Neutral Citation Number: [2020] EWCA Civ 1706

Case No: C3/2019/2666

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)
Upper Tribunal Judge Elizabeth Ovey, Mr S James and Mr P Rawsthorn
T/2019/16

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2020

Before:

LORD JUSTICE McCOMBE
LADY JUSTICE ASPLIN
and
LORD JUSTICE POPPLEWELL

- -

Between:

COACH HIRE SURREY LIMITED **PAUL JONES**	**Appellants**
- and -	
TRAFFIC COMMISSIONER FOR THE LONDON AND SOUTH EAST TRAFFIC AREA	**Respondent**
-and-	
SECRETARY OF STATE FOR TRANSPORT	**Intervener**

- -
- -

David Pojur (instructed by Stone King LLP) for the Appellants
Adam Heppinstall (instructed by the Government Legal Department) for the Intervener
The Respondent did not appear and was not represented

Hearing date: 20 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Thursday, 17 December 2020.

Lord Justice McCombe:

Introduction

1. This is the appeal of Coach Hire Surrey Limited ("CHS") and Mr Paul Jones (together "the Appellants") from the decision of 13 August 2019 of the Upper Tribunal (Administrative Chamber) (Upper Tribunal Judge Elizabeth Ovey and Specialist Members Mr Stuart James and Mr David Rawsthorn) (the "UT"). By their decision the UT dismissed an appeal by the Appellants from a decision of 23 January 2019 of the Traffic Commissioner for the London and South East Traffic Area (Ms Sarah Bell) (the "TC"). The TC's decision had three elements:

> "1. Pursuant to section 17(3)(e) of the Public Passenger and Vehicles Act 1981, [CHS] no longer meets the mandatory requirements under section 14ZA of that Act, namely good repute, financial standing and professional competence and revoked its licence with effect from 23:45hrs on 28 February 2019.
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> 2. CHS and Mr Paul Jones are disqualified from holding or obtaining an Operators' Licence or being involved in an entity that holds such a licence as provided for by section 28 of the Transport Act 1985 for a period of 10 years from 23:45hrs on 28 February 2019.
>
> 3. The operator failed to satisfy [the TC] that Mr Paul Jones meets the requirement for good repute as per Section 14ZA(3)(a)."

2. By a decision of 3 October 2019, the UT declined to review their decision (in exercise of the power conferred by r.45(1) of the Tribunal Procedure (Upper Tribunal Rules 2008)), and they refused permission to appeal to this court from their earlier substantive decision of 13 August 2019. On 23 October 2019 the Appellants filed an Appellant's Notice in this court seeking permission to appeal and seeking an order setting aside the UT's order as a whole. By order of 3 March 2020 of Lewison LJ the Appellants were granted permission to appeal, limited to the period of disqualification only.

3. In his skeleton argument for the appeal, Mr Pojur for the Appellants argued that the period of disqualification was manifestly excessive and challenged certain parts of the reasoning underlying the orders that were made. By order of 25 September 2020 (Dingemans LJ) the Secretary of State for Transport was given permission to intervene in the appeal. Mr Heppinstall lodged written submissions on his behalf and supplemented those submissions at the hearing before us. I am grateful to both counsel for their contributions.

Background Facts

4. The case has a long history and some of the events covered by the TC's decision go back as far as 2013. I can, however, take the basic facts of the case from the UT's decision, none of which are now contested on the appeal.

5. The immediate trigger for the present proceedings occurred in late August 2018 when Mr Jones became a director of CHS. Mr David Harriss resigned his directorship of CHS on 28 August 2018 and Mr Jones took his place on the following day. On that day an application was lodged for Mr Jones to become the transport manager of CHS. In the application, which was signed by him, he gave the name of "Adam Smith", and enclosed a copy of a deed poll evidencing the change of name from Adam Smith to Paul Jones. It seems that a "certificate of professional competence" had been granted to Mr Jones in the name "Adam Smith" on 12 July 2012. The UT, perhaps surprisingly, considered that the use of the name Adam Smith in the application was "understandable". The application disclosed no convictions in respect of the applicant, in either name. That omission made the application glaringly incomplete.

6. There was also an application made to vary the operator's licence to remove the name of Mr Harriss and to replace it with Mr Jones. That disclosed Mr Jones' involvement with a company called Western Greyhound Limited which had gone into administration while he was engaged in the company's business. It was said that Mr Jones had stayed on to help the administrators in the sale of assets and that he had thereafter been made redundant. That application also stated that Mr Jones had not been convicted of any relevant offence. Certain "licence undertakings" were also included, including promises that Mr Jones would notify the TC of any convictions against him and of any changes that might affect the licence.

7. This application was immediately met by a letter from the TC's Office (of 3 September 2018), requesting documentation and asking why Mr Jones had failed to disclose convictions which were in the office's records. Mr Jones responded on 11 September 2018 with this:

> "With regard to my conviction for Possession of counterfeit currency, the part of the form that was due to be completed and was in fact completed in relation to this by the previous owner of [CHS] and not myself …"

He went on to say that he had been arrested and charged with three offences, that he pleaded guilty to one offence out of the three and was sentenced to a custodial sentence of 12 months, suspended for 18 months, with 120 hours community service and a fine of £600. Mr Jones said that he realised that the TC would "take my conviction in a very dim light"; he said he had had no convictions since 2014. He wrote that in the light of this and "other negative involvements" with the TC's Office, he wished to ask for a public enquiry.

