



When deciding whether a licence holder (or an applicant for a licence) is of good repute, what can a Traffic Commissioner take into account?

Catch 22 Bus Limited and Philip Higgs v Secretary of State for Transport [2019] EWCA Civ 1022
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By Hannah Curtain

Background

1. The Senior Traffic Commissioner had decided in 2015 that a corporate bus operator in Blackpool (now known as Catch 22 Bus Ltd) and its sole shareholder and managing director (Mr Higgs) should lose their licences to operate buses and be disqualified for holding such a licence for 7 years.
2. Afterwards, Mr Higgs instructed a private investigator to carry out covert surveillance of the Senior Traffic Commissioner driving her car which was uploaded to You Tube, with commentary and music. The commentary alleged road traffic infractions. As the Court of Appeal recorded “*The commentary effectively accused [the Senior Traffic Commissioner] of hypocrisy because in her professional capacity she exhorted licence holders to comply with the road traffic legislation*” (para 18).

3. Mr Higgs appealed to the Upper Tribunal and the Senior Traffic Commissioner's decision was set aside by consent and the matter was remitted before a deputy traffic commissioner. The only matter which fell for consideration before him was Mr Higgs' conduct in causing the above-mentioned surveillance to be carried out and uploading it to You Tube under an assumed name.
4. Mr Higgs' conduct had been investigated by the Police. The CPS advised against prosecution but in favour of a Harassment Information Notice being served on Mr Higgs warning him as to his future conduct.

Proceedings before the deputy traffic commissioner

5. As to the surveillance and the video, the deputy traffic commissioner heard from Mr Higgs in evidence that *"he had been very aggrieved by what had happened at the hearing"* (before the Senior Traffic Commissioner) and that *"he felt he 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"* (paras 22/23).
6. The Deputy Traffic Commissioner held that the making and uploading of the video meant that good repute had been lost such that Catch 22 should lose its licence and Mr Higgs be disqualified for 12 months.

The Upper Tribunal

7. The Upper Tribunal upheld the decision of the deputy traffic commissioner, rejecting an appeal that he should not have taken the surveillance/video production conduct into account. The Upper Tribunal found that traffic commissioners can take any conduct into account when considering good repute so long as *"there is some connection between the conduct in question*

and fitness to hold a licence...although that conduct need not be directly connected with road transport” (para 29).

The Court of Appeal

8. Catch 22 and Mr Higgs appealed to the Court of Appeal and the appeal came before the Senior President of Tribunals (Sir Ernest Ryder) and the Vice-President of the Queen’s Bench Division (Dame Victoria Sharp DBE, President of the QB as from 23 June 2019).
9. The legislative mechanism by which transport appeals were incorporated into the “new tribunal” structure means that unlike other appeals from the Upper Tribunal this was not a “second appeal” (paragraph 36). The Court confirmed, however, that it would nevertheless defer to the specialist expertise of the Upper Tribunal (which sits with two specialist lay members in transport cases (para 36)).
10. Further, despite the fact that exceptionally in a transport case, an appeal to the Upper Tribunal, is not as it usually is, limited to a point of law, it was agreed by the parties that the deputy traffic commissioner’s evaluation as to good repute could only be disturbed on appeal if it could be held that it had “exceeded the generous ambit within which a reasonable disagreement is possible” (i.e. the well-known appellate test relating to discretionary decisions set out in *G v G* [1985] 1 WLR 647 at 652). See para 27 of the Court’s judgment.
11. The Court recorded that paragraphs 1(1) and (2) Schedule 3, Public Passengers Vehicle Act 1981 state that, in determining whether an individual is of good repute, a traffic commissioner shall have regard to “all the relevant evidence”.
12. In *Crompton t/a David Crompton Haulage v Department of Transport* [2003] EWCA Civ 64 [2003] RTR 34 Kennedy LJ, in the context of goods vehicles’

licensing said that *“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 reputation to focus on matters relevant to the individual’s fitness to hold a licence...”*

13. The Court endorsed that test and went on to observe that such conduct does not have to be unlawful to be taken into account but it does have to have some connection to the fitness of the person to hold the licence.
14. The Court noted that *“Licensing is based on trust”* and thus conduct which tends to show that that trust, between the regulated and the regulator, is or will be undermined is relevant and will be taken into account.
15. 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”* (para 38).
16. The Court of Appeal rejected that submission agreeing with both the deputy traffic commissioner and the Upper Tribunal that the surveillance etc. were *“matters that were quite obviously relevant to the good reputation and fitness questions”* and further that *“the facts demonstrated that Mr Higgs’ conduct could properly...be characterised as an affront to the regulatory system...”* which indicated that the Second Appellant was *“unprepared to accept regulatory action”* and *“was prepared to (and did) operate outside of the system by maliciously targeting the decision-maker”* and in terms of trust between regulator and regulated, *“There could be no assurance against repetition were he to be subject of an adverse adjudication in the future”* (para 41). Thus:

“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).” (para 42).

17. Accordingly, the Court of Appeal upheld the decisions below and the deputy traffic commissioner’s decision stands.

All relevant conduct should be taken into account...

18. In addition to conduct related to the day to day running and operating of a transport business, this judgment makes clear that a traffic commissioner may take into account any conduct which can be connected to the regulatory questions which need to be asked and answered under the legislation.
19. In particular, this includes what has become known as the *Priority Freight* question, being *how likely is it that the operator will, in future, operate in compliance with the operator’s licensing regime?* (see para 8).
20. In answering that question, a traffic commissioner is entitled to take into account whether they can trust *“those to whom they grant operator’s licenses to operate in compliance with the regulatory regime”* (see para 7(iii)) thus matters relevant to that issue of trust are likely to be admitted at the public inquiry as to good reputation, regardless of whether they amount to wrongdoing, in purely legal terms.

21. Previously, the Upper Tribunal in the case of *Heart of Wales Bus and Coach Company* [2011] UKUT 364 (AAC) had stated that: “Generally, however, to cross the line, Traffic Commissioners should require evidentially established and relevant conduct that is patently unacceptable in a regulated industry that requires operators and Transport Managers to be of good repute.” (para 22.) The Upper Tribunal said that was not prepared to rule out “a gross and proved case of sexual harassment by an operator, director or Transport Manager may, depending on its facts, be something that a Traffic Commissioner could, or even should, consider under the general provisions relating to relevant evidence” (para 21) and in addition it accepted that “...aggressive, intimidating, or manifestly unfounded allegations against VOSA officials, bus monitors and others with a direct connection to the operator’s use of authorised vehicles, or a direct connection with enforcement or compliance may be relevant.” (para 21.) It did not think however, that “issues relating to...unresolved civil disputes, and qualitative or subjective judgments relating to [the licence holder’s] manner, personality and dealings with others” should be taken into account in relation to repute (para 23).
22. It is now clear that these questions should all be answered by considering whether there is “some connection between the conduct in question and the fitness of the person to hold the licence” (para 7(iii)), and if there is such a connection, the conduct should be taken into account.
23. Sir James Eadie QC and [Adam Heppinstall](#) appeared for the Secretary of State.

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¹ Any views or opinions contained in this document are the author’s own.