

**IN THE WESTMINSTER MAGISTRATES' COURT**

**IN THE MATTER OF AN APPEAL UNDER THE PRIVATE HIRE VEHICLES  
(LONDON) ACT 1998**

**BEFORE DEPUTY SENIOR DISTRICT JUDGE IKRAM**

**B E T W E E N:**

**UBER LONDON LIMITED (“ULL”)**

**Appellant**

**-and-**

**TRANSPORT FOR LONDON (“TfL”)**

**Respondent**

**-and-**

**LICENSED TAXI DRIVERS ASSOCIATION (“LTDA”)**

**Interested Party**

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**TRANSPORT FOR LONDON’S SKELETON ARGUMENT  
FOR APPEAL**

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**For hearing:**

15-17 September 2020

**Recommended reading (1 day):**

- Skeleton arguments [CB/1-3];
- Decision Note [CB/5];
- Revised list of issues [CB/9];
- List of agreed and non-agreed conditions;
- Judgment of Chief Magistrate from 2018 appeal [1/4];
- Appellant’s witness evidence:
  - First, Second and Third witness statements of Mr Heywood [CB/12; 15; 18];
  - First and Second witness statement of Ms Powers-Freeling [CB/13; 16];
  - First witness statement of Mr Schildt [CB/17];
- Respondent’s witness evidence:
  - First and Second witness statements of Helen Chapman [CB/14; 19].

References in this skeleton argument are in the form:

- *[CB/x/y/z]* where *CB* refers to the Core Bundle, *x* refers to the tab number, *y* refers to the page number and *z* refers to the paragraph number in the relevant document.
- *[x/y/z]* where *x* refers to the tab number in the non-core bundle, *y* refers to the page number and *z* refers to the paragraph number in the relevant document.

## INTRODUCTION

1. This is the hearing of an appeal brought by ULL against the decision of TfL, taken on 25 November 2019 (“**the Decision**”), not to renew ULL’s London private hire operator’s licence.
2. TfL was established by s. 154 of the Greater London Authority Act 1999 (“**GLAA**”). Its functions include licensing private hire operators, drivers and vehicles in London, pursuant to the Private Hire Vehicles (London) Act 1998 (“**the 1998 Act**”). ULL has been licensed by TfL as a private hire operator since 2012.
3. ULL exercised its statutory right to appeal the Decision, pursuant to s. 3(7)(a) and 25(3) of the 1998 Act.<sup>1</sup> On an appeal of this kind, the Court conducts a *de novo* redetermination of ULL’s licence application by reference to the same standard that TfL applied when taking the Decision: whether ULL is a ‘fit and proper person’ to hold a licence.<sup>2</sup> The Court must determine whether TfL’s decision not to renew ULL’s licence is wrong, in the light of the evidence now before it:<sup>3</sup>

“What the appellate court will have to do is to be satisfied that the judgment below ‘is wrong’, that is to reach its conclusion on the basis of the evidence before it and then to conclude that the judgment below is wrong, even if it was not wrong at the time.” (emphasis added).

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<sup>1</sup> Procedurally, it is brought by way of a complaint for an order pursuant to ss. 51-53 of the Magistrates’ Court Act 1980 and Rule 34 of the Magistrates’ Court Rules 1981.

<sup>2</sup> *Rushmoor Borough Council v Michael Richards* (Tuckey J) (1996 WL 1092090).

<sup>3</sup> *R (Hope & Glory Public House Ltd) v City of Westminster Magistrates’ Court* [2009] EWHC 1996 (Admin) (Burton J), §§42-3. The judgment and this approach was upheld on appeal.

4. TfL’s position on this appeal is set out at paragraphs 89-91 of Ms Chapman’s First Witness Statement.<sup>4</sup> In brief:
- (a) TfL’s Decision was correct: ULL was not fit and proper to hold a licence in November 2019.
  - (b) Some of the matters that informed TfL’s Decision have been addressed by ULL in the intervening 10 months.
  - (c) The matters that caused TfL to find that ULL was not a fit and proper person in November 2020 are relevant in three respects:
    - (1) To the extent that the Court finds that TfL’s concerns about ULL’s systems, processes or operations remain unaddressed, they support the conclusion that ULL is not a fit and proper person.
    - (2) Where TfL’s concerns about ULL’s systems, processes or operations have now been addressed by changes introduced by ULL:
      - (i) The Court will need to determine whether it has sufficient confidence that ULL no longer presents a risk to public safety. As Ms Chapman explains: “*it is relatively early days and... more time is required to be confident that these interventions have sufficiently embedded.*”<sup>5</sup>
    - (3) Where TfL’s concerns related to past breaches of the licensing regime:
      - (i) The Court should take those breaches into account when assessing ULL’s current fitness and propriety because “*past misconduct by the licence holder will in every case be a relevant consideration to take into account when considering whether to cancel a licence.*”<sup>6</sup>

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<sup>4</sup> [CB/14/328-331 ¶¶89-91].

<sup>5</sup> [CB/14/328 ¶89(c)].

<sup>6</sup> *R v Knightsbridge Crown Court, ex parte International Sporting Club* [1982] QB 304, 318 (Div. Ct).

- (d) Other matters have arisen since the Decision and are set out in Part 3 of Ms Chapman's First Witness Statement and her Second Witness Statement.<sup>7</sup> The Court will need to consider those matters, alongside all the other relevant material, when determining whether or not ULL is now a fit and proper person to hold an operator's licence.
- (e) TfL will assist the Court by testing ULL's evidence and identifying areas where it still has concerns as to ULL's fitness and propriety.
5. ULL has produced a very substantial skeleton argument, which reviews the parties' evidence in detail. This skeleton argument adopts a different approach: it sets out TfL's position on the legal framework and applicable principles of law and seeks to draw out the most important areas of evidence in relation to which TfL considers that the Court will need to form a view. TfL will make further submissions on the evidence in closing.

## THE LAW

6. There is little between the parties on the legal regime that governs the licensing of PHV operators and the determination of appeals of this kind.

