Memo/Release

The TAS Partnership Limited
Passenger Transport Specialists
Guildhall House
59-61 Guildhall Street
Preston PR1 3NU
Telephone: 01772 204988
Fax: 01772 562070
info@taspartnership.co.uk
www.taspartnership.co.uk

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Author: John Taylor
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Bus & Coach Association (BCA) v Secretary of State for Transport

The High Court has today released the judgement in this case.

Background

The BCA brought a Judicial Review claim against the Secretary of State for Transport - in effect DfT and DVSA - as a means of bringing pressure on them to enforce EC Regulation 1071/2009 against community transport operators more robustly than is currently the case. 1071/2009 is concerned with setting professional standards for road transport operators across the EU, in essence the 'O' licensing system. The assumption was made by DfT when implementing 1071/2009 into GB that operations under s19 and s22 Permits were exempt because their operations were "*exclusively for non-commercial purposes*". The BCA challenged this view, in the light of some Permit operators undertaking school and social care contracts (and indeed competitively tendering against PSV operators). They initially asked the Court to declare that services provided for payment under contracts won in competition with commercial operators should be regarded as undertaken "*for commercial purposes*"; and that operators with bus company characteristics (paid drivers, fares, contestable markets) should be regarded as commercial.

In their final claim, this was modified to bring them closer to the language that the DfT used in its 2018 consultation on the issue. They asked for a declaration that decisions as to whether operation is exclusively for non-commercial purposes should take into account, in order of importance: the level of payment received; the proportion of work won in competitive procurement; the size and scale of the operation in the market; whether the operation could afford to licence as a PSV operator; whether the operator uses volunteers or relies on paid staff.

They also asked for a declaration that where an undertaking does not operate exclusively for non-commercial purposes, then drivers cannot rely on the "*non-commercial*" exemptions from requiring a full D/D1 driving licence and a Driver CPC.

The Judgement

The BCA has been unsuccessful in its claim. The Court will not issue the declaration that the BCA requested, nor indeed any such declaration.

In its reasoning the Court spent some time considering the appropriateness of making a declaration as to the law in a case where there wasn't a particular set of facts to consider at the core of the dispute, nor were the associated operators represented, especially if the issue could impact on future criminal proceedings. As the BCA's position moved much closer to the DfT's position (and indeed many of the principles proposed were not disputed by the Community Transport Association or Mobility Matters), it became less and less clear to the Court what was the specific disputed point of law. The Court concluded that there was no dispute between the parties as to the applicable legislation or to the principles that should be adopted in interpreting it, hence no useful purpose served by issuing a declaration.

BCA relied heavily on a European Court judgement in a case (Lundberg) involving a rally driver stopped driving a lorry, carrying his rally car, without a tachograph. The ECJ had decided that he was exempt from tachograph rules because he wasn't being paid to drive. The High Court concluded firmly that this case is not relevant to 1071/2009, as it concerned a differently worded regulation with different subject matter and had no application to the situation with which this case was concerned.

The Court set out some principles that it found were not in dispute:

- The key focus is on the "purposes" for which the organisation is engaged in providing road passenger transport services.
- The fact that the organisation is a charity or otherwise cannot distribute profits does not mean that it must be considered as operating exclusively for non-commercial purposes.
- Receiving payment for the services does not mean that the operation is for commercial purposes.
- The fact that a community transport organisation covers its costs or even makes a profit from providing a particular service does not necessarily mean that its purposes in providing the service are partly commercial. However, if the reason for operating that service is simply to raise money for a different purpose, then the CT could not rely on the exemption.
- The question whether an organisation is "engaged in road passenger transport services exclusively for non-commercial purposes" is one of fact, requiring consideration of the organisation's features and activities that allow its purposes to be ascertained or inferred. Relevant considerations include:
  - Levels of payment received
  - The extent to which the organisation provides services under contracts won through competitive procurement
  - The size and scale of its operations
  - The extent to which the organisation relies on volunteers or, if it relies on paid staff, whether they are paid at levels comparable to equivalent staff at commercial operators.

The Court concluded that in the absence of a specific dispute about interpretation of the phrase "exclusively for non-commercial purposes", it could not and should not make an abstract declaration, and that even if it did that declaration would have no binding legal force. It recognised that there will be disputes about whether a particular operator comes within the exemption or not, but that will depend upon the facts in any particular case, and it acknowledged that determining this may be far from straightforward. However the Court wasn't asked to adjudicate on a specific case.

A further conclusion was that if the applicable legislation is clear, then there is no justification for the DfT (and DVSA) to delay taking any enforcement decisions on the grounds that "the law isn't clear". Applying the rules may be difficult but that isn't a good reason to avoid enforcement.

