

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN
NORTHERN IRELAND**

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Blast 106 Limited's Application [2015] NICA 16

**IN THE MATTER OF AN APPLICATION BY BLAST 106 LIMITED
FOR JUDICIAL REVIEW**

Before: GIRVAN LJ, COGHLIN LJ AND GILLEN LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal by the Office of Communications ("Ofcom") from a judgment given by Treacy J on 30 June 2014 concerning an application by Blast 106 Limited ("Blast") for judicial review of two related decisions regarding a community radio licence held by Blast. The decisions under challenge were:

- (a) a decision by Ofcom of 2 June 2014 that Blast was in breach of its licence for failing to provide a service in accordance with its key commitments as provided in its licence ("the breach decision"); and
- (b) a decision by Ofcom of 10 June 2014 not to extend Blast's licence beyond its expiry date of 7 July 2014 ("the decision not to extend").

[2] On the hearing of the appeal Ms Gallafent QC appeared with Mr McLaughlin on behalf of Ofcom. Mr Lavery QC and Mr Byrne appeared

for Blast. The court is indebted to counsel for their helpful and persuasively presented written and oral submissions.

[3] Following a leave hearing on Monday 30 June 2014 and a full hearing on Friday 4 July 2014 the learned judge handed down a written judgment on the morning of Monday 7 June 2014. He quashed both of the impugned decisions and ordered that Ofcom “shall extend the Applicant’s licence on terms which reflect the usual practice for the granting of extensions”.

[4] In this appeal Ofcom does not challenge the decision to quash the breach decision or the decision not to extend. The appeal is limited to a challenge to the relief granted, namely the order to extend the licence.

Factual Background

Blast’s licence

[5] Pursuant to section 85 of the Broadcasting Act 1990 (“the 1990 Act”) Ofcom may, in accordance with the provisions of Part III of the 1990 Act, grant licences to provide relevant independent radio services. The holding of a licence to do this is essential for without a licence section 97(1) of the 1990 Act renders any person who provides any relevant regulated radio service without being authorised to do so by or under a licence under the 1990 Act guilty of an offence.

[6] On 8 July 2009 Ofcom granted a community radio licence to Belfast Student Radio Limited for a period of 5 years to provide a community radio service under Part III of the Broadcasting Act 1990. The licence was later transferred to Blast on 7 November 2011.

[7] Under section 106(1) of the Broadcasting Act 1990 a licence:

“... shall include such conditions as appear to OFCOM to be appropriate for securing that the character of the licensed service, as proposed by the licence holder when making his application, is maintained during the period for which the licence is in force”.

Condition 2(1) of Blast’s licence required Blast to provide the service described in an Annex which is commonly referred to as the “key commitments” document. This Annex described the broad character of the service in the following way:

“Blast 106 will establish a community owned student and youth radio station that will educate, inform, entertain and represent the entire student and youth

community of Belfast. Programmes will be made by students and young people themselves and will reflect their tastes and interests.”

[8] The Annex elaborated on this general statement with a series of more specific commitments regarding Blast’s broadcast content. These related to the proportion of music and speech content during daytime hours, the variety of the music content, the nature of the speech content (e.g. debate and discussion on student news events, student sports coverage and documentaries on student politics), primary use of the English language and the duration of live broadcasting during term time.

Ofcom’s findings of breaches of key commitments

[9] In 2013 Ofcom carried out monitoring of the station to determine whether it was meeting its key commitments. Following a monitoring period of 3 days at the start of the academic term (28 - 30 January 2013) Ofcom found Blast 106 to be in breach of its licence by failing to provide a service in accordance with its key commitments. That decision was dated 27 August 2013 and published in the Ofcom Broadcast Bulletin, Issue 236. It found a breach relating to ratio of music to speech output; content of speech output in terms of being insufficiently targeted at the student community; and content of music output in terms of being insufficiently varied. Ofcom did not impose any sanction on Blast under sections 110 or 111 of the 1990 Act and Blast did not seek to challenge that decision.

