Neutral Citation Number: [2019] EWHC 3319 (Admin)

Case No: CO/4989/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2019

Before:

LORD JUSTICE LEGGATT
and
MR JUSTICE LEWIS

- -

Between:

THE QUEEN (on the application of) BUS AND COACH ASSOCIATION LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and -	
(1) COMMUNITY TRANSPORT ASSOCIATION **(2) MOBILITY MATTERS CAMPAIGN LIMITED**	**Interested Parties**

- -

James Segan (instructed by **Martin Lee & Co**) for the **Claimant**
Alan Bates (instructed by the **Government Legal Department**) for the **Defendant**
Richard Drabble QC (instructed by **Russell-Cooke LLP**) for the **Interested Parties**

Hearing date: 19 November 2019

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Approved Judgment

Lord Justice Leggatt (giving the judgment of the court):

Introduction

1. Regulation (EC) No 1071/2009 of the European Parliament and of the Council dated 21 October 2009 (the "EU Regulation"), which has direct effect as part of UK law, establishes rules which govern admission to, and the pursuit of, the occupation of road transport operator. There is an exception from these rules for "undertakings engaged in road passenger transport services exclusively for non-commercial purposes".

2. On this claim for judicial review, Bus and Coach Association Limited, a campaign organisation dedicated to representing the interests of commercial bus and coach operators in the UK, is asking the court to declare what the words of this exception mean. The claimant says that there is, or should be, no lack of clarity about their meaning; but the court should nevertheless make a declaratory order because an alleged lack of clarity is being relied on by the Secretary of State for Transport as a reason for not prosecuting certain community transport organisations which are allegedly providing road passenger transport services in England and Wales for commercial purposes in breach of the EU Regulation.

3. The Secretary of State has defended the claim on the basis that there is "legal uncertainty" as to the proper interpretation of the "non-commercial purposes" exception and that this is a relevant factor to take into account in deciding whether it is in the public interest to bring a criminal prosecution or take other enforcement action. However, the Secretary of State when acknowledging service of these proceedings did not oppose the grant of permission to apply for judicial review, "in view of the potential benefit of the proceedings in providing judicial clarification of the relevant law".

4. Two interested parties have been joined. They are the Community Transport Association, which represents organisations providing community transport services in the UK; and Mobility Matters Campaign Limited, which campaigns on behalf of community transport organisations. The interested parties have common representation.

5. In this judgment we will:

   (1) outline the relevant legal framework;

   (2) summarise the background to the proceedings;

   (3) identify the principles to be applied in deciding whether it is appropriate for the court to make an order declaring what the law is in a case of this kind;

   (4) consider whether or in what respect there is any real dispute about the law between the parties to these proceedings; and

   (5) explain our reasons for concluding that it is not appropriate to make a declaratory order in this case, as there is no such dispute, and that it is the responsibility of the Secretary of State to enforce the law as it stands.

(1) The legal framework

The 1981 Act

6. Section 12(1) of the Public Passenger Vehicles Act 1981 prohibits the use of a "public service vehicle" on a road for carrying passengers for hire or reward except under a "PSV operator's licence" granted in accordance with the Act. Pursuant to section 12(5), it is a criminal offence to use a vehicle in contravention of this rule (unless the operator establishes a defence under section 68(3) of the Act by proving that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence).

7. A "public service vehicle" is defined in section 1 of the Act as a vehicle used for carrying passengers for hire or reward which is either adapted to carry more than eight passengers or is used for carrying passengers at separate fares in the course of a business of carrying passengers.

8. PSV operator's licences, commonly known as "O-licences", are granted by traffic commissioners who are appointed by, but act independently of, the Secretary of State. To obtain an O-licence, an applicant must satisfy requirements of having an effective and stable establishment in Great Britain, being of good repute, having appropriate financial standing and having the requisite professional competence. The applicant must also have a designated transport manager who satisfies requirements of good repute and professional competence. The relevant requirements derive from the EU Regulation.

The 1985 Act

9. The prohibition in section 12(1) of the Public Passenger Vehicles Act 1981 against using a public service vehicle without an O-licence is subject to exemptions provided for in sections 18 to 23 of the Transport Act 1985. These exemptions apply to bodies operating under two kinds of permit:

   (1) A permit granted under section 19 to a body concerned with education, religion, social welfare, recreation or other activities of benefit to the community. Such a permit does not cover the use of a public service vehicle for the carriage of members of the general public or with a view to profit or incidentally to an activity which is itself carried on with a view to profit.

   (2) A "community bus permit" granted under section 22 to a body concerned for the social and welfare needs of one or more communities to provide a "community bus service". This is defined in subsection (1) as a "local service" provided by such a body without a view to profit, either on the part of that body or of anyone else. For this purpose, a "local service" means a service using public service vehicles for the carriage of passengers by road at separate fares on which passengers may travel for less than 15 miles (see section 2 of the Act).

