

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

T/2016/072

1st Appellant: Catch 22 Bus Ltd
(formerly Oakwood Travel Services Ltd)

2nd Appellant: Philip HIGGS

Respondent: Secretary of State for Transport

On Appeal From: The Traffic Commissioner South Eastern and
Metropolitan Traffic Area)

Operator's Licence: PC1067540 (North West of England)
Public Inquiry: 7th November 2016 London
Decision Date: 18th November 2016
Appeal to UTAAC: 29th November 2016
Upper Tribunal Hearing: 5th September 2017

**DECISION OF THE UPPER TRIBUNAL
ON AN APPEAL AGAINST THE TRAFFIC COMMISSIONER**

**Upper Tribunal Judge H. Levenson
Upper Tribunal Member J. Robinson
Upper Tribunal Member S. James**

100.4 (Traffic Commissioner Appeals: Repute & Fitness).

T/2016/072

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON AN APPEAL AGAINST THE TRAFFIC COMMISSIONER FOR THE
SOUTH EASTERN AND METROPOLITAN TRAFFIC AREA**

Decision

1. **This appeal does not succeed.** We confirm the decisions of the Traffic Commissioner (“the Commissioner”) given on 18th November 2016 in respect of PSV Operator’s Licence **PC1067540** following a public inquiry held in London on 7th November 2016. Accordingly, the above licence held by the first appellant (Catch 22 Bus Limited) is revoked and the second appellant (Mr Higgs) is disqualified for 12 months from holding or obtaining a PSV operator’s licence. The orders made by the Commissioner were originally to take effect from 18th January 2017 but subsequently the Commissioner stayed the implementation of his orders pending our decision. We now direct that they are to take effect from 0001 on 18th February 2018. This will enable appropriate arrangements to be made.

Hearing

2. We held an oral hearing of the appeal at Field House (London) on 5th September 2017. The appellants were represented by Michael Rawlinson QC and James Backhouse, of Backhouse Jones, solicitors. The Secretary of State for Transport was represented by James Eadie QC and Adam Heppinstall of counsel. The Secretary of State opposed the appeal(s).

The Relevant Provisions

3. So far as is relevant the Public Passengers Vehicle Act 1981 (as amended) provides as follows (references are to section numbers):

17(1) A traffic commissioner must revoke a standard licence if it appears to the commissioner at any time that –

(a) the holder no longer satisfies the requirements of section 14ZA(2)

...

14ZA(1) The requirements of this section are set out in subsections (2) and (3).

14ZA(2) The first requirement is that the traffic commissioner is satisfied that the applicant –

(a) ...

(b) is of good repute (as determined in accordance with paragraph 1 of Schedule 3) ...

4. Paragraphs 1(1) and (2) of Schedule 3 provide as follows:

1(1) In determining whether an individual is of good repute, a traffic commissioner shall have regard to all the relevant evidence and in particular to

–

- (a) [relates to convictions]
- (aa)[relates to penalty notices]

- (b) such other information as the commissioner may have as to his previous conduct in whatever capacity, in relation to the operation of vehicles of any description in the course of a business.

1(2) In determining whether a company is of good repute, a traffic commissioner shall have regard to all the relevant evidence and in particular to–

- (a) [relates to convictions]
- (aa)[relates to penalty notices]

- (b) such other information as the commissioner may have as to previous conduct to -
 - (i) the company's officers, employees and agents in relation to the operation of vehicles of any description in the course of any business; and
 - (ii) each of the company's directors, in whatever capacity, in relation to the operation of vehicles of any description in the course of any other business.

5. Section 28 of the Transport Act 1985 (as amended) provides as follows:

28(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.

...

28(4) [relates to directions which may be made].

28(5) The power 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 ...

Background

6. There is a massive amount of background material in this appeal. We have endeavoured to confine our explanation to those matters relevant to this particular appeal and which are necessary to place our decision in context.

7. On 27th April 2007 Oakwood Travel Services Limited was granted a standard international public passenger vehicle operator's licence authorising 8 vehicles. The Director at that time was FS. In 2012 he began to work with the second appellant, Mr Higgs. In 2013 the business was sold to Mr Higgs, the name of the limited company was changed to Catch 22 Bus Ltd (the first appellant), Mr Higgs became the sole shareholder and the managing Director. FS was the transport manager.

8. In September 2012 VOSA had begun an investigation into Oakwood Travel Services Limited, which was not completed until 22nd March 2014. Allegations of a whole range of regulatory breaches were investigated, many of the allegations having been made by Blackpool Borough Council. Ultimately they were not substantiated and it is not necessary to set them out here. Adverse decisions were made by the then Senior Traffic Commissioner (the STC) on 30th June 2015 (in her capacity as Traffic Commissioner for the North West of England) but these were set aside by the Upper Tribunal on 15th April 2016 and the matters were remitted for rehearing by a different Commissioner with a direction that those adverse decisions would form no part of the evidence or documentation to be considered at the new public inquiry..

