



JUDICIARY OF
ENGLAND AND WALES

District Judge Szagun

In the Brighton Magistrates' Court

Uber Britannia Limited (UBL)

Applicant

V

Brighton & Hove City Council (BHCC)

Respondent

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1. I am dealing with an appeal brought by UBL against the determination of the Brighton and Hove City Council on 23rd April 2018 not to renew the private hire operator's licence for Uber Britannia Ltd.
 2. The reasons given for the refusal are set out in a letter dated 1st May 2018. The determination of the panel was that they were not satisfied that UBL are "fit and proper".
 3. The reasons for this, in summary:-
 - i. The Data breach – (Delay in notification of the breach and impact/trustworthiness and integrity).
 - ii. Commitment to only use Brighton and Hove Licensed drivers – Cross Border Hiring – The impact of this on the local area by circumventing local standards and creating barriers to enforcement of those standards. Non-compliance with the original undertaking given and impact.

CURRENT POSITION OF THE PARTIES

4. Data Breach – BHCC – Submit that given that UBL have accepted fault in relation to this matter and put in place a number of steps detailed in their statement at paras 24-29, the lapse of time since these provisions have been in place without any material difficulties, BHCC in correspondence dated 16th November agree the conditions set out in the letter from UBL's solicitor (of the same date) to address this issue. "This issue is no longer relied upon by the Respondent authority for refusing to renew the Appellant's Operator licence."

5. Cross Border Hiring - In relation to only use BHCC Licensed drivers - BHCC acknowledge that “There is nothing unlawful in “cross border hiring” (the licensing trinity or triple lock) but highlight that the impact of this continues to be one of their core concerns. They do not, however, continue to rely on UBL having misled them, in that they relied on the understanding that the undertaking given was to use only BHCC Licensed drivers. They do, however, submit that the influx of drivers from out of area and specific encouragement for drivers to apply for licences out of area e.g. Lewes facilitates a circumvention of the local standards and creates barriers to enforcement of those standards necessary and particularised to meet the particular demographic of the local area. A key cause for concern is the lack of CCTV, as a required standard, in the neighbouring areas and absence of protection this affords to drivers and passengers alike. This they say eroded the trust in the company which resulted in the finding against fit and properness. BHCC concede, however, that the licence be granted subject to conditions to meet their concerns; specifically, by a) instituting geofencing for Brighton and Hove (rather than the SE region as currently set) subject to “pairings” for area which share a governance regime similar to their own, and proviso for “transit through” permitted pick up for return journeys. All of which is within the capability of the technology available as demonstrated by geofencing already in place.
6. UBL -a) Do not concede to the condition of more restrictive geofencing for the City of Brighton and Hove and argue specifically that this is unlawful, b) they note specifically the action taken to ensure compliance with local standards for drivers including; that in relation to enhanced DBS checks all licensing authorities in the SE region require this, safeguarding training being provided via Barnardo’s for Uber drivers and that by end of 2018 this will be a mandatory course for all new drivers in the SE region c) but consider that the need for adherence to other local blue book standard is unnecessarily restrictive. In relation to in car CCTV, something that UBL say is the subject of an ongoing debate. The argument is whether this is in conflict with human rights, in relation to the local knowledge test they rely on the lack of distinction between complaints about routes made against out of town drivers as compared with local drivers.
7. Whilst not permitted to formally participate in these proceedings, I remain mindful of the fact that this argument for localism in the context of UBL’s operation within Brighton and Hove (BH) put forward by Streamline in their preliminary application, is that it is a ground for refusal of the licence, if not as failing the fit and properness test, then under “any other reasonable cause” s.62(1) (d) Local Government (Miscellaneous Provisions) Act 1976.

AGREED BACKGROUND

8. The first Operator’s licence was issued to UBL by BHCC on 24TH November 2015 for the period ending 4th November 2016.
9. Renewals were granted on 2/11/16 and 2/11/17 to the period 4/5/18.
10. There were no objectors to the licence other than from trade competitors.

11. Further renewal was refused on 23rd April 2018.
12. Uber did not begin operating in BH until October 2016.
13. In March 2018 Uber introduced geofences essentially dividing England and Wales into 9 regions. The SE Region includes Brighton, Southampton and Portsmouth.
14. The effect of establishing these regions has addressed the influx of vehicles to Brighton and Hove from Greater London area.
15. The number of vehicles and drivers operating with Uber with licences in BH is 97.
16. The number of vehicles and drivers operating with Uber with licences in Lewes is 117.