10. Local authorities and other bodies designated by the Secretary of State may grant section 19 permits in relation to the use of public service vehicles other than large buses (defined as vehicles adapted to carrying more than 16 passengers). Section 19 permits

for large buses and community bus permits issued under section 22 may only be granted by traffic commissioners.

11. Bodies operating vehicles under section 19 or section 22 permits have to comply with some regulatory requirements including a requirement to have adequate facilities or arrangements for maintaining any vehicle used under the permit in a fit and serviceable condition. But these requirements are much less onerous than the regime applicable to bodies that require an O-licence.

The EU Regulation

12. Underlying the UK licensing regime is the EU Regulation, which took effect on 4 December 2011. As set out in article 1(2), the EU Regulation applies to "all undertakings established in the Community which are engaged in the occupation of road transport operator." Article 1(4) specifies certain categories of undertakings to which, by way of derogation from this general rule, the EU Regulation does not apply (unless otherwise provided for in national law). These include:

> "(b) undertakings engaged in road passenger transport services exclusively for non-commercial purposes or which have a main occupation other than that of road passenger transport operator;"

13. It is the meaning of the first part of this exception which is the subject of the present proceedings.

14. Article 22(1) of the EU Regulation imposes an obligation on member states to lay down the rules on penalties applicable to infringements of the regulation and to "take all the measures necessary to ensure that they are implemented".

(2) Background to the proceedings

Amendments to the 1985 Act

15. When the EU Regulation first came into force, someone reading sections 18 to 22 of the Transport Act 1985 would reasonably have got the impression that meeting the requirements for and being granted a section 19 or section 22 permit was sufficient to exempt the operator of a public service vehicle from the need to obtain an O-licence. It appears that this was also the view of the Department for Transport, which no doubt explains why, until recently, sections 18 to 22 made no reference to the EU Regulation. The Department's understanding was that an operator who met the requirements for a section 19 or section 22 permit would fall outside its scope: there was therefore no possibility that a body operating in accordance with such a permit would be contravening the EU Regulation.

16. The Secretary of State now accepts that this is not necessarily the case. Accordingly, with effect from 1 October 2019, sections 18 to 22 of the 1985 Act have been amended to make it clear that a section 19 or section 22 permit may only be granted to an "exempt body" and also that the dispensation from the requirement to hold an O-licence only applies to the use of any vehicle under a section 19 or section 22 permit by an "exempt body". An "exempt body" is defined in section 18(5) to mean a body to whom the EU Regulation does not apply for one of three possible reasons – one such reason being

that the body is not engaged (and does not intend to engage) in the occupation of road transport operator (as defined in the EU Regulation) and another reason being that the body falls within the exception in article 1(4)(b) because it is engaged in road passenger transport services "exclusively for non-commercial purposes" or because road transport operator is not its main occupation.

Community transport organisations

17. Already by 2010 there were, according to research conducted by the Community Transport Association, at least 1,692 community transport organisations in England alone. The term "community transport organisation" (or "community transport company") is not a term of art but is used to describe charities and other not-for-profit organisations which provide road passenger transport services as a means of fulfilling charitable or other public benefit purposes. There is a wide variety of such organisations, ranging from small local voluntary bodies to large undertakings with annual incomes exceeding £1 million a year. Many local authorities subsidise community transport organisations through grants.

18. Overall, the largest source of income for community transport organisations in the UK is contracts made with public bodies for the delivery of passenger transport services on their behalf. Such contracts are often awarded through competitive tenders. Pressures on local authority budgets in recent years have reduced public funding for road transport services and led to increased demand for community transport. In addition, community transport organisations have been encouraged to become more self-sufficient by seeking out alternative income streams and operating on a more business-like model.

19. The vast majority of community transport organisations operate under section 19 or section 22 permits.

The claimant's campaign

20. Mr Martin Allen, a director of the claimant, has described in a witness statement how he was instrumental in forming the claimant association in early 2014 with the aim of taking action to challenge what he and some other private operators believed was the award of commercial contracts by public authorities to community transport organisations operating unlawfully under section 19 and 22 permits rather than O-licences. The claimant contends that failure to implement and enforce the EU Regulation is giving such organisations an unfair cost advantage in competing with private operators because of the higher costs involved in operating public service vehicles under an O-licence. Mr Allen has a private transport company, JA Travel Limited, which operates in Nottinghamshire and which he claims has been driven out of the market for providing transport using public service vehicles because of such unfair competition.