9. Meanwhile, Mr Higgs had developed a degree of personal animosity towards the STC and took certain actions. The relevant facts are not significantly disputed and were presented to the fresh hearing before the different Commissioner by a police detective inspector.

10. Mr Higgs had instructed a private investigator who for three days had followed the STC and filmed her driving her personal vehicle. Under an assumed name Mr Higgs had posted video footage on YouTube with captions alleging that during the course of her own driving the STC had turned left against a red light and had travelled at excessive speed along two separate motorways. The commentary effectively accused her of hypocrisy because in her professional occupation she exhorted licence holders to comply with road traffic legislation. Mr Higgs also sent copies of a videotape to certain people (described as "numerous colleagues and associates" of the STC) through the ordinary post, using a false identity to do so. Recipients included (in late October 2015) the Upper Tribunal. We note that no official action was taken against the STC in relation to any of these allegations. On 13th October 2015 the STC complained to the police about all of this. Police enquiries led to the identification of Mr Higgs as being responsible. On 6th December 2015 the police interviewed Mr Higgs, who accepted that he had been involved in this, offered an explanation and promised to post no further video material.

11. On 25th March 2016, on the advice of the Crown Prosecution Service, the Lancashire Constabulary issued Mr Higgs with a Police Harassment Information Notice. This stated that harassment is a criminal offence under the Protection from Harassment Act 1997 and included the following:

“WARNING: Lancashire Constabulary makes no comment as to the truth, or otherwise, of these allegations at this stage. This information is being brought to your attention in the spirit of crime prevention and to make clear to you that this allegation has been made.

It is important that you understand that should you commit any act or acts directly or indirectly that amount to harassment, you may be liable to arrest. A copy of this notice can be produced if necessary in any subsequent criminal proceedings against you.

A copy of this notice will be retained by the police. This does not in any way constitute a criminal record and will only be referred to should further allegations of harassment be received.”

12. We note that such a notice is not the equivalent of a criminal conviction or of a police caution and does not necessarily mean that the recipient has accepted the truth of the allegations. However, in this particular case Mr Higgs has done so (see paragraph 10 of the Commissioner’s written decision). He admitted that his private investigator had followed the STC for three days. He said that he had wanted to prove corruption (which he did not find) and that a previous decision by the STC had cost him a lot of business and had led to the loss of jobs.

13. The matters that had been remitted and the new issue were considered by the Commissioner at the Public Inquiry held on 7th November 2016, and on 18th November 2016 the Commissioner made the orders referred to in paragraph 1 above (as well as finding that FS had retained his good repute). On 30th November 2016 the Commissioner ordered a stay of the implementation of his orders pending appeal to the Upper Tribunal. On 29th November 2016 the appellants appealed to the Upper Tribunal against the decisions of the Commissioner. On 16th January 2017 the Upper Tribunal ordered that the Secretary of State be added as a party to the appeal. An oral hearing of the appeal was directed and this took place on 5th September 2017. The Secretary of State opposed the appeal and supported the decisions of the Commissioner. Both parties cited authorities, but they deal either with well established legal principles or with specific factual circumstances and it is not necessary to review them in this decision.

The Commissioner’s Decision

14. A number of matters were raised and dealt with before the Commissioner that need not be dealt with or considered by the Upper Tribunal. On the relevant matter the Commissioner noted in his written decision (paragraph 10):

“I asked Mr Higgs how he felt now about what he had done and he said that he felt it was right to expose someone who is blatantly ignoring the rules of the road and on the other hand telling others not to. I asked again how he allegedly felt about what he had done as opposed to what [the STC] had done and he said that he was not sure if he would do anything differently in the same circumstances although he did think the same circumstances would be most unlikely to arise in the future. He said that the hard data relating to the video and anything that was held on his laptop had been destroyed or deleted”.

