr Ali, did not appear before Carr J and was not represented. It also appears that Carr J, who was considering the question of the burden of proof in relation to a revocation of a driver's licence, was concerned to enquire of counsel for the City Council whether there was any relevant authority. She was informed, no doubt truthfully, that as far as counsel was concerned he was not aware of any. It therefore follows that she did not have referred to her the Court of Appeal decision in Re Muck It to which we have had our attention drawn.

37. Carr J allowed the appeal against the decision of the magistrates' court and she did so on the basis of what she said were "three fundamental submissions of law which lie at the heart of the appeal", which she summarised at paragraphs 24 to 26 of her judgment:

> "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 ... [T]he 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 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..."

38. She then proceeded to find in favour of upholding the appeal. She did so effectively on the basis that it was apparent from the case stated that the magistrates had been reviewing the decision of the Council as opposed to looking at the case anew, whereas the magistrates should have proceeded by way of a rehearing. She then made a finding that the onus of proof at all material times was on Mr Ali and not on the Council, and that 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.

39. The magistrates in this case, having had these two authorities cited to them, chose to apply the Canterbury City Council decision on burden of proof. They did so on the basis both that it was right and that it was more recent than the case of Re Muck It and that Re Muck It, being concerned with a different statutory regime, was not sufficiently similar to the regime with which they were dealing to have assisted them. Accordingly, applying the Canterbury decision, they proceed by way of a rehearing and they imposed the burden of proof on the applicant to demonstrate that he was still a fit and proper person, notwithstanding all that had happened on 2 March and thereafter. They concluded that they did not find on the balance of probabilities that Mr Kaivanpor was a fit and proper person to hold a hackney carriage licence private hire driver's licence and therefore dismissed his appeal against revocation.

40. In my judgment, the magistrates erred in law in giving the weight that they did to the decision in Canterbury City Council and they should have applied the Court of Appeal decision in Re Muck It. Canterbury City Council as an authority has a number of limitations and difficulties, the most important being that it was a decision reached with only one party present and represented which was based on an absence of relevant Court of Appeal authority and where the decision on the burden of proof was, strictly speaking, not necessary for the decision which was made. The appeal against the magistrates' decision was upheld effectively because they had failed to conduct a rehearing but had conducted a classic judicial review exercise, criticising the procedures adopted by the City Council in delegating the matter to its officers and failing to hold a proper hearing. The question of what was the burden of proof was, strictly speaking, not necessary for that decision.

41. In my judgment, looking at the two statutory schemes, it is clear that they reflect the same dichotomy between on the one hand those who apply for a licence, and on the other hand where once they have a licence, the circumstances in which that licence may be revoked or suspended or not renewed. There is a clear and principled dichotomy between the application stage where the onus of proof is sensibly, properly and clearly on the applicant to satisfy the statutory requirements. Once that person has a licence then the schemes, again sensibly and on the basis of proper principle, require the licensing authority which wishes to revoke or suspend a licence or not renew the licence to be satisfied of certain matters. The burden is therefore on the licensing body to establish to its satisfaction that those changes of circumstance or prohibited circumstances have arisen; it is not for the licence holder endlessly to prove that they continue to be a fit and proper person or a person of good repute.

42. Accordingly, the magistrates in this case were wrong in law in deciding to follow Canterbury as opposed to applying Re Muck It. The answer, therefore, to question 1(b) is no, they were not right in all the circumstances to place the burden on the applicant to show that he was a fit and proper person when considering an appeal under section 61(3) of the 1976 Act.

43. Given that they were wrong in law, and given the conclusion to which they came, in my judgment this appeal must succeed on this ground.

44. Mr Lewis-Hall seeks to go further and seeks to argue that the magistrates' decision was, in any event, perverse to the point that this court should effectively take the decision for itself and conclude that Mr Kaivanpor's licence should not have been revoked. He relies on a number of arguments, one of which is that the Council failed to apply, and the magistrates failed to have regard to, guidance as to what sanctions may be appropriate in relation to certain levels of motoring offence. He also identifies a number of other criticisms which he says amount to perversity.