### Transport for London and the Licensing Regime

7. Ms Chapman's First Witness Statement explains TfL's role as licensing authority for the private hire sector, and the statutory framework that governs PHV licensing in London.<sup>8</sup> That is not repeated in detail here. By way of summary only:
- (a) TfL is required by the GLAA to exercise its powers for the purpose of developing and implementing a safe, integrated and efficient transport system in London (ss. 141(1) and 154(3)). It is also obliged to implement the Mayor's Transport Strategy. Public safety is TfL's top concern.<sup>9</sup>

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<sup>7</sup> [CB/14/387-410 ¶¶278-391]; [CB/19].

<sup>8</sup> [CB/14/305-312 ¶¶11-38].

<sup>9</sup> [CB/14/304-5 ¶¶8-10].

- (b) The 1998 Act establishes a three-part licensing regime for the PHV sector: the operator accepting a booking (s. 2(1) of the 1998 Act); the driver fulfilling a booking (s. 13 of the 1998 Act) and the vehicle itself (s. 7) must all be separately licensed by TfL.
- (c) Section 3 of the 1998 Act (read together with s. 32(1)) confers on TfL the power to prescribe licence conditions for PHV operators, by way of regulations. TfL has exercised this power in the Private Hire Vehicles (London) (Operators' Licences) Regulations 2000, as amended ("**the Operators' Licences Regulations**").
- (d) Before it grants a licence, TfL must be satisfied that the operator is a "*fit and proper person*" to hold a licence. In *R (RBNB) v Crown Court at Warrington* [2002] 1 WLR 1954, at [9] Lord Bingham called this a:

"... a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis of 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."

In reaching that conclusion, TfL (and on an appeal of this kind the Court) may take into account any factor that a reasonable and fair-minded decision maker might rely on per Lord Bingham CJ in *McCool* at [25]:

"What will be (or may be) a good reason will vary from case to case and vary according to the context in which those words appear... it is appropriate for the local authority or justices to regard as a good reason anything which a reasonable and fair-minded decision maker, acting in good faith and with proper regard to the interests both of the public and the applicant, could properly think it right to rely on."

8. TfL publishes a list of factors that it may take into account, as part of the consideration of an operator's licence application. That list is not exhaustive.
9. The Court has the same powers when hearing an appeal as TfL has when it determines a licence application. It may confirm, reverse or vary TfL's original decision.<sup>10</sup>

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<sup>10</sup> See s. 25(7) of the 1998 Act.

### **Powers available if TfL/the Court determines that the applicant is fit and proper**

10. Should the Court determine, having heard all the evidence, that ULL is fit and proper to hold a licence, two subsequent questions then arise:
- (a) What conditions, if any, should be attached to the licence?
  - (b) How long should the licence be?
11. These questions come logically and legally after the question of fitness and propriety. ULL suggests that a Court that is minded to refuse a licence (because the applicant is not fit and proper) might reach a different conclusion because “*its concerns could be addressed by the imposition of appropriate conditions.*”<sup>11</sup> TfL disagrees. An applicant cannot be fit and proper because certain conditions might be imposed on their prospective licence. The Court must first find that they are fit and proper before then determining what conditions, if any, should be imposed on the licence.
12. That is clear from the wording of s. 3(3) of the 1998 Act, which provides that: “*the licensing authority shall grant a London PHV operator’s licence to the applicant if the authority is satisfied that—(a) the applicant is a fit and proper person to hold a London PHV operator’s licence...*” The question of any conditions that might be imposed on the licence, and the licence length, follow afterwards in ss 3(4) and 3(5). It is also clear from the judgment of the Divisional Court in *R on the application of United Cabbies Group (London) Ltd v Westminster Magistrates’ Court* [2019] EWHC 409 (Admin) per Burnett LCJ and Supperstone J, at [32], approving the approach taken by the Chief Magistrate at the hearing of ULL’s 2018 appeal:
- “The parties and the judge were fully aware that the question of the duration of any licence and any conditions it would be subject to, would arise if and only if the court was satisfied that Uber was, at the date of the hearing, a “fit and proper person” to hold a London PHV operator’s licence.”
13. Any conditions that are imposed on ULL’s licence may be tailored to reflect the particular history of ULL’s operation and its conduct, as well as the particular nature of ULL’s systems and processes. However, the imposition of those conditions should not – of itself

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<sup>11</sup> [CB/1 ¶14.6].

– influence the Court’s analysis of whether or not ULL is fit and proper to hold a licence (and so should be granted a licence at all).

14. As directed by the Court, the parties have provided a list of conditions that the Court might consider appropriate to impose if the Court decides that ULL is fit and proper to hold a licence. That list of conditions is only provisional, and may need to be amended in the light of the oral evidence at the hearing. It goes without saying that the Court may also decide to impose conditions that differ from those agreed by the parties.
15. Much the same reasoning applies in respect of the length of the licence. The 1998 Act grants TfL a broad discretion as to the length of any licence: “...*a London PHV operator’s licence shall be granted for five years or such shorter period as the licensing authority may consider appropriate in the circumstances of the case.*” (s. 3(5))
16. The discretion must be exercised for proper and rational reasons but there are no constraints imposed by the legislation on the kind of factors that might justify the grant of a licence for less than five years in any case.
17. The Department for Transport has recently issued Statutory Taxi and Private Hire Vehicle Standards, which include some observations in relation to licence length. It provides (by reference to the Local Government (Miscellaneous Provisions) Act 1976, which regulates the private hire sector outside London), that:
 

“Any shorter duration licence should only be issued when the licensing authority thinks it is appropriate in the specific circumstances of the case, if a licensee has requested one or where required (e.g. when the licence holder’s leave to remain in the UK is time-limited) or when the licence is only required to meet a short-term demand; they should not be issued on a ‘probationary’ basis.”
18. At ULL’s previous licence appeal in 2018, the Chief Magistrate granted a licence for 15 months, stating:
 

“The rapid and very recent changes undergone by ULL lead me to conclude that a shorter period would enable TfL to test out the new arrangements. A 15 month licence will enable Ms Chapman and her team to check the results obtained by the independent assurance procedure set out in condition number 4 whilst ensuring the public are kept safe.”
19. Her reasoning was challenged by the United Cabbies Group (London) Ltd on the grounds that she had granted ULL a “*provisional or probationary licence without considering*

*whether Uber was, at the time of the hearing, a fit and proper person.*”<sup>12</sup> The Divisional Court rejected that suggestion for the reasons set out at paragraph 12 above.

