



Institute of Licensing

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**Uber High Court Case Review**

Institute of Licensing National Training Conference  
16 November 2022

James Findlay KC & Jack Barber

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**The Agenda** 

1. Legal Framework – Overview
2. Contract with Operator or Driver?
3. Private hire plying for hire?
4. What next? & Questions

*Uber BV v Aslam* [2021] UKSC 5  
*R (UTAG) v TfL & Uber London v TfL & Ors* [2021] EWHC 3290 (Admin)  
*R (UTAG) v TfL and Transopco UK Ltd* [2022] EWCA Civ 1026

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LEGAL FRAMEWORK

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**Legal Framework**

- **PHVs**
  - London: Private Hire Vehicles (London) Act 1998 ('the 1998 Act')
  - Rest of England & Wales: Local Government (Miscellaneous Provisions) Act 1976 ('the 1976 Act')
- **Black cabs**
  - Metropolitan Public Carriage Act 1869 (as amended) ('the 1869 Act')

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**The 1998 Act**

- **Triple lock:** three kinds of licence must exist for PHV journey in London to be lawful:
  - Operator licence (ss. 2-5)
  - Vehicle licence (ss. 6-11)
  - Driver licence (ss. 12-14)

Note: s. 56(1) of the 1976 Act: "(1) For the purpose of this Part of this Act every contract for the hire of a private hire vehicle licensed under this Part of this Act shall be deemed to be made with the operator who accepted the booking for that vehicle whether or not he himself provided the vehicle."

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**Contract with Operator or Driver?**

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**Uber BV v Aslam – the substantive issue** 

- **Question:** Was an Uber driver a "worker" for the purposes of employment legislation which gives "workers" rights to be paid NMW / annual paid leave / other benefits?
- **UKSC's Answer:** Yes (§94-101; 119)
- Lord Leggatt's judgment (unanimously endorsed by the other JSCs) included consideration of the statutory licensing regime and has influenced subsequent cases.

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**Uber's argument** 

- Uber argued drivers **not workers** because no contract whereby drivers undertook to perform work/services for Uber.
- It said drivers were performing services solely for, and under, contracts made with passengers through **agency** of Uber.
- Proposed court should **start** by interpreting agreements between **Uber and drivers**, and **Uber and passengers**; acceptance of booking constituted contract between passenger and driver to which **Uber was not a party**.
- Uber said its role was to act as booking agent providing tech services / collecting payment as agent for drivers.

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**The Supreme Court's view** 

- Two fatal objections to Uber's argument:
  - (1) Not correct approach to decide whether workers simply to apply ordinary principles of law of contract and agency.
  - (2) No written agreement between Uber and drivers, nor mechanism by which driver gave authority to Uber to act as agent.

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**The court's third objection? (S46-49)** 

- If the contractual scheme was as described by Uber, it would be unlawful because the 1998 Act requires acceptance by the operator of a contractual obligation owed to the passenger to carry out the booking and to provide a vehicle for that purpose.

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**Lord Leggatt's analysis (S46-49)** 

- References in the 1998 Act to 'acceptance' of private hire booking understood to connote personal acceptance of contractual obligation to carry out booking/provide vehicle for that purpose (e.g., s.4(2)).
- In principle, possible for Uber to accept obligation and contract on behalf of driver. But then hard to avoid conclusion driver also person who accepts booking by undertaking contractual obligation owed to passenger, **contrary to s.2(1)** (accepting private hire booking without holding PHV operator's licence for London).

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**Lord Leggatt's analysis** 

- At §47:  
*"This suggests that the only contractual arrangement compatible with the licensing regime is one whereby Uber London as the licensed operator accepts private hire bookings as a principal (only) and, to fulfil its obligation to the passenger, enters into a contract with a transportation provider (be that an individual driver or a firm which in turn provides a driver) who agrees to carry out the booking for Uber London."*
- But **qualification** at §49:  
*"It is unnecessary, however, to express any concluded view on whether an agency model of operation would be compatible with the PHV licensing regime because there appears to be no factual basis for Uber's contention that Uber London acts as an agent for drivers when accepting private hire bookings".*

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**R (United Trade Action Group Ltd) v Transport for London & Uber London Ltd v Transport for London & Ors [2021] EWHC 3290 (Admin)** 

Claims raised two issues:

- (1) The Operator Issue
- (2) The Plying for Hire Issue

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**The High Court** 

- Two separate claims involving two PHV operators (Uber and Free Now) licensed under 1998 Act:
- (1): United Trade Action Group Ltd (UTAG) brought claim for judicial review of TfL's decision to renew licence of Transopco (UK) Ltd (trading as Free Now) under the 1998 Act.
- (2): Uber brought a Part 8 claim against, among others, TfL and UTAG, seeking a declaration.

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**Judicial Review Claim - Grounds** 

- Ground 1: That according to the operator's own terms and conditions, bookings were accepted by PHV drivers and not by the operator itself, which was unlawful because under the 1998 Act the booking had to be accepted by the licensed operator.
- So licence should be quashed.