AGREED LAW

17. The power to grant and refuse the licensing of operators of private vehicle licences rests with a District Council.
18. The relevant statutory provisions are found in Part II of The Local Government (Miscellaneous provisions) Act 1976.
19. In summary the provisions provide for the separate consideration for the licensing of private hire vehicles, drivers and operators.
20. The licensing of drivers and operators is mandatory, subject to the “fit and proper test” and in the case of an individual the absence of disqualification, by reason of immigration status.
21. The licensing of a vehicle is based upon satisfaction of 5 criteria relating to the nature of the vehicle AND the proper insurance of the vehicle.
22. The council are by s.48 prevented from refusing a vehicle licence for the purpose of limiting the number of vehicles.
23. S. 46 (1) (e) provides “no person licensed under s.55 shall in a controlled district operate any vehicle as a private hire vehicle -i) if for the vehicle a current licence under the said s.48 is not in force; or ii) if the driver does not have a current licence under the said s.51. (*The so called “triple lock”.*)

24. In turn S. 75(2) disapplies the prohibition by s.46(1) (a) – (c)
 “Paragraphs (a) –(d) of s.46(1) shall not apply to the use or driving a vehicle or the employment of a driver of a vehicle while the vehicle is used as a private hire vehicle in a controlled district if a licence issued under section 48 of this Act by the council whose area consists of or includes another controlled district is then in force for the vehicle and a driver’s licence issued by such a council is then in force for the driver of the vehicle. *(The so called “right to roam” - It is accepted by the parties that the effect of these provisions is that as long as the three licences are issued by the same licensing authority any journey can start, pass through or end in any local authority area.)*
25. S.55A inserted by the Deregulation Act 2015 (from 1st October 2015) further relaxed subcontracting by operators of private hire vehicles.
26. s. 80 – “operate” means in the course of business to make provision for the invitation or acceptance of bookings for a private hire vehicle.
27. S.62 – provides power to the District Council to suspend or revoke or refuse to renew an operator’s licence on any of the following grounds:-
- a. any offence under, or non-compliance with, the provisions of this Part of this Act;
 - b. any conduct on the part of the operator which appears to the district council to render him unfit to hold an operator’s licence;
 - c. any material change since the licence was granted in any of the circumstances of the operator on the basis of which the licence was granted;
 - ca. that the operator has since the grant of the licence been convicted of an immigration offence or required to pay an immigration penalty; or
 - d. any other reasonable cause.
28. The leading authority which provides for the basis of the accepted principles of such appeals is to be found in the High Court decision of *Hope and Glory v City of Westminster Magistrates’ Court* [2011] EWCA Civ 31 The accepted principles being:-
- i. The hearing is de-novo based on up to date evidence.
 - ii. The burden of proof rests with the appellant.
 - iii. The court should consider the aims and objectives of the legislation, any guidance policy and authorities.
 - iv. The court should not lightly reverse the decision of the licensing authority.
 - v. The court should only reverse the decision if satisfied that it is wrong.
 - vi. The court should pay careful attention to the reasons given by the licensing authority to its decision.
 - vii. The weight to be given to those reasons will be a matter of judgement in all the circumstances, taking into account the fullness and clarity of those reasons, the nature of the issues and the evidence given on the appeal.

THE EVIDENCE

29. The evidence is contained within several bundles and is not repeated here as for the most part, it is not in dispute.
30. I also heard live evidence from Frederick Austin Jones on behalf of the Appellant company and from Joanne Player on behalf of Respondent Council.
31. Mr Jones joined Uber in 2015. Initially working on the launch of Uber in Bristol. He has been a Director of UBL since August 2017, having been previously Uber UK Head of Cities which made him responsible for Uber's relationships with key stakeholders and regulatory compliance. He oversaw operations in BH when Uber began operating in October 2016.
32. He confirmed his statements and further clarified his position in relation to Uber's engagement and partnership working with BHCC to address concerns about cross border and assist with enforcement action. He explained the rationale behind the 9 regions providing, as the company saw it, an appropriate balance between preserving rights of people to live and work across LA boundaries whilst recognising the difficulties of enforcement of long distance cross bordering. He described how these changes had been discussed and communicated to BHCC in advance of implementation.
33. He emphasised the company's responsiveness to local concerns demonstrated, in particular by; early intervention and geofencing of taxi ranks (where complaints from local trade indicated that their drivers were inappropriately parking there), taking down of the website page providing comparator cost and processing of applications for licences between Brighton and Hove and Lewes. In respect of this website page he did not accept that the company had set out to provide the pros and cons in respect of applying to each area but just to provide relevant information for drivers. He described the incentivization scheme offered to drivers relicensing with BHCC viz £1000 plus 250 commission free fares.
34. He confirmed that as at 5th November 2018 the number of drivers licensed with BHCC was 97, and those licensed with Lewes was 117.
35. He described a proactive safeguarding approach emphasising the company's work with Barnardo's to offer courses for all drivers which would be mandatory for all new drivers from end of 2018.
36. In relation to the question of the use of in vehicle CCTV he described Uber's position as "openminded to the widespread adoption of CCTV". He acknowledged that they had contributed to the debate in a public document submitted to Lewes DC, which recommends against mandating CCTV in preference for voluntary installation, due, he explained, to the ongoing debate re human rights and cost vs the safety benefits. He indicated that the company were positively contributing to the debate by providing anonymised data to analyse the impact on public safety. He was unequivocal that Uber would support the conclusions of any analysis and where councils mandate the use of CCTV they will ensure adherence.