Involvement of the Commission

21. The first step taken by the claimant association was to complain to the European Commission. This led to the Commission commencing infraction proceedings against the UK by sending a letter of formal notice in April 2015 stating that it appeared to the Commission that permits were being granted under sections 19 and 22 of the Transport Act 1985 to certain community transport companies allowing them to engage in road

passenger transport services without fulfilling the necessary requirements under the EU Regulation.

22. To date, no further action has been taken by the Commission but the Department for Transport has been keeping the Commission informed of the steps which the Government has taken to which we refer below.

The Erewash case

23. In August 2016 solicitors instructed by JA Travel Limited and the claimant wrote to the Senior Traffic Commissioner to complain about the activities of one particular community transport organisation, Erewash Community Transport Limited. The letter explained that JA Travel had lost out to Erewash in a competitive tender held by Nottinghamshire County Council to award contracts for the provision of certain passenger transport services on the basis of lowest price. On the back of this information and the most recent annual accounts of Erewash, which showed income from providing transportation services of almost £600,000, the claimant alleged that Erewash was engaging in commercial activity without an O-licence in contravention of the EU Regulation and domestic licence regime.

24. The Senior Traffic Commissioner referred the claimant's complaint to the Driver and Vehicle Standards Agency ("DVSA"), which is an executive agency responsible for enforcing operator licensing requirements on behalf of the Secretary of State. On 18 December 2016 the claimant made further complaints to the DVSA calling on it to investigate another nine community transport organisations. Many more similar complaints were made in January 2017. In total, the claimant complained about the activities of around 100 community transport organisations. All these further complaints were based solely on the published accounts of the organisations concerned.

25. The DVSA decided in the first instance to investigate Erewash, effectively treating it as a test case. After carrying out its investigation, the DVSA on 31 July 2017 sent a letter setting out its findings, which included findings that Erewash was engaged in road passenger transport services as its main occupation and not "exclusively for non-commercial purposes": as such, it required an O-licence in order to comply with the EU Regulation and was not entitled to operate vehicles under a section 19 permit, as it was doing.

26. On the same day (31 July 2017) the Department for Transport published a guidance letter regarding the issue and use of section 19 and section 22 permits for road passenger transport. The guidance letter summarised the decision reached in relation to Erewash (without identifying the company by name) and explained the reasoning behind the decision. All holders of section 19 and section 22 permits were asked to make sure that they were complying with the relevant legal requirements. The letter also announced an intention to launch a public consultation with a view to updating current guidance and amending the Transport Act 1985 to clarify the relationship between the conditions set out in the Act and the exceptions provided for by the EU Regulation.

27. In response to the Department's letter, many community transport operators raised concerns, which led to the House of Commons Transport Committee launching an inquiry into community transport in October 2017. Its report was published in December 2017.

28. In the meantime, the DVSA had referred Erewash to the traffic commissioner. After considering the evidence and representations made on behalf of Erewash, the traffic commissioner announced on 5 January 2018 that he did not consider it appropriate to convene a public inquiry (which would be a prelude to taking any regulatory action).

29. On 8 February 2018 the Department for Transport issued its consultation paper seeking views on (amongst other things) proposed guidance on the meaning and effect of the "exclusively for non-commercial purposes" exception in article 1(4)(b) of the EU Regulation.

30. In July 2018 Mr Allen's company, JA Travel Limited, again tendered for contracts with Nottinghamshire County Council to provide passenger transport services, and again lost out to Erewash. Mr Allen again considered that he had been at an unfair disadvantage in this competition because Erewash was continuing to operate under section 19 permits.

Pre-action correspondence

31. On 10 August 2018 the claimant's solicitors sent a letter before claim to the Department for Transport under the Pre-Action Protocol alleging unlawful failure to take enforcement action against Erewash and other community transport operators for operating without an O-licence and giving notice of the claimant's intention to apply for judicial review. In its response dated 13 September 2018 on behalf of the Secretary of State, the Government Legal Department explained the reasons for the Department's "current choice that it will not pursue enforcement action, including in particular a prosecution," against Erewash (or other community transport organisations which are in a materially identical position) "*at this time*" in relation to operating without an O-licence. The reasons were said to include:

> "a lack of certainty as to the precise test, or tests, to be applied for determining whether or not an organisation, such as a charity or other 'non-profit' entity, which is providing transport services for the benefit of people in the locality that it serves is, or is not, engaging in that activity 'exclusively for non-commercial purposes'."

32. The letter further stated that responses to its consultation had reinforced the Department's understanding that "there is an ongoing legal debate" about the proper interpretation and application of article 1(4)(b) of the EU Regulation. In a subsequent letter, the Government Legal Department indicated that, if proceedings were brought with a view to clarifying the law, the Secretary of State was likely not to oppose the grant of permission to apply for judicial review. That was indeed the Secretary of State's position after these proceedings were commenced on 12 December 2018.