45. In order to be perverse, the conclusion of the magistrates must be such that no reasonable bench of magistrates, properly directing themselves as to law, could have reached. In my judgment, none of the matters, either taken singly or cumulatively, relied on by Mr Lewis-Hall come anywhere close to establishing such a case. The points that he makes are no doubt of some weight, and if the magistrates had considered them or considered them properly it may be that different magistrates would have come to a different conclusion, but, in my judgment, this is one of those classic situations where the arguments either way might well prevail. This is therefore a case where it is appropriate for this appeal to be allowed, if my Lord Beatson LJ agrees, and for the matter to be remitted to a different bench of magistrates for a rehearing.

46. LORD JUSTICE BEATSON: I agree with my Lord that the answers to the three questions should respectively be: question 1(a), yes; question 1(b), no; and question 2, no. It follows that the appeals to this court on the recusal ground and the perversity ground are dismissed for the reasons he has given, but that the appeal on the burden of proof ground is allowed.

47. I agree with the careful analysis of the statutory structures and the authorities, but because we are differing from the decision of an Administrative Court (the decision in Canterbury City Council v Ali [2013] EWHC 2360 (Admin)), I add a short comment.

48. In my judgment, the decision in that case reflects the court's focus on whether the hearing before the magistrates had been a de novo hearing or a review, was per incuriam of the decision of the Court of Appeal in Re Muck It and appeared to elide the approach to be used when a person makes an initial application for a licence which is governed by section 51 of the Local Government (Miscellaneous Provisions) Act 1976 and that used when the suspension or revocation of a driver's private hire or hackney carriage licence is being considered pursuant to section 61. The judge, for example, referred to the decision in McCool v Rushcliffe Borough Council, a case of initial application. There is no reference in the judgment to section 51 or to the contrast.

49. It is for those reasons that I agree with my Lord that there is no material difference from the situation in this case as far as burden of proof is concerned and that considered by the Court of Appeal in Re Muck It, a decision by which this court is, of course, bound.

50. Thank you, Mr Lewis-Hall. The matter will go back.

51. MR LEWIS-HALL: My Lords, yes. There is an application for costs.

52. LORD JUSTICE BEATSON: There is no schedule, is there? Or is there?

53. MR LEWIS-HALL: My Lord, there is no schedule.

54. LORD JUSTICE BEATSON: There is no schedule?

55. MR LEWIS-HALL: There is no schedule of costs.

56. LORD JUSTICE BEATSON: We are supposed to have schedules.

57. MR LEWIS-HALL: Those instructing me enquired of the court whether one would be required, and they were told no.

58. LORD JUSTICE BEATSON: In which case the court has probably waived the requirement.

59. MR LEWIS-HALL: My Lord, in terms of costs, the primary application would be for costs to be paid by the Lord Chancellor under section 34 of the Courts Act 2003, of which I can hand up a copy.

60. LORD JUSTICE BEATSON: There is a problem here. When you were discussing whether the Council or the court were going to appear, were they put on notice that this application was going to be made now?

61. MR LEWIS-HALL: My Lord, they were not put on notice. In terms of an application for costs against the Lord Chancellor, in my submission, there is no

requirement to put the Lord Chancellor on notice that a costs application will be made in these proceedings.

62. LORD JUSTICE BEATSON: You would like us to determine it without a representative of, whether it is the Lord Chancellor or the Secretary of State, I know not, but whichever hat he is wearing in this capacity?