8. It emerged in the course of the subsequent public enquiry, and confirmed by a certificate of conviction, that in the Crown Court at Kingston upon Thames on 15 August 2014 Mr Jones had been convicted, on his pleas of guilty, to offences involving possession of counterfeit currency to the face value of £9,600 for which he had been sentenced to a total of 16 months imprisonment suspended for 24 months, with a requirement of 150 hours unpaid work. It seems that the Crown did not proceed on a further charge of intention to spend the notes still in his possession. That sentence was, of course, more severe than that which he had disclosed when confronted by the letter from the TC's Office of 3 September 2018.

9. The TC's officials asked for financial information with regard to CHS, including 3 months' trading statements. Bank statements for the period April to October 2018 were provided. The UT recorded in their decision that the statements disclosed insufficient funds. In para. 11 of the decision the UT outlined the "other involvements" to which Mr Jones must have been referring in his letter of 11 September 2018. They said in their decision that the documents showed that Mr Jones had been involved with a number of other companies providing public transport as follows:

> "(1) from about 27th March 2013 to 12th March 2014 Mr. Jones was the director and controlling shareholder of BETC ("BETC"). He then transferred his shares to Mr. Richard Hill and resigned as a director but continued to be employed as general manager. A public inquiry was held by the present TC in relation to BETC on 9th May 2017, but the matters with which that inquiry dealt did not relate to Mr. Jones, although in the evidence it was alleged that he had left the company's affairs in a mess. It is stated in the case summary at p.5 of our bundle that the name Adam Smith appears on 5th June 2018 in relation to a variation application. When the case summary was prepared BETC's licence had been revoked, subject to an appeal;
>
> (2) Mr. Jones (under the name Adam Smith), as one of two directors, applied on 8th April 2014 for an operator's licence for Surrey Etc. Limited ("Surrey Etc.") and was the nominated transport manager. The other director was Mr. Nigel Thomas. The application was subsequently withdrawn. It is alleged in a letter dated 7th October 2014 from a firm of solicitors called Oliver Legal to the then traffic commissioner for the South Eastern and Metropolitan Traffic Area that Surrey Etc. was incorporated in an attempt to steal work from BETC. Other allegations are also made in relation to Mr. Jones, but we have seen nothing to support any of them. We note, however, that BETC appears to have traded under the name Buses Etc. and that another company called Croydon Coaches Limited appears to have traded under the name Coaches Etc. Mr. Jones appears to have had some form of connection with the latter company;
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> (3) from 1st August to 2nd September 2014 Mr. Jones was a director of Black Velvet Travel Limited ("Black Velvet"), in relation to which a public inquiry was held on 10th September 2015, jointly with an inquiry in respect of Western Greyhound, by the present TC in the capacity of Traffic Commissioner for the Western Traffic Area. Our bundle includes a newspaper cutting which states that Mr. Jones' sentence for possessing counterfeit currency was suspended because the Black Velvet employees depended upon him for their employment;
>
> (4) the decision made by the TC following that inquiry shows that there was evidence that Mr. Jones had held himself out as a

director of Western Greyhound and in February 2015 described himself as the owner of both Black Velvet and Western Greyhound. The decision included an addendum requiring that if Mr. Jones applied to be involved in operator licensing in Great Britain, the application must be referred to a traffic commissioner or deputy and could not be dealt with under delegated authority;

(5) on 12th July 2016 Mr. Jones became the sole director of Hireyourtranport.com Limited ("Hireyourtransport.com"). He resigned on lst May 2018 but was reappointed on lst September 2018. He was also the controlling shareholder from 12th July 2016 to 1st February 2017 and again from 1st September 2018. In the intervening periods Mrs. Jane Jones was the sole director and controlling shareholder;

(6) Mrs. Jones was the sole director and controlling shareholder of Meritrule Limited, in relation to which the TC held a public inquiry on 24th July 2018. The evidence at that inquiry included the facts that Mrs. Jones was Mr. Jones' mother and had given permission for him to be the nominated contact in relation to the Meritrule licence. The Meritrule transport manager, Mr. Mark Warren, gave evidence that Mr. Jones had approached him to become the transport manager in about July 2017. He understood that Hireyourtransport. corn was a brokerage company and expected Meritrule, which had been effectively dormant, to start operating again. It did not do so, but the Hireyourhansport.com website and Facebook pages appeared to show that that company was hiring coaches and buses and employing drivers, conductors and cleaners;

(7) the Meritrule inquiry was conjoined with an inquiry in relation to Classic Routemasters Limited, of which Mr. Warren was again the transport manager, having become so in about January 2018 on the recommendation of Mr. Jones. On 20th February 2018 a company called Yourtransport Group Limited, incorporated on 6th February 2018 with Mrs. Jones as its sole director and shareholder, became the majority shareholder of Classic Routemasters. The director, Miss Zetterlund, referred to Mr. Jones as a colleague and there was some evidence of links with Hireyourtransport.com, including payments for fuel and drivers. As far as Mr. Warren knew, Classic Routemasters operated only on 8th March 2018;

(8) Meritrule and Classic Routemasters were called to a conjoined inquiry inter alia because the TC was concerned that they might be fronting for Mr. Jones. In her decision she concluded that there was strong and cogent evidence to infer that Mrs. Jones and Miss Zetterlund were fronting for Mr. Jones and found that he was a de facto and shadow director. He was not called to the inquiry on that basis and so the TC did not

> make a formal disqualification order, but she repeated what she had said at the end of the Black Velvet and Western Greyhound inquiry and warned him that if he applied for an operator's licence he would need to address all the concerns set out in the decision. Meritrule and Mrs. Jones were disqualified for 10 years; Classic Routemasters and Miss Zetterlund were disqualified for three years; and Mr. Warren was also disqualified for three years. All of them lost their good repute."