37. Ms Players position and background is as Head of Communities for BHCC – Trading Standards Officer and Chief Inspector of Weights and Measures.
38. She confirmed her statement prepared for these proceedings. Her statement described the local demographic and emphasised the particular issues of the area.
39. She acknowledged that “there is nothing unlawful in cross border hiring”, but suggests that the law is antiquated in the context of the new technology which allows for very different working practices from ones hitherto envisaged.
40. Whilst accepting the history of the grants of licences to Uber she notes that the intention of the council was initially to use these periods to understand and test the application of the new technology and later “pending resolution of the TFL appeal and a holding decision pending a full hearing”
41. She described the initial impact following launch of Uber in BH as being a “proliferation of TFL drivers”, which prompted a “huge outcry from the local taxi trade” and required a “huge amount of time and resources being expended in managing the situation.”
42. She views the division of Uber into 9 regions as an “acknowledgement of Uber of legitimate concerns about out of town drivers and the challenges they pose for local enforcement. She considers that the Lewes comparison table called into question Uber’s integrity.
43. She stated that the creation of the new region has resulted in increased numbers of drivers licensed in Lewes operating in the City instead of those from TFL, noting that the conditions imposed on Lewes driver licences are less stringent than their own and notably do not include CCTV. Although she acknowledges that proposals for this are being consulted upon.
44. Whilst her evidence acknowledges co-operation with UBL but states that this has required “a lot of work from Brighton and Hove staff” stating “we have had to push the Appellant to make changes”
45. In respect of CCTV she suggests that “Uber are seemingly dismissive of CCTV, taking the view it adds nothing to protecting passengers” Placing reliance on information that 90% of revocation of drivers’ licences have CCTV as a feature.”
46. She confirms that BHCC have enforcement agreements with Adur and Worthing and Lewes. There are no agreements with Chichester, Havant and Portsmouth – whose drivers appear in the city. She emphasises that this curtails enforcement and that the use by Uber of a website to promote another authority “undermines our local regulation framework”
47. She identifies the simple solution to “institute geofencing” for BH and suggests a condition to that effect with a proviso for “pairing” where standards mirror those of BH as well as for “transit through” to provide for return journeys.

48. In cross examination Ms Player accepted that if geofencing was agreed BHCC would not oppose the licence.
49. That therefore what it came down to was that BHCC considered that UBL would be “fit and proper” if it put in place the requested geofencing, but was not fit and proper if it did not.
50. She acknowledged what Mr Kolvin referred to as a “degree of absurdity” in that position.
51. She also acknowledged that the effect of the refusal of the licence meant that BHCC would lose any control over the drivers.

LEGAL ARGUMENT

52. Whether the practice of Cross Border Hiring is a matter which can go to the determination of “fit and properness”.
53. Whether a condition can be attached to a licence that restricts statutory rights (as a means of rebalancing the right to roam with the principle of localism).
54. Mr Kolvin on behalf of the Appellant argues that if the appellant is otherwise fit and proper they cannot be otherwise due to exercise of a statutory right and that a condition preventing statutory rights under other licences cannot be imposed.
55. He relies upon the fact that the fit and proper test to be applied goes to the attributes and competence of the appellant to carry out activities under the licence and not to the question of whether there is an objection to the exercise of statutory rights under another authority.
56. He relies upon the purpose for which conditions may be applied, namely to control the licensed operation for which the licence is sought and not to curtail rights granted by parliament.
57. He relies upon the statutory framework set out above as well as numerous authorities; inter-alia;
 - i. Dittah v Birmingham City Council(DC) 1993 RTR 356 – Re triple lock “applying s80(2) to sections 46(1)(d) and(e) has the effect that an operator requires a licence from the area in which he intends to operate and may operate only in that area vehicles and drivers licensed by the same district. This has the practical effect that an operator licensed in area A may only use vehicles and drivers licensed in area A but these vehicles and drivers will by virtue of section 75(2) exemption be able to go anywhere in the course of hiring. That in my judgement is an accurate statement of the law, whatever may have been said in the past.”
 - ii. Adur DC v Fry 1997RTR 257- Re meaning of operator (not in issue)

