



Neutral Citation Number: [2019] EWCA Civ 1022

Case No: C3/2018/0106

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**(ADMINISTRATIVE APPEALS CHAMBER)**  
**UPPER TRIBUNAL JUDGE H. LEVENSON**  
**T/2016/072**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/06/2019

**Before :**

**SENIOR PRESIDENT OF TRIBUNALS**  
and  
**LADY JUSTICE SHARP**

-----  
**Between :**

**CATCH22BUS LIMITED (1)**  
**PHILIP HIGGS (2)**

**Appellants**

**- and -**

**THE SECRETARY OF STATE FOR TRANSPORT**

**Respondent**

-----  
-----  
**Ben Emmerson QC** (instructed by **Backhouse Jones, Solicitors**) for the **Appellants**  
**Sir James Eadie QC and Adam Heppinstall** (instructed by **Government Legal Department**)  
for the **Respondent**

Hearing dates: 07 November 2018  
-----

**Approved Judgment**

## **Lady Justice Sharp**

### *Introduction*

1. This is an appeal against the decision of the Upper Tribunal (Administrative Appeals Chamber) dated 4 December 2017. Permission to appeal was granted by Asplin LJ on 26 January 2018. The core question it raises is the relevance of certain information that was taken into account by a deputy traffic commissioner in determining whether Philip Higgs and Catch22bus Limited (the company), the appellants, were of “good repute” in accordance with the Public Passengers Vehicle Act 1981, as amended (the 1981 Act); and whether the Upper Tribunal was in error in concluding the deputy traffic commissioner was entitled to take that information into account.

### *The legal framework*

2. So far as relevant, the 1981 Act provides that:

“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) ...

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

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

3. Paragraphs 1(1) and (2) of Schedule 3 of the 1981 Act provide as follows:

“(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 business.

(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."

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

"(1) Where the traffic commissioner for any traffic area revokes a PSV operator's licence he may order the former holder to be disqualified indefinitely or for such period as he thinks fit, from holding or obtaining a PSV operator's licence.

...

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

(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..."

5. The Upper Tribunal adopted the submissions of Sir James Eadie QC for the Secretary of State on the approach that should be adopted to the issue of good repute within this legislative framework; and though the position was less clear below, it is no longer controversial in these proceedings that this approach is correct.

6. Thus, the guiding principle as to matters that the traffic commissioners can and should take into account in this context is relevance. In *Crompton t/a David Crompton Haulage v Department of Transport North Western Traffic Area* [2003] EWCA Civ. 64 [2003] RTR 34 (regarding the Goods Vehicles regulatory regime and Schedule 3 to the Goods Vehicles (Licensing of Operators) Act 1985) Kennedy LJ said, at para 19(5):

"...Parliament cannot have intended a traffic commissioner ever to have regard to immaterial evidence, so the conclusion must surely be that the Schedule requires the traffic commissioner when considering alleged loss of repute to focus on matters relevant to the individual's fitness to hold a licence..."

7. There are a number of subsidiary points to be made on relevance.

i) First, the conduct does not have to be unlawful in order to fall within the wide scope of relevance. There is nothing explicit or implicit in the legislative regime to suggest otherwise. The requirement is to have regard to "all the relevant evidence" of conduct when considering good repute. As Sir James Eadie QC also pointed out, if unlawfulness was determinative of relevance, this would risk

drawing traffic commissioners into the need to rule on the criminal or civil unlawfulness of particular conduct; it would introduce considerable complexity into what is intended to be a simple exercise of judgment about repute and fitness and it would involve drawing a bright line between morally reprehensible conduct and technical unlawfulness, which is hard to square with the fundamentals of the regulatory regime.