[10] The breach decision impugned in these proceedings arose from further monitoring of the station by Ofcom between 4 and 6 February 2014. On 29 April 2014 Ofcom provided Blast with a preliminary view that it was again in breach of the key commitments and gave Blast an opportunity to make written representations. The document also stated that, given that the breach was considered to be a repeated and continuing contravention following the breach recorded in 2013, Ofcom would consider the case for imposition of a statutory sanction.

[11] On 13 May 2014 Blast made detailed written representations which included a request for an oral hearing should Ofcom wish to proceed with its preliminary view. Treacy J found that Ofcom never engaged with the request for an oral hearing and he found that Ofcom failed to respond to it. Ofcom does not challenge these conclusions in this appeal.

[12] Ofcom’s Director of Content Standards, Licensing and Enforcement reached a decision that Blast was in breach of its licence. This decision was notified to Blast on 28 May 2014 and published in the Ofcom Broadcast Bulletin on 2 June 2014. Ofcom found that Blast was:

“...still not delivering a number of key commitments that are core to the station’s ability to cater for its target community and deliver the required character of service.”

[13] Ofcom concluded that Blast had failed to fulfil three key commitments namely:

- (a) “Speech output will include debate and discussion on issues of specific interest and importance to students and young people locally, regionally, nationally and internationally. Blast 106 will provide local student news and coverage of student sports events. The station will produce documentaries and will cover developments in student politics.”
- (b) “Blast 106 will provide local student news and student politics as they relate to and affect the local student community and will promote debate and discussion throughout, with programming that is interactive with the community served through phone-in, text-in, email and post.”
- (c) “Music output will be very varied but will be directed to the tastes and interests of volunteers in the community served. The station will offer an opportunity to hear alternative music genres and world music and will also cater for the tastes and needs of minority student groups including Ethnic Minority cultures. It will also provide a forum to showcase new local talent and bands.”

Ofcom indicated that it would consider the case for imposition of a statutory sanction, though this was not acted upon.

Blast’s application for an extension of its licence

[14] Blast’s licence was due to expire at midnight on 7 July 2014. On 3 January 2014, Blast applied to extend it. At the time of Blast’s application, the Licence Extension application form stated:

“In most cases we expect to make a decision on an application for a licence extension within a month of receipt.”

[15] Section 253A of the Communications 2003 Act (“the 2003 Act”) provides Ofcom with the power to grant one extension of a community radio licence for a period of not more than 5 years after the end of the period for which it was granted originally. Section 253A states:

“(1) A person who holds a community radio licence is entitled to apply to OFCOM, in accordance with the following provisions of this section, for one extension of the licence.

...

(5) If, on an application for an extension under subsection (1), OFCOM are satisfied as to the matters mentioned in subsection (6), they shall modify the licence by extending the period for which the licence is to be in force by such period authorised by subsection (2) as they think fit.

(6) Those matters are –

- (a) the ability of the licence holder to maintain the service for the period of the extension; and
- (b) the likelihood of a contravention by the licence holder of a requirement imposed by a condition included in the licence by virtue of section 106 of the 1990 Act.”

[16] The renewal provisions of the Act are inflexible in relation to the timescale for renewal applications and the determinations of such applications. This inflexibility has contributed to the problems arising in this case. If, as has happened here, a decision in relation to renewal is given very late in the day the decision may constitute, as it did in this case, a challengeable decision in judicial review proceedings. There is no mechanism for a short term extension of the licence to be granted to protect the licence holder while the judicial review proceedings are concluded and a fresh decision reached. It was Ofcom’s case at the leave stage in the proceedings that the court simply had no power to grant interim relief to safeguard the interests of the licence holder pending the resolution of the judicial review proceedings. The wording of the legislation supports Ofcom’s approach on that question. Thus, as the legislation stands, it contains the real potential for an injustice to a licence holder who holds a licence which dies by effluxion of time if not renewed and who may well be properly entitled to a renewal. A fairer provision might have empowered Ofcom to grant a temporary short term renewal pending the completion of any challenge to the decision not to renew or conferred on the court a power to grant effective interim relief.