63. MR LEWIS-HALL: My Lord, yes, because the reason why --

64. LORD JUSTICE BEATSON: We have just had an appeal on one of the limbs of natural justice.

65. MR LEWIS-HALL: My Lord, yes. The reason why the application is made in this way is because section 34(1) precludes a costs order being made against magistrates, which would be the obvious place for a costs order to be made in this case. The magistrates have been put on notice that this hearing is going ahead; they have stated a case; they have not taken part, and the statute, section 34, precludes an order being made against those magistrates. What the statute allows is this court in its discretion to order the costs are paid in essence in lieu of the fact that the magistrates cannot be made to pay by the Lord Chancellor to remedy what in my submission is an injustice, which is that Mr Kaivanpor has rightly appealed a decision of the magistrates, has succeeded in part on that appeal and will go back to the magistrates for a rehearing, and it is wrong, in my submission, the magistrates having erred in law, that he should have to pay the costs of pursuing that appeal and dealing with that case. That is why, in my submission, section 34 is there: it is to remedy that injustice in the same way that a defendant in a criminal case can apply for costs out of central funds.

66. LORD JUSTICE BEATSON: The prosecutor is normally there, though, when the court decides on that application.

67. MR LEWIS-HALL: My Lord, a prosecutor in a criminal case would take no real position on an application for costs out of central funds, because the prosecutor would be representing the Crown Prosecution Service.

68. LORD JUSTICE BEATSON: And central funds would be out of a different part.

69. MR LEWIS-HALL: Would be out of a different budget.

70. LORD JUSTICE BEATSON: Okay, so you make that application. You have a schedule of costs?

71. MR LEWIS-HALL: My Lord, no, there is no schedule of costs and in my submission the court --

72. LORD JUSTICE BEATSON: So what would you like us to do? You would like us to award you your costs not knowing how much they are?

73. MR LEWIS-HALL: My Lord, the Justices and Justices' Clerks (Costs) Regulations --

74. LORD JUSTICE BEATSON: To be taxed if not agreed.

75. MR LEWIS-HALL: Yes, my Lord. To be subject to detailed assessment if not agreed. That is what is provided for in the regulations dealing with costs applications under section 34. It does not specifically deal with --

76. LORD JUSTICE BEATSON: Okay. We will have a word about that.

(The bench conferred).

77. We will make an order for one-third of the costs, reflecting the way in which this appeal went, with liberty on the part of the Ministry of Justice or the Lord Chancellor or the Secretary of State for Justice to apply within 7 days to set aside this order. Our order is for there to be a detailed taxation if the sum is not agreed.

78. MR LEWIS-HALL: My Lords, may I address you in relation to your decision on one-third of the costs?

79. LORD JUSTICE BEATSON: Yes, of course you can. I do not make decisions without hearing people; I have not heard the Lord Chancellor yet.

80. MR LEWIS-HALL: The appeal has been successful.

81. LORD JUSTICE BEATSON: I know, the appeal has been successful. I had not got my stopwatch going for your submissions, but a lot more time was spent on question 1(a) than question 2.

82. MR LEWIS-HALL: My Lord, yes, that may well be the case, but in my submission the costs associated with the case, in particular attendance and preparation, would not be reduced by two-thirds had those other two grounds not have been pursued. So in my submission, although I can see why your Lordships have indicated a reduction in costs, the appropriate order would be for two-thirds of the costs to be paid to reflect the fact that there is some degree of over-preparation for grounds that have not been successful, but the reality is the costs that are associated with bringing this matter to court would not have been significantly less if there had only been that one ground before the court.

83. LORD JUSTICE BEATSON: Okay.

(The bench conferred.)

84. We are against you. Although the office may have told you that you did not have to submit a summary assessment, it is standard practice of the Administrative Court that those who wish costs can apply for summary assessment, which is a much cheaper although a rough guide. So your submissions are made, we are blind as to what actually is at issue here, and we make a rough judgment. The fine-tuning which you sought to make with your supplementary submissions is not appropriate in that context. So we are against you.

85. MR LEWIS-HALL: My Lord, yes.

86. LORD JUSTICE BEATSON: We have some summary reasons for that.