- ii) Secondly, relevance is a threshold question. If conduct is relevant, the weight and significance to be attached to it is a matter for the traffic commissioner to consider.
  - iii) Thirdly, relevance is both context and fact specific. The context here is good repute and the holding of licenses under the 1981 Act. There must therefore be some connection between the conduct in question and the fitness of the person to hold the licence (though there is no requirement that the conduct be directly connected with road transport). One aspect of this (important in this appeal) is trust. Licensing is based on trust so that: “*Traffic commissioners must be able to trust those to whom they grant operator’s licenses to operate in compliance with the regulatory regime*”: see *Martin Joseph Formby t/a G & G Transport* at para 17.
8. The ultimate question when considering what action to take against an operator is a prospective one, namely how likely it is that the operator will, in future, operate in compliance with the operator’s licensing regime? See *Priority Freight Ltd & Paul Williams* 2009/225 at para 9. A Traffic Commissioner need not be satisfied that the appellant would not comply with the licensing regime in the future, but need only consider the likelihood of compliance.
9. The question then to be considered is not whether the conduct is so serious as to amount to a loss of repute, but whether it is so serious as to require revocation. To put it another way, the question is whether the conduct is such that the operator ought to be put out of business, which in turn, involves a consideration of the proportionality of such a conclusion. See *Bryan Haulage (No 2)* 2002/217 at para 11.

#### *Factual and Procedural Background*

- 10. Mr Higgs is the sole shareholder and the Managing Director of the company. The company operates bus services in the Blackpool area and employs 25 people.
- 11. In September 2012 the Vehicle and Operator Services Authority began an investigation into Oakwood Travel Services Ltd (the name of the company before it changed its name to Catch22bus Ltd in 2013). The investigation was not completed until 22 March 2014. On 30 June 2015, following a public inquiry, the then Senior Traffic Commissioner (the STC), in her capacity as Traffic Commissioner for the North West of England area, concluded that the company had lost its repute and that Mr Higgs and the company should be disqualified from holding an operator’s licence for a period of seven years. After that hearing, the STC recused herself from any further involvement in the case.
- 12. The appellants appealed to the Upper Tribunal and on 15 April 2016, by consent, the Upper Tribunal allowed the appeal and ordered that the case be remitted for re-hearing before a different traffic commissioner or deputy traffic commissioner. A condition of

the consent order was that the decision of the STC would form no part of the evidence or documentation to be considered at the new public inquiry.

13. The deputy traffic commissioner appointed to conduct the re-hearing (the DTC) took steps to avoid seeing the 2015 decision, any transcripts of evidence given at the hearing and any ancillary case notes. Care was also taken that the case file should be “pruned” before the DTC saw it so that any document that related to the hearings before the STC and the subsequent decision was removed. This was done by senior members of the staff of the Office of the Traffic Commissioner for South East and Metropolitan Traffic Area (SEMTA).
14. The re-hearing took place on 7 November 2016. We have a transcript of the proceedings. We are not concerned with the regulatory issues remitted by the Upper Tribunal. These were ultimately found by the DTC to be unsubstantiated, and it is unnecessary to refer to them further.
15. Central however to the consideration of the DTC, and to this appeal, was footage of the STC, filmed without her knowledge, at the instigation of Mr Higgs, which had been made into a video (the video) and uploaded by him to the Internet on YouTube.
16. The appellants applied at the outset of the re-hearing to exclude the video. The central point made was that it was irrelevant and therefore inadmissible because Mr Higgs’ conduct in connection with the making and uploading of the video was not unlawful. The DTC decided the video was relevant, and heard oral evidence pertaining to it from Detective Inspector Jane Webb of Lancashire Constabulary and from Mr Higgs. Detective Inspector Webb had also provided a written statement dated 16 September 2016, the content of which was not in material dispute at the re-hearing.
17. The facts as they emerged from the evidence were these.
18. Between the date of the handing down of the STC’s decision in June 2015 and the first hearing before the Upper Tribunal, Mr Higgs had instructed a private investigator to conduct a covert surveillance of the STC. The private investigator followed the STC for three days and filmed her, amongst other things, driving her personal car. A video was then made by a third party using the driving footage, which included captions written by Mr Higgs and music. The captions to the video alleged that during the course of 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 capacity she exhorted licence holders to comply with the road traffic legislation. On 22 September 2015, Mr Higgs uploaded the video footage to YouTube using an assumed name. Mr Higgs also sent copies of the video through the ordinary post, again using an assumed name, to a number of people and offices associated with the STC’s role. Recipients included the Police and Crime Commissioner for Lancashire, the Department of Transport, other Traffic Commissioners, editors of relevant trade magazines and the Upper Tribunal itself. The title to the video included the words: “Part One”, and therefore suggested another video was to follow.
19. On 13 October 2015, the STC complained to the police about the uploading of the video, about the fact that she had been followed, and that footage had been recorded of her without her knowledge. Part of her complaint, as recorded by Detective Inspector Webb, was that this had been done in an effort to undermine her position and call into

question her character. Further, what had happened had caused her considerable upset and distress sufficient to call the police. She was concerned that the person responsible had followed her home and therefore knew where she lived. She was also concerned that there may be other footage that would be posted in a similar way. She therefore felt very vulnerable. The STC subsequently made a formal complaint of harassment.