20. TfL concurs with the Department for Transport’s Standards: a short licence ought not to be granted so that an operator might demonstrate that they are fit and proper (a probationary licence). However, a Court may perfectly properly conclude that a shorter licence is suitable if the individual circumstances and history of the case make that appropriate.
21. Should the Court decide to grant ULL a licence, TfL will make submissions as to the appropriate length of that licence at that point, taking account of the totality of the evidence at the appeal.

### **Statutory appeals to the Magistrates’ Court**

22. Section 3(7)(a) of the 1998 Act provides that an applicant for a PHV operator’s licence may appeal to the Magistrates’ court against a decision not to grant a licence (see further s. 25). A statutory licensing appeal of this nature is a “*complaint for an order*”, pursuant to rule 34 of the Magistrates’ Court Rules 1981.
23. As Parker J explained in *Golding v Secretary of State for Transport* [2013] EWHC 300 (Admin), (§12), a statutory appeal of this kind is not akin to a claim for judicial review: it is a “*hearing de novo*”, albeit the licensing authority’s original reasons should be given appropriate weight: *R (Hope & Glory Public House Ltd) v City of Westminster Magistrates’ Court* [2011] EWCA Civ 31, [2011] PTSR 868, 45 (Toulson LJ).
24. The Court should apply the same test as applied by TfL when determining a licence application: is ULL a “*fit and proper person*” to hold a PHV Operator’s licence? As to that, the following principles emerge from the authorities:
  - (a) The test is specific to the nature of the licence sought. In *McCool v Rushcliffe BC* [1998] 3 All ER 889, Lord Bingham CJ elaborated on the application of this test in a private hire licensing context (specifically in relation to drivers’ licenses). He

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<sup>12</sup> *United Cabbies Group* [27].



stressed that the test is context specific and will depend on the particular context and objectives of the licensing regime in question at [891F]:

“One must, as it seems to me, approach this case bearing in mind the objectives of this licensing regime which is plainly intended, among other things, to ensure so far as possible that those licensed to drive private hire vehicles are suitable persons to do so, namely that they are safe drivers with good driving records and adequate experience, sober, mentally and physically fit, honest, and not persons who would take advantage of their employment to abuse or assault passengers”

- (b) The Court is not constrained as to the factors it may take into account, as long as those factors (and that evidence) would be relevant to a “*fair minded decision maker acting in good faith and with proper regard to the interests both of the public and the applicant.*”<sup>13</sup>
- (c) As set out above, the historic conduct of the applicant is relevant, even in a case where that historic conduct has now been disavowed or resolved, and the appellant has restructured. In *International Sporting Club*, three London casinos had operated in breach of the relevant gaming laws. Each lost its licence. The licence holders appealed and then sold the companies to third parties in the interim. The new owners replaced the entire previous management with new staff. The Divisional Court held, on appeal, that (p. 317):

“On the question of whether or not the companies are fit and proper persons to hold the licence it is conceded that this question must be determined in the light of the circumstances existing at the time of the appeal. Past conduct will, of course, be relevant as we shall discuss more fully hereafter. There are, however, other considerations which should be taken into account particularly when the licence holder is a limited company; for instance, whether the shareholding or management of the company remains the same at the date of the material hearing as they were when the past misconduct occurred; the general character and reputation of the shareholders and directors of the company at the date of the hearing should be taken into account. So should any evidence that the "re-structured" licence holder has the capacity and intention to run the casino on different lines, or indeed that it may have already started to do so.”

- (d) Consistent with the above, that historic behaviour of the applicant must be assessed by reference to the particularities of that licensing regime. In *R (Stace) v Milton Keynes Magistrates' Court* [2006] EWHC 1049 (Admin), Keith J noted (in relation to Mr Stace’s convictions for assaulting his wife and failing to surrender to bail) that at [16]:

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<sup>13</sup> *McCool* ¶25.

“And when it came to considering his convictions, they were not supposed to look at them in a vacuum. They had to look at them in the context of whether conduct of that particular kind might affect his fitness to drive passenger-carrying vehicles... How serious was Mr Stace's conduct? What were the risks of any repetition of violence? In what way did his propensity for violence impinge upon his abilities as a driver? And to what extent was he a risk to those passengers with whom he would come into contact?”

## FACTUAL BACKGROUND

25. ULL is one of several entities that operate around the world under the Uber brand. On 31 May 2012, TfL granted ULL a London PHV operator's licence for a period of five years.<sup>14</sup> ULL was the first exclusively app-based private hire operator to enter the market in London. Since 2012 a number of traditional operators have also developed app-based booking platforms, although they typically also still accept bookings over the phone. Other app-only operators have now entered the London market.<sup>15</sup>
26. ULL is the largest PHV operator on the market in London in terms of the number of drivers registered to drive with ULL (though they may well be registered to drive with other operators as well).
27. As Ms Chapman explains, the presence of app-based operators has created some complexities for regulators (including TfL). The legislative framework that underpins the licensing regime was created when the internet was in its infancy.<sup>16</sup> In the early years of ULL's operation, TfL was involved in litigation including:
  - (a) Whether ULL's vehicles were “*equipped with a taximeter*”, contrary to s. 11 of the 1998 Act. The LTDA intervened in the Part 8 application for a declaration and the Court held that ULL's operations were not unlawful: *Transport for London v Uber London Limited* [2015] EWHC 1928 (Admin).
  - (b) Whether certain changes made by TfL to the licensing regime in the PHV sector were unlawful. In this case ULL issued judicial review proceedings against TfL. At first instance, the High Court quashed two of the changes introduced by TfL, but upheld another (*R (Uber) v Transport for London* [2017] ACD 54). The Court

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<sup>14</sup> [CB/14/314 ¶46].

