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IN THE COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM
THE UPPER TRIBUNAL IN NORTHERN IRELAND
(ADMINISTRATIVE APPEALS CHAMBER)

Between:

TREVOR CATHERS & TREVOR CATHERS LIMITED

Appellants

and

THE MINISTER FOR THE DEPARTMENT FOR INFRASTRUCTURE

Respondent

Before: McCloskey LJ, Horner LJ and McBride J

Representation

Appellant: Mr Simon Clarke, of counsel, instructed by Macaulay & Ritchie Solicitors
Respondent: Mrs Nessa Murnaghan KC and Ashleigh Jones, of counsel, instructed by the Departmental Solicitor's Office

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McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] The parties to this application for leave to appeal are Trevor Cathers and Trevor Cathers Limited ("the appellants") and the Minister for the Department for Infrastructure ("Department"). The Minister is involved in these proceedings in his capacity of regulator of the transport industry Northern Ireland. The first-named appellant, whom we shall describe as "the father", now aged 73 years, has spent a lifetime in the road haulage business. The second-named appellant is a registered company established by Alistair Cathers, whom we shall describe as "the company" and "the son" respectively.

History of the appeals

[2] This leave application follows upon two levels of decision making. At the first level, a Presiding Officer of DfI Transport Regulation Unit ("the regulator") made three decisions: revoking the father's statutory transport operator's licence; disqualifying him as a transport manager for an indefinite period; and refusing the second company's application for a standard international goods vehicle operator's licence.

[3] The appellants exercised their statutory right of appeal, resulting in a hearing before and decisions of the Upper Tribunal (Administrative Appeals Chamber). By its decision dated 29 November 2021 the appeals were dismissed. On 14 December 2021 the appellants filed applications for leave to appeal to the COA. By its decision dated 22 December 2021 the Upper Tribunal refused these applications. By a separate decision of the same date the Upper Tribunal suspended its decisions in effect to facilitate a further challenge before this court.

Factual Matrix

[4] On 1 January 2010 the respondent granted the first appellant (the father) a standard international licence authorising the use of ten vehicles and 23 trailers. The first appellant was the designed Transport Manager. The operating centre to which the licence related is situated in Omagh.

[5] The first appellant was also the holder of a separate operator's licence in Scotland. On 4 May 2016, following a public inquiry in that jurisdiction, this licence was revoked on the grounds that (a) specified licence conditions and undertakings had been violated and (b) the business had been operated by Alistair Cathers, the first appellant's son rather than the first appellant. In addition to revocation a three years' disqualification period was imposed. The substance of the breaches of licence conditions was the following: convictions in respect of certain offences during the previous five years; the receipt of various prohibition notices issued by the Scottish regulator or the Scottish police during the previous five years; and making false statements when applying for the licence. The substance of the undertakings breached was: failing to adhere to the rules governing and restricting drivers' hours of work and failing to notify the traffic commissioner immediately of any changes or convictions affecting the licence. There was also a specific finding recorded in the later decision of the Public Inquiry Presiding Officer ("PIPO") in these terms:

> "It was also found that since the licence was issued there had been a material change in the circumstances of its holder namely it appeared that Alistair Cathers operated the business."

As will become apparent this was a finding of some significance. Finally, the Scottish PIPO refused Alistair Cathers' application for an operator's licence.

[6] The first element of the appellants' reaction to these grave commercial setbacks was the following. The company, as already noted, was established by the son, who is its sole director and shareholder. It was incorporated in October 2016. On 17 October 2016 the second appellant applied for a standard international licence in respect of five vehicles and seven trailers. One Ivan Black was proposed as the designated Transport Manager, with the business operating from the same venue as before. This was the trigger for a hiatus of two years, during which the only events of note were the Department's request (dated 24 October 2016) for further information and the second appellant's response (dated 31 October 2016).

[7] On 10 October 2018 the Department transmitted to the first appellant a formal notice of intention to revoke his sole trader's licence. The first appellant's response, dated 6 November 2018, was to exercise his statutory right to request a public inquiry. Another hiatus, this time of some 17 months duration, ensued. On 27 March 2020 DVA (an offshoot of the NI regulator) conducted a "compliance audit" in respect of the licence.

[8] Next, on 21 January 2021 the public inquiry was conducted. On 25 January 2021 the decision of the Presiding Officer (the "NIPIPO") revoking the first appellant's sole trader licence and refusing the second appellant's application for a licence were transmitted. On 9 February 2021 notices of appeal to the Upper Tribunal were lodged. On 12 February 2021 the impugned decisions were formally stayed. On 30 September 2021 the Upper Tribunal heard the appeals together. By its decision dated 29 November 2021 the Upper Tribunal dismissed the appeals. By a further decision dated 22 December 2021 the Upper Tribunal refused permission to appeal to the Court of Appeal. On the same date, it promulgated a separate decision staying its substantive decisions.