20. The police began an investigation, as a result of which they identified Mr Higgs as the person responsible. On 6 December 2015 he was arrested and interviewed under caution. Mr Higgs admitted he had hired the private investigator who had followed the STC for three days, that the video had been made on his instructions by a third person who he was not prepared to name and that he (Mr Higgs) had uploaded it. The work of the private investigator had been invoiced to the company. He said a second video had not been prepared but he did have material for it. He offered an explanation for his activity and promised to post no further material. He said that he 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. He said he wanted to expose the fact that an STC “breaks the law”. The police subsequently made attempts, with Mr Higgs’ co-operation, to take down the video footage, but this did not prove to be possible.
21. The Crown Prosecution Service advised there was insufficient evidence to charge Mr Higgs with harassment but that he should be issued with a harassment warning advising him “to cease his behaviour or continued activity could be considered as harassment”. On 25 March 2016, the police issued Mr Higgs with a Police Harassment Information Notice (the Harassment Notice). The conduct specified in the Harassment Notice was hiring the private detective to follow and video the STC; causing the video to be made; causing it to be published on YouTube and sending it to numerous colleagues and associates of the STC. As the DTC observed in his decision, 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 had admitted his responsibility for the conduct complained of and specified in the Harassment Notice.
22. In his oral evidence before the DTC, Mr Higgs said he had been very aggrieved by what had happened at the hearing before the STC, specifically by her refusal to disclose the names of people who had sent her complaints about the company and by her refusal to order Blackpool Transport (the bus company run by Blackpool Council) to attend at the hearing. He said he had anecdotal evidence of relevant conversations between the STC and Blackpool Council/Transport officers. He said there had been no intention to procure information (from the covert surveillance) concerning speeding: that had been a by-product. He later told police he wanted to prove corruption but did not find this. After three days he had evidence of what he believed to be hypocritical behaviour by the STC, who had said a hard line would be taken against vocational drivers caught speeding.
23. In response to questions from the DTC about how he felt now about what he had done, he said he felt it was right to expose someone who was blatantly ignoring the rules of the road, and he was not sure he would do anything differently in the same circumstances, albeit such circumstances were unlikely to arise in the future. In her evidence, Detective Inspector Webb said, amongst other things, that whilst the video of the STC appeared to show certain motoring offences being committed the evidence could not be used to prove it to a criminal standard. Detective Inspector Webb also said

that she had knowledge of what had been filmed for a possible second video, and what that contained.

24. The DTC handed down his decision in writing on 18 November 2016. As Mr Higgs was the sole shareholder and Managing Director of the company, the DTC treated his actions as the actions of the company which was legally the operator. No issue is taken with that approach. The DTC gave reasons for admitting the evidence concerning the video and he carefully summarised the evidence. He directed himself on the approach to be followed by reference to the legislation and principles referred to above. The DTC's conclusion was that the actions of Mr Higgs in commissioning and distributing the video resulted in a loss of the good repute of the company. He ordered the revocation of its Public Service Vehicle (PSV) operator's licence on the grounds of loss of good repute under section 17(1) of the 1981 Act. He also determined that Mr Higgs should be disqualified for holding or obtaining a PSV operator's licence for a period of 12 months pursuant to his powers under section 28(1) of the 1985 Act.
25. His reasons for reaching these conclusions were these:

“14. My starting point to consider is the statutory provision under Schedule 3(1) and (2) of the Public Passenger Vehicles Act 1981 which states that when good repute is being considered the Traffic Commissioner shall consider all relevant evidence... As a preliminary matter I determined that conduct does not have to be shown to be unlawful to be relevant to repute but it does have to be shown to be relevant and admissible. Conduct can be relevant even if it is not directly connected with road transport as is shown by the legislation. Schedule 3 (3) requires a mandatory finding against good repute if an individual has more than one conviction for a serious offence i.e. an offence for which a sentence of imprisonment for a term exceeding three months, a fine exceeding level 4 on the standard scale or a community service order for more than sixty hours was imposed.