Outcome of the consultation

33. On 7 March 2019 the Secretary of State made the Transport Act 1985 (Amendment) Regulations 2019. These Regulations, which were laid before Parliament on 15 March and came into force on 1 October 2019, effected the amendments to sections 18 to 23 of the Transport Act 1985 referred to at paragraph 16 above. The purpose was to make clear that a section 19 or section 22 permit can only be held by an organisation that is

exempt from the licensing requirements set out in the EU Regulation. The Regulations also gave effect to an exemption that is provided for in article 1(5) of the EU Regulation, which allows member states to exempt from its provisions road transport operators engaged exclusively in national transport operations having only a minor impact on the transport market because of the short distances involved.

34. On 15 March 2019 the Department for Transport published the Government response to its consultation. This stated that in the responses to the consultation views were divided on how the non-commercial purposes exception should be interpreted. The Government response referred to the present proceedings and said that the Government would not be making any further statement or providing any guidance on what this exception means until these proceedings have been concluded. The response also announced the Department's intention to carry out a review of the current domestic permit regime in 2019 "to see if the legislation is still fit for purpose and provides the correct balance for the bus sector as a whole". There is no evidence that such a review has yet begun.

The claimant's case

35. In his skilfully presented argument on behalf of the claimant, Mr Segan submitted that these proceedings have been brought as a last resort. There has, he submitted, been a failure on the part of the Secretary of State extending over many years to take any enforcement action, in particular prosecution, against any community transport organisation for operating without an O-licence in circumstances where the organisation is engaged in providing passenger transport for what, on a proper understanding of the EU Regulation, is or includes a commercial purpose. To seek to excuse this lack of action, the Secretary of State has invoked a perceived lack of clarity in the meaning of the non-commercial purposes exception. Mr Segan submitted that there is not, or at least should not be, any such lack of clarity in the law. However, he argued that the only way to dispel the perception of a lack of clarity – when the Secretary of State has chosen not to bring any prosecution or use any other means of clarifying the scope of the exception – is for this court to make an order declaring how article 1(4)(b) of the EU Regulation should be interpreted.

36. To this end, the claimant has put forward a series of suggested principles. The initial formulation of these principles was revised to take account of comments made on behalf of the Secretary of State and the interested parties in their detailed grounds of resistance to the claim. In the result, there was no dispute at the hearing about the correctness of these principles.

37. Against this background, the claimant asks the court to make an order declaring the uncontested principles, or such other principles as the court thinks fit, to be correct in law.

(3) Declaratory judgments

38. There is no doubt that an order declaring the meaning or effect of a legislative provision is a kind of order which the court has power to make and often does make in proceedings for judicial review. However, the proper exercise of the power is constrained by two fundamental principles which are relevant in this case.

39. The first principle stems from the essential function of a court of law, which (at least under the UK's constitutional arrangements) is to decide disputes between the parties to cases brought before the court by one (or more) of them. All court procedures – in particular, the core procedures of receiving evidence and hearing argument – are designed for this task. It also circumscribes the extent of the court's authority. Thus, an order made by a court only binds parties to the proceedings (and those with privity of interest). The limit of the court's authority is also reflected in the doctrine of precedent under which it is only the *ratio decidendi* (or rationale for what the court has decided) which can bind another court in a later case. If no disputed issue has been decided, no such precedent can be established.

40. These constitutional and institutional constraints are particularly relevant where the judgment that a court is asked to give is not a judgment ordering any party to the case to do anything but is a judgment declaring what the law is. As Lord Bridge said in *Ainsbury v Millington* [1987] 1 WLR 379, 381:

> "It has always been a fundamental feature of our judicial system that courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

41. At any rate in public law cases, it is not always necessary that the dispute should be one that at the time of the hearing has direct practical consequences for the parties to the proceedings. *Ainsbury v Millington* was a case involving private rights in which, by the time of the appeal to the House of Lords, the issue raised had become academic in the sense that deciding it would no longer have made any practical difference to the parties' rights against each other. In *R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450, 456-457, Lord Slynn (with whom the other members of the House of Lords agreed) made it clear that the decision in the *Ainsbury* case must be read as limited to the field of private law and that, in the area of public law, although the discretion must be exercised with caution, the court may decide to hear a claim which has become academic if there is a good reason in the public interest for doing so. Lord Slynn gave as an example a case where "a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future".