15. The Commissioner stated that he was taking into account the lack of previous regulatory action and the benefit to the community of the services that were being run. However (paragraph 16), he stated that if Mr Higgs had felt that he had been unfairly treated by the STC during the course of the hearings before her or if, as he said to the police, he suspected corruption and wanted to prove it, he had “a range of acceptable options open to him”. He continued (Paragraph 17):

“I find that what he chose to do amounts to a serious invasion of privacy and inevitably led to the “considerable upset and distress” reported to the police. It is not unreasonable or surprising that [the STC] was upset that her home had been identified and/or under surveillance. I do not accept that his intention in posting the video on YouTube and sending copies to the range of people and bodies was merely for her to be held to account for her alleged behaviour. I believe that Mr Higgs was at best uncaring as to the impact on [the STC] and more likely than not to have wanted to cause her distress and was acting out of malice. I note that when questioned by the police he refers to the consequences of the [STC]’s decision in relation to his licence and this gives me an insight into his motive and supports my finding. His actions were made worse, and lead me to conclude that he knew that what he was doing was wrong, by the fact that he posted the video using a false identity and was only discovered after specially trained police officers were able to trace him. I find it telling and significant that when questioned by me at this inquiry he “couldn’t say” if he would do the same thing again in the same circumstances. He expressed no remorse at causing distress or for any other aspect of his conduct.

16. The Commissioner concluded (paragraph 18) that there was a serious question mark over whether Mr Higgs could be trusted. His past behaviour showed animosity, resentment and a tendency to “take the law into his own hands”, all of which drew into question the likelihood of him adhering to operating requirements, particularly if he did not judge them as necessary or reasonable.

17. Notwithstanding the fact that 25 people were employed and the threat to the business, a finding of loss of repute (and the necessary consequences) was a proportionate and justified response (paragraph 19). This had to be made clear both to Mr Higgs and the wider transport industry (paragraph 21). The chosen disqualification period of one year would give Mr Higgs time to reflect on what he did and why his conduct was a totally inappropriate response to the injustice that he perceived had been done to him.

18. In reaching his decision the Commissioner referred in particular to Priority Freight Ltd and Paul Williams T 2209/225 in relation to trust in future compliance with the regulatory regime, and to Bryan Haulage (No 2) T 2002/217 in relation to proportionality and whether the operator should be put out of business.

The Appeal – The Appellants

19. Both parties have shifted their ground in the course of these proceedings. We focus on the issues that were ultimately and actually argued before us, except to note that arguments no longer pursued by the appellants included submissions that there

was some kind of data breach in the police forwarding the Police Harassment Information Notice to the Commissioner, and that in connection with good repute a Commissioner may not consider activities that are not unlawful. Mr Rawlinson argued that “the sole matter which actuated” the Commissioner was the video. He noted that at the police interview, several weeks after the STC had brought the matter to the attention of the police, Mr Higgs was entirely co-operative, explained his motivation, and said that he had refrained from publishing a second video. He had tried unsuccessfully to remove the online posting when he had been asked to do so. It was “of cardinal importance to note” that there was no intention to influence the STC in her dealings with Mr Higgs because she had recused herself from further dealings with him. Mr Rawlinson argued that the Commissioner should have taken the following approach (it is convenient to quote from his replacement written skeleton argument, although we have omitted the paragraph numbers):

“The [Commissioner] has to ask him/herself the following questions:

Upon the understanding that the regulatory sanctions of revocation and/or disqualification exist to ensure that all operators will continue to comply with the regulatory regime in future, and thereby promote both the safety of the public and the maintenance of fair competition, do the matters which I can lawfully take into account persuade me that

- (a) This operator will not comply with the regulatory regime in future?
- (b) Such that it is a proportionate regulatory response to revoke the licence (via the medium of a finding of lost repute)?

If the first question is answered in the negative that is the end of the matter – repute cannot have been lost. If both questions are answered in the positive then the second question is repeated for the purpose of considering disqualification.

When analysing the matters which the [Commissioner] can take into account, there is no rule that in order to be relevant the material before the [Commissioner] has to relate to either:

- (a) credibly alleged or proven criminal behaviour; or
- (b) credibly alleged or proven civil wrongs

However, in the absence of either alleged or proven criminal behaviour or civil wrongs, it is difficult to envisage the circumstances where either of the ... questions could be answered in the affirmative since without those markers the risk is that the [Commissioner] would simply be exercising inappropriate individual value judgment inadequate to merit the imposition of sanction. Such a presumption is necessary in order to permit meritorious appeals. If there is no such presumption then in a review [by the Upper Tribunal] limited to consideration of the exercise of the [Commissioner]’s discretion it would be very difficult to challenge what was simply one person’s view of something as exiguous as perhaps the operator’s belief or way of life etc.

20. Mr Rawlinson went on to argue that the matters taken into consideration must always relate, at least in some degree, to the operation of the licence. Criminal behaviour may have little specific relevance to the operation of the licence. In the absence of either civil or criminal wrong there must be a substantial connection with the operation of the licence. The Commissioner has to balance the interests of the licence holder and the public interest in the maintenance of the regulatory regime.