15. When considering repute I need to consider and balance positive features of the case with the negative. On the positive side there is no history of previous regulatory action against the operator or the previous linked companies other than the inquiry which is the subject of this rehearing. In advance of this inquiry I was sent a letter dated 24 October 2016 from Lancashire County Councillors, Clempson and Shedwick, who said that Catch22bus were running services which benefited the communities in their areas. They also said that they had been able to maintain good communication with the operator and had found Mr Higgs helpful and responsive to requests passed on from residents.

The compliance record is blemished by a number of prohibitions issued in 2014 and more recently in 2016 but on the positive side reassurances have been given as to actions taken to prevent re-occurrence of the faults. The initial report presented by Traffic Examiner Newton identified a number of failings in relation to the operation of bus services but his evidence was amended to neutralise all those points. Other ancillary matters such as the circumstances surrounding the administration of a previous company, a previous maintenance investigation and complaints reportedly made by

Blackpool Council into the operation of the present company have either been dealt with previously or were not included in my bundle of papers.

16. I turn now to determine the relevance to be attached to the conduct perpetrated by Mr Higgs against Senior Traffic Commissioner Mrs Bell and to weigh what I find against the factors outlined above which are either positive or “neutral”.

Mr Backhouse submitted on behalf of Mr Higgs that “he has done nothing wrong” which I do not accept. The Regulation of Investigatory Powers Act 2000 sets the regime for surveillance and allied activity and provides a range of safeguards and restrictions to guard against unreasonable and overly intrusive activity of this nature by public bodies. None of those safeguards or protections applied to the activity in question.

I have asked myself what other options Mr Higgs had if he felt that he had been unfairly treated by Mrs Bell during the course of hearings before her or if as he said to the police he suspected corruption and wanted to prove it. In terms of the outcome of the inquiry his remedy was to appeal which he had done by the time that he had engaged the private detective. If he suspected corruption he could have reported his concerns to the police or another body e.g. the Department of Transport and/or taken legal advice on an appropriate way to raise those suspicions. He had a range of acceptable options open to him.

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 Mrs Bell was worried 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 Mrs Bell and more likely than not to have wanted to cause her distress and was acting out of malice. I note that when questioned by police he refers to the consequences of Mrs Bell’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 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.

18. Before deciding what action to take in relation to the operator I need to ask myself the question set out in the case of *Priority Freight Ltd & Paul Williams 2209/225* – how likely is it that this operator will, in future, operate in compliance with the operator’s licensing regime? With this question comes an implicit expectation of trust which it is often said is the basis of the relationship between operators and the Traffic Commissioners. In this case on the one hand there is a comparatively good record of compliance but against



that there is the seriousness of the conduct set out by me in the previous paragraph. I have also noted that in the course of his evidence to me Mr Higgs explained that he had previously compiled an on-line “blog” which I assume contained matters concerning Mrs Bell as it resulted in him being called back before her and in his words “her being very critical about it”. I have also noted the details of what appears to have been a lengthy dispute over various matters with Blackpool Council/Transport and his decision to put up bus stop flag stickers without authority because the council had not done so within the time frame expected.

These factors lead me to the conclusion that there is a serious question mark over whether Mr Higgs can be trusted. His past behaviour and in particular his conduct towards Mrs Bell shows animosity, resentment and a tendency to “take the law into his own hands” all of which draw into question the likelihood of him adhering to operating requirements as necessary or reasonable.