42. Similarly, the dispute need not be one that has arisen from a particular set of facts already in existence. The courts recognise that it sometimes serves a useful purpose to resolve an issue which will or is likely to have practical importance in the future. So, for example, in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318, the Court of Appeal was prepared to entertain a claim to resolve a dispute between an employer and a trade union about whether the use of length of service as a criterion in selecting employees for redundancy was lawful. There was not yet any case in which this criterion had actually been used to select an employee for redundancy; but the issue was not purely academic as it was likely to affect a large number of people and, if not resolved, would lead to claims of unfair dismissal. By contrast, in *R (Rusbridger) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357, where the claimant sought a declaration that the publication of a newspaper article which advocated the abolition of the monarchy was lawful notwithstanding the literal wording of section 3 of the Treason Felony Act 1848, the House of Lords held that the claim

should be dismissed as not only had no prosecution been brought under that provision – either in that case or in any other case since 1883 – but there was no possibility that a prosecution could succeed in light of section 3 of the Human Rights Act 1998.

43. In determining whether it is appropriate to make a declaration in a case where there is a real dispute between the parties, albeit not a dispute relating to a specific set of existing facts, relevant considerations include the following.

44. First, a declaration is more likely to be appropriate where the question raised is one of pure law and less likely to be appropriate where the question is fact sensitive. That is because, where the outcome may depend on particular facts, it is generally imprudent and less likely to be useful for a court to give a ruling without having all the relevant facts of an actual case before it: see e.g. *Rusbridger*, para 23.

45. Second, before making a declaration in such a case, the court will wish to be satisfied that all sides of the argument have been fully and properly put. It will therefore wish to ensure that all those who will be directly affected by the decision are either before the court or will have their arguments made by a party which represents their interests or has materially similar interests: see *Rolls-Royce*, para 120(6), per Aikens LJ; *R (Hampstead Heath Winter Swimming Club) v Corporation of London* [2005] EWHC 713 (Admin); [2005] 1 WLR 2930, paras 23-24.

46. Third, it is always relevant to consider whether there is a better or more effective way of resolving the issue: see e.g. *Rolls-Royce*, para 120(7).

47. A second key principle relevant in the present context derives from the division of responsibility in our legal system between the civil and criminal courts. The principle is that a civil court should avoid giving a declaration on a question which it is the role of the criminal courts to decide. For this reason, where criminal proceedings have been commenced or threatened, the civil courts should not rule on whether an offence has or has not been committed: see *Imperial Tobacco Ltd v Attorney General* [1981] AC 718. In addition, even where no prosecution has been brought or threatened and no existing conduct is in issue, a civil court should only grant a declaration that particular future conduct would or would not be contrary to the criminal law if there is a cogent reason to do so, since (other things being equal) questions of criminal law are most appropriately decided by criminal courts in cases where the question whether a criminal offence has been committed has actually arisen: see e.g. *R (Haynes) v Stafford Borough Council* [2006] EWHC 1366 (Admin); [2007] 1 WLR 1365, paras 13-21.

48. In this case the claimant has, rightly, been careful not to ask the court to make an order which would decide whether any organisation has operated in a way that (subject only to any defence under section 68(3) of the 1981 Act) constitutes a criminal offence by providing road passenger transport services for which it required but did not have an O-licence. Not only would it be wrong for the court to express any opinion on such a question when the organisation concerned is not a party to the proceedings, but to do so would usurp the role of the criminal court in any potential criminal prosecution. Accordingly, this court has not been asked to decide whether the "non-commercial purposes" exception applies on the facts of any individual case.

(5) Meaning of the non-commercial purposes exception

49. If there were an ambiguity in the wording of the EU Regulation which had given rise to a dispute between the parties to these proceedings about the meaning of article 1(4)(b), it might well be appropriate for the court to resolve such a question of interpretation. As we will explain, however, there is no such dispute.

General scope of the EU Regulation

50. A community transport organisation providing transport services under a section 19 or 22 permit and without an O-licence has no need to rely on the "non-commercial purposes" exception in article 1(4)(b) unless the organisation would otherwise fall within the scope of the EU Regulation, as defined by article 1(2). This depends on whether the organisation is an "undertaking" engaged in "the occupation of road transport operator" – defined in article 2(3) as including "the occupation of road passenger transport operator".

51. As defined in article 2(4), the term "undertaking" includes any natural or legal person or association or group of persons, whether profit-making or not. The fact that an organisation operates on a not-for-profit basis, therefore, does not take it outside the general scope of the EU Regulation.

52. The "occupation of road passenger transport operator" is defined in article 2(2) to mean the activity of any undertaking operating, by means of vehicles suitable and intended for carrying more than eight passengers, "passenger transport services for the public or for specific categories of users in return for payment by the person transported or by the transport organiser." An organisation which provides passenger transport for no payment is therefore not within the scope of the EU Regulation. (It is also outside the scope of the licensing requirement provided by section 12 of the Public Passenger Vehicles Act 1981 because it does not use any vehicle for carrying passengers for hire or reward.)