[17] On 3 June 2014 Ofcom’s Broadcast Licensing Committee (“BLC”) met to consider the extension application. The lower court was advised that there were no minutes of that meeting. On 4 June 2014 Ofcom notified Blast by letter that it was minded not to renew the licence on the basis that it was not satisfied of the matter set out at section 253A(6)(b). Ofcom referred to the following factors:

- a) the two breach decisions of 2013 and 2014, the second of which was considered to be on-going;
- b) that representations made by Blast in the context of the 2014 investigation indicated that Blast did not accept the terms of the key commitments as these were interpreted by Ofcom;
- c) that Blast had submitted to Ofcom a change request of its key commitments and that this was subject to consultation under section 106ZA of the 1990 Act and consent under section 106(1A) of the 1990 Act; and
- d) that Blast intended to apply for judicial review of the breach decision.

[18] On 9 June 2014 Blast responded. Its submissions included that, despite requests, Ofcom had given insufficient guidance on the key commitments and that it had difficulties second-guessing Ofcom's interpretation of the key commitments. Blast also said it had taken steps in response to the 2013 breach and that it did not consider that its application to change its key commitments or its prospective judicial review application should be taken into account the application for a licence extension.

[19] The BLC met on 10 June 2014 to consider Blast's representations and decided not to extend the licence. The decision was communicated to Blast by letter dated 13 June 2014. It repeated the concerns set out in the preliminary view and further stated that:

- (a) Ofcom had engaged appropriately with Blast with regard to guidance on its key commitments;
- (b) while Blast had taken steps to address the music to speech content ratio, Ofcom had continuing concerns in relation to the level of student-related content;
- (c) Blast's intention to bring judicial review proceedings was not a factor in the BLC's decision; rather, the BLC had considered whether, in light of possible proceedings, it was appropriate to take the 2014 breach into account, and concluded that it was;
- (d) the BLC took into account that Blast continued to disagree it had committed a breach; and
- (e) Blast's application to change key commitments was not a factor in the BLC's decision.

Judicial review proceedings

[20] On 17 June 2014 Blast wrote to Ofcom pursuant to the Pre-action Protocol for judicial review. Ofcom responded on 20 June 2014 contesting the claim and proposing that a rolled up hearing should be requested given that Ofcom could not grant a licence extension pending proceedings.

[21] On 25 June 2014 Blast commenced judicial review proceedings. Blast sought by way of interim relief an interlocutory injunction ordering Ofcom to extend Blast's licence beyond 7 July 2014 pending determination of the judicial review proceedings.

[22] On Monday 30 June 2014 the lower court granted leave to apply for judicial review. As Ofcom argued the court proceeded on the basis that there was no power to grant an extension of the licence pending the outcome of the proceedings. The case was listed for full "rolled up" hearing on Friday 4 July.

The e-mail of 5 July

[23] Following the hearing there was email correspondence between the parties which was copied to the judge. On Saturday 5 July 2014 Ofcom by way of an e-mail wrote to Blast's lawyers advising that in light of the fact that the licence would expire at midnight on 7 July 2014, and on the basis that the judge could order Ofcom to reconsider the application to extend the licence, Ofcom had made arrangements to convene the BLC in London at 2 pm on 7 July 2014. The e-mail invited Blast to submit written representations by 1 pm on 7 July and also to attend the meeting to make oral representations in person, by videolink, or by telephone.