Statutory Framework

[9] The regulatory regime governing the use of vehicles on a road for the carriage of goods either for hire or reward or for or in connection with any trade or business is contained in the Goods Vehicles (Licencing of Operators) Act (NI) 2010 (the "Goods Vehicles Act"). By section 1 every activity of the foregoing kind requires an "operator's licence." Section 2(5) provides that a standard licence "may" authorise a goods vehicle to be used for the carriage of goods by road either (a) on both national and international transport operations or (b) on national transport operations only. Section 4 makes clear that the terms of the operator's licence regulate the vehicles and trailers which the operator is permitted to use. Section 5 provides that an operator's licence shall specify the maximum number of vehicles to be used. A maximum number of vehicles exceeding a specified weight may also be prescribed. By section 6 the licence must specify the approved operating centre to which it

relates. "Operating centre" is defined as "the base or centre at which the vehicle is normally kept …."

[10] The cornerstone provisions of every standard operator's licence are contained in section 12A, which provides:

> "**Requirements for standard licences**
>
> 12A.—(1) The requirements of this section are set out in subsections (2) and (3).
>
> (2) The first requirement is that the Department is satisfied that the applicant—
>
> (a) has an effective and stable establishment in Northern Ireland (as determined in such manner as may be prescribed);
>
> (b) is of good repute (as determined in such manner as may be prescribed); and
>
> (c) has appropriate financial standing (as determined in such manner as may be prescribed]); ...
>
> (d) …
>
> (3) The second requirement is that the Department is satisfied that the applicant ...—
>
> (a) is an individual who—
>
> (i) is professionally competent (as determined in such manner as may be prescribed) and
>
> (ii) has designated a suitable number of individuals (which may include the applicant) who satisfy such requirements as may be prescribed, or
>
> (b) if the applicant is not an individual, or is an individual who is not professionally competent, has designated a suitable number of individuals who satisfy such other requirements as may be prescribed.
>
> (c) …

> (4) For the purposes of subsection (3), a number of designated individuals is suitable if the Department is satisfied it is proportionate to the maximum numbers of motor vehicles and trailers that may be used by the applicant in accordance with section 5 if the standard licence is issued.
>
> (5) In this Act, "transport manager" means an individual designated under subsection (3)(a)(ii) or (b)."

Per section 15(2), the duration of every operator's licence is, subject to revocation or other form of termination, indefinite. Section 15(3) enables the licence holder to request the Department to terminate it. The Department shall accede to such request unless it is considering revocation, suspension or curtailment of the licence under section 23 or 24.

[11] Sections 23–25 constitute a discrete statutory regime governing the revocation, suspension and curtailment of operators' licences. Section 23(1) empowers the Department to direct revocation, suspension or curtailment of an operator's licence "*for any reasonable cause*" and in any of the circumstances which are then specified – including breach of licence conditions, breach of licence undertakings and false representations in applying for the licence. Section 24, separately, empowers the Department to revoke a standard licence if at any time it appears to the Department that the licence holder no longer satisfies one or more of the requirements of section 12A (see para [9] above). In such cases the Department is obliged to give notice of its intention to revoke the licence. The Department must then consider any representations made by the licence holder. Where the Department makes a revocation decision it may also impose disqualification under section 25. Neither revocation of the licence nor disqualification of the licence holder can be effected, per section 26(1):

> "… without first giving the holder of the licence …. notice that it is considering doing so and holding an inquiry if the holder of the licence …. requests the Department to do so."

[12] By section 35 there are various rights of appeal to the Upper Tribunal. An appeal lies against *inter alia* any revocation, suspension or curtailment of an operator's licence. Section 48 provides that subject to any regulations made under section 52:

> "… an operator's licence is neither transferrable nor assignable."

In other words, it is personal to the holder and inalienable.

[13] The Goods Vehicles Act co-exists with a measure of EU law, namely EU Regulation (EC) Number 1071/2009. This is the parent EU measure in a cohort containing a large number of components. It is a classic EU internal market measure, as the recitals make clear. Unsurprisingly, recital (2) draws attention to the importance of public safety. The need for licence operators to have good repute is another dominant theme of the recitals. Article 3 prescribes the general requirements for engaging in road transport activities:

> "Undertakings engaged in the occupation of road transport operator shall:
>
> (a) have an effective and stable establishment in a Member State;
>
> (b) be of good repute;
>
> (c) have appropriate financial standing; and
>
> (d) have the requisite professional competence."

