COURT OF APPEAL JUDGEMENT: THE FREE NOW MOBILE APPLICATION, PRIVATE HIRE DRIVERS & PLYING FOR HIRE

The Court of Appeal rules on UTAG's appeal as to the lawfulness of the Free Now mobile application. Neil Morley gives an overview.

by Neil Morley

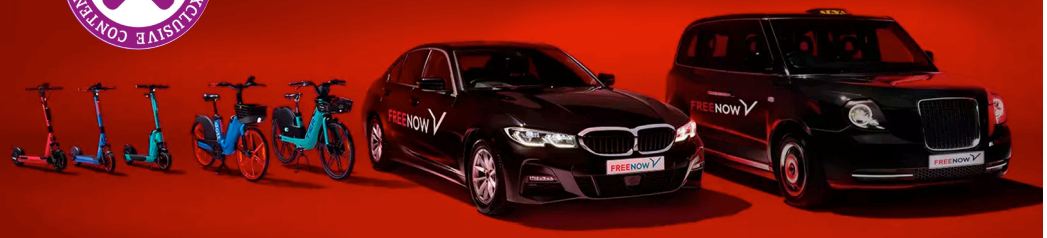
On 22nd July 2022 the Court of Appeal handed down its decision in the case of ***R (United Trade Action Group Limited) v Transport for London & Others [2022] EWCA Civ 1026***.

It had been tasked with hearing an appeal on a judicial review claim, brought by the United Trade Action Group Limited ("UTAG"), to quash a Transport for London ("TfL") **decision to renew Transopco (UK) Limited's private hire operator licence** on 9th August 2020.

The main issue centred on the use, by Transopco UK Limited ("Transopco"), of its **Free Now mobile application**. UTAG contested, as set out in the judgement (at para. 9), Free Now:

> *"...enables and encourages PHV drivers unlawfully to **ply for hire**; and that as a result Transopco is **not a 'fit and proper person'** to hold a London PHV operator's licence..."*

In giving an earlier judgement on this case, the **High Court** rejected UTAG's argument and **dismissed the case** (*R (United Trade Action Group Limited) v Transport for London & Others [2021] EWHC 3290 (Admin)*).



On that occasion the High Court placed reliance, in its reasoning, on ***Reading Borough Council v Ali [2019] EWHC (Admin)*** ("Reading"). Wherein a similar question, regarding the "Uber app", had concluded a mobile application did not amount to "plying for hire".

UTAG, in its appeal, argued the High Court had **erred** in *Reading* and its Free Now decision (at paras. 9 and 32). Submissions focussed on challenging the **"plying for hire" test**, in respect of the meaning of "**exhibited**" and "**solicited**", under ***Cogley v Sherwood [1959] 2 QB 311*** ("Cogley") (at para. 29-31).

Transopco, in reply, drew attention to UTAG's submissions and summarised its case for "plying for hire" as based on two key points (at para. 34):

> *"...that drivers **drive towards areas of demand** in the hope of bookings (solicitation)..."*; and
> *"...that an **anonymised outline of vehicles** is shown on the app (exhibition)..."*

Such an interpretation, and its application, was questioned by Transopco on **practical, factual and legal grounds** (at paras. 35-36). It, in particular, noted this approach would mean *"...lawful conduct under private hire legislation is **simultaneously criminal conduct** under hackney carriage legislation..."* (at para. 34),

The Court of Appeal **reaffirmed *Cogley*** and **agreed with Transopco** on UTAG's submission. It likewise concluded (at para. 42):

> *"...[UTAG] argue that as a **matter of ordinary language** a vehicle plies for hire if it "drives around or parks in a public place waiting for someone to hire it". That **cannot possibly be enough**. Such a test would criminalise almost the entire PHV industry..."*

Finding **against** UTAG, and **dismissing** the appeal, Lord Justice Bean concluded (at para. 45):

> *"...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 or the public to hire without prior contract. **I do not consider that drivers of PHVs using the FREE NOW app can be said to be plying for hire**. Neither the "exhibition" nor the "solicitation" element of the test is satisfied."*

It is understood the Court of Appeal **refused permission for an appeal** to the Supreme Court.

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