10. By letter of 7 November 2018, the TC's Office convened the public inquiry that Mr Jones had requested. It stated that its purpose was to investigate apparent shortcomings with regard to CHS and to consider whether the applications submitted should be granted in whole or in part. Issues of concern that were highlighted were that since the grant of the initial licences to CHS there had been a material change of circumstances of the holder and that CHS might not be of good repute, appropriate financial standing or meet the requirements of professional competence. Specific attention was drawn to Mr Jones' undeclared conviction, his links to Black Velvet and Western Greyhound which the TC had found to be a joint enterprise between Mr Jones and a Mr Michael Bishop, his links to the revoked BETC licence, further links to Meritrule and Classic Routemaster licences of which Mr Jones had been found to be de facto director and to the question whether Hireyourtransport.com had been operating public service vehicles without the necessary licence.

11. The letter instructed Mr Jones to prepare evidence of financial standing showing access to an average £16,750 over three months for the three current vehicles, increasing to £25,550 to cover the application for authorisation of a total of five vehicles. The possibility of the loss of CHS's licence was indicated as a potential outcome. The inquiry was held on 13 December 2018 in the Tribunal Room at the TC's Office at Eastbourne. Mr Jones appeared, unrepresented, for CHS and for himself.

The Inquiry and the TC's Decision

12. It is apparent that the inquiry did not proceed smoothly. There was a "slightly testy exchange" at the beginning when Mr Jones asked that it be recorded that he had asked for the inquiry and the TC informed him that that fact was already a matter of record. There were two adjournments to enable Mr Jones to consult the documents and to help him meet points that the TC had put to him. Reading the TC's decision and that of the UT, it appears that Mr Jones adopted a combative approach to the concerns that had been raised and to the matters raised with him at the inquiry. In para. 20 of her decision, the TC produced a detailed tabular chronology of the relevant events, which gives additional background to the matters summarised by the UT in the passage from para. 11 of their decision that I have set out above. Her conclusions on the principal points come out from paras. 21 to 23 of her decision as follows:

> "21. As stated above, the case revolves around the honesty and integrity of Mr. Jones, trust lying at the heart of the operator-licensing regime.
>
> 22. The letter from Mr. Jones to CLO dated 1 November 2018 (page 58/59 of the bundle) is confrontational and more akin to

pre action inter-partes correspondence. At the hearing, Mr. Jones represented the Licence holder as if the operator licensing regime was on trial and the traffic commissioners a party to that litigation. In the circumstances of this case, I find this was a tactic to try to deflect from dealing properly with the above history. By way of example:

i) He insisted on putting on the record as soon as the case opened that he had requested the public inquiry. The request was already in the hearing bundle.

ii) Mr. Jones failed to lodge evidence of financial standing in the prescribed manner by the call in deadline He was intractable when I demonstrated at the hearing why it still did not meet the requirements of the STC's Statutory Document No. 2. He presented as if I was being difficult with him rather than abiding by the Statutory Guidance to which I must have regard and the Statutory Directions, which I must follow.

iii) He requested me to state my authority on why there had been a breach of the Licence terms by moving the operating centre without notifying the change to my office. SGSD 4 refers at paragraph 34 to vehicles being normally kept at the authorised operating centre. Further, the requirement is attached to all PSV Licences as demonstrated by page 3 of the Licence issued to this Operator on 4 September 2016 attached at "Annex A".

iv) He challenged the 2014 sentencing details in the PI Brief and poured scorn on the apparent reliance on media reports in that regard. He brought no evidence to suggest that the journalist's court reporting was wrong. At the hearing, he feigned ignorance on the actual details of his sentence due to the passage of time. Yet there is nothing equivocal about the letter dated 11 September 2018 (page 51 of the bundle) where he states that he only pleaded to one count and received a 12 month sentence suspended for 18 months and 120 community service. The certificate of conviction demonstrates the accuracy of the media court reporting and the inaccuracy within the written and oral evidence of Mr. Jones in this regard. To ensure Mr. Jones cannot mislead others, I attach marked Annex B a copy of the certificate of conviction.

v) He did not bring any evidence in support of his personal rehabilitation measures to date, apart from oral confirmation of completing the community service order. Overall, Mr. Jones presented as attaching little importance to the detail of the convictions for 3 counts of dishonesty or his sentence,