The more detailed out-workings of the requirement of good repute are contained in Article 6. Article 6(2) provides that in any case where the undertaking or the transport manager has been convicted of a serious criminal offence or incurred a certain type of penalty for infringements of rules the competent authority:

> "… must carry out in an appropriate and timely manner a duly completed administrative procedure …
>
> The procedure shall determine whether, due to specific circumstances, the loss of good repute would constitute a disproportionate response in the individual case. Any such finding shall be duly reasoned and justified. If the competent authority finds that the loss of good repute would constitute a disproportionate response, it may decide that good repute is unaffected ….
>
> If the competent authority does not find that the loss of good repute would constitute a disproportionate response, the conviction or penalty shall lead to the loss of good repute."

Thus, the regulator and other associated agencies must act timeously. The Regulation has a self-contained proportionality mechanism. Per Article 6(2)(a):

> "For the purposes of point (b) of the third subparagraph of paragraph 1:
>
> where the transport manager or the transport undertaking has in one or more Member States been convicted of a serious criminal offence or incurred a penalty for one of the most serious infringements of Community rules as set out in Annex IV, the competent authority of the Member State of establishment shall carry out in an appropriate and timely manner a duly completed administrative procedure, which shall include, if appropriate, a check at the premises of the undertaking concerned.
>
> The procedure shall determine whether, due to specific circumstances, the loss of good repute would constitute a disproportionate response in the individual case. Any such finding shall be duly reasoned and justified.
> If the competent authority finds that the loss of good repute would constitute a disproportionate response, it may decide that good repute is unaffected. In such case, the reasons shall be recorded in the national register. The number of such decisions shall be indicated in the report referred to in Article 26(1)."
> If the competent authority does not find that the loss of good repute would constitute a disproportionate response, the conviction or penalty shall lead to the loss of good repute;

The Underlying Proceedings

[14] In his decision dated 25 January 2021 the NIPIPO noted the following, a para [2]:

> "Following a public inquiry on the 21 April 2016 Trevor Cathers was found to have breached the conditions and undertakings on an operator's license held in Scotland. The conditions breached were, incurring relevant convictions in the previous 5 years, receiving prohibition notices issued by the DVSA or the Police within the past 5 years and making false statements when applying for the operator's license. The undertakings breached were, vehicles not being kept in a fit and serviceable condition, not adhering to the rules on drivers' hours and not informing the traffic commissioner immediately of any changes or

> convictions which affected the license. It was also found that since the license was issued there had been a material change in the circumstances of its holder namely it appeared that Allister Cathers operated the business."

On the foregoing basis the Traffic Commissioner for Scotland concluded that loss of repute had been established in respect of the first appellant and imposed the sanctions noted in para [5] above.

[15] The Scottish Traffic Commissioner's decision relating to Alistair Cathers is outlined in para [4] thus:

> "Alistair Cathers, who is Trevor Cathers' son, had made an application in Scotland for a new licence which was considered by the Traffic Commissioner at the same inquiry. She refused the application on the ground that she did not find that Alistair Cathers had the necessary repute. This conclusion was reached because of his involvement in the Scottish license held by his father, the fact that in 2011 he had used a magnet to defraud a tachograph device and in 2014 had been guilty of a series of drivers' hours' offences including 24 occasions when he made a false record by using a card belonging to another person."

The decision further notes that Alistair Cathers is the sole director of Trevor Cathers Limited, the second appellant.

[16] Evidence was given at the NI public inquiry by both the first appellant and Alistair Cathers. Para [13] of the PIPO's decision records:

> "In respect of the applicant company Trevor Cathers Limited, Allister Cathers said that he had set up the company in 2015 and accepted that work since 2016 had been undertaken through that company even though they did not have an operator's license. He had not realised at the time that this was wrong. He had made significant changes since 2016 to improve compliance including the engagement of an external analyst in relation to tachograph records.

Alistair Cathers further accepted that from 2016 the operating vehicles had not normally been kept in Northern Ireland and that the operating entity had been the second appellant (ie Alistair Cathers). He suggested that the DVA audit in January 2020 had been "*generally very positive*".