53. If a community transport organisation is providing road passenger transport services in return for payment so as to fall within the general scope of the EU Regulation, and this is its main occupation (so that it cannot rely on the second limb of article 1(4)(b)), the question arises whether the services are provided "exclusively for non-commercial purposes".

Approach to interpretation

54. It is common ground that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the legislation of which it is part: see e.g. *Sociedad General de Autores y Editores de España v Rafael Hoteles SL* (Case C-306/05) [2007] Bus LR 521, para 34. Furthermore, where (as here) the provision in question is a derogation from a general rule, it should be interpreted strictly, although not so as to deprive the provision of its intended effect: see e.g. *Belgium v Temco Europe SA* (Case C-284/03) [2004] ECR 1-11237, para 17.

55. The rationale for the non-commercial purposes exception appears from recital (6) of the EU Regulation, which states:

> "In the interests of fair competition, the common rules governing the exercise of the occupation of road transport operator should apply as widely as possible to all undertakings. However, it is unnecessary to include within the scope of this Regulation undertakings which only perform transport operations with a very small impact on the transport market."

56. There was some debate at the hearing about whether, as Mr Bates for the Secretary of State submitted, the reference in this recital to the "transport market" is a reference to the EU internal market for road transport with the purpose being to remove impediments to cross-border trade, or whether, as Mr Segan for the claimant suggested, the phrase should be understood in a less technical sense. However, nothing turned on this point, as it did not result in any disagreement about what the words of article 1(4)(b) of the EU Regulation mean.

The Lundberg case

57. The same applies to reliance placed by the claimant in its written submissions on the decision of the Court of Justice of the European Union in *Criminal Proceedings against Daniel Lundberg* (Case C-317/12) (3 October 2013). In that case the CJEU was asked to interpret an EU regulation which required a tachograph to be installed in all vehicles used for the carriage of goods by road except for vehicles below a certain size which were used for "the non-commercial carriage of goods".

58. Mr Lundberg, in his leisure time, competed in car rallies as an amateur rally driver. He drove his own lorry to a fair to show his car. His participation in rallies and the fair was financed in part from his own funds and in part by sponsorship. The effect of the judgment was that he was using his vehicle for the "non-commercial carriage of goods" because he was using the vehicle as part of his hobby. The court stated (at para 24) that:

> "With regard, firstly, to the usual meaning of the concept of 'non-commercial carriage of goods', it must be noted that such a carriage occurs where there is no link with a professional or commercial activity, that is to say, where the carriage of goods is not performed with a view to earning income therefrom. As it is usually understood, the non-commercial carriage of goods therefore designates, in particular, the carriage of goods by a private individual as part of a recreational activity outside his professional activity."

59. Although in this passage the CJEU attached significance to the fact that the carriage of goods was "not performed with a view to earning income therefrom", it is (as mentioned) common ground that earning income from passenger transport services does not of itself indicate that the purposes are commercial in the present context, as the EU Regulation is only capable of applying where an undertaking is providing road passenger transport services in return for payment. Nor are the other factors relied on in the *Lundberg* case relevant for present purposes. That case was concerned with a differently worded regulation with different subject-matter, and the conclusion that the regulation applied "essentially to professional drivers and not to individuals driving for

private purposes" has no application to the type of situation with which the present proceedings are concerned.

Agreed principles

60. As mentioned earlier, all the parties to the present proceedings are in agreement about the meaning of the non-commercial purposes exception in the EU Regulation. In particular, the following principles are common ground between the claimant, the Secretary of State and the interested parties.

61. First, it is clear from the words of article 1(4)(b) that the focus is on the purposes for which the organisation is engaged in providing road passenger transport services and whether those purposes are exclusively non-commercial. This requires consideration of the totality of the road passenger transport services in which the organisation is engaged and whether any of those services is being provided at least partly for a commercial purpose. If an undertaking engages in road passenger transport services, to any extent, for purposes which are not entirely non-commercial, then that undertaking's engagement in such services does not fall within the exception.

62. Second, the fact that an organisation is a registered charity or is otherwise constitutionally prevented from distributing profits does not of itself mean that it is engaged in road passenger transport services "exclusively for non-commercial purposes". That is because the purposes for which an organisation is engaging in a particular activity may not be identical to its overall objects as an organisation.

63. Third, the mere fact that an organisation is providing road passenger transport services in return for payment does not mean that it is providing such services for purposes which are, even partly, commercial. If that were so, the exception would be otiose, since an undertaking which receives no payment in return for its services is not within the scope of the EU Regulation to begin with and therefore has no need to rely on the exception. That is because, as already indicated, such an undertaking is not engaged in the occupation of road passenger transport operator, as defined in article 2(2) of the EU Regulation.