19. I need to also ask myself the question set out in the case of *Bryan Haulage (No 2) 2002/217* – is the conduct such that the operator ought to be put out of business? Allied to this question I have to consider the question of proportionality arising from Article 6 of Regulation (EC) 1071/2009 which was amplified in the case of *Crompton T/A David Crompton Haulage v Department of Transport North Western Area (2003) EWCA Civ. 64*. Mr Backhouse proposed that I “take no action” and allow the operator to continue in business. Whilst he did not address me on the consequences of loss of repute it is self evident that this would be the end of the business which as stated in Mr Higgs’ statement employs 25 people and it is with consequence very much in mind that I make my decision. Having considered all of the factors, positive and negative, set out in paragraphs 14 to 16 as well as my determination on the likelihood of future compliance set out in paragraph 17 I find that loss of repute is proportionate response in the particular circumstances. In making this judgment I repeat my view that this was a covert, serious invasion of privacy perpetrated against the Senior Traffic Commissioner which resulted in a significant level of distress. The action was taken in the context of an industry that relies on trust between operators and the regulators and this adds to the seriousness. All of these factors coupled with my finding on likely future compliance lead to the conclusion that loss of repute is proportionate and justified.”

26. On 29 November 2016 the appellants appealed to the Upper Tribunal against the decision of the DTC. The appeal was brought pursuant to section 50 of the 1981 Act, which grants a right of appeal from any decision of a Traffic Commissioner to revoke a PSV licence or to disqualify someone from holding such a licence. The Upper Tribunal in this instance is constituted by a judge of the Upper Tribunal and two lay members having “substantial experience in transport operations and its law and practice”: see *The Transfer of Functions (Transport Tribunal and Appeal Panel) Order 2009*, and para 4A, *Practice Statement, Composition of Tribunals in relation to Matters that fall to be decided by the Administrative Appeals Chamber of the Upper Tribunal*

on or after 26 March 2014. On 30 November 2016, the DTC ordered a stay of the implementation of his orders pending appeal to the Upper Tribunal.

27. On 16 January 2017, the Upper Tribunal directed that the Secretary of State be added as a party to the appeal. An oral hearing took place on 5 September 2017 before Upper Tribunal Judge Levenson, the senior Judge in the Upper Tribunal (Transport) and two lay members, with the relevant expertise: Upper Tribunal Members J. Robinson and S. James. Para 17 of Schedule 4 of the 1981 Act applied to the appeal. Thus, the appeal to the Upper Tribunal was not restricted to a point of law: the Upper Tribunal had full jurisdiction to hear and determine all matters, whether of fact or law, as arose under the appeal. However it was common ground that the DTC's findings as to good repute could only be overturned by the Upper Tribunal if the evaluation "*exceeded the generous ambit within which a reasonable disagreement is possible*": see *G v G* [1985] 1WLR 647 at 652. Further, as the Upper Tribunal was to record (at para 24) none of the findings of fact by the DTC were in issue.
28. On 4 December 2017 the Upper Tribunal confirmed the decision of the DTC and dismissed the appeal. The Upper Tribunal recorded that the appellants no longer submitted that a traffic commissioner could not consider activities that are not unlawful when determining the issue of good repute. However, the appellants argued in summary, that it was difficult to envisage circumstances in which material that did not relate to alleged or proven criminal behaviour or civil wrongs, could be taken into account in determining good repute. Without those markers it was said, there would be a risk that the traffic commissioner would simply make an inappropriate personal value judgment, which would be difficult to challenge on appeal. It was further submitted that matters taken into account must always relate in some degree to the operation of the licence; and in the absence of either a civil or criminal wrong, the connection had to be a substantial one (see paras 19 and 20). In this case, it was argued the DTC was wrong not to take account of or more account of positive factors (including that there was an objective basis for posting the video and the Harassment Notice had no evidential significance) and that he had "over relied" on what he regarded as negative factors, in circumstances where for example, the surveillance was lawful, the filming was not a serious invasion of privacy, the anonymity of posting followed a general practice on YouTube; and in circumstances where the STC had already recused herself, so that Mr Higgs had no wish to influence the STC in his case (see paras 21 to 22).
29. The Upper Tribunal identified the question to be determined as whether the DTC was entitled to take account of the matters he did as being relevant to the good repute issues. In answering that question, it accepted the submissions of Sir James Eadie QC both as to the correct approach, and as to consequences of applying that approach to the facts. As to approach, the Upper Tribunal said that whether conduct is relevant is a threshold question. If conduct is relevant, its significance and the weight to be attached to it are matters for the traffic 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. Relevance is also fact specific – which means caution must be exercised in trying to draw general rules from fact specific decisions.
30. The Upper Tribunal highlighted at para 24, the findings of fact by the DTC. These, in the Upper Tribunal's view, were demonstrably connected to the fitness of Mr Higgs to hold a licence. The Upper Tribunal went on to say, at paras 25 and 26, that it is clear