> where he was fortunate to escape immediate custody. This is disingenuous, particularly when he remains un-rehabilitated in the eyes of the law.
>
> vi) He did not bring any evidence in support of the compliance systems moving forward to ensure road safety. Mr. Jones suggested that compliance improved historically when he became involved in a PSV operation. The BVTS/WGL decision directly contradicts that assertion (e.g. the wheel loss in December 2014 when it was pure chance no one was injured or worse) and Mr. Jones brought no corroborative evidence to support his assertion.
>
> vii) He did not bring any evidence to demonstrate that previous arrangements between his "brokerage" and Meritrule and other PSV Operators were legitimate "aims length" arrangements. By way of example, he said that the financial arrangements with CRM were because Miss Zetterlund tricked him out of the money and he lost a lot of personal funds. Mr. Jones produced no corroborative evidence at the hearing.
>
> viii) In summary, he had done no obvious preparation for the hearing based on the call in letter and papers. It was often a challenge to keep him focused on the actual questions posed and on details. Mr. Jones said that he had not read the Meritrule written decision in detail because he is heavily dyslexic. After a few more questions, I offered a break for him to go over the bundle and see if there was anything else he wanted to say to me. Mr. Jones said he did not want more time to consider the hearing bundle because he had already read it so many times. The Meritrule decision is at pages 170 to 176 of that bundle.
>
> 23. From observing Mr. Jones and listening to his evidence, I did not find him a credible or compelling witness."

13. The TC found herself unable to accept Mr Jones' assertion that he had not intended to mislead. At para. 27 of the decision she said this:

> "27. …In particular: -
>
> i) I issued the Meritrule written decision (pages 170 -183 of the PI bundle) just 3 weeks before Mr. Jones's name was added to this Licence. At paragraph 29 it says: "... Mr. Jones is found as a de facto and shadow Director ... if he applies for an Operator's licence in the future, I again make it clear that that must be considered by a Traffic Commissioner or Deputy and not under any delegated authority. Further, he

> will need to address all the concerns which are set out in this written [decision] as part of that process."
>
> ii) Mr. Jones attached his wet signature to the TM1 form twice on 29 August 2018 (pages 33 to 36 of the PI bundle), both as Director and proposed Transport Manager. The section headed "Convictions & Penalties" states "none added" and this is not amended by Mr. Jones;
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> iii) The "error" on the TM1 form should have caused him to also review the director questionnaire. He did not.
>
> iv) Mr. Jones produced his Deed Poll to cover the difference between the name on the TM1 and his CPC Certificate. However, at no time before 3 September 2018 does he link these back to his convictions, the BVTL, WGL or Meritrule decisions.
>
> v) The director questionnaire does refer to the financial failing of WGL (page 43 of the bundle) but the answer refers to being a "manager" and not to the formal findings made on his role. This entry is highly selective and would not of itself alert CLO to previous findings. On balance, it is more akin to window dressing to give a semblance of transparency to the form."

14. At para. 30 speaking of the period following Mr Jones' 2014 conviction, the TC found:

> "30. …Since that time, he has worked in the shadows because he knew his conviction would pose a problem. Once confronted by CLO on 3 September 2018, he has lied, glossed and scorned without a hint of embarrassment or contrition, including at the hearing. Indeed at the hearing his evidence was so fluid it ebbed and flowed like a river, by way of example paragraph 22(ii), 22(iv) and 22(viii) above. Having taken into account the words, demeanour and conduct of Mr. Jones it is difficult to find any redeeming features. I gave him a number of adjournments during the day to gather his thoughts. Regrettably, he failed to improve his approach or behaviour right to the end."

At para. 31, the TC continued:

> "The evidence is overwhelming that this entity through the conduct of its current director [i.e. Mr Jones] is no longer of good repute. I cannot trust him and therefore the Operator [i.e. CHS] moving forward – there is no material evidence to suggest otherwise. Indeed the evidence is compelling that the legitimate hard working industry and the public who are impacted by his conduct and lack of honesty need the

> mendacious Mr Jones removed. To do otherwise would bring the whole regime into disrepute."

15. The TC's conclusion on disqualification was this:

> "33. For revocation to be possible under the discretionary or mandatory provisions it is the traffic commissioner who must be satisfied of the ground of revocation. On the standard of proof, the House of Lords has cited with approval the proposition that *"the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it"*.
>
> 34. An operator's licence gives rise to limited benefits which are property for the purposes of human rights law. Deciding on the appropriateness of any action is therefore different from the sentencing exercise carried out by the criminal courts. Whilst there may be an element of deterrent effect the discounting of penalties or other sentencing practices are discouraged. Nor is it a matter of just ensuring consistency with other individual cases. The legislation provides no definition of good repute, and so when a traffic commissioner is considering if an individual is of good repute the traffic commissioner can have regard to any matter, but in considering a company's repute the traffic commissioner can have regard to all *material evidence.* In practice these may amount to the same considerations.

16. CHS and Mr Jones appealed to the UT against the entirety of the TC's decision on good repute, financial standing and competence and against the period of disqualification imposed. As the appeal to this court has only been permitted in respect of the disqualification period, I need only record the UT's decision on that one point, to which I now turn.