[17] At para [22] of the NIPIPO's decision one finds the following key passage:

> "It follows from my findings in the last paragraph that the delay in listing this inquiry has resulted in Trevor Cathers being able to continue to operate under the auspices of his Northern Ireland licence for longer than would have otherwise been in the case. If he had done so by using his approved operating centre and his sole trader licence, I anticipate that I would have been able to consider the case before me as akin to an application for repute to be regained. However, what Mr Cathers has done in the period since 2016 is continue his business operation in Scotland as if the revocation and disqualification ordered by the Traffic Commissioner had not happened. By keeping the authorised vehicles there, employing drivers who are based there and operating from there the order has been circumvented from 2016 until now. The situation has been compounded by the transfer of the business operation to Trevor Cathers Limited, a company which does not hold a licence in any jurisdiction."

Having regard to the gravity of these failures the NIPIPO had "no hesitation" in finding that the first appellant no longer had repute in relation to his current licence, ordering its revocation. Turning to the second appellant, the decision states at para [24]:

> "I find that it is more likely than not that Trevor and Alistair Cathers knew that what they were doing was outside the scope of the licence held in Northern Ireland. To think that it was permissible would make a mockery of the initial revocation and disqualification. Allister Cathers told me in the inquiry that his refresher training had included sections on operating centres and legal entities and appeared to accept that he knew that what they were doing was wrong."

In relation to both appellants, while acknowledging that there were certain discernible positives and improvements, it was concluded that these did not outweigh the negative effect of the unlawful operation.

[18] The NIPIPO's self-direction as regards the issue of delay was this:

> "I need to consider the reasons for the delay **and whether a fair hearing is still possible**."
> [Emphasis added.]

He reasoned and concluded thus:

> "In deciding whether a fair hearing is possible I also take note that the reasons the enquiry was being called were communicated to [the First appellant] and his son Alistair Cathers when the original decision to do so was made. The primary evidence justifying an enquiry was the decision of the Scottish Traffic Commission and this was in their possession. **In these circumstances I find that a fair hearing is possible in principle despite the delay**."
> [Emphasis added.]

The Upper Tribunal Decisions

[19] There were three grounds of appeal to the Upper Tribunal, each featuring delay. The delay under scrutiny was the four year period identified above. The Upper Tribunal's self-direction about the nature and scope of the appeal was that it took the form of "a review of the material placed before the [NIPIPO] … together with a transcript of [the] public inquiry …."

[20] In its determination the Upper Tribunal identified the two periods of delay under scrutiny as four years and three months (first appellant) and four years and two months (second appellant). It found the reasons proffered for the respondent's delay "insupportable", "deplorable" and "inexcusable" highlighting inter alia "carelessness and inattention …. which appeals to be systemic."

[21] Next the Upper Tribunal pose this question: Did the aforementioned delay affect the fairness of the impugned decisions of the PIPO? In this context it is important to identify the first appellant's case:

> "[Counsel] submits that the delay in the holding of a Public Inquiry ... delayed the first appellant's retirement and caused prejudice to him …. insofar as his life was effectively on hold."

The Upper Tribunal rejected this submission in these terms:

> "It is our view that if this was the first appellant's intention then he could have exercised it at any time. He did not do so because the second appellant's application for a license in Northern Ireland had not been determined and, as a consequence, if the family business in Northern Ireland was to continue then it would have to be conducted through the vehicle of the first appellant's

> Northern Ireland licence. We now know that not only did the family business continue but that operations were conducted unlawfully with the second appellant taking over the business without having a license and operating in other geographical jurisdictions without having licences there."

The second submission advanced was "…. the delay in the determination of the second appellant's licence restricted the second appellant's ability to enjoy his possessions." This submission was rejected on the ground that "… despite having no licence of his own the second appellant had in essence taken over the family business and was operating it in an unlawful manner."

[22] The Upper Tribunal's overarching conclusion was that the decisions of the NIPIPO "were not plainly wrong." Its concluding comments make clear that the centre piece of its decision was:

> "…. the fact that the first and second appellants continued to operate the business in Scotland (and beyond) as if the revocation and disqualification had not occurred. Further the business was, in effect, being conducted by the Second appellant, through his limited company which did not hold a licence anywhere. We agree with the Presiding Officer's conclusion that the first and second appellants knew what they were doing and that it was unlawful."

Finally, having acknowledged essentially the same "positive features" as those identified by the NIPIPO, the Upper Tribunal concluded that they were "… far outweighed by the negative aspects."

Refusal of leave to appeal

[23] Certain relevant statutory provisions are contained in section 13 of the Tribunals, Courts and Enforcement Act 2007 and the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (a Lord Chancellor's instrument of subordinate legislation). The Upper Tribunal reasoned that none of these provisions applies, given that the first level decision maker (NIPIPO) is not a First-Tier Tribunal as defined. Thus, the statutory so-called "second appeal" test was not engaged. The Upper Tribunal nonetheless considered that it had jurisdiction to grant leave to appeal, applying the test of whether the proposed appeal had a real prospect of success, concluding that this test was not satisfied. Para [19] of its decision explains why:

> "The matters raised by the applicants' representative in the applications were raised during the course of the proceedings ….