[24] On Sunday 6 July 2014 Blast's lawyers replied, terming the substance of the previous day's email as "a conditional offer of an urgently convened rehearing of the extension decision". The reply stated that Ofcom had not addressed the breach decision and that it was difficult to see the offer as anything other than an attempt to avoid an order of mandamus from the court and thereafter to ensure that Ofcom's original decision was affirmed. The reply raised concerns about the independence of the proposed BLC from the original decision makers, the failure to disclose to Blast documents relating to the 2013 breach, and the lack of clarity as to whether Ofcom would accept material from Blast on broadcasts outside the 3 day period of monitoring. The reply sought confirmation that a full rehearing of the breach decision and the decision not to extend would be heard at a time that would enable Blast to make full oral representations and that in the meantime the licence would be extended.

[25] In its reply of the same day Ofcom clarified that, in the event that the learned judge were to find against Ofcom, the matter would have to be remitted to Ofcom to reconsider the application to extend and that the Court

could not order Ofcom to extend the licence if Ofcom was not satisfied of the matters in section 253A(6) of the 2003 Act. Ofcom also stated that Blast could make submissions about whether material outside the 3 day monitoring period could be taken into account, and that material which Blast complained had not been disclosed to it would not be before the BLC on 7 July.

The Judge's Decision

[26] The judge concluded that it was unfair for the breach decision and the decision not to extend the licence to have been taken without conscientious engagement with the request made by the respondent for an oral hearing. By analogy with Ofcom's usual procedure in relation to statutory sanctions under section 110 of the 1990 Act there should have been a similar opportunity to make oral representations to the BLC before a final decision was taken on the application for an extension of the licence. The judge concluded that the effective revocation without appropriate procedural safeguards commensurate to what was at stake required the court to quash the decision of the BLC. Given the centrality of the impugned breach decision to BLC's deliberation the judge said that it was unfortunate that BLC was apparently unaware of the unexamined outstanding request for an oral hearing in respect of the breach decision. Without procedural safeguards the judge concluded that the decision not to extend was disproportionate.

[27] At paragraph [25] of his judgment the judge said:

"[25] ... In the 2nd July letter the respondent offered an oral hearing but the timescale was scarcely realistic. In any event what was being offered was an oral hearing after, not before, a final decision had already been taken and before the same board whose decision is under challenge. Furthermore the period of notice is so short and the overall circumstance is such as to question the utility and indeed the true purpose of any such exercise."

The judge's reference to the letter of 2 July related to an earlier offer by Ofcom to conduct an oral hearing to deal with Blast's concerns as to the process followed. In his judgment the judge does not in terms deal with the contents of the e-mail of 5 July 2014. Though the judge does not deal in express terms with the effect of the e-mailed offer the judge's concern about the shortness of the time and the utility of a hearing as suggested in the letter of 2 July would apply a fortiori to the hearing proposed for the afternoon of 7 July which would be a matter of hours before the expiry of the licence at the deadline of midnight 7 July.

[28] The judge went on in paragraph [26] to state:

“[26] Having regard to the above I quash the breach decision of 2 June and the not extend decision of 10 June. In order to protect the interests of all those involved and to ensure that the coincidence to timing does not serve to defeat the ends of justice I have given anxious consideration as to the form of relief that is now appropriate over and above the quashing of both impugned decisions. Since the applicant’s licence is due to expire from midnight tonight the only way in which injustice, resulting from the respondent’s public law wrongs, can be avoided is by requiring the respondent to extend the applicant’s licence beyond 7 July 2014. Since the breach decision has been quashed the basis upon which the not extend decision was made is undermined. In the absence of a lawful breach decision I consider that the only proportionate decision was to extend the licence. Accordingly, the court requires the respondent to extend the applicant’s licence on terms which reflect the usual practice for the granting of extensions. The court having been informed that the usual timescale was one of 5 years the applicant will appreciate, of course, that if the second breach decision now proceeds to sanctions there are a range of options at the disposal of Ofcom including financial penalties and revocation in accordance with the published guidance.”