from the legislation, in particular paragraph 1(1) of Schedule 3 to the 1981 Act, that the traffic commissioner must have regard to “all the relevant evidence” and that this may include evidence of conduct that is not unlawful. It noted that references to invasion or breach of privacy can be taken in a general sense and need not refer to the establishment of a tort. There could be no rational argument that the conduct was not connected to the regulatory regime and the operation of the licence. Mr Higgs had admitted the relevant conduct and therefore any argument that the Harassment Notice had no probative value had very little significance. The argument that there could be no attempt to influence the STC because she had recused herself had very little merit because 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.

31. The Upper Tribunal rejected the submission that its approach would enable a traffic commissioner to exercise an inappropriate value judgment. It said that Counsel for the appellants had no need to try and imagine relevant circumstances to be taken into account that were not unlawful, which he had said he found difficult, because they had actually occurred in the present case. It said:

27. ...Certainly, the exercise of individual judgement 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.”

#### *Grounds of Appeal and submissions of the parties*

32. Eight grounds of appeal were advanced in writing. They raised, in substance, three points. First, the evidence of Mr Higgs’ conduct in relation to the video was not relevant to the company’s fitness to hold a licence. Secondly, the DTC’s determination that Mr Higgs’ previous conduct was such that it could be concluded the company might not in future adhere to operating requirements under the terms of its licence, was irrational. The Upper Tribunal upheld the same irrational decision. Thirdly, the decision that the company had lost its repute was neither a proportionate nor a justified response having regard to the fact that it involved the mandatory revocation of the company’s licence. The DTC failed to apply the tests arising from established case law, as did the Upper Tribunal.
33. In oral argument, Mr Emmerson QC for the appellants, who did not settle those grounds, or appear below, refined those arguments as follows. He submitted that on the basis of the factual findings by the DTC, Mr Higgs’ conduct looked at in the round, was insufficiently serious to be relevant to his conduct as a bus operator for the purposes of the section 14ZA assessment, and the conduct was certainly insufficient to be the sole justification for the revocation of his licence. It was, he submitted, important to bear in

mind that the assessment is prospective, concerning how the operator is likely to behave in the future. One key question was whether what Mr Emmerson QC conceded was a misjudgement, namely the posting of the video, was directed at the STC, rather than the system of regulation itself. That there is an evaluative judgment to be made by the DTC cannot be gainsaid. However, whatever Mr Higgs' motive may have been, he committed no offence or civil wrong; what he did was objectively in the public interest because it revealed traffic infractions, and there was substantial 'provocation', viz. the STC's conduct in relation to the first public inquiry. If this was a deliberate attack on the system of regulation, and the conduct was sufficiently serious to suggest it would be repeated in the future, the Secretary of State 'would have a point'. But to infer that this was an attack on the regulatory regime was a syllogism with a flawed premise. Mr Emmerson QC further submitted that there needed to be a relationship of proportionality between the gravity of the conduct and the process of revocation. Morality of conduct has no relevance, unless it shows, properly and rationally that it presages future non compliance; or it is so morally egregious and shows such a complete disrespect for the law, that it is likely there would not be compliance in the future.

