

# APPEALS – *or what to do if it all goes wrong?*

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Outer Temple Chambers

# Precursor to an appeal: a review?

- Goods vehicles – s.35 GV(LO)A 1995; PSVs – s.49A of PPVA 1981
- Limited to situations in which there has been a “procedural requirement that has not been complied with”
- In practice rare: may be limited to failure of notice provisions, opportunity to appear, etc

# Rights of appeal

- Goods vehicles – s.37 Goods Vehicles (Licensing of Operators) Act 1995
- PSVs – S.50(1) Public Passenger Vehicles Act 1981
- Transport managers (repute and prof competence): Road Transport Operators Regulations 2011

## Rights of appeal (contd)

- Right (broadly) limited to substantive decisions – refusals of applications, revocations, and other sanctions, disqualification, etc
- Not for interim decisions or procedural decisions before case ends: limited in that scenario to judicial review

# The Upper Tribunal

- Predecessor Transport Tribunal
- Created by Tribunals, Courts, & Enforcement Act 2007
- Upper Tier – Administrative Chamber

## The Upper Tribunal

- Initially constituted of same judges as TT:
- Now changed: increasingly drawn from general non-specialist judiciary
- Perception amongst practitioners: appeals now more difficult in many respects

# How to appeal (1)

- Time / procedure for appealing Procedure governed by Tribunal Procedure (Upper Tribunal Rules) 1998
- Notice must be within 1 month from date of receipt of decision: Rule 23 of 2008 Rules
- To be filed by 5 pm on last day

# How to appeal (2)

- Unusually, no permission required
- Form for Notice of appeal:

<https://www.gov.uk/government/publications/form-ut12-form-to-appeal-to-the-upper-tribunal-against-a-traffic-commissioner-decision>

- Government Guidance on appeal process:
- [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/689170/ut12-notes-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689170/ut12-notes-eng.pdf)



## How to appeal (3)

- Send to :Upper Tribunal (AAC) Office  
Traffic Commissioner Appeals  
5<sup>th</sup> Floor Rolls Building, 7 Rolls Building  
Fetter Lane  
London EC4A 1NL
- May wish to check with staff: Ms Gail  
Courtney 020 7071 5662

# Filling out the Notice

- Key sections:
- A: Summary of type of case
- E: Details of decision appealed against
- G: whether seeking stay
- F: Grounds of Appeal
- H: Extensions of time

## Filling out the Notice (2)

Key part: getting Grounds right:

- Avoid generalized grounds of appeal
- Be focused and specific
- Run only points that have real merit: damages appeal prospects to have good points lost amidst poor ones
- But required to set out fully: *Tate Fuel Oils 2001/41*
- Must be in numbered paragraphs: *Andrew Harris t/2014/50*

# STAYS

- Often critical for client: appeals often pointless without
- Must first ask TC.
- Needs carefully crafted approach – you are appealing his/her decision
- If refused – renew request to Upper Tribunal
- Principles = those in *Ptarmiggan Solutions Ltd T/A Bankfoot Buses* (T/2009/513)

## STAYS (2)

- Key issue to address = merits of appeal
- Without merit, very difficult
- Emphasise consequences of no stay: putting out of business?
- Address measures to ensure road safety and protect fair competition
- Increasingly difficult climate: very frequently refused

# Parties to appeal

- Usually just the appellant
- TC's not (usually) represented – except in some impounding cases
- DfT occasionally appears
- Transport Tribunal historically encouraged DfT representation: but DfT not keen on spending!
- Has real impact on how appeals work: although often no formal opponent, Tribunal itself is highly adversarial in testing your case

# Nature of appeals

- The theory: full jurisdiction:

Para 17, Sched 4 to Transport Act 1985:

“The First-tier Tribunal and the Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport.”

- In the case of the Upper Tribunal, this is subject to sub-

## Nature of appeals (2)

Para 17, Sched 4 to Transport Act 1985 (contd):

“2) On an appeal from any determination of a traffic commissioner other than an excluded determination, the Upper Tribunal is to have power—

(a) to make such order as it thinks fit; or

(b) to remit the matter to the traffic commissioner for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate; and any such order is binding on the commissioner.”



## Nature of appeals (3)

“3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.”

- V important principle in running appeals: no fresh evidence
- Limited grounds for admission of evidence – “Ladd v Marshall” principles:
  - Not available with use of reasonable diligence at first hearing
  - Credible
  - Relevant to issue

# Basis on which appeal can succeed: What you have to show

- High threshold
- Appellant must show that the decision below is “wrong”
- *“”It is not enough that the Tribunal might prefer a different view; the appellant must show that the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view” – Bradley Fold Travel Ltd [2010] EWCA Civ 695*
- Commonly described as requirement to show “plainly wrong”

# Proportionality

- Full jurisdiction does however include requirement in part of UT to consider proportionality

- Crompton/ Bryan Haulage No 2:

*“....the question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the question becomes :is the conduct such that the operator ought to be put out of business?”* **On appeal, the Tribunal must consider not only the detail of cases but also the overall result”**

## Common Arguments on Appeal (1)

### **(a) Failure to apply legal test of proportionality**

- Crompton
- Bryan Haulage No 2 – (again):

*“the question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the question becomes :is the conduct such that the operator ought to be put out of business?”*

## Common Arguments on Appeal (2)

### (b) **Failure to ask ‘Priority Freight’ question**

“How likely is it that this operator will, in future, operate in compliance with the operator licensing regime?”.

# Common Arguments on Appeal (2)

## **(c) Inadequate reasoning in decision**

Conflicting judgments: but:

- Yorkshire Rider (2000/57)
- Severn Valley Transport (2009/008)

“Decisions should contain sufficient detail to allow a person with experience of the haulage industry to understand the basis upon which the decision was arrived at.”

## Inadequate reasoning Continued

Yorkshire Rider:

*“we have to say that the Traffic Commissioner does not give any analysis of his reasoning at all. He sets out what has occurred at the public inquiry and says that he has taken everything into account. But he then goes directly into his conclusions. What weight did he attach to the monitor’s evidence? To what extent did he accept their conclusions? What did he make of Mr Buchanan’s warnings...”* etc

## Common Arguments on Appeal (3)

(d) The balancing exercise

*“There are three main ingredients in a properly conducted balancing exercise. First, the identification of all the relevant factors. Second, an assessment of each and third, the conclusion, which must explain why one factor or group of factors outweighs another or others and so provide justification for the conclusion reached”*

*SA Taylor and M Taylor (T/2010/052 & 053)*



## Common Arguments on Appeal (4)

(e) Bias –

- Often what clients want you to run!
- Difficult – but on occasions conduct is such to allow to run
- Special procedure – EA Scaffolding (2004/426): basis of assertion to be set out in affidavit, and responses from TC may be invited

- TEST: *Magill v Porter* (2001) UKHL 67

*“the question is what the fair-minded and informed observer would have thought and whether his conclusion would have been that there was a real possibility of bias”*

## Common Arguments on Appeal (5)

(f) Breach of rules of natural justice

(g) Substantive proportionality: just too harsh

(h) Failure to have regard to some relevant evidence

(i) Disqualifications

# Some statistics

- 2019 – 37 appeals / 10 successful
- 2018 – 26 appeals / 6 successful
- 2017 – 31 appeals / 13 successful
- 2016 – 34 appeals / 6 successful
- 2015 – 70 appeals / 7 successful
- Overall percentage over 5 years – 21% success rate