21. In the present case, he argued, the Commissioner was wrong not to take account of, or more account of, positive factors. These included giving correct explanations in respect of many of the complaints against him (although we observe that the Commissioner's decisions that are under appeal to us were not based on unsubstantiated allegations), the demonstration of a clear intention to comply with the regulatory regime, the provision of a good bus service, the employment created by the business (we note that this is a weak point because if the service is required then somebody or bodies will step into the gap), there was an objective basis for the posting of the video (this would be a more persuasive point if the video had been posted by a person who had no personal stake in ongoing regulatory investigations and procedures), and the Police Harassment Information Notice had no evidential significance (this is also a weak point, because it was evidence that a complaint had been made, and because the relevant facts were not significantly disputed).

22. On the other hand, the Commissioner had over-relied on what he regarded as negative aspects. The surveillance was lawful (we observe that this was not the case if it actually amounted to harassment), the filming was not a serious invasion of privacy: it was undertaken at a distance in public places and showed nothing which arose from inherently private or confidential circumstances; it was akin to insurance investigators checking on claimants. There was no evidence of the considerable upset and distress said to have been caused to the STC except in the summary of the police interview. The anonymity of his posting followed the general practice on YouTube and surely emphasised that he had no wish to influence the STC in his own personal case.

The Appeal – The Secretary of State

23. Mr Eadie argued that the correct approach is to take account of all relevant circumstances, make a balanced assessment of all relevant matters in the round and consider their relationship to good repute, rather than trying to split the questions in the way that Mr Rawlinson suggested. The weight to give any matter is for the Commissioner, as are the issues of trust and future compliance. Beyond that it is a question of making an assessment in each individual case. Whether conduct is relevant is a threshold question. If conduct is relevant, its significance (from being only just relevant to being determinative) and the weight to be attached to it are matters for the Commissioner. Relevance is context specific, so there must be some connection between the conduct in question and fitness to hold a licence. Trust is a specific aspect of that. It is clear from the legislation that conduct need not be directly connected with road transport (although in our view, in the present case it is so connected). Relevance is also fact specific – which means caution must be exercised in trying to draw general rules from fact specific decisions.

24. In this specific case the question is whether the Commissioner was entitled to take account of the matters he did as being relevant to the good repute issues, and the

answer to that question is in the affirmative. None of the specific findings of fact was being challenged by the appellants. These included findings that the conduct was specifically targeted at the STC in consequence of her performing her functions in the regulatory regime; the Commissioner rejected the suggestion that the only motive was to hold the STC "to account"; the conduct amounted to a serious invasion of privacy and inevitably led to considerable upset and distress because the STC (neither unreasonably nor surprisingly) thought her home was under surveillance; Mr Higgs was more likely than not to have wanted to cause distress and was acting out of malice (we note here that even in the absence of malice, for which Mr Rawlinson argued there is no evidence, our view of the reprehensible conduct would be the same); Mr Higgs had sought to cover his tracks by using a false identity; he could not say whether he would do the same thing again and expressed no remorse; there were other, acceptable, ways of dealing with his suspicion and grievances. "These matters are demonstrably connected" to the fitness of Mr Higgs to hold a licence.

Conclusions

25. In general terms we agree with Mr Eadie's submissions. We have given some specific indication above of where we disagree with the arguments put forward on behalf of the appellants. It is clear from the legislation, in particular paragraph 1(1) of Schedule 3 to the Public Passengers Vehicle Act 1981 that the Commissioner must have regard to "all the relevant evidence" and that this may include evidence of conduct which is not unlawful. Mr Rawlinson has no need to try to imagine relevant circumstances to be taken into account that are not unlawful (which he stated that he found difficult) because they actually occurred in the present case. We add that references to breach or invasion of privacy can be taken in a general sense and need not refer to the establishment of a tort. There can be no rational argument that the conduct was not connected to the regulatory regime and the operation of the licence.

26. Mr Higgs has admitted the relevant conduct and therefore any argument that the Police Harassment Information Notice has no probative value is of very limited relevance. The argument that there could be no attempt to influence the STC because she had recused herself also has very little merit. Such conduct could be intended to create an intimidatory atmosphere for others involved in traffic adjudication. Even if not actually intended to do this, it could result in the feeling that this was so intended.

27. We do not accept Mr Rawlinson's argument that our approach would enable a Commissioner to exercise inappropriate individual value judgment. Certainly the exercise of individual judgment and discretion is built into the legislative provisions but such exercise must be carried out judicially and reasonably and the Upper Tribunal will not hesitate to interfere if that has not been done.

28. However, the admitted conduct in the present case was a direct attack on the very essence of an independent adjudicatory process. It was directed at the STC because of her official position and function. In our view the sanctions imposed by the Commissioner were the very least that could reasonably be imposed in the circumstances of this case. This appeal does not succeed.

H. Levenson
Judge of the Upper Tribunal

4th December 2017