<sup>15</sup> [CB/14/310 ¶31].

<sup>16</sup> [CB/14/310 ¶31].

of Appeal overturned the decision of the High Court and upheld one of TfL’s changes quashed below ([2018] EWCA Civ 1213).

28. On 22 September 2017 TfL refused ULL’s application to renew its licence because it had concluded ULL was not a “*fit and proper person*” to hold a PHV operator’s licence in London.<sup>17</sup> TfL’s reasons, in brief, were that:<sup>18</sup>
- (a) ULL had provided materially false and misleading information to TfL in 2014 and to the High Court in 2015 concerning the processes by which it accepted bookings.
  - (b) ULL had available to it in London a piece of software called ‘Greyball’, which had been used by some companies in the Uber group to evade regulatory enforcement. Some of the individuals responsible for ULL’s operations in London had been aware of its use for that purpose in other jurisdictions.
  - (c) ULL had shown a lack of corporate responsibility in relation to a number of safety-related issues.
29. ULL made a number of significant changes to its governance, personnel and processes before the hearing of an appeal in June 2018. ULL’s initial position – following the refusal to grant the licence – had been that TfL had made a mistake. However, by the date of the hearing it accepted that TfL had made the right decision but argued that it was now fit and proper to hold a licence.<sup>19</sup> The Chief Magistrate granted ULL a licence for 15 months.<sup>20</sup>
30. On 3 July 2019 ULL applied to renew its licence for 5 years. The licence was due to expire on 25 September 2019. At that point TfL was actively considering, and unable to resolve, two key questions. It concluded that those matters were “*sufficiently substantial*

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<sup>17</sup> [CB/14/314 ¶48].

<sup>18</sup> Ibid.

<sup>19</sup> [CB/14/315 ¶49].

<sup>20</sup> [CB/20].

*and sufficiently uncertain at the current time, that a licence of two months' duration should be granted.*"<sup>21</sup> The two issues were:

- (a) There had been a number of cases of fraud in which certain individuals had manipulated the ULL app to upload their photograph in place of the picture on another driver's account. They had then taken trips on that account. TfL wished to find out more about how many of these incidents there had been and why they had occurred. TfL also wanted to find out whether these incidents reflected vulnerabilities in ULL's systems such that there was a risk that future breaches would occur and that passenger safety was at risk.
  - (b) TfL had recently received an allegation from the London Cab Drivers' Club ("LCDC") that ULL was unlawfully making provision for the invitation and acceptance of bookings outside London from its offices in London. It had not obtained full submissions from ULL and the LCDC's on this point.<sup>22</sup>
31. On 24 September 2019, TfL decided that ULL should be granted a licence for two months. In the intervening two months TfL appointed Cognizant Worldwide Limited ("**Cognizant**"), a recognised cyber security and systems specialist, to conduct a review of ULL's security and IT Service Management ("**ITSM**") processes. This reflected TfL's concerns that ULL had repeatedly breached the London licensing regime and that a number of those breaches appeared to be connected to weaknesses in ULL's systems (and in particular service management processes).<sup>23</sup>
32. Cognizant completed two reports on 15 November 2019: an ITSM and a cyber security report. The contents of those reports are set out in more detail below. Most importantly, they concluded that ULL's ITSM processes were below the standard that Cognizant would expect of a company in ULL's position and market.<sup>24</sup> ULL was offered an

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<sup>21</sup> [CB/14/318 ¶58].

<sup>22</sup> Had TfL concluded that the LCDC was correct, that would have materially altered TfL's overall analysis of whether ULL was fit and proper to hold a licence. TfL concluded, following correspondence with the parties, that there was not sufficient evidence that ULL was breaching the licensing regime in London or elsewhere.

<sup>23</sup> [CB/14/319-321 ¶¶61-65].

<sup>24</sup> [CB/14/321-324 ¶¶66-72].

opportunity to make representations in respect of those reports, and did so. ULL's representations did not cause Cognizant to change its assessment of ULL's systems.<sup>25</sup>

33. On 25 November 2019 TfL informed ULL that it would not renew its licence. That is the Decision under challenge on this appeal.

## THE EVIDENCE

34. The evidence in this case falls into broadly three categories (as foreshadowed in Chapman 1 ¶¶91):<sup>26</sup>

- (a) The material that informed the Decision. This material remains relevant for the Court when determining if ULL is now fit and proper to hold a PHV operator's licence, even where the relevant concerns have now been addressed by changes to ULL's practices and systems.
- (b) The parties' witness evidence filed on this appeal, in particular in relation to the changes that have been made to ULL's systems and processes; and
- (c) Matters that have arisen since the Decision in November 2019.

35. There is inevitably some overlap between these three parts and some issues arise in more than one section. The remainder of this skeleton argument adopts broadly that structure.

## The Decision

36. Ms Chapman does not repeat the reasons for the Decision in any detail: she reproduces only the summary of TfL's reasons at paragraph 12 of the Decision Note.<sup>27</sup> This skeleton argument sets out that reasoning in slightly greater detail but – as noted in Ms Chapman's statement – the underlying reasons for TfL's conclusions are best understood following a full review of the Decision Note itself (see the recommended pre-reading above).<sup>28</sup>

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<sup>25</sup> [CB/14/324-325 ¶¶73-77].

<sup>26</sup> [CB/14/330-331 ¶¶91].

<sup>27</sup> [CB/14/331 ¶93].

<sup>28</sup> [CB/14/331 ¶92].

There is a high degree of repetition between the Decision Note and the Decision Letter. The references below are taken from the Decision Note.