Consideration of the appeal

[29] Ms Gallafent at the outset of her submissions conceded that Ofcom was not challenging the judge’s decision to quash the breach decision and the decision not to extend. She submitted that in this appeal it was Ofcom’s case that this court should establish that the judge had erred in his approach to the granting of an order requiring a renewal. This approach was, she contended, a breach of the overriding principle that the relevant decision-maker to whom the matter should have been remitted was Ofcom (operating through the BLC). She contended that there was adequate time on 7 July for a fresh decision to be properly reached and even if there was not the judge was not entitled to order a renewal but should have remitted the matter to Ofcom for reconsideration even after the expiry of the unrenewed licence. She contended that it was still open to Ofcom to re-determine the question and if it decided that a renewal was inappropriate this court could thereafter on learning that decision quash the order renewing the licence from the date of

the fresh decision. If the decision was in favour of an extension the renewal would run not from the date of the decision but from the date of the expiry of the original licence.

[30] Mr Lavery contended that Ms Gallafent's argument as to the relief sought in the appeal was entirely at odds with Ofcom's case at the leave stage that there was in fact no mechanism whereby interim relief could be granted and that it was not open to Ofcom to present an inconsistent case on appeal. We see considerable force in Mr Lavery's argument. We consider, however, that the course suggested by Ms Gallafent in this case is not open to this court. It was not open to the judge at first instance to make such an order which would have been inconsistent with the statutory framework and would involve Ofcom considering, after expiry of the licence, the question whether it *should have* granted a renewal before the expiry. Furthermore, if the licence had been renewed under order of the court Ofcom on a remittal would be considering the question whether the licence should have been properly renewed both from a broadcasting point of view and, effectively, the question whether the court was correct to order its renewal. After expiry of the licence or after its renewal pursuant to the order of the court Ofcom on a remittal would be considering different questions from those which arise and fall to be determined during the life of the licence when the question of renewal falls to properly considered.

[31] Ms Gallafent argued that even if the court rejected the suggested remedial course proposed it should grant declaratory relief in order to provide guidance for the future to underline the primacy of Ofcom as the appropriate decision-maker and to make clear that in the circumstances of the case the judge's approach to ordering a renewal was erroneous in principle. The case, she argued, raised an important matter of constitutional principle.

[32] In this case there occurred a concatenation of events and circumstances, which it is to be hoped will not reoccur and are highly unusual. This being so, this case is hardly a suitable case for the establishment of any particular principle and it is unlikely to provide much helpful guidance in the future. The context in which this case was decided should be clearly understood thus:

- (a) This was a case in which Ofcom inappropriately delayed its decision in relation to renewal, a delay contributed to by Ofcom's delay in dealing with the making of the breach decision.
- (b) Ofcom followed an unfair procedure, failing to engage on the question of an oral hearing.
- (c) The delay in the decision-making was such that the decision fell to be made at a time very close to the deadline for renewal. This created a situation of unnecessary urgency in dealing with the

entirely justifiable judicial review proceedings. This resulted in a hearing and a decision within a matter of hours of the expiry of the deadline.

- (d) The judicial review proceedings had to be conducted in a vacation court and they left no effective time for an appeal before the expiry of the licence.
- (e) The court was provided with little assistance by counsel on the question of the appropriate remedy. Counsel were not available when judgment was given, as it had to be on 7 July.
- (f) The time available for any reconsideration of the quashed decision was limited to a matter of hours. This was clearly not conducive to a fair, timely and properly considered reconsideration of the issues.

If this case provides any precedent guidance it is from the lessons to be learnt from the way the matter was handled by Ofcom. The process of considering and deciding renewal applications should be carried out promptly, timeously and efficiently and fairly. Secondly, if they are not so conducted the court will be faced with a situation (brought about by Ofcom itself) in which the court is left to struggle with the question of how to ensure a fair and balanced outcome. Thirdly, those representing the parties should provide every possible assistance to the court in arriving at the proper and just outcome. Fourthly, the legislative framework contains such a degree of inflexibility which requires the court to apply and construe it in such a way that, so far as possible, injustice is avoided.