The UT's decision on Disqualification

17. The UT upheld the TC's decision on the disqualification to be imposed and said this at paras. 70 to 72 of their decision:

> "70. We accept that the TC dealt briefly with her reasons for imposing a 10 year period. She did, however, identify three factors:
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> (1) that Mr. Jones had worked tirelessly for years to stay in the industry under the radar;
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> (2) that it was necessary to send the message that the traffic commissioners take pride in their role of protecting road safety and fair competition;
>
> (3) that it was necessary to deter those foolish enough to work in ways that prevent transparent regulation.

> Those are factors which are consistent with the Statutory Guidance to which the TC referred, which itself is derived from the case law. They are also consistent with *T/2010/29 David Finch Haulage*, to which the TC again referred. In all the circumstances, we think the reasons given were sufficient.
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> 71. We point out in addition that the Statutory Guidance is also referred to in *T/2014/40-41 C G Cargo Limited and Sandhu*, [2014] UKUT 0436 (AAC), which drew attention to the suggested range of 5 to 10 years for conduct meriting the description "severe". Examples of "severe" conduct include any conduct designed to strike at the relationship of trust between traffic commissioners and operators and conduct designed to mislead the OTC. The TC clearly regarded Mr. Jones' conduct as severe for those purposes and on the basis of her findings of fact she was justified in doing so.
>
> 72. As an alternative, it was argued that in *T/2018/01 David King t/a Military World*, [2018] UKUT 0098 (AAC) the Upper Tribunal referred to the rehabilitation period specified in the Rehabilitation of Offenders Act 1974 as a barometer for assessing the length of a period of disqualification, whereas the TC in the present case did not make any such link. Here the rehabilitation period expires in September 2020. We do not think that it was intended in *King* to lay down a general rule that the period of disqualification should be closely linked to the period of rehabilitation. That was a case in which loss of repute was mandatory as a result of Mr. King's convictions. In such circumstances, the rehabilitation period may be a helpful guide. In the present case, although clearly the TC had regard to Mr. Jones' convictions, the major factor was his involvement in fronting, which was not a matter for the criminal courts. There is no reason to look for a close link to the rehabilitation period for offending behaviour which in fact occurred before the principal events giving rise to the loss of trust."

The Appeal to this Court and my Conclusions

18. On the appeal to this court, in succinct and helpful submissions, Mr Pojur accepted that neither the TC nor the UT could be faulted in finding that this was a serious case warranting suitable disqualification, but he argued that the disqualification should have been for no more than 5 years. He referred to the decision of the UT in *CG Cargo Ltd.* [2014] UKUT 0436 (AAC), which was cited by the UT in this present case in the passage that I have just quoted above.

19. In *CG Cargo*, the UT quoted what used to be para. 74 of the Statutory Document No. 10 issued by the Senior Traffic Commissioner as follows:

> "74. Taking account of the guidance from the Upper Tribunal that each case must be looked at on its merits, Traffic Commissioners may wish to use as a starting point for a first

> public inquiry consideration of a disqualification period of between 1 and 3 years, but serious cases, where, for example, the operator deliberately puts life at risk and/or knowingly operates unsafe vehicles or allows drivers to falsify records, may merit disqualification of between 5 to 10 years or in certain cases for an indefinite period. It is always open to a disqualified person to make application for removal or reduction of the order. Unless there are exceptional circumstances, a disqualification of less than two years will not normally be reduced, and disqualification for longer or indefinite periods will not normally be reviewed, until half the period or 5 years of the disqualification have elapsed as applies."

Mr Pojur submitted that, even regarding this case as a serious one, the TC did not explain why it was justified going to the top of the range in imposing the disqualification. Why, he asked rhetorically, was a ten year period appropriate and not five?

20. Mr Pojur made the obvious point that the period of disqualification imposed here is an extremely long one and far exceeded the five year rehabilitation period that applies in respect of Mr Jones's convictions which were a material element in the decision-making process of both the TC and the UT. He referred us to the UT decision in *David King t/a Military World* [2018] UKUT 0098 (AAC). In that case the UT said (at para. 29) that it took "as a barometer" for the proportionality of their decision the length of the rehabilitation period applicable in the case of that appellant, who had been convicted and imprisoned for tax evasion offences. As seen already, the UT did not consider that the rehabilitation period in respect of Mr Jones's crimes had the same relevance in this case as in *David King.*

21. Mr Heppinstall for the Secretary of State gave us a helpful "tour d'horizon" of the material statutory provisions, the statutory documents from the Senior Traffic Commissioner ("STC") and some additional cases. He explained that the TCs do not respond to appeals such as this and that it is left to the Secretary of State to apply to intervene in any suitable case in which matters of principle might arise. It was pointed out in Mr Heppinstall's written submissions that in *Coakley &* others [2003] Scot CS, Lord Kingsdown in the Court of Session said that the TC has no locus standi to appear in that court, but that the Secretary of State is entitled to appear. For my part, I find the present position about this rather unsatisfactory and I take the view that the UT and this court may well be assisted by representation by some person to put directly the opposite side of the argument to that presented by the appellant in support of an appeal. Since the appeal hearing, the Secretary of State has reminded us of the judicial element of the TCs' function in these matters as a reason for not being represented on appeals from their decisions. Indeed, that is so. However, for example, in my own experience the Information Commissioner frequently appears by counsel in appeals from her decisions; her role has some similarity to that of a TC in the present type of case. However, I move on.