iii. Delta Merseyside Ltd, UBL and Knowsley Metropolitan Borough Council 2018 EWHC 757 (and authorities referred to therein). It is not contested that this case determined in summary that a policy intended to restrict the drivers from exercising their right to roam freely, was held to be unlawful. “I do not accept that the authorities relied upon by KMBC (*Blue Line Taxis (Newcastle Ltd) v Newcastle City Council* 2013 RTR 8, *Shanks v North Tyneside BC* 2001 LLR 706, *Windsor and Maidenhead Royal BC v Khan* 1994 RTR 87 and *Dittab v Birmingham DC* 1993 RTR 356*) justify the proposition that a person may be fit and proper to hold a licence if willing to sign up to work predominantly from Knowsley, yet unfit to hold a licence if unwilling to do so. I accept that the phrase “fit and proper person” in this context relates to the personal characteristics and professional qualifications of the driver and not to his or her work preferences and visibility.

iv. *Stewart v Perth and Kinross DC* 2004 UKHL 16 2004 (in which a licensing authority sought to use conditions imposed on car dealers to regulate the terms of their trade with customers. Held to be unlawful. Lord Hope of Craighead:-

a. “But it is clear that the discretion which is vested in the licensing authority is not unlimited. The authority is not at liberty to use it for an ulterior object, however desirable that object may seem to it to be in the public interest (*Pyx Granite Co Ltd v Ministry of Housing and Government*, per Lord Denning at p 572; *Newbury DC v Sec of State for Environment*, per Viscount Dilhorne at p 572)

Baroness Hale:-

b. “conditions imposed by local authorities must a) be for the purpose of regulating the activity requiring to be licensed and not for any other purpose; b) fairly and reasonably relate to the activity being licensed and (c) be reasonable in the modern public law sense of that word (*Newbury DC v Sec of State for Environment*, per Viscount Dilhorne at p599).”

v. *R v CC @ Warrington, Ex Parte RBNB (an unlimited Co) – Re (fit and properness)* “This is a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do.”

58. Mr Kolvin relies on these authorities in support of his submissions that the finding of the BHCC is unlawful and that the imposition of the proposed condition would be, in effect, ultra vires.

59. Regarding fit and properness more generally he indicates that there is no matter before me that points to any issue arising in relation to the appellant's conduct with the operation of the licence. There is no suggestion of failure to fulfil the obligations of BHCC Blue Book requirements. The office has been inspected and there have been no issues drawn to my attention relating to their drivers or users and that therefore the appellant is fit and proper. In relation to the proposed conditions, parliament has not given a mandate to demand what is asked for. It is therefore, untenable, unprecedented, irrelevant and cannot in the circumstances be "reasonably necessary"
60. Mr Charalambides for the Respondent-

Acknowledges in his argument that the authorities put forward are established law. He argues, however, that the decisions were not made on the basis and circumstances of the novel business model that Uber is operating on a national basis. That BHCC's decision needs to be considered in the context of the unique nature of this model, which essentially undermines the local policy and the principle of localism and so whilst lawful, renders it unfit and or justifies the imposition of conditions as requested. He relies specifically on the obiter comment at para 30 of Mr Justice Kerr in Knowsley, to submit that there is support for the fact that this issue remains unresolved. "It is not necessary for me in this case to attempt a resolution of these difficult and at times seemingly contradictory propositions, but in the light of them I do well understand, and have sympathy with, the concern of KMBC to preserve elusive local control over the operator's drivers and the vehicles which it licences." He submits that by agreeing to geofencing, for the regions and the areas they have, Uber are in effect broadly in acceptance of the distortion. That the courts should respond to his "plea to sympathy" to recognise that the right to roam should not be of such weight as to prevent and ouster localism. That in all the circumstances it is open to find that the decision of BHCC was rooted in genuine local concerns and that the lawful conduct elsewhere makes Uber unfit in BH as it undermines their policies or that the impact of the nature of the operation makes necessary and proportionate the conditions of further geofencing etc justifiable.