64. Fourth, 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 a purpose of providing a particular road passenger transport service is simply to generate revenue or profits which can then be used to fund or subsidise other road passenger transport services which are themselves being provided entirely for social or other non-commercial purposes, the organisation will not be able to rely on the exception. The same will be true if any of its road passenger transport services is being provided wholly or partly for the purpose of generating revenue or profits which can then be used to fund activities outside the field of road passenger transport undertaken exclusively for charitable or other non-commercial purposes.

65. Fifth, beyond this, the question whether an organisation is "engaged in road passenger transport services exclusively for non-commercial purposes" is one of fact, to be answered on the basis of an examination, in the round, of features of the organisation and its activities from which the purposes for which it engages in road passenger transport services can be ascertained or inferred. Relevant considerations include:

(1) the level of the payments received by the organisation for providing its road passenger transport services;

(2) whether or to what extent the organisation is providing services under contracts won in competitive procurement or tender exercises;

(3) the size and scale of its operations in the market for road passenger transport services; and

(4) the extent to which the organisation relies upon the support of unpaid volunteers to deliver its road passenger transport services or, in so far as it relies on paid staff, whether they are paid at levels comparable to the staff paid by commercial operators to perform similar roles.

(5) Conclusions

66. As we have indicated, the principles set out above are not in dispute between the parties to these proceedings. Nor did any of the parties identify any issue regarding the proper interpretation of the non-commercial purposes exception about which they now disagree. In the absence of such an issue, an argument in the abstract about whether or not the law is clear is not itself a question of law on which a court can adjudicate. That is not to say that there is or will be no dispute about how the question whether a community transport organisation falls within the exception is to be answered on the facts of any particular case. Indeed, it is apparent that in some cases the application of the test is likely to be far from straightforward. We are not asked, however, nor – as explained earlier – could the court properly be asked in these proceedings, to decide whether, as a matter of fact, any particular organisation does or does not fall within the exception.

67. We conclude that there is no issue or dispute between the parties to these proceedings for the court to resolve or which the court is actually being asked to resolve. In these circumstances, it is not appropriate to make any declaration about the meaning of the non-commercial purposes exception; and even if the court were to do so, such a declaration would not, for the reasons given earlier, have any binding legal force.

68. By the same token, however, these proceedings have not borne out the assertions made by the Government in pre-action correspondence (and in its response to its consultation) that there is a lack of certainty or clarity as to the test to be applied for determining whether or not an organisation such as a charity or other 'non-profit' entity which is providing passenger transport services is, or is not, engaging in that activity "exclusively for non-commercial purposes". No issue about the legal test to be applied has been identified. It follows that the Secretary of State cannot appeal to such an alleged lack of certainty or clarity regarding the correct legal test to justify a decision not to take action to enforce the provisions of the EU Regulation. Applying the test to particular facts may be difficult. But that is not, of itself, a good reason for choosing not to enforce the law. This is particularly so in the present context where article 22(1) of the EU Regulation requires national authorities to take all necessary measures to ensure that the provisions of the EU Regulation are implemented. If the Secretary of State considers that prosecution (or other enforcement action) is otherwise appropriate, the fact that the organisation concerned denies that, on the agreed or alleged facts, it is operating in breach of the regulation would not justify a refusal to take such action.

Neutral Citation Number: [2019] EWHC 3319 (Admin)

Case No: CO/4989/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2019

Before:

LORD JUSTICE LEGGATT
and
MR JUSTICE LEWIS

- -

Between:

THE QUEEN (on the application of) BUS AND COACH ASSOCIATION LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and -	
(1) COMMUNITY TRANSPORT ASSOCIATION **(2) MOBILITY MATTERS CAMPAIGN LIMITED**	**Interested Parties**

- -

James Segan (instructed by **Martin Lee & Co**) for the **Claimant**
Alan Bates (instructed by the **Government Legal Department**) for the **Defendant**
Richard Drabble QC (instructed by **Russell-Cooke LLP**) for the **Interested Parties**

Hearing date: 19 November 2019

- -

Approved Judgment

Lord Justice Leggatt (giving the judgment of the court):

Introduction

1. Regulation (EC) No 1071/2009 of the European Parliament and of the Council dated 21 October 2009 (the "EU Regulation"), which has direct effect as part of UK law, establishes rules which govern admission to, and the pursuit of, the occupation of road transport operator. There is an exception from these rules for "undertakings engaged in road passenger transport services exclusively for non-commercial purposes".