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**Part 8 Claim** 

- Uber London Ltd brought claim against TfL, UTAG and App Drivers and Couriers Union.
- Sought declaration that an operator licensed under the 1998 Act who accepted a booking from a passenger was not required by the Act to enter as principal into a contractual obligation with the passenger to provide the journey in respect of that booking.
- Transopco (UK) Ltd (trading as Free Now) given permission to intervene and make submissions in support of Uber's case

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**The Operator Issue** 

*Whether, in order to comply with the 1998 Act, a licensed operator must accept a contractual obligation to the passenger as a principal to carry out the booking.*

- **Uber and Free Now:** not necessary.
- **UTAG:** is necessary. Free Now's T&Cs mean that it is encouraging drivers to operate unlawfully; quash decision to grant licence.
- **TfL:** Neutral, but issue needs to be decided.

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**The Court's decision – Operator Issue** 

- At §27:  
  
*"The 1998 Act plainly contemplates that acceptance of a booking by the operator will create a contract between the operator and the passenger and... that this will be a contract by which the operator undertakes an obligation... to provide a vehicle and driver to convey the passenger to the agreed destination"*

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**The Court’s decision – Operator Issue** 

- Language of s.4: “private hire vehicles and drivers which are available to him for carrying out [a] booking accepted by him”. (§28)
- **Operator** carries out the booking. No distinction between acceptance of booking & undertaking of obligation to carry out journey.
- Even clearer in s.5 (sub-contracting by operator). (§29)
- EWHC say 1998 Act **requires** contractual obligation to give effect to statutory purpose of ensuring public safety (§30-31)

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**[2021] EWHC 3290 (Admin) - Summary** 

- At §57:  
*“We have concluded, perhaps not surprisingly, that the Supreme Court meant what it said in Uber BV v Aslam ... Accordingly, we will grant a declaration in both proceedings that in order to operate lawfully under [the 1998 Act] a licensed operator who accepts a booking from a passenger is required to enter as a principal into a contractual obligation with the passenger to provide the journey which is the subject of the booking. Otherwise we dismiss the claim for judicial review.”*

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**Consequences of the Court’s decision** 

**To operate lawfully, operator must undertake contractual obligation to passengers.**

- **Uber / Free Now** to amend basis on which provide services.
- **TfL** to reconsider practice of not reviewing contractual terms of operator when considering a licence application; to consider how to ensure basis on which PHV operators conduct operations is in accordance with 1998 Act.
- TfL’s decision to grant licence **NOT** quashed; disproportionate.
- **Question:** Can an operator who accepts contractual obligation to passenger to carry out a booking to exclude in effect all liability to passenger?

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**Private hire plying for hire?**

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**R (United Trade Action Group Ltd) v Transport for London & Uber London Ltd v Transport for London & Ors [2021] EWHC 3290 (Admin)**

- Ground 2: That PHVs plied for hire in London using the operator's own app, which was unlawful as only licensed hackney carriage drivers could lawfully ply for hire, and that the operator's encouragement to break the law meant that the regulator could not rationally conclude that it was a fit and proper person to hold a licence.

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**The 1869 Act (The statutory regime for black cabs)**

- s.4, 1869 Act: "Hackney carriage" defined as "*any carriage for the conveyance of passengers which plies for hire within the limits of this Act, and is neither a stage carriage nor a tramcar.*"
- s.7, 1869 Act provides that if any unlicensed hackney carriage plies for hire, the owner shall be liable to a fine, as will the driver unless the driver proves their ignorance of the fact of the carriage being unlicensed.
- 1869 Act amended to include reference to tramcar and to provide for TfL to be the licensing authority for hackney carriages. "Plying for hire" remains without statutory definition.

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**The Plying for Hire Issue** 

*Whether a driver soliciting passengers by means of the Free Now app (or equivalents, e.g., Uber app), is “plying for hire” within the purposes of the 1869 Act.*

- **UTAG:** Yes, so irrational for TfL to consider Transopco “fit and proper person” in deciding to reissue licence because its mode of operation involves the commission of a criminal offence by its drivers (plying for hire).
- **Free Now & TfL:** No.

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**Case law on “plying for hire”** 

- Soliciting or waiting for passengers without any previous contact with them: *Sales v Lake* [1922] 1 KB 553, 557-558 per Lord Trevethin CJ.
- There must be some “exhibition” of the vehicle to the public in order for the vehicle to be plying for hire: *Cogley v Sherwood* [1959] 2 QB 311, per Lord Parker CJ.
- Question: How “plying for hire” including (i) soliciting, (ii) exhibiting, and (iii) absence of prior contact applies to process of booking PHV via app?