CONCLUSIONS

61. I conclude that I cannot concede to the plea to "sympathy" put forward on behalf of BHCC. I am bound by the legal framework and authorities as clearly and comprehensively set out above.
62. The licensing "triple lock" and "right to roam" are clearly embodied within this statutory regime and endorsed by the case law as set out above. The spirit of this legislative framework as further deregulated in 2015 supports an open market.
63. Any changes to this are a matter for parliament.
64. The only remaining objection to the grant of an operator's licence relied upon by BHCC is the extent of UBL's exercise of these statutory rights. They submit that the exercise of these statutory rights undermines their local regulation and control and renders UBL unfit.

65. It is not in dispute, however that UBL, their drivers and the vehicles licensed by BHCC are fully compliant and operating effectively and in accordance with the local requirements. Their administrative office has been inspected by the BHCC on 2 separate occasions and this inspection has disclosed no cause for concern.
66. The case law on the question of fit and properness is unequivocal. The test relates to the personal characteristics and qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do. The recent decision in Delta Merseyside Ltd UBL and Knowsley Metropolitan Borough Council 2018 is on a very similar point and clearly rejects the argument that previous authorities justify a proposition that a policy restricting statutory rights is lawful. It follows that a refusal on the basis of the argument put forward by BHCC that UBL are fit and proper as long as they agree to a condition restricting their right to roam but otherwise are not is, therefore, clearly not lawful.
67. I consider that it would be equally unlawful to circumvent or undermine the legislation and case law by determining that the exercise of these statutory rights can amount to "any other reasonable cause" for refusal of a licence pursuant to s.62(d).
68. The law is equally clear in respect of the exercise of discretion in attaching conditions to licences. *Stewart v Perth and Kinross DC* 2004 in which it was held to be unlawful to impose conditions on a car dealer to regulate the terms of their trade. "...discretion is not unlimited. The authority is not at liberty to use it for an ulterior object, however desirable that object may seem to be in the public interest".
69. This is precisely what I am being invited to do and which the case law expressly prohibits.
70. For the avoidance of any doubt, on the facts and evidence in this case, I am satisfied that UBL have taken a responsible and collaborative approach in meeting the concerns around localism and difficulties presented by the nature and size of their operation.
71. I found Mr Jones' evidence to be measured and reflective. The information provided demonstrated a responsible attitude towards the safety of all users of the service as well as an attitude of proactive and positive engagement and responsiveness to real concerns posed by BHCC.

72. In particular; they have:-
- i. geofenced the taxi ranks at which it was suggested their drivers were using illegally,
 - ii. arranged in partnership with Barnardo's a training course on safeguarding children, which will be compulsory for all new drivers by the end of this year,
 - iii. have enhanced DBS checks for all drivers, in line with local authority requirements;
 - iv. provided a 24/7 hotline for the reporting and action of any serious allegations posing a threat to public safety,
 - v. provided email contact to assist with cross border enforcement (nationally),
 - vi. provided the respondents with data to assist their enforcement team,
73. Furthermore the app itself provides the customer with the name and vehicle registration on booking as well as the name of the licensing authority. It also enables a customer to permit others to track their journey, so providing safety and assurance for many users. Uber have also introduced from January 2018 a cap on drivers' hours.
74. In response to local concerns about the website offering information about neighbouring councils licensing cost and processes, the website was removed. Inducements have been offered to drivers re-licensing with BHCC.
75. Uber have now nationally introduced geofencing for 9 regions across England and Wales
76. I do not accept that these are the actions of a company that rejects or seeks to undermine the standards of this local area. On the issue of CCTV, they have responded proactively to the debate and are contributing to the provision of information to inform future decisions. They have agreed to enforce any mandated requirement. There is no evidence of any difficulty arising from the investigation of any complaint made against an Uber driver due to absence of CCTV. Indeed there is an absence of any complaint or objection from any public protection authority or elsewhere, other than trade competitors.
77. Since the decision of the licensing authority to refuse to renew the licence there have been several developments, including the decision of the Chief Magistrate on 26th June 2018 on the fit and properness of Uber London Ltd arising, inter alia, from the changes made to the company governance etc, following the data breach, as well as other concessions as set out in paras 74 - 77 above.
78. UBL have satisfied me that they are now fit and proper to be granted this licence, that since BHCC have conceded that their concerns regarding the data breach have been addressed and that they no longer rely on having been misled by the terms of the undertaking given, they have been holding out on a misguided premise.
79. I also find that it would be in no way lawful, proportionate or necessary to impose a condition to restrict their statutory rights as requested.

80. The concessions UBL have made to their practices and the conditions that they have adhered to and additionally agreed to justify the grant of a licence.
81. I therefore grant the operator's licence to UBL incorporating previous and additional conditions now agreed.
82. I shall consider the length of the licence following further representations in the light of my decision.
83. Likewise with costs I shall hear any application and representations thereon.