> These issues were addressed … in some degree of detail in [the UT's] decisions. I do not consider that the conclusions …. were in error in connection with this issue. I also do not consider that the renewal of the arguments meets the threshold test of a real prospect of success."

Independently, orders staying its decisions were made.

Analysis and Conclusions

[24] The core of the appellants' case is readily deduced from the grounds of appeal and counsel's submissions. It has two central pillars. By the first pillar, they contend that there was excessive delay in convening the Public Inquiry giving rise to unlawful interference with their separate rights to peaceful enjoyment of their property/possessions contrary to Article 1 of The First Protocol, in contravention of section 6 of the Human Rights Act 1998.

[25] As the court made clear at the hearing, the crucial issue in this context is that of interference. The interference asserted by the two appellants is not the same. In response to the court, Mr Clarke formulated the interference on which the father relies in the following terms: by reason of the delays of the respondent he was deprived of the opportunity to advance, at a timeously convened public inquiry, the case that the PIPO should exercise his discretion in a manner favourable to him by permitting termination of his operator's licence (under section 15(3) of the Goods Vehicles Act: see para [10] *supra*). The immediate riposte to this contention is that this has nothing to do with interference with the father's enjoyment of the "*possession*" in question, namely his operator's licence. The father wished to relinquish his article 1/protocol 1 "possession." Furthermore, as a matter of fact the father was not deprived of the opportunity to make this case to the NIPIPO. Next, the Department's delay had no impact whatsoever on the first appellant's ability to carry on business under and in accordance with his operator's licence.

[26] The analysis continues thus. A consideration of the evidence, the facts found at first instance and concessions appropriately made before this court confirms beyond peradventure that the first appellant made a conscious choice not to carry on the business activities permitted by his licence – or, at most, to barely do so – during the four year period under scrutiny. This choice was driven by the following considerations: due to increasing age and failing health he wanted to retire from the business; market conditions for the business on the island of Ireland had become considerably less favourable; it was more lucrative to allocate the business's vehicles to haulage operations conducted from a base in Scotland; and in this way the father's preference to progressively transfer all of the business assets to his son could be achieved.

[27] The first appellant's article 1/protocol 1 case is further confounded by the analysis in para [22] of the NIPIPO's decision, reproduced at para [17] above. In short, albeit in an illicit way, the first appellant positively sought to take advantage of his "*possession*" ie the operator's licence throughout the period under scrutiny. This licence was the veneer of respectability, or legitimacy, with which both appellants attempted to clothe the unremittingly unlawful road haulage business operations carried out under the stewardship of the son.

[28] In short, no "interference" with the first appellant's "possessions" has been demonstrated.

[29] As regards the second appellant the article 1/protocol 1 case is formulated differently. This appellant's case concerns a <u>prospective</u> (rather than actual) "*possession*", namely the operator's licence for which it had applied, which application also was determined by the NIPIPO. Mr Clarke's submission was that the <u>interference</u> with this prospective possession occurred when the NIPIPO refused the operator's licence application. This court is prepared to assume that, on these facts, the article 1/protocol 1 requirements of (a) "*possession*" and (b) interference therewith are satisfied. Based on this premise a particular analysis is required.

[30] This flows from the consideration that the right protected by article 1/protocol 1 of The First Protocol is not absolute in nature. Rather it is subject to the control of the use and enjoyment of property in accordance with the general interest. This is the test which the ECtHR has formulated and applied in multiple decisions including, for example, *Sporrong and Lonnroth v Sweden* [1982] 5 EHRR 35 at para [61]. This is linked to the well-known entitlement of every state to strike a fair balance between the demands of the general interests of the community and the protection of individual rights.

[31] In a sentence, all of the business activities carried on by or on behalf of the two appellants and/or Alistair Cathers during a period of some four and a half years were in all material respects unlawful, flagrantly so. Alistair Cathers used the incorporated company and his father's NI licence as a ruse to circumvent the decision of the Scottish Traffic Commissioner in July 2016 to refuse him an operator's licence on the ground that he had not demonstrated the requisite repute. Alistair Cathers, as sole director and transport manager of the company, continued to operate blithely in the teeth of this refusal and the statutory scheme. Based on the NIPIPO's findings and all the other evidence he plainly did so knowingly. Furthermore, he chose not to adopt the lawful option identified in para [25] of the NIPIPO's decision namely assisting his father in developing the business in Northern Ireland and improving the compliance regime, thereby building his own personal repute.