37. The operative part of the Decision Note separates the relevant material into two parts:
- (a) Those elements that support the conclusion that ULL is a fit and proper person to hold a PHV operator’s licence; and
  - (b) Those elements that do not support that conclusion.
38. TfL identified seven elements that fell into the first category. Some of those elements might appear unusual at first sight but were specifically remarked upon by TfL because ULL had an historic track record of poor performance/conduct in that area. The seven elements were:
- (a) ULL’s transparency and communications with TfL.<sup>29</sup> TfL drew specific attention to this because ULL had not been transparent and open in its dealings with TfL in the past (particularly in the period before the refusal of ULL’s licence in 2017). TfL concluded that:<sup>30</sup>

“The overall tone and content of the correspondence from ULL, since the Chief Magistrate’s decision, has been productive and, in the main, transparent.”
  - (b) Reporting to the police.<sup>31</sup> In 2017, TfL had relied on ULL’s failure to notify serious driver misconduct (including some cases of criminal behaviour) to the police when refusing the licence. In 2019 TfL no longer had any concerns in that respect.
  - (c) Data management. TfL concluded that, despite some incidents of data loss or mismanagement, there had been a “*clear shift in approach to these types of issues.*” ULL (and other companies in the Uber Group) had carried out extensive work in relation to data security.<sup>32</sup>

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<sup>29</sup> [CB/5/78-79 ¶¶39-41].

<sup>30</sup> Ibid.

<sup>31</sup> [CB/5/79-81 ¶¶42-50].

<sup>32</sup> [CB/5/82-85 ¶¶51-59].

- (d) ULL’s operating model. TfL has no concerns about the lawfulness of ULL’s operating model, which was reviewed by Deloitte in 2019.<sup>33</sup>
  - (e) ULL’s compliance inspection. TfL’s compliance inspection, conducted at ULL’s offices, did not reveal any incidents of concern or non-compliance by ULL.<sup>34</sup>
  - (f) ULL’s management structure and governance. TfL concluded that ULL’s Board had helped it to change its culture and to ensure that it conducted itself in a transparent manner. The leadership of the company had significantly improved since 2017.<sup>35</sup>
  - (g) Programme ZERO. ULL has introduced Programme ZERO as a means of driving down breaches of the licensing regime to, or as close as possible to, zero. The Decision recognised that this has led to positive changes and that Programme ZERO has led to “*significant improvements*” in relation to the rates and incidents of regulatory non-compliance.<sup>36</sup>
39. The evidence in relation to each of these areas was consistent with the conclusion that ULL is a fit and proper person to hold a PHV operator’s licence.
40. TfL then, however, went on to identify four core issues that led it to conclude that ULL was not a fit and proper person to hold a PHV operator’s licence, despite the improvements summarised above.
41. First, ULL’s breaches of the licensing framework in relation to insurance. These can be divided into three distinct sub-issues.
- (a) Provision of uninsured vehicles. In October 2018, during an on-street compliance check, TfL’s enforcement officers identified a ULL driver who did not have valid hire and reward insurance. Following an internal review, ULL identified four other drivers in the same category. The failures were the result of manual error. Each of

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<sup>33</sup> [CB/5/85-86 ¶¶60-64].

<sup>34</sup> [CB/5/86-88 ¶¶65-72].

<sup>35</sup> [CB/5/89-93 ¶¶73-87].

<sup>36</sup> [CB/5/93-94 ¶¶88-92].

those drivers had carried out multiple bookings; two of them undertook over 1,400 bookings between them.<sup>37</sup>

In July 2019, ULL pleaded guilty to four offences of “*causing/permitting the use of a motor vehicle on a public road without insurance*” and “*failing to comply with statutory record keeping obligations*.” This was the second time that ULL had been convicted of this offence: the first time was in 2014. The District Judge hearing the case found that “*In my opinion Uber should have learned its lesson fully of what was required by it. The fact that this situation has arisen is regrettable and would have been quite easily avoidable.*”<sup>38</sup>

ULL has changed its systems and processes in order to prevent a recurrence of further offences this kind. TfL concluded that: (a) this was a serious breach of the licensing regime; (b) it had now occurred on more than one occasion; and (c) it presented a real threat to public safety. It was a “*strong indicator*” that ULL was not fit and proper to hold a licence.<sup>39</sup>

- (b) Premature acceptance of insurance. In July 2019 ULL informed TfL of another weakness that it had identified whereby its staff had approved a number of insurance documents that were not yet valid. As a result, certain drivers had undertaken trips without insurance. In total this failing related to 9 drivers who undertook 252 trips in total.<sup>40</sup>
- (c) Fraudulent documents. This issue is wider than insurance documents alone. Indeed, one of TfL’s concerns was that it had to encourage ULL to review other possibly fraudulent documents (such as MOT certificates or DVLA driver licences) as well.<sup>41</sup>

In February 2019 ULL informed TfL that it had identified six cases in which drivers had modified insurance documents to make them appear current when they had

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<sup>37</sup> [CB/5/97-98 ¶¶97-101].

<sup>38</sup> [CB/14/344 ¶136].

<sup>39</sup> [CB/5/101-102 ¶¶106-107].

<sup>40</sup> [CB/5/101-102 ¶¶108-111].

