

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)
ON APPEAL FROM THE DECISION OF A DEPUTY TRAFFIC COMMISSIONER
BETWEEN:**

**(1) CATCH 22 BUS LIMITED
(2) PHILIP HIGGS**

Appellant

-and-

THE SECRETARY OF STATE FOR TRANSPORT

Respondent

**REVISED RESPONSE OF
THE SECRETARY OF STATE FOR TRANSPORT**

1. The Secretary of State for Transport has reconsidered his position in relation to this appeal. He has done so having become concerned as to the correctness of the position taken in the previous Response dated 14 February 2017 and having considered the matter further with Leading Counsel. It is of course for the Upper Tribunal to rule on the issues, whatever position the parties may take. There is a strong public interest in the correct approach in principle being adopted in regulatory decisions of this kind and in the context of this regime (which in part concerns public safety.) That is all the more so if the issues have the potential to have impact outside that appeal. This Revised Response replaces the previous response. The Secretary of State seeks the Upper Tribunal's permission to substitute its response with the present document pursuant to Rule 5(3)(c) UT Rules.
2. The Secretary of State continues to submit that the Appellants' primary ground, that conduct has to be unlawful in order to fall within the wide scope of §1 Schedule 3 Public Passenger Vehicles Act 1981 ('the 1981 Act'), is wrong.
 - (a) There is nothing in the legislative regime imposing any such restriction or limitation expressly. There is nothing in EC Regulation 1071/2009 to the contrary.
 - (b) There can be no such implication into that regime. It was evidently intended to allow consideration to be given to any matters to which Traffic Commissioners

could properly attach weight in considering good repute and fitness. That is confirmed by the requirement that they must have regard to “*all the relevant evidence*” of conduct when considering good repute. If “*relevant evidence*” had truly been intended to mean, and to be limited to, “*evidence of unlawful conduct*” it is inconceivable that the requirement would have been framed as it is.

- (c) Such an interpretation would also risk dragging Traffic Commissioners into a need to rule on the criminal and/or civil unlawfulness of particular conduct (including no doubt consideration in some circumstances of the mental state of individuals in relation to such conduct) as a precondition to being able to take matters into account when considering good repute. That introduces an unnecessary and improbable complexity into what was evidently intended to be a relatively simple exercise of judgement about repute and fitness.
 - (d) Such an interpretation would also involve drawing a sharp line between thoroughly morally reprehensible conduct and technical unlawfulness. And when police are involved, on the ‘unlawfulness only’ interpretation, only a successful prosecution would render the conduct relevant (or perhaps some re-trial to the civil standard by Traffic Commissioners to determine if the offence had been committed). That is hard to square with the fundamentals of the regime.
3. The Secretary of State will in addition rely on the cases reported at page 29 of the 20 July 2016 Digest (for the proposition that there is certainly no need for a conviction – to the extent that that is not already self-evident from the structure of Schedule 3 to the 1981 Act); and §§44 and 57 of the Senior Traffic Commissioner’s Statutory Document No 1 on Good Repute and Fitness.
4. It is submitted that the guiding principle and the control as to the nature of the matters and the evidence that Traffic Commissioners can and should take into account in this context is relevance. See *Crompton v Dept of Transport* [2003] EWCA Civ 64 and the Transport Tribunal’s decision in *D & H Travel Limited* 2006/487. In *Crompton* (considering the Goods Vehicles regulatory regime and Schedule 3 to the Goods Vehicles (Licensing of Operators) Act 1995), Kennedy LJ stated the principle thus:
- “...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...”* (§19(5).)
5. Three subsidiary points may be made about the concept of relevance:
- (a) The question whether conduct is relevant is a threshold question. If conduct is relevant its significance (from ‘only just relevant’ to ‘determinative’) and the weight to be attached to it in considering all the issues bearing on the licence decision are matters for the Traffic Commissioner to consider.