[32] The NIPIPO, in making his determinations against both appellants, expressly recognised the (very few) positive features in their cases, fundamentally the improvement in the compliance regime in respect of the Scottish business

operations. He specifically concluded that this did not "… *outweigh the negative effect of the unlawful operation*". In this way he conducted the balancing exercise required by the proportionality provision of the EU regulation (para 10 *supra*). This court is satisfied that his decision is unimpeachable in this respect. The conclusion that the property interference of which the second appellant complains was manifestly in the public interest follows inexorably.

[33] The second pillar of the appellants' case is constructed around the reasonable time requirement enshrined in article 6 ECHR. This Convention provision provides, in material part:

> "1. In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing **within a reasonable time** by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
> [emphasis added]

The first question is whether the decisions of the NIPIPO and the Upper Tribunal's dismissal of the ensuing appeals of the appellants entailed the determination of any civil right or obligation of either appellant. The parties did not develop any submissions on this discrete issue. This court, having considered for itself the leading decisions is prepared to assume, without deciding, that the impugned decisions of the PIPO determined a civil right of both appellants.

[34] Properly analysed, the appellants' article 6 case has the following interlocking components: the determinations of the NIPIPO determined some unspecified civil right of both appellants; the appellants were entitled to these determinations within a reasonable time; this entitlement was breached because the relevant period of time, some four years, entailed excessive and inexcusable delay on the part of the Department; by reason of such delay the decisions of the NIPIPO should have been favourable to the appellants; the Upper Tribunal should therefore have allowed their appeals; and this court should grant leave to appeal and determine the appeals substantively in the appellants' favour by (per the Notice of Appeal) (a) quashing the decisions of the NIPIPO and the Upper Tribunal and (b) substituting – in some unspecified way – its own decisions. The same analysis, with appropriate adjustments, applies to the appellants' case under article 1 of The First Protocol (*supra*).

[35] At both first instance and second instance it has been held that there was indeed excessive and inexcusable delay on the part of the Department in convening the public inquiry and completing that statutory process. This court having expressed the provisional view that in this discrete respect the decisions of both the NIPIPO and Upper Tribunal were unassailable Mrs Murnaghan, representing the Department, very properly agreed. The question is how, if at all, this avails either appellant in their article 6 case.

[36] It is well established that the reasonable time requirement is a free-standing element of article 6: see for example *Darmalingum v The State* [2000] 1 WLR 2303 per Lord Steyn and *Porter v Magill* [2002] 2 AC 357 at para [109] per Lord Hope. Furthermore, in considering whether this discrete requirement has been infringed it is not incumbent on the individual to demonstrate prejudice.

[37] Next it is necessary to consider the <u>purpose</u> of the reasonable time requirement. In *Stugmuller v Austria* [1969] the ECtHR in one of its earliest decisions, made clear that it is designed to protect parties against excessive procedural delays. Other recurring themes of the jurisprudence are that there is no absolute time limit; every case is fact sensitive; and a fair balance is to be struck between the need to conduct judicial proceedings expeditiously and the more general principle of the proper administration of justice, itself also derived from article 6(1); see for example *Pafitis v Greece* [1999] 27 EHRR 566 at para [97].

[38] In determining whether the reasonable time requirement has been breached a series of now well-established principles emerges from the jurisprudence of the ECtHR. First, this is an intensely fact/case sensitive issue. The particular circumstances must always be examined. Second, the whole of the relevant period must be considered. Thus, the entirety of the legal proceedings in question have to be taken into account. Third, lengthy individual periods of stagnation are not acceptable. Fourth, the special characteristics of the process, or proceedings, in question must be considered. Fifth, complexity is a relevant factor. *Ditto* the conduct of the applicant. What was at stake for the applicant must also be taken into account. In addition, the conduct of the relevant state agencies must be considered.

[39] There is one particular principle belonging to this *corpus* of Convention jurisprudence which resonates in the present case. The Strasbourg court has repeatedly emphasised that each contracting party must organise its legal system in such a manner as to guarantee finality of proceedings within a reasonable time. See for example *Vocaturo v Italy* [24 May 1994, Series A Number 2016 – C] and, more recently, *Bielinski v Poland* (Number 48762/19, 21 July 2022). Furthermore, it has specifically been held that where litigation delays are attributable to a temporary backlog of cases the reasonable time requirement will not be violated provided the state has taken reasonably prompt remedial action: see *Bucholz v Germany* (6 May 1981, Series A Number 42).