<sup>41</sup> [CB/5/102 ¶¶112].



expired. 172 trips were taken in reliance on those documents. In late February 2019, ULL wrote again to update TfL that it had identified a further six cases of the same kind. At TfL’s instigation, ULL began a review of all fraudulent documents. In August 2019 it updated TfL in relation to a further 27 cases. In 17 of those cases the fraud had been identified before the driver carried out any bookings. However, in the other cases booking had been undertaken on the strength of fraudulent documents, including one individual who undertook 801 trips before a document was flagged as suspicious.<sup>42</sup>

As set out in the Decision Note, one of TfL’s concerns was that before September 2018 ULL had not suspended a driver when it first formed the view that a document was suspicious. Instead, it had permitted the driver to continue driving until it was definitively established that the documents in question were fraudulent. TfL considered that this was a serious error of judgment. ULL recognised that this approach was not appropriate and amended its processes in September 2018.<sup>43</sup>

42. Second, there had been a significant number of cases in which individuals had been able to manipulate ULL’s systems in order to replace the photograph on a driver’s account and then undertake bookings on their behalf (“**the driver photo fraud issue**”).
43. In November 2018 ULL sent TfL a PHV105 notification concerning a case in which the named driver was female but the driver who arrived to conduct the journey was male.<sup>44</sup> The case was not escalated to TfL as a safety issue; something that subsequently caused TfL concern.
44. ULL first identified that there was a wider issue with driver photo fraud in February 2019.<sup>45</sup> It commenced a complete audit of its drivers at that point. However, ULL did not notify TfL of this issue until it raised it in a monthly update on 31 May 2019 and in an appendix to the June 2019 Assurance Report, both of which identified that there had been

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<sup>42</sup> [CB/5/104 ¶117].

<sup>43</sup> [CB/5/104-5 ¶¶118-119].

<sup>44</sup> [CB/5/106 ¶125].

<sup>45</sup> [CB/5/111 ¶139].

six cases of this kind.<sup>46</sup> By August 2019 the number of incidents had increased from six to 21. In September 2019, ULL confirmed that nearly 14,000 bookings were affected. In October 2019 ULL identified a further case of fraud in relation to a different driver. Yet another case was then identified in November 2019. This raised a number of concerns for TfL:

- (a) The manner in which this issue was notified to TfL was not acceptable. TfL concluded that ULL did not initially treat it as a serious safety matter. The provision of private hire services by an unauthorised driver presents clear risks to passenger safety. In the most extreme case, those individuals might not be licensed by TfL or indeed licensed to drive at all. Each of the journeys was also carried out without insurance (because they were conducted on a fraudulent basis).<sup>47</sup>
- (b) Each of the fraudulent drivers had previously been suspended or dismissed by ULL for some form of misconduct: the safety-related consequences were obvious.<sup>48</sup>
- (c) The first six cases were notified to TfL in a monthly update, followed by an Appendix to the June 2019 Assurance Report. They were not afforded the prominence or significance that they warranted. Likewise, the notification of some of these cases by way of PHV105 forms was insufficiently clear for TfL properly to understand the underlying facts. TfL was concerned that the manner in which these incidents had been presented suggested that ULL might be *“trying to lessen the impact and significance of these issues hoping they would go unnoticed.”*<sup>49</sup> The Court will be aware that the inference drawn by LTDA is that ULL sought to hide the driver photo fraud issue from TfL until it became *“unrealistic”* to do so.<sup>50</sup> The LTDA’s written submissions set out the relevant history in some detail; that factual background is not repeated here.

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<sup>46</sup> [CB/5/107 ¶126].

<sup>47</sup> [CB/5/111 ¶¶141].

<sup>48</sup> [CB/5/111 ¶¶142].

<sup>49</sup> [CB/5/112 ¶¶142].

<sup>50</sup> [CB/3 ¶2(i)(e)].

45. Third, other regulatory breaches. Pursuant to the licence conditions imposed by the Chief Magistrate, ULL provided TfL with six-monthly Assurance Reports. The December 2018 report recorded 152 breaches in the period from 26 June to 30 November 2018. The June 2019 report recorded 50 regulatory breaches and the October 2019 report identified 24 regulatory breaches.
46. The overall trend reported by ULL through the Assurance Reports was of decreasing breaches. However:
- (a) As explained in the Decision Note, there were certain discrepancies in relation to the material in the Assurance Reports. TfL itself identified that some breaches had not been included in the Assurance Reports at a time when ULL was aware of those incidents (it did this by cross-checking the dates on the relevant PHV 105 notices with the data set out in the Assurance Reports).<sup>51</sup> Likewise, TfL identified some breaches of condition 12(b) (the obligation to notify safety related breaches within 24 hours) that were not included in the Assurance Reports (TfL checked the time stamps of the initial reports against the times of the notification to TfL).<sup>52</sup> Ultimately, TfL had to ask for the underlying data for the December 2018 and June 2019 reports in order to quality control the material it had received. When it evaluated that data, it identified further discrepancies and breaches that had not been notified. This undermined TfL’s confidence in the Assurance Report process conducted by ULL.<sup>53</sup>
- (b) The continued existence of these breaches was “*disappointing and of concern*” to TfL.<sup>54</sup>
47. Fourth, TfL’s inability to obtain confidence about the reliability of ULL’s systems. As described above, TfL appointed Cognizant to review ULL’s ITSM and cyber security systems. Although Cognizant concluded that ULL’s cyber security systems were at the level it would expect of a company in ULL’s position, it was not able to provide that

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<sup>51</sup> [CB/5/122 ¶173].

<sup>52</sup> [CB/5/122 ¶174].

<sup>53</sup> [CB/5/123 ¶177-178].

<sup>54</sup> [CB/5/125 ¶185].

assurance in relation to ULL’s ITSM systems. It assessed ULL’s Change Management and Release Management Systems at maturity level 2. It expected a company in ULL’s position to achieve a maturity score of 3.<sup>55</sup> Cognizant identified a number of what it called “*major gaps*” in ULL’s processes that could have “*severe consequences*” for the reliability of ULL’s systems.<sup>56</sup> Cognizant did not consider it appropriate to change its conclusions following consideration of ULL’s representations on the reports (which it had provided to ULL in draft). The weaknesses identified by Cognizant led TfL to conclude that it could not have sufficient confidence that the breaches described above would not recur.