[33] The proceedings came on for hearing with the leave application being heard on 30 June 2014 and the substantive hearing on 4 July during vacation. The judge proceeded to hear and decide the case with commendable speed within a short time frame necessitated by the failure of Ofcom to deal properly and expeditiously with the respondent's application to extend its licence which it had made on 3 January 2014. It is clear that unless the application to extend time were dealt with promptly and within a reasonable time frame the approach of the deadline of 7 July 2014 was inevitably going to present problems for the respondent. The licence would expire on midnight 7 July and thereafter the respondent would be unable to lawfully broadcast and would be liable to criminal prosecution if it did so. The closer the timing of the decision on the application for renewal or non-renewal, the greater the procedural difficulty is facing the respondent in relation to any legal challenge to the decision. A decision against renewal did not come until 13 June 2014. This necessitated expedited judicial review proceedings which, for justifiable reasons, did not come for hearing until 4 July. If, as it turned out, the respondent's legal challenge was soundly based and successful the result was that the decision not to renew had to be quashed on the very day

on which the licence was to expire. In the absence of a decision to extend the licence the effect of the unlawful decision not to extend would be to terminate the licence unless a fresh decision could be properly and fairly reached between the time of the quashing order and the expiry of the licence. If a proper and fairly reached decision could not be made, the consequence of Ofcom's illegality would be to bring the licence to an end even though its decision was legally flawed. Such an unfair and unjust outcome would inevitably frustrate the decision of the court. How was the court to deal with that? How would the court balance the rights and duties of the parties in order to achieve a just outcome? Those were problems facing the judge in the situation caused by the failure of Ofcom to have in place mechanisms relating to renewal applications which protected broadcasters in the event of procedural or legal errors by Ofcom. At the same time the court had to bear in mind that Ofcom was supposed to exercise oversight duties under 1990 and 2003 Acts.

[34] Once the judge decided that the impugned decisions should be quashed, in the normal course of events the matter fell to be remitted to the properly constituted decision-maker namely Ofcom. As we have seen the events were by no means normal. If there was sufficient time before the expiry of the licence for a proper lawful decision to be made then, as Ms Gallafent correctly argued, Ofcom was the body to make that decision. We read the judgment of the judge as indicating that the timescale was such that a fresh determination within time could not be made. This was a necessary implication from the way in which the judge has expressed himself in paragraph [25] of his judgment. In any event we are satisfied that the suggested hearing on 7 July could not have provided a fair opportunity for Blast to present its case. Fairness requires that a party is given a reasonable opportunity to take proper advice, organise all his material, put together his evidence and present his case. Furthermore, a party is entitled to expect a decision-maker to take appropriate time to weigh up and consider the evidence and materials and submissions of the parties. The appearance of a rush to judgment is to be avoided. We conclude without hesitation that Ofcom had disabled itself from conducting a fair re-hearing of the matter before the expiry of the deadline. Accordingly, the judge was bound to conclude no valid decision could be made by Ofcom before the expiry of the deadline.

[35] Ms Gallafent argued that if the court was against Ofcom on the issue of a re-hearing on 7 July (as we are), the judge was bound to carry out the function of the decision-maker on the issue of whether a renewal should in fact be granted. The judge should have, in effect, taken over the decision-making role which Ofcom was unable to fulfil before the expiry of the licence. Mr Lavery rejected that argument contending that the court was not qualified to carry out such a function and had never been asked to do so. A central principle of public law is that in a judicial review the court's role is strictly that of a supervisory nature with the exception of determining proportionality

in Convention and EU law cases. The court must eschew reaching merit based decisions. A decision on the question of the renewal or non-renewal of a broadcasting licence calls for an expert judgment on issues involving the public interest in relation to the way in which broadcasting services are provided. Ofcom is the statutory body which is called on to make that judgment. In exercising the judgment it will take account of broadcasting standards and expectations throughout the United Kingdom and the way other broadcasters are treated. It may well have established policies and published criteria and standards and a record of other decisions. A judge does not have recourse to that material nor does he have the expertise or knowledge of the broadcasting industry. The legislation does not envisage the court having a role in making merits based decisions in this field.