22. Mr Heppinstall invited us to note certain provisions of the Public Passenger Vehicles Act 1981 ("PSVA 1981"). These included ss. 14(1) and 14ZA requiring that a TC has to be satisfied on applications for operators' licences that the applicant is "of good

repute", "has appropriate financial standing" and is "professionally competent". Similar criteria of repute and competence are required as to the designated transport manager. Pursuant to s.17, licences may be revoked by a TC if the holder or transport manager no longer satisfies those criteria.

23. For present purposes, the important statutory provision as to disqualification is to be found in s.28 of the Transport Act 1985 (in sub-ss. (1) and (5)), as follows:

> "(1) Where the traffic commissioner for any traffic area revokes a PSV operator's licence, he may order the former holder to be disqualified, indefinitely or for such period as he thinks fit, from holding or obtaining a PSV operator's licence.
>
> …
>
> (5) The powers conferred by this section in relation to the person who was the holder of a licence shall be exercisable also—
>
> (a) where that person was a company, in relation to any officer of that company; and
>
> (b) where that person operated the vehicles used under the licence in partnership with other persons, in relation to any of those other persons and any reference in subsection (6A) below to subsection (1) above or to subsection (4) above includes that subsection as it applies by virtue of this subsection."

I also note ss. (6A) providing that a TC may at any time cancel or vary a disqualification direction. Mr Pojur asked us to bear in mind that Directions given by the Senior Traffic Commissioner ("STC") say that a disqualification for this length will not normally be reviewed until 5 years have elapsed unless there are exceptional circumstances.

24. PSVA 1981 s. 4C provides that the STC can give guidance or general directions on certain matters. The relevant provisions are as follows:

> "4C Power of senior traffic commissioner to give guidance and directions
>
> (1) The senior traffic commissioner may give to the traffic commissioners
>
> (a) guidance, or
>
> (b) general directions, as to the exercise of their functions under any enactment.
>
> This subsection is subject, in relation to Scotland, to subsection (5) below [and, in relation to Wales, to subsection (6) below.

> (2) The guidance that may be given under subsection (1)(a) above includes guidance as to
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> > (a) the meaning and operation of any enactment or instrument relevant to the functions of traffic commissioners;
> >
> > (b) the circumstances in which, and the manner in which, a traffic commissioner should exercise any power to impose any sanction or penalty;
> >
> > (c) matters which a traffic commissioner should or should not take into account when exercising any particular function.
>
> (3) The directions that may be given under subsection (1)(b) above include directions as to
>
> > (a) the circumstances in which, and the manner in which, officers or servants of a traffic commissioner may exercise any function for or on behalf of the traffic commissioner, and any conditions which such officers or servants must meet before they may do so;
> >
> > (b) the information which a traffic commissioner must ask to be supplied in connection with the exercise of any particular function, and the steps which must be taken to verify the accuracy of any information so supplied;
> >
> > (c) the procedure to be adopted in conducting inquiries under section 54 of this Act, section 35 of the Goods Vehicles (Licensing of Operators) Act 1995 or any other enactment;
> >
> > (d) the manner in which a traffic commissioner must or may publish his decisions;
> >
> > (e) circumstances in which a traffic commissioner must consult some, or all, of the other traffic commissioners before exercising any particular function."

The distinction between "guidance" and "general directions" should be borne in mind here. Section 4C (2) provides for "guidance" to be given as to sanction or penalty, not "general directions". Section 4C(4) provides that before issuing guidance or directions the STC must consult a number of persons and bodies: the Secretary of State, Scottish and Welsh Ministers, other TCs (as thought appropriate), representatives of local government and transport authorities and relevant organisations representative of users and operators of transport services.

25. We were provided with Statutory Document No. 10 (November 2018). "The Principles of decision Making and the Concept of Proportionality" issued by the STC. This document contains both the STC's "guidance" and "directions" on the subject. It will be recalled that in the *CG Cargo* case, the UT cited para. 74 of the Statutory

Document 10 as then current. They also quoted from that Document a grid of three levels of relevant conduct, bearing on disqualification:

> "13) In addition, the Statutory Document indicates that Traffic Commissioners will consider conduct generally in the context of a regulatory starting point ranging from 'Low' at the bottom end, up to 'Severe' at the top end:

CONDUCT	**REGULATORY STARTING POINT**
Any conduct designed to strike at the relationship of trust between traffic commissioners and operators	SEVERE
Deliberate acts or omissions that compromise road safety and/or result in the operator gaining a commercial advantage	SEVERE to SERIOUS
Any conduct designed to mislead an enforcement agency or the Office of the Traffic Commissioner	SEVERE to SERIOUS"

26. Mr Heppinstall told us at the hearing that the paragraphs quoted in *CG Cargo* had been removed from the Guidance, showing that the STC was now eschewing any tariff on the question of disqualification. He submitted that the central point of the guidance is now to be found in paras. 58 and 61 of the Guidance as follows:

> "58. An order for disqualification can only be made against the operator or a director/equivalent of the corporate body (but not for instance a company secretary) or a transport manager (under different provisions). Disqualification of an operator cannot be imposed without an order for revocation (and can be made following revocation of an interim licence) but an order for disqualification does not necessarily follow revocation. Disqualification is a potentially significant infringement of rights and the Upper Tribunal has indicated that whilst there is no 'additional feature' required to order disqualification it is not a direction which should be routinely ordered. There may be cases in which the seriousness of the operator's conduct is such that a traffic commissioner may properly consider that both revocation and disqualification are necessary for the purposes of enforcing the legislation. The provisions are in general terms, consistent with the concept of deterrence, but assessment of culpability and use of words such as penalty should be avoided. The case law indicates a general principle that at the time the disqualification order is made that the operator cannot be trusted to comply with the regulatory regime and that the objectives of the system, the protection of the public and

> fairness to other operators, requires that the operator be disqualified. A clear example of this is when an operator fails to attend a public inquiry after an application to adjourn the hearing has been refused.
>
> …
>
> 61. Traffic commissioners are reminded that consideration of the period of any order for disqualification will always turn upon the facts of the individual case. The guidance from the Upper Tribunal reflects this. *"It is only on those rare occasions on which the facts are exactly the same that another decision is likely to be of any assistance on the question of the appropriate length of disqualification".* It is clear that each case must be considered on its own merits and relies on the traffic commissioner to assess what is necessary to balance the objectives of the legislation including the protection of the public and ensuring fairness to the legitimate licensed transport industry against the potentially significant infringement of the licence holder's or individual's rights."

27. Popplewell LJ, pointed out during argument that the self-same paragraph which had been quoted as para. 74 of the Statutory Document in the *CG Cargo* case (see para. 19 above) now appears as para. 100 of the present Document in the Directions section. Mr Heppinstall's told us, as we understood on instructions, that the STC had clearly removed the passage from the guidance section. However, at our request, Mr Heppinstall undertook to enquire after the hearing as to what had happened about this paragraph in the Document since the *CG Cargo* case.

28. By letter from the Government Legal Department of 22 October 2020 the Court was told that the following information had been obtained from the STC:

> "1. The quotation from Statutory Document 10 set out in the case of CG Cargo (page 134 of the Appeal Bundle, paragraph 12 of the decision) is now to be found at paragraph 100 of the current Statutory Document (page 91 of the Appeal Bundle). Searches indicate that those words were only ever included in the "Directions" part of Statutory Document 10, as opposed to the "Guidance" section of that Document.
>
> 2. The "Directions" section of the document provides statutory directions which must be followed by traffic commissioners and members of DVSA staff deployed to the Office of the Traffic Commissioner. Those staff members prepare submissions recommending action to Traffic Commissioners and use the "Directions" to gage how the various scenarios might be approached by a traffic commissioner. Paragraph 100 provides rough "starting points" as to when disqualification might be in contemplation.

> 3. Searches confirm that there has in fact been no change in that part of the Statutory Document. The text at paragraph 100 has always been there but did not form part of the Statutory Guidance section. The "Guidance" and "Directions" sections reflect the different powers given to the Senior Traffic Commissioner. The summary of the relevant case law in the "Guidance" did change. However, the term "guidance" found its way into the Upper Tribunal's decision in CG Cargo.
>
> 4. It remains the submission of the Secretary of State that the guidance to be given to Traffic Commissioners on length of disqualification is that provided at paragraph 61 of the Statutory Guidance document (page 82 of the Appeal Bundle). The indicative lengths of time given at paragraph 100 may well be useful starting points, but the Secretary of State continues to favour the flexible approach set out at paragraph 61.
>
> 5. The Secretary of State apologies to the Court for the confusion surrounding this issue."

The apology did not cover the inaccurate information provided at the hearing when the matter was initially raised by the court at the hearing of the appeal. Clearly, there was and is confusion caused by all this, which remains to be addressed.

29. In my judgment, because of the distinction drawn between "guidance" and "general directions" in PSVA 1981 s. 4C (1), it is to the *Guidance* section of the document that TCs must turn in exercising powers as to penalty or sanction. That section of the document provides no definitive "steer" as to the length of any disqualification period. The directions section appears to be aimed at staff exercising delegated functions. Save for the short passage in paragraph 2 of the letter of 22 October 2020, we were not informed as to the circumstances in which staff members might have to deal with issues of disqualification and in which, therefore, they would have to have regard to para. 100. The TCs cannot be fettered by what appears in para. 100 in making their own decisions in individual cases, but the thinking that appears in the paragraph cannot be put entirely out of mind as part of the relevant background. It certainly influenced the UT in the *CG Cargo* case and they can hardly be faulted in being so influenced.

30. Mr Heppinstall drew our attention to the decision of a Full Bench (consisting of five judges) of the Inner House of the Court of Session in Scotland, with the Lord Justice-Clerk (Lord Cullen) presiding, in *Thomas Muir (Haulage Ltd. v Secretary of State for the Environment, Transport and the Regions* [1999] SC 86. The court addressed the underlying purpose of the disqualification provisions in legislation of this character, in that case relating to goods vehicle licensing. The opinion of the court was delivered by the Lord Justice-Clerk; it included the following:

> "In the light of that background it is clear that the underlying purpose of a direction under sec 26(1) can only be stated in very broad terms, namely that it is intended to be used, so far as may be appropriate, to achieve the objectives of the system. The proper question is whether in that context the direction is