48. Taking account of all the matters above, TfL concluded that ULL was not a fit and proper person to hold a PHV operator’s licence.
49. The day after the decision, Mr Khosrowshahi, Uber’s global CEO, tweeted: “*We understand we’re held to a high bar, as we should be. But this TfL decision is just wrong.*”<sup>57</sup> On the same day, Mr Heywood described the decision as “*extraordinary and wrong.*”<sup>58</sup> TfL disagrees. The breaches were numerous and serious and the flaws in ULL’s systems were considerable.
50. The proper question for the Court is whether ULL is fit and proper to hold a licence as of the date of the hearing. Nonetheless, the evidence concerning ULL’s historic failings and conduct is relevant to this appeal: the Court must take it into account when determining whether or not to renew the licence. TfL submits that this evidence is a weighty factor for the Court to take into account when assessing ULL’s fitness and propriety now.

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<sup>55</sup> [CB/5/135 ¶213].

<sup>56</sup> [CB/5/135-136 ¶214-215].

<sup>57</sup> [CB/14/327/84].

<sup>58</sup> [CB/14/327/85].

### The parties' evidence and the changes made by ULL since the Decision

51. As set out above, this skeleton argument does not summarise or make submissions concerning the very considerable evidence before the Court.<sup>59</sup> In particular, this skeleton does not summarise the changes made to ULL's systems, which are rehearsed in great detail in ULL's skeleton argument.
52. There is comparatively little between the parties as to the facts; but there is some difference between the parties as to the proper analysis or significance of those facts or the inferences to be drawn from them. TfL will address the Court in more detail on the evidence in closing. It makes the following seven initial observations by way of opening.
53. First, despite its forthright reaction to the Decision (set out above), ULL's witnesses accept that it made a series of mistakes that were properly identified by TfL in the Decision Note. Mr Heywood's evidence is that: "*we have made mistakes and sometimes fallen short of the standards we set ourselves and of our regulatory obligations*". He is "*deeply disappointed that any of these breaches took place*" and he recognises that "*the Decision Letter was right to point out that we made mistakes.*"<sup>60</sup> His second witness statement, in particular, is at pains to stress that ULL recognises the seriousness of the breaches that have occurred.<sup>61</sup>
54. The overwhelming focus of ULL's evidence is on the changes that have been made since the Decision. It may be, therefore, that ULL now acknowledges the seriousness of the breaches that informed the Decision and the correctness of the Decision itself. That is a matter on which the Court will now doubt wish to reach a view.
55. Second, as to the insurance breaches, the parties are agreed that:

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<sup>59</sup> Ms Chapman sets out the key paragraph references, where ULL's first round of evidence dealt with particular issues, at the beginning of each section of her First Witness Statement.

<sup>60</sup> [CB/12/178 and 183 ¶¶14, 30 and 31].

<sup>61</sup> By way of example [CB/15/417 ¶21]; [CB/15/422/47].

- (a) The various different species of insurance breach (some of which resulted in ULL being prosecuted for a second time) are serious and were a proper subject of concern to TfL (and by implication this Court).<sup>62</sup>
  - (b) The contingent insurance policy obtained by ULL was not sufficient to provide cover in all circumstances. Mr Heywood's evidence is that it provides some mitigation but no more.<sup>63</sup>
  - (c) ULL's historic practice (of allowing drivers to continue to operate while potentially fraudulent documents were checked) did not reflect the seriousness of this issue and the implications, from the perspective of public safety, of uninsured drivers providing PHV services.<sup>64</sup>
56. The Court will need to weigh the historic breaches (and the pattern of those breaches) and the changes that ULL has made when assessing ULL's fitness and propriety to hold an operator's licence.
57. Third, as to the driver photo fraud issue, the parties are agreed that:
- (a) This is another serious breach of the licensing regime, which affected over 14,000 trips. Each such trip put a member of the public at risk.
  - (b) ULL took too long to escalate the issue to Board level and communicated inadequately with TfL on this issue (at least at first).<sup>65</sup> As set out above, the LTDA has provided the Court with a forensic examination of the timing and manner in which ULL corresponded with TfL on this issue (which is not repeated here). It will need to form its own view as to the proper inferences to be drawn from that material.

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<sup>62</sup> Heywood 1 [CB/12/202; 205 and 213 ¶¶87, 100 and 133]; Heywood 2 [CB/15/418 ¶21].

<sup>63</sup> [CB/12/204 ¶91].

<sup>64</sup> [CB/12/209 ¶¶114-115].

<sup>65</sup> [CB/13/296 ¶88]; [CB/15/421 ¶46].

- (c) The investigation of this process involved multiple audits that were themselves undermined, at least in part, by human error.<sup>66</sup> Mr Heywood can understand Ms Chapman's doubts as to whether TfL (and the Court) can have confidence in ULL's current root cause analysis. He accepts that the process of analysis was undermined (in part at least) by the failure of ULL's engineering team to appreciate the seriousness of the issue and investigate it rigorously at first.<sup>67</sup>
- (d) The issue arose because of the ability of fraudsters to exploit vulnerabilities within ULL's controls.<sup>68</sup>
58. There is some disagreement between the parties over whether ULL always understood this issue as a safety matter. Ms Chapman does not understand how ULL's response to this issue is consistent with the conclusion that it was treated as a safety issue. Mr Heywood asserts that it was always treated in that manner.<sup>69</sup> In any event, TfL's position is that ULL: (a) took too long to identify the nature of the problem; (b) took too long to understand the scope of it; and (c) provided piecemeal information to TfL.
59. Fourth, the parties are broadly agreed that Programme ZERO has made a material contribution to the reduction of breaches on ULL's part.<sup>70</sup>
60. The Court will need to assess the seriousness of the historic breaches, the continued occurrence of some breaches and ULL's record of reporting of those breaches.
61. Fifth, both KPMG and PA Consulting agree that ULL's ITSM processes are now of a standard that they would expect of a company in ULL's position. ULL's changes have plugged the major gaps identified by Cognizant.<sup>71</sup>

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<sup>66</sup> [CH/15/423 ¶50]. Mr Heywood notes that ULL will now conduct a further audit of old profile photos.

<sup>67</sup> [CB/15/426 ¶¶61-62].

<sup>68</sup> [CB/12/232 ¶188].