34. Sir James Eadie QC maintained the arguments advanced before the Upper Tribunal. He submitted that the test is whether it appears to the DTC that the holder of the licence is not of good repute, and the legislation requires that issue to be determined taking into account all relevant evidence; but that subject to the usual public law constraints, it is a matter for the decision-maker as to what to take into account, and what decision to make on that evidence. The conduct in question does not have to be unlawful to be relevant. Relevance confers a wide discretion on a specialist tribunal regarding the licence. Subject to rationality, the traffic commissioner is entitled to take into account anything that he or she concludes bears on licence suitability and to attach such weight to it as they think fit. Relevance is a threshold question. Matters taken into account must be capable of bearing on questions of fitness (to hold a licence) and repute. If a matter falls outside the mandatory considerations (criminal convictions) this is a matter of rational judgment, and weight is also a matter of rational judgment. Relevance is also context specific. The conduct itself does not have to relate to the operation of vehicles; and given the context, questions of trust between licensee and traffic commissioner are important, and an important part of the context.
35. On the basis of the uncontested findings of fact by the primary fact finder, Sir James Eadie QC submitted the answer to the question whether those facts were capable of supporting a revocation decision was not merely yes, but that it would be unfortunate if the answer was not yes. This is because that conduct plainly went to the expectation of trust that those regulating the system are likely to have in those to whom they grant licences; it indicated that Mr Higgs was prepared to take the law into his own hands to address a grievance, actual or suspected and went precisely to predictions *de futuro* about how he would be expected to operate as a licensee. It showed a disdain for the system of regulation and those who administer it. It targeted the decision-maker personally, and was intimidating behaviour of an inappropriate kind. The short answer to whether the findings of primary fact were capable of supporting the decision was yes.

### *Discussion*

36. This appeal is a first appeal, limited to a point of law arising from the decision of the Upper Tribunal: see section 13 of the *Tribunals, Court and Enforcement Act 2007*. It is not a second appeal as it does not fall within section 13 (7) of that Act and is therefore

outside the remit of *Appeals from the Upper Tribunal to the Court of Appeal Order 2008* (SI 2008/2834). Further, it is to be borne in mind that ordinary courts should approach appeals from a Tribunal including expert members, such as this one, with an appropriate degree of caution, because in applying the law in their specialised field it is probable the tribunal got it right: *AH (Sudan) v Secretary of State for the Home Department* 2008 1 AC 678 per Baroness Hale at para 49. That probability is in my judgment, borne out in this case.

37. The appellants' case has shifted somewhat from its starting point. By the time this matter came to the Upper Tribunal, it was no longer in issue that the DTC was entitled to take account of conduct that was not unlawful in determining the question of good repute. Further, as indicated earlier, the relevant legal principles as identified by the DTC, and his findings of fact are not now the subject of challenge. The real focus of this appeal is on the DTC's evaluative judgment, and on the decision of the Upper Tribunal to uphold it. As to that, I can see no basis for interfering with the decision of the Upper Tribunal. In my judgment, the DTC's analysis, set out above, disclosed no error, and the Upper Tribunal was correct to confirm his decision for the reasons it gave.
38. The appellants submitted that evidence of a personal dislike of a traffic commissioner by a director of a company which holds an Operator's Licence and a desire to criticise her public conduct, whether purely malicious or otherwise, is not relevant to the operator's ability to operate bus services in keeping with the regulations. However, the question of relevance is a concrete, not an abstract one; and as the Upper Tribunal identified, it is important to focus on the facts as found by the DTC.
39. Specifically these were as follows. Mr Higgs' conduct was targeted at the STC in consequence of her performing her functions within the regulatory regime in making a decision adverse to Mr Higgs. It was not the case, as Mr Higgs had suggested that his intention was merely for her to be held to account for her behaviour. Mr Higgs' conduct amounted to a serious invasion of privacy and inevitably led to the considerable upset and distress reported to the police. The worry and distress arose because the STC (neither unreasonably nor surprisingly) thought that her home had been identified and/or was under surveillance. The conduct did not merely involve following and filming the STC in an attempt to obtain footage that might harm her reputation and standing. It also involved posting a video on YouTube in an attempt to cause her maximum damage and embarrassment. Mr Higgs was at best uncaring about the impact on the STC, and it was more likely than not that he wanted to cause her distress and was acting out of malice. His conduct showed animosity, resentment and a tendency to take the law into his own hands. The seriousness of what occurred was compounded by the fact that the video was uploaded and sent through post using a false identity. Mr Higgs knew what he was doing was wrong, hence his decision to cover his tracks. The connection back to Mr Higgs was only discovered after specially trained police were able to trace him.
40. Further, Mr Higgs could not say if he would do the same thing again in the same circumstances. He expressed no remorse or apology for causing distress or for any other aspect of his conduct. Whilst the police had decided not to prosecute Mr Higgs for harassment, they had issued the Harassment Notice in relation to his conduct. Mr Higgs had had a range of acceptable options open to him that did not involve this sort of conduct, to raise and deal with his sense of grievance and suspicion. Instead he chose

to engage in conduct that was a totally inappropriate response to the injustice he perceived had been done to him.