[36] That is not to say that in judicial review proceedings the judge may not be called on to consider the strength of the evidence and arguments that may point strongly towards or away from the appropriateness of a renewal or a non-renewal when considering how he should exercise his discretion for or against granting relief. As it is in this case at paragraph [15] of his judgment the judge said:

“Had the licence application been determined in accordance with the normal timeframe it seems virtually inevitable that it would have had to have been granted since at that point no breach other than the 2013 breach (which did not attract any sanction) would have been established. Indeed, the monitoring itself commenced just over a month after the application for the extension and the results of that were not available until sometime later. The applicants were therefore arguably prejudiced by the delay in processing the extension application. If the licence extension had been granted and a breach meriting statutory sanctions was thereafter established then the sanction procedures could have been activated in any event. The sanctions available include financial penalties, shortening or suspending a licence and revocation of a licence.”

In this paragraph the judge was, of course, not dealing with the situation as it stood in July 2014. What can be said as of July 2014 is that the evidence before the court did not point clearly towards a non-renewal. There were issues for judgment in relation to the question of renewal which required balancing and weighing. Had the evidence pointed strongly to the likelihood or unlikelihood of renewal then it would have been open to the court to put that in the scale in deciding whether a mandatory order was necessary or appropriate.

[37] Ms Gallafent focused on the judge's use or, as she argued, his misuse of the principle of proportionality. We do not read the judge's remarks as incorporating the principle of proportionality as used and applied in Convention cases. There was no Convention point in this case. Rather, it is clear that the judge was alive to the point that the court was faced with competing interests and duties, namely the interests of Blast in seeking to protect and extend its broadcasting licence and the interests and duties of Ofcom in ensuring that (inter alia) the matters set out in Section 253A(6) of the 2003 Act were properly addressed. The judge bore in mind that the public interest in proper broadcasting standards was protected by the existence of a power of revocation of a licence or an extended licence (which is a power exercisable only after due process). Since the public interest was so protected the order for the extension of the licence could not produce an unjust result or a result contrary to the public interest whereas a failure to order an extension would produce irremediable damage to a licence holder who, even in Ofcom's case, might well have been entitled to have an extension granted before the licence expired. To refuse to make an order requiring an extension would be to visit on the licence holder a disproportionately unfair result compared to the alleged unfairness to Ofcom in having to grant a licence which if abused could be revoked. We conclude that the judge's decision was in the circumstances an entirely appropriate order to make in the hopefully unique circumstances of this case. This case can be considered to be one of those exceptional cases in which it was not appropriate to follow the usual and normal course of remittal of the matter to the statutory decision-maker who had disabled itself from making a decision in accordance with its statutory obligations before the expiry of the licence.

[38] In the course of argument Mr Lavery contended that in fact in this case Ofcom was bound to grant a renewal because it had not reached any valid adverse decision establishing the likelihood of a contravention under Section 263A(6)(b). By its own procedural error it had disabled itself from making such a finding before the deadline expired. While we consider that there is considerable force in this argument it is not necessary for us to found our conclusion on this point since, for the reasons already given, we conclude that in the circumstances of this case the judge's order was not an erroneous one. In fact, as matters have transpired what is now known is that the renewal of the licence has so far produced no ill effects, no breach of the public interest and no injustice because the licence is currently operating satisfactorily. If the judge had not made the order which he made Blast would have been unable to broadcast after 7 July in a situation in which, even on Ofcom's current case, it may well have been entitled to a valid renewal.

[39] In the result we dismiss the appeal.