[40] The link between the immediately preceding cases and the instant case is unmistakable. The NIPIPO, focusing only on one segment of the overall period of delay, recorded the Department's explanation that between 2017 and 2019 the delay:

> "… resulted from an absence of suitably qualified and experienced individuals to preside at the inquiries."

The period under scrutiny actually dated from October 2016, when the second appellant's application for a licence was received. The overall period had a total duration of four years and three months. The Department made no attempt to explain the first year's delay. Indeed, the Department adduced no evidence at all at the public inquiry. It was left to counsel to proffer an explanation. This we consider entirely unsatisfactory. In the event the cumulative delays attracted the withering condemnations noted in para [20] above: "… insupportable … deplorable … redolent of carelessness and inattention which appears to be systemic."

[41] We remind ourselves that the litigation history of this application for leave to appeal contains two decisions of specialised tribunals, each bringing to bear its particular specialised knowledge and expertise. Each was clearly aware of a broader panorama which is not before this court. The application of *Edwards v Bairstow* principles impels inexorably to this court declining to interfere with the foregoing judicial assessments. If and insofar as this court, being a public authority under section 6 of the Human Rights Act 1998 ("the Human Rights Act"), is obliged to determine this issue afresh, we have no hesitation in concurring fully with those assessments. Accordingly, the appellants have clearly demonstrated a breach of the reasonable time guarantee in article 6(1) ECHR and, thus, a breach of their article 6(1) right by the Department contrary to section 6(1) of the Human Rights Act.

[42] The critical question is where this should have led as a matter of law. As already noted, both appellants in substance make the case that by virtue of the breach of the reasonable time requirement the outcome of the first appellant's challenge to the notice of intention to revoke his operator's licence and the second appellant's application for such a licence should have been favourable to them. This, starkly, is their case.

[43] This issue is resolved by an appreciation of the character of this discrete Convention right and some general Convention principles. Lord Bingham's treatise on the reasonable time requirement in *Attorney General's Reference No 2 of 2001* [2003] UKHL 68 at paras [20]–[23] is particularly valuable in this respect. While it was concerned with delay in criminal proceedings, we consider certain aspects of it to be applicable in other litigation contexts, including the present case. In particular (and inexhaustively):

(i) The fairness of the process or proceedings in which the delay occurred is a material consideration.

(ii) "… time, once spent, cannot be recovered. If a breach of the reasonable time requirement is shown to have occurred, it cannot be cured."

(iii) The fundamental right embedded in article 6 is a right to a fair hearing.

(iv) In cases where the hearing process has been fair, it would be anomalous, in the criminal context, to discharge the defendant.

(v) It is material to consider whether there is any support in Convention jurisprudence for the applicant's contention.

(vi) In any case where the proceedings are compatible with the litigant's right to a fair hearing but are infected by lengthy delays the pursuit and completion of the proceedings breaches no article 6 (or other Convention) right <u>other than</u> the failure to observe the reasonable time requirement.

[44] The following must also be considered. Criminal prosecutions involve issues of pre-trial loss of liberty, post-trial loss of liberty where imprisonment is imposed, or other penalties such as loss of reputation or standing in the community and the acquisition or aggravation of a criminal record. In such cases the jurisprudence of the House of Lords makes clear that where a breach of the reasonable time requirement is demonstrated, in the language of Lord Bingham:

> "… the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant."

[45] In the present case it is contended that the breach of the reasonable time requirement should (a) in the case of the first appellant, result in a dismissal of the licence revocation proceedings and the recognition of his entitlement to voluntarily surrender the licence and (b) in the case of the second appellant, the grant of an operator's licence. Standing back, these two outcomes, if sanctioned by this court, would belong to a vacuum in which the statutory regulation regime, the unchallenged regulatory action taken against both Mr Cathers senior and Mr Cathers junior in Scotland, the undisputed breaches of the first appellant's licence conditions, the undisputed breaches of the first appellant's licence undertakings and the overwhelming evidence of four years of business operations in defiance of the regulatory regimes would be cancelled in a stroke. Conscious and sustained disregard of the law would be not merely disregarded but positively rewarded. The public interests underpinning the statutory regulatory regime would be summarily extinguished. There would in substance be a disapplication of this regime to both appellants and the public interests underpinning this regime and the action taken against both appellants by the Scottish and Northern Ireland regulators would be swept aside. In *Attorney General's Reference No 1* Lord Bingham described the outcome for which the accused persons were contending – discontinuance of

their delayed prosecutions - as "*anomalous.*" This characterisation applies fully here. Indeed, it is no overstatement that the outcomes for which these appellants are contending are positively breath-taking.