- (b) Relevance is context specific. The context here involves good repute in the context of the holding of relevant licences 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. In the present context, one specific aspect of that is trust. Licensing is based on trust and it is submitted that the correct approach is that *“Traffic Commissioners must be able to trust those to whom they grant operator’s licences to operate in compliance with the regulatory regime...”* (T/2012/34 Martin Joseph Formby t/a G&G Transport, §17). It is also to be noted that a connection between the conduct in question and fitness to hold a licence does not require that the conduct is directly connected with road transport. That is evident both from the provisions of Schedule 3(3) and from the fact that a wide range of conduct not directly connected in that way would plainly bear on fitness.
 - (c) Relevance is also fact specific. Some caution is therefore needed in seeking to extract broadly applicable principles or approaches from past decisions which necessarily turn on the particular facts, and combination of facts, under consideration.
6. The question on this appeal is whether the Deputy Traffic Commissioner, Mr Baker (‘the DTC’) was entitled to take account of the matters he did as relevant to the good repute issues in this case. It is necessary in considering that question clearly to focus on the actual findings themselves – none of which are challenged as findings of fact on this appeal. The key findings were in summary as follows:
- (a) Mr Higgs’ conduct was specifically targeted at the Senior Traffic Commissioner. It was so targeted in consequence of her properly acting and performing her functions within the regulatory regime in making a decision adverse to Mr Higgs. (The Senior Traffic Commissioner had called various companies linked to Mr Higgs to a Public Inquiry over successive hearings in 2014 and 2015 which resulted in a determination on 30 June 2015 that the First Appellant’s licence would be revoked and disqualified for 7 years and Mr Higgs was also disqualified for 7 years. An appeal to the Upper Tribunal against that decision was granted by consent of the parties on 15 April 2016 on the basis of delay between the last hearing and the issue of the Senior Traffic Commissioner’s decision. The matter was remitted back to a different Commissioner for hearing.)
 - (b) The DTC explicitly rejected the suggestion by Mr Higgs at the hearing that his intention was *“merely for her to be held to account for her alleged behaviour”* (§17).

- (c) Mr Higgs' conduct amounted to "*a serious invasion of privacy and inevitably led to the 'considerable upset and distress' reported to the police*" (§17). The worry and distress arose because Mrs Bell (neither unreasonably nor surprisingly) thought that her home had been identified and/or was under surveillance. The conduct in question involved not merely following and filming Mrs Bell in an attempt to obtain footage that might harm her reputation and standing. It also involved posting a video on YouTube, no doubt in an attempt to cause maximum damage and embarrassment to Mrs Bell.
 - (d) The DTC made a specific finding that Mr Higgs was "*more likely than not to have wanted to cause her distress and was acting out of malice*" (§17); and that his conduct "*shows animosity, resentment and a tendency to 'take the law into his own hands'*" (§18); and that "*he knew what he was doing was wrong*" (§17).
 - (e) Mr Higgs had sought to cover his tracks. The video was posted using a false identity. The connection back to Mr Higgs was only discovered after specially trained police were able to trace him.
 - (f) Mr Higgs "*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*" (§17).
 - (g) Whilst the police had decided not to prosecute for harassment, they had issued a Harassment Information Notice dated 25 March 2016 in relation to Mr Higgs's conduct.
 - (h) Mr Higgs had had a range of acceptable options which did not involve this sort of conduct open to him to raise and deal with his sense of grievance and suspicion (specifically, to appeal and to raise his suspicions with the police): §16 of the Decision. Instead his conduct was "*a totally inappropriate response to the injustice he perceived had been done to him*" (§21).
7. It is submitted that those matters are plainly relevant to the good repute and fitness questions being considered by the DTC. They indicate a man unprepared to accept regulatory action – unprepared simply to accept a decision and move on with a view to better compliance in the future; and unprepared to use the available avenues within the system for raising issues e.g. by appeal. Instead, the choice made, knowing that what he was doing was wrong and acting out of malice, was to mount a distressing, intimidating campaign against the decision maker. So, the conduct found by the DTC indicates a man prepared personally to seek to target a person responsible for overseeing and administering the system; seeking to destroy or seriously damage her reputation. And finally, there was no indication of remorse; or any assurance against repetition.
8. Those matters are demonstrably connected to Mr Higgs' fitness to hold a licence.

- (a) They go directly to what the DTC described as the “*implicit expectation of trust which it is often said is the basis of the relationship between operators and the Traffic Commissioners*” (§18). The risks to an effective system of that sort of intimidating and distressing conduct directed against those responsible, in public service, for its operation are obvious.
- (b) They also go directly to the question also posed (correctly) by the DTC at §18: “*how likely is it that this operation will, in future, operate in compliance with the operator’s licensing regime?*” In summary, such conduct indicates a disdain for the system of regulation and those who administer it – and a preparedness personally, and maliciously, to target those who reach decisions Mr Higgs considers adverse to his interests. It is thus entirely unsurprising that the DTC should have concluded that Mr Higgs’ conduct raised “*a serious question mark over whether [he] can be trusted*” calling “*into question the likelihood of him adhering to operating requirements set by Traffic Commissioners particularly if he did not judge the requirements as necessary or reasonable*” (§18).
9. For all these reasons, the Secretary of State invites the Tribunal to dismiss the appeal and to affirm the decision of the Deputy Traffic Commissioner.

JAMES EADIE QC

Blackstone Chambers

6 April 2017