Comment

Given the years and years of hostile correspondence, lengthy arguments and denouncements in the press it may seem somewhat perverse for the Court to conclude that the BCA, DfT, DVSA, CTA and Mobility Matters are all in agreement with each other. However, this reflects the difficulty of coming up with abstract formulations of the meaning of "non-commercial purposes" - the moment you come up with a simple principle, a countervailing case is likely to arise that renders it unfit for purpose.

The community transport sector will be relieved that the BCA has been unsuccessful in persuading the Court to make a declaration as to the law. If the BCA's original formulation had been accepted there is no doubt that a major crisis would have occurred and service continuation would have been put in doubt. This was a real existential threat.

The BCA may, however, console itself that the Court has accepted one of its contentions which was that the DfT and DVSA were unjustified in delaying making enforcement decisions. In essence the Court has put the ball back firmly in the DfT's court and told it to face up to the fact that the legislation, as currently worded, is difficult.

However, we get from this judgement little of the clarity for which both the community and commercial transport sectors might have been hoping. Consequently, the DfT must now produce much more detailed, explicit and nuanced guidance than it has managed to date. In its proposals thus far it has focused on interpreting "non-commercial". The Court has explicitly rejected this approach. In its next attempt to draft guidance, the DfT will have to grapple with understanding the community transport sector's varied purposes and identifying the factors associated with these.

Although the Court has listed some considerations, it makes clear that these are not exclusive and it rejected BCA's attempt set them up in some form of priority. It is already clear, from the Welsh Traffic Commissioner's decisions in the ACT and DANSA cases, that there are a whole range of factors, not considered by the Court, which might come into play. Note that those two cases concerned community transport groups using Permits to undertake paid contract work for local authorities obtained through open procurement portals; in one case the Commissioner reissued the Permits, in the other case he revoked them. This reinforces the view that the quest for a simple black and white ruling is a fool's errand.

Taking just one example, consider the reference that both the Traffic Commissioner and the Court has made to the pay levels of community transport staff. The implication appears to be that a community transport operator paying their drivers above the going rate (often in school transport cases, minimum wage) would be a factor suggesting that they were operating commercially. This leads to the 'Catch 22' that paying uncommercial rates is evidence of commercial purposes whereas paying commercial rates is associated with non-commercial purposes. A community transport operator may well adopt a policy of paying at living wage (or indeed above) on social grounds. But how does this imply "commercial purposes"? Perhaps the argument is that setting the charge rate at a level that enables staff to be better paid than average implies that the organisation is seeking to make more money than necessary from the contract, so it is in fact operating the service for the benefit of its staff rather than to meet its core objectives. This would be very, very difficult to determine. Maybe the intent was that the pay issue should only apply to management - but that's not what the 'principle' states.

The community transport sector now faces its own challenge. Over the past decade the sector has come into conflict with parts of the commercial sector. In our view, the actual levels of conflict have been grossly exaggerated by the BCA but there is, nevertheless, clearly a significant issue. The conflict has consumed much time and significant effort, prevented sector development, wasted very large amounts of money that could have been better used to meet passenger needs, created difficulties for local authorities caught in the crossfire and led to some operations deciding to close down. The sector can celebrate the removal of the immediate threat, but the judgement in this case will not make the conflict go away. So the challenge will be for the sector to develop its own principles that, if applied, could minimise the 'conflict zone' by redefining the parameters. The alternative will be to wait for the DfT to develop guidance and that hasn't gone well in the past.

Finally, local authorities have a role to play. In both the ACT and DANSA cases, the Welsh Traffic Commissioner called on local authorities to alter their procurement practices to apply separate considerations to tenders from community transport organisations. An obvious means by which authorities could do this would be to meet their duties under the Public Services (Social Value) Act 2012 and Total Transport principles, to take into account the additional value for the community that accrues from a sustainable community transport operation in their area. There are developing social value assessment systems that could be applied to assist this process. In essence this would require any financial advantage that community transport groups may acquire by operating under Permits to be repaid explicitly to the community in additional service quality, scale or scope. Such an approach is consistent with European procurement law and would undermine the majority of claims of 'unfairness'.

TAS is proud of the professional support that we have provided to Mobility Matters and latterly to CTA as Interested Parties in this case. The judgement has endorsed many of the specific points that we made and reached the conclusion that we anticipated. With our balanced portfolio of clients including commercial and community-based operators, passenger transport authorities and central government, we are more conscious than most of the strength of opinion held by the different parties to this case. Now that it has been fought to a standstill in the courts, the time has come for a more constructive path to be pursued. The last five years have seen massive cuts to budgets for school, social care and public transport, and this has forced commissioning authorities to encourage a race to the bottom on a lowest cost basis. Now let's turn this round and focus on the passengers.