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**Reading Borough Council v Ali [2019] 1 WLR 2635** 

- Appeal of failed prosecution, s.45 Town Police Clauses Act 1847. Council said Uber driver “plying for hire”.
- Divisional Court held no plying for hire:
  - (1) Mere depiction of D’s vehicle on Uber app insufficient to establish exhibition.
  - (2) On any view, pre-booking by customer, recorded by Uber as PHV operator. No soliciting without prior booking.
  - (3) Character of waiting. No question of driver soliciting custom during period of waiting.

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**The High Court’s treatment of Reading BC v Ali: §§53-55** 

- Indistinguishable from present case.
- Arguments advanced by Council and rejected in that case same as those advanced by UTAG.
- Contractual position as between Uber and driver no basis for distinction.
- Since question whether vehicle plying for hire necessarily focuses on what it does before contract concluded, can make no difference whether any resulting contract of hire is made with operator or driver.

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**The Court of Appeal - R (UTAG) v TfL and Transpoco UK Ltd** 

- UTAG took the "plying for hire" issue to the Court of Appeal.
- *"It might seem extraordinary that the underlying question of law is one of the interpretation of a statute enacted in 1869, before the invention of the telephone or the motorcar, let alone the internet or the smartphone app. Yet that is the issue before us."* per Bean LJ, §1, [2022] EWCA Civ 1026
- UTAG arguing that *Reading BC v Ali* was wrongly decided; sufficient for driver to turn on app / drive around in search of bookings to be "plying for hire".
- UTAG sought to rely on *Sales v Lake* to effect that exhibition not the standard for "plying".

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**EWCA’s survey of authorities** 

- In order to ply for hire, a vehicle must be exhibited, and must be soliciting business from prospective customers: *Cogley v Sherwood* [1959] 2 QB 311
- Test for "exhibition": the vehicle "should while on view expressly or impliedly solicit custom, in the sense of inviting the public to use it" *Rose v Welbeck Motors* [1962] 1 WLR 1010

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**EWCA’s reading of Reading BC v Ali** 

- Depiction of available vehicles in the form used by the App is not “exhibition”; the App simply uses modern technology as a substitute for the operator of a traditional mini cab firm.
- The driver using the App is not soliciting custom during the period of waiting; there is nothing on the vehicle advertising that it is for hire and the driver will not allow passengers simply to hail the vehicle and step into it.

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**EWCA’s decision** 

- Not enough to meet definition if a vehicle “drives around or parks in a public place waiting for someone to hire it”. Test would criminalise almost entire PHV market.
- Plying for hire requires a vehicle to be not just exhibited or on view but, while exhibited, to be soliciting custom in the sense of inviting members of the public to hire it without a prior contact.

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**Outcome of EWCA decision** 

- EWCA dismissed UTAG’s appeal against substantive decision of Divisional Court on the plying for hire issue and held Reading BC v Ali correctly decided.
- In Free Now context, neither the “exhibition” nor the “solicitation” element of the test satisfied.
- UTAG’s permission to appeal to UKSC refused.
- EWCA has assertively confirmed approach in digital era – Reading BC v Ali affirmed.

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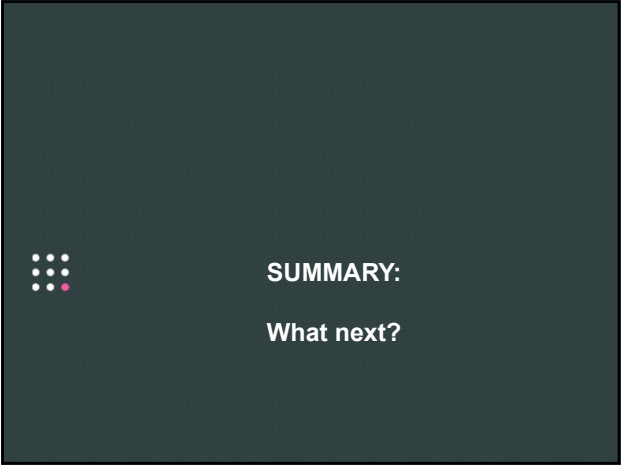
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**SUMMARY:**  
What next?

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Your questions answered 




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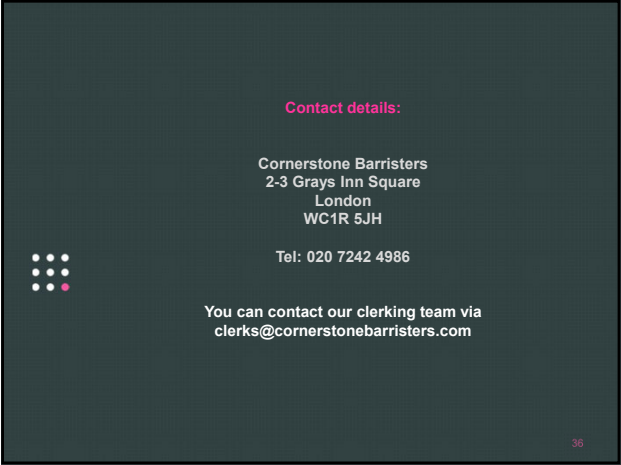
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