[46] Such outcomes would also be manifestly incompatible with the general convention principles which fall to be considered. These have been formulated by the House of Lords in its early Human Rights Act jurisprudence in the following way: the Convention deals with the realities of life; it does not offer relief from "the heartache and the thousand natural shocks that flesh is heir to"; and the Convention is concerned with "infringements of basic human rights" rather than "departures from the ideal": *Attorney General's Reference No 1*, para [22].

[47] To all of the foregoing we would add the following. Given the framework of Strasbourg jurisprudence which we have outlined the appellants' contention is positively startling. It finds no support in the express terms of article 6, any established Convention principle, any material decision of the Strasbourg court or any domestic decision binding on this court. Second, the benefits which the appellants have reaped in consequence of the breach of the reasonable time requirement are of manifestly greater value to them that any of the "just satisfaction" or remedial measures contemplated in *Attorney General's Reference No 1*. Third, and finally, the Convention jurisprudence and principles which we have adumbrated above confound the case which the appellants seek to make.

[48] Furthermore, the first appellant's case cannot circumvent the assessment in para [21] of the NIPIPO's decision that a more timeous public inquiry would inevitably have had the same result, namely revocation of the licence. This assessment we consider unassailable, reminding ourselves of the application of the *Edwards v Bairstow* principles to a finding or assessment of this kind by a tribunal of this nature.

[49] It is of no consequence that neither the NIPIPO nor the Upper Tribunal analysed and dismissed the appellants' Convention rights case in the manner in which this court has done, at paras [25] – [47] above. The important point is that they dismissed it. This judgment explains in greater detail why they were correct to do so. We would emphasise that, by well-established principle, the question for this appellate court is not how the two tribunals reached their conclusion. Rather our focus must be on the conclusion itself. This is the approach mandated by the decisions of the House of Lords in *Belfast City Council v Miss Behavin'* [2007] UKHL 19 and *SB v Governors of Denbigh High School* [2006] UKHL 15.

[50] For all of the reasons elaborated above, this court concurs with the decisions of the NIPIPO and the Upper Tribunal in their substantive incarnation. Procedurally, the Upper Tribunal made a further decision to refuse leave to appeal to this court: see paras [23]–[24] above. This court concludes without hesitation that the Upper Tribunal was correct to do so.

[51] As elaborated above, these applications for leave to appeal have no merit and are dismissed accordingly.

A Brief Discourse

[52] We would add the following observations. Certain decisions of the Upper Tribunal concerning the issue of delay have been brought to our attention. These include *Toner* [2017] UKUT 0353 (AAC). This case, in common with others, was concerned with delay (six months) between the public inquiry and the ensuing decision of the Presiding Officer. Correctly analysed, the *ratio* of that decision is found in the statement in para [42] that the decision under appeal was "not rational or cogent." The established test of "plainly wrong" was satisfied in this way. The appeal did <u>not</u> succeed on the narrow basis of post-delay.

[53] As regards other cases, we would have reservations about the decision in *Swallow Coaches* (Appeal 2005/523), while in *Caledonia Coaches* (Appeal 2006/351) the delay of 16 months between the public inquiry and the ensuing decision of the Traffic Commissioner, which was to impose a penalty of £5,500, was relevant only to the limited extent that the penalty was quashed on account of the financial loss likely to have been suffered by the appellant during the intervening period of uncertainty: see paras [5] and [6].

[54] Next, the narrow confines of the decision of the English Court of Appeal in *Bangs v Connex South Eastern* [2005] 2 All ER 316 must also be understood. This was another case of a delay between hearing and decision, in this instance a period of 16 months between an employment tribunal hearing and the promulgation of its decision. This was the impetus for the court holding that there might exceptionally be cases where unreasonable delay of this kind would constitute a serious procedural error or material irregularity giving rise to a question of law in the tribunal proceedings within the compass of the relevant statutory appeal provision, namely section 21(1) of the Employment Tribunals Act 1996. Such cases, the Court of Appeal held, could give rise to an appellate court decision that the delay created a real risk that a party had lost the benefit of a fair hearing on the basis of errors and omissions in the tribunal's decision relating to findings on the credibility of witnesses, the threshold for intervention being that of perversity: see especially para [43](2)–(4) and (7) and para [53]. We reject the appellants' attempt to portray this decision as being of more extensive, or different, reach.

Overall Conclusion

[55] The applications for leave to appeal are dismissed and the decisions of the Upper Tribunal affirmed. The stay of those decisions is hereby discontinued.