> appropriate in the public interest. The objectives of the system plainly include the operator's adherence to the various requirements of sec 13(5). In the case of prohibitions and convictions it is plain that the protection of the public is a very important consideration.
>
> During the course of the discussion our attention was drawn to the fact that in a number of their past decisions the transport tribunal referred to a direction by a licensing authority under a predecessor of sec 26 as a "penalty" and expressed the need to ensure that the "penalty" was effective.
>
> We can see no justification for treating the direction under sec 26(1) in the same way as if it were a punishment administered by a criminal court and hence arrived at by reference to the full range of considerations which such a court would take into account. This appears to us to involve a confusion in roles. When Parliament intends to invoke the criminal law, it does so expressly by enacting provisions which define the offence and its penal consequences.
>
> On the other hand, it does not follow that a traffic commissioner is prevented from taking into account, where appropriate, some considerations of a disciplinary nature and doing so in particular for the purpose of deterring the operator or other persons from failing to carry out their responsibilities under the legislation. However, taking such considerations into account would not be for the purpose of punishment per se, but in order to assist in the achievement of the purpose of the legislation. This is in addition to the obvious consideration that a direction may be used to provide direct protection to the public against dangers arising from the failure to comply with the basis on which the licence was granted. Whether or not such disciplinary considerations come into play must depend upon the circumstances of the individual case."

31. I agree that that passage is directly applicable to cases of the present type. Disqualification is not to be seen in the same way as a punishment imposed by a criminal court. One has to be conscious of the disciplinary function arising in this jurisdiction and one must be cautious of expressions such as "serious punishment" in describing the power to disqualify. That was one of the phrases used in this court's judgments in *Re Anglorom Trans (UK) Ltd* [2004] EWCA 998 at [23]. The *Thomas Muir* case was not cited in *Anglorom* which had different issues to consider. I do not ignore the fact that a disqualification order is a severe course of action and any such order has to be made with proper circumspection. The general purpose of the legislation in securing appropriate standards in the interests of the public and preventing "corner cutting" by unscrupulous operators has also to be borne in mind.

32. Mr Pojur argued that, in this case, the TC had been unduly influenced by negative factors in Mr Jones' past history which affected her view of him prior to the hearing. He also submitted that the TC was wrong to have made reference to the pride taken by

TCs in protecting road safety and fair competition. Such pride, he submitted was not relevant: the result was an overemphasis on deterrence and a manifestly excessive period of disqualification.

33. Assessing all the features carefully advanced before us by counsel, I cannot see that the TC's decision was erroneous in any way that would justify us interfering with it on this second appeal, after a full consideration by the UT as the expert appeal tribunal in the field. I accept, in this regard, Mr Heppintall's submission that special respect needs to be given to the decisions of expert decision-makers in this type of case: see e.g. per Laws LJ in *Raschid v GMC* [2007] EWCA 46 at [19] and Simon Brown LJ (as he then was) in *Re Ribble Motor Services v Traffic Commission for the North West Traffic Area* [2001] EWCA Civ 267 at [50].

34. Mr Pojur had to concede, correctly in my view, that this was a serious case, and the TC was clearly and properly concerned by the persistent attempts by Mr Jones, over a long period, to stay "under the radar" of the regulators. The position was compounded by the combative approach adopted by him: first, when the TC began to enquire into matters giving rise to concern following the applications submitted in relation to CHS in August 2018; and secondly, at the public inquiry itself for which it seemed that he had shown little inclination to prepare properly by furnishing the required information.

35. The history of Mr Jones' involvement with previous transport undertakings, as summarised in the tabular chronology in para. 20 of the TC's decision and in para. 11 of the UT's decision, was clearly in Mr Jones' mind when he wrote in his first letter to the TC on this matter on 11 September 2018 and mentioned "other negative involvements involving myself and the Office of the Traffic Commissioner". It must have been obvious that the TC was concerned about these other matters and that they would be raised at the inquiry, in accordance with the inquisitorial role conferred upon the TC in these cases. This makes it impossible for him to complain about the TC's view of him prior to the inquiry. The reference in the decision to "the pride taken by the TCs in their role" is merely reflective of a recognition of the need to ensure proper respect by operators for the regulatory function of the TCs and the need to deter those in the industry from the type of deceptive behaviour that the TC found had occurred in this case. The conduct demonstrated a refusal to recognise the need to be subject to oversight or regulation and a determination to earn money notwithstanding avoiding its reach.

36. There is no basis upon which we could find any error on the TC's part in fixing the disqualification period as she did.

37. It was suggested in the grant of permission to appeal that this might be a case for the court to give guidance on the principles to be applied. On reflection, I do not think that can be so, given that the statutory power to give guidance on matters of sanction is expressly conferred by PSVA 1981 s.4C(1) and (2), upon the STC, after compliance by him with the wide consultation obligation imposed upon him/her in s.4C(4), and that he has positively declined to prescribe any tariff system. It seems that the STC has left TCs to be guided by the general principles that he has set out in the guidance section of the Statutory Document. However, I would not leave the case without the comment that the role to be played by para. 100 of the Statutory Document seems to me, with respect, worthy of further consideration.

38. For these reasons, I would dismiss this appeal.

Lady Justice Asplin:

39. I agree.

Lord Justice Popplewell:

40. I also agree.