41. The DTC and the Upper Tribunal, with their specialist knowledge of this field, considered these were matters that were quite obviously relevant to the good repute and fitness questions being considered by the DTC, and demonstrably connected to Mr Higgs' fitness to hold a licence. I agree. In my view, the facts demonstrated that Mr Higgs' conduct could properly to be characterised as an affront to the regulatory system rather than (merely) an affront to the particular individual concerned. As Sir James Eadie QC submitted, they indicated that Mr Higgs was a man who was unprepared to accept regulatory action or confine himself to the legitimate routes available for redress, but was prepared to (and did) operate outside the system by maliciously targeting the decision-maker responsible for overseeing and administering the regulatory system through an intrusive, distressing and intimidating campaign designed to destroy or seriously damage her reputation. This included with the Upper Tribunal to whom a copy of the video was sent at a time when he had, under his own name, apparently engaged with the process of appeal. There could be no assurance against repetition were he to be the subject of an adverse adjudication in the future, in circumstances where Mr Higgs knew what he was doing was wrong and demonstrated neither remorse nor any real insight about the implications of his conduct, appearing instead to consider that the ends justified the means.
42. In those circumstances, the Upper Tribunal's strong core conclusion, reflecting that of the DTC, that Mr Higgs intended to create an intimidatory atmosphere for others involved in traffic adjudication and that such conduct represented a direct attack on the very essence of an independent adjudicatory process was one it was justified in reaching on the facts; as was its conclusion and similarly reached that these matters went directly to the "implicit expectation of trust which it is often said is the basis of the relationship between operators and the Traffic Commissioners" and to the likelihood of Mr Higgs' future compliance with the licensing regime (the *Priority Freight* question). The issue of proportionality was carefully considered by the DTC who specifically asked himself whether this was a case where the conduct was such that the operator ought to be put out of business (the *Bryan Haulage* question). In the light of the findings he had made, including as to the seriousness of what had occurred, and its implications for future conduct, the decision that the company had lost its good repute and that Mr Higgs should be disqualified for holding or obtaining a PSV operator's licence for 12 months could not be described as irrational; on the contrary, it was, in my view, a reasonable one.
43. There is one further matter to be addressed, which concerns an issue of disclosure that arose following the grant of permission to appeal. It relates to a complaint made by Mr Higgs on 26 March 2015 about the conduct of the STC in relation to the public inquiry. By the time of the hearing of this appeal a report had been produced for the Secretary of State which the appellants' representatives had not seen, but considered should be disclosed for the purposes of this appeal. The Secretary of State considered it had no relevance to the issues arising the appeal and opposed its disclosure. However the appellants' solicitors were provided with certain information about it in correspondence (which we were invited to direct should be exempted from the public access provisions of CPR Part 5) for the limited purpose of enabling the issue of disclosure to be argued.

44. At the outset of the hearing of the appeal, Sir James Eadie QC proposed and Mr Emmerson QC was content with this course, that we should hear the appeal and then sit in private to consider the disclosure application with the benefit of the material provided to the appellants (and if we so wished, the report itself). It was necessary for us to consider the matter in private, which we did very briefly, to preserve the position, pending the determination of the application. In the event, we did not consider we needed any further information to determine the application, and did not order the disclosure asked for. The short point is that in our judgment, the report had no relevance to the question arising in the appeal, namely whether the Upper Tribunal made an error of law in upholding the decision of the DTC, nor any bearing on the facts found by the DTC or the sound conclusions that he drew from them, including that revocation was required in this case.
45. For the reasons given, I would dismiss the appeal. For the avoidance of doubt, I would also direct pursuant to CPR 5.4C(2) there should no public disclosure of any document provided to the court or referred to in this judgment that relates to the disclosure issue.

**The Senior President of Tribunals, Sir Ernest Ryder**

46. I agree.