<sup>69</sup> [CB/15/422/46].

<sup>70</sup> [CB/14/340 ¶¶121-122]; [CB/13/285 ¶47]; [CB/15/428 ¶69].

<sup>71</sup> [CB/14/383 ¶¶272-273].

62. Ms Chapman summarises her view of the significance of these changes at paragraph 277 of her First Witness Statement.<sup>72</sup> In summary only:
- (a) ULL’s historic systems were inadequate.
  - (b) Those systems are now of the standard that would be expected of a company such as ULL.
  - (c) It is important to recall that the improvements of ULL’s systems have been prompted by the criticisms made by TfL. This is something that is accepted – at least in part – by Mr Heywood, who recognises that this must be frustrating for TfL (as a regulator).<sup>73</sup>
  - (d) The Court will need to weigh the historic weaknesses of ULL’s systems and the history of the amendments made to them. It will then need to determine whether ULL’s overall track-record of breaches and systems changes is sufficient to give the Court confidence that ULL is fit and proper to hold a PHV operator’s licence.<sup>74</sup>
63. Sixth, ULL accept that its Assurance Reports have been inadequate in certain respects (Mr Heywood states that he was “*extremely disappointed*” about this).<sup>75</sup> He agrees that TfL should not have to interrogate the underlying data in those reports, in order to confirm its accuracy and completeness.<sup>76</sup>
64. Seventh, as to the three drivers in respect of whom serious sexual allegations were made, but no safety investigation initiated until nearly three years’ later, ULL’s evidence is that: (i) the historic mistakes were the result of human error; and (ii) there is now an automated system to transfer data from the complaints system (Bliss) to the customer safety system (Jira).<sup>77</sup> The Court will need to weigh ULL’s track record of retrospectively identifying

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<sup>72</sup> [CB/14/385 ¶¶277-8].

<sup>73</sup> [CB/15/434 ¶98].

<sup>74</sup> On this see: Chapman 1 [CB/14/386 ¶277(e)] and Heywood 2 [CB/15/438-439 ¶¶115-118]. ULL considers that these changes are sufficiently embedded – and rely on the PA Consulting Report to that effect; Ms Chapman retains some doubts, on the basis of her past experience and the novelty of these changes.

<sup>75</sup> [CB/15/431 ¶80].

<sup>76</sup> [CB/15/431 ¶81].

<sup>77</sup> [CB/17/456-459 ¶34].



serious errors against the comfort that can be taken from the changes ULL has made to its systems and processes.

### Events since the November 2019 Decision

65. The third category of relevant evidence concerns additional matters or events that have arisen since the Decision. The key evidence falls under four headings:

- (a) The deactivation of three drivers in late 2019 in connection with serious incidents that occurred in 2016-2017. As Ms Chapman explains, this has been a source of some concern to TfL.<sup>78</sup> The three drivers were not deactivated at the time of the serious incidents (each of which related to inappropriate sexual conduct towards passengers) because of a manual error in ULL's systems.<sup>79</sup> Each of those drivers carried out a considerable number of journeys in the intervening time: between 8,000 and 13,000. The drivers also demonstrated an ongoing pattern of concerning behaviour after the original serious incident.<sup>80</sup> ULL introduced new systems in November 2019. Those systems had retrospectively identified these historic errors. Ms Chapman does not share ULL's confidence that all relevant historic cases have now been identified, in part because ULL gave a similar assurance to the Chief Magistrate in 2018.<sup>81</sup>
- (b) In February 2020 ULL informed TfL that seven drivers had been able to take a total of ten trips in the hour after their MOT expired, as a result of a flaw in ULL's systems.<sup>82</sup>
- (c) In February 2020, ULL informed TfL that the data of approximately 14,500 Uber UK Eats/Rides customers were inadvertently transferred to Zomato, in India, in connection with the sale of Uber Eats in India.<sup>83</sup> Mr Heywood is keen to stress that

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<sup>78</sup> [CB/14/389 ¶292].

<sup>79</sup> [CB/14/391 and 393 ¶¶296 and 307].

<sup>80</sup> [CB/14/394-396 ¶¶312-20].

<sup>81</sup> [CB/14/392 ¶303].

<sup>82</sup> See Ms Chapman's assessment of this issue at [CB/14/401 ¶352].

<sup>83</sup> [CB/14/408 ¶382].

there is little evidence that the data has been misused, or that customers have been approached in reliance on that material.<sup>84</sup>

- (d) In May 2020 ULL informed TfL that two drivers had been able to take three trips after their insurance certificates had expired because of a data outage at one of ULL's main data centres from 25 March 2020 to 1 April 2020. Ms Chapman concludes that ULL did not share the necessary information in relation to this breach as proactively as they should have done.<sup>85</sup> Mr Heywood's evidence is that ULL could only have provided an incomplete picture sooner because it lacked a full account of the incident.<sup>86</sup>
- (e) As Ms Chapman explains in her Second Witness Statement, on 31 August 2020, ULL provided TfL with a new Assurance Report.<sup>87</sup> Ms Chapman also explains that TfL has just received a letter on 31 August 2020, which explains that there was a gap in the way ULL had been reporting the number of trips that had been affected by breaches because it was not reporting trips that had started (the passenger entered the vehicle) but were then cancelled. This led to small but significant changes to the number of breach-impacted trips, the number of trips associated with safety-related complaints and the number of breaches of the insurance obligation. Ms Chapman explains that the ongoing inaccuracies in ULL's reported data undermines the confidence that TfL can place in that material.

66. Each of these incidents will need to be assessed, as part of the overall evidence concerning ULL's fitness and propriety, when determining whether to grant ULL a licence.

**MARIE DEMETRIOU QC**

**TIM JOHNSTON**

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<sup>84</sup> [CB/15/443 ¶138].

<sup>85</sup> [CB/14/408 ¶379].

<sup>86</sup> [CB/15/443 ¶135].

<sup>87</sup> [CB/19].

**Brick Court Chambers**

**9 September 2020**