2. On this claim for judicial review, Bus and Coach Association Limited, a campaign organisation dedicated to representing the interests of commercial bus and coach operators in the UK, is asking the court to declare what the words of this exception mean. The claimant says that there is, or should be, no lack of clarity about their meaning; but the court should nevertheless make a declaratory order because an alleged lack of clarity is being relied on by the Secretary of State for Transport as a reason for not prosecuting certain community transport organisations which are allegedly providing road passenger transport services in England and Wales for commercial purposes in breach of the EU Regulation.

3. The Secretary of State has defended the claim on the basis that there is "legal uncertainty" as to the proper interpretation of the "non-commercial purposes" exception and that this is a relevant factor to take into account in deciding whether it is in the public interest to bring a criminal prosecution or take other enforcement action. However, the Secretary of State when acknowledging service of these proceedings did not oppose the grant of permission to apply for judicial review, "in view of the potential benefit of the proceedings in providing judicial clarification of the relevant law".

4. Two interested parties have been joined. They are the Community Transport Association, which represents organisations providing community transport services in the UK; and Mobility Matters Campaign Limited, which campaigns on behalf of community transport organisations. The interested parties have common representation.

5. In this judgment we will:

   (1) outline the relevant legal framework;

   (2) summarise the background to the proceedings;

   (3) identify the principles to be applied in deciding whether it is appropriate for the court to make an order declaring what the law is in a case of this kind;

   (4) consider whether or in what respect there is any real dispute about the law between the parties to these proceedings; and

   (5) explain our reasons for concluding that it is not appropriate to make a declaratory order in this case, as there is no such dispute, and that it is the responsibility of the Secretary of State to enforce the law as it stands.

(1) The legal framework

The 1981 Act

6. Section 12(1) of the Public Passenger Vehicles Act 1981 prohibits the use of a "public service vehicle" on a road for carrying passengers for hire or reward except under a "PSV operator's licence" granted in accordance with the Act. Pursuant to section 12(5), it is a criminal offence to use a vehicle in contravention of this rule (unless the operator establishes a defence under section 68(3) of the Act by proving that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence).

7. A "public service vehicle" is defined in section 1 of the Act as a vehicle used for carrying passengers for hire or reward which is either adapted to carry more than eight passengers or is used for carrying passengers at separate fares in the course of a business of carrying passengers.

8. PSV operator's licences, commonly known as "O-licences", are granted by traffic commissioners who are appointed by, but act independently of, the Secretary of State. To obtain an O-licence, an applicant must satisfy requirements of having an effective and stable establishment in Great Britain, being of good repute, having appropriate financial standing and having the requisite professional competence. The applicant must also have a designated transport manager who satisfies requirements of good repute and professional competence. The relevant requirements derive from the EU Regulation.

The 1985 Act

9. The prohibition in section 12(1) of the Public Passenger Vehicles Act 1981 against using a public service vehicle without an O-licence is subject to exemptions provided for in sections 18 to 23 of the Transport Act 1985. These exemptions apply to bodies operating under two kinds of permit:

   (1) A permit granted under section 19 to a body concerned with education, religion, social welfare, recreation or other activities of benefit to the community. Such a permit does not cover the use of a public service vehicle for the carriage of members of the general public or with a view to profit or incidentally to an activity which is itself carried on with a view to profit.

   (2) A "community bus permit" granted under section 22 to a body concerned for the social and welfare needs of one or more communities to provide a "community bus service". This is defined in subsection (1) as a "local service" provided by such a body without a view to profit, either on the part of that body or of anyone else. For this purpose, a "local service" means a service using public service vehicles for the carriage of passengers by road at separate fares on which passengers may travel for less than 15 miles (see section 2 of the Act).

10. Local authorities and other bodies designated by the Secretary of State may grant section 19 permits in relation to the use of public service vehicles other than large buses (defined as vehicles adapted to carrying more than 16 passengers). Section 19 permits

for large buses and community bus permits issued under section 22 may only be granted by traffic commissioners.

11. Bodies operating vehicles under section 19 or section 22 permits have to comply with some regulatory requirements including a requirement to have adequate facilities or arrangements for maintaining any vehicle used under the permit in a fit and serviceable condition. But these requirements are much less onerous than the regime applicable to bodies that require an O-licence.

The EU Regulation

12. Underlying the UK licensing regime is the EU Regulation, which took effect on 4 December 2011. As set out in article 1(2), the EU Regulation applies to "all undertakings established in the Community which are engaged in the occupation of road transport operator." Article 1(4) specifies certain categories of undertakings to which, by way of derogation from this general rule, the EU Regulation does not apply (unless otherwise provided for in national law). These include:

> "(b) undertakings engaged in road passenger transport services exclusively for non-commercial purposes or which have a main occupation other than that of road passenger transport operator;"

13. It is the meaning of the first part of this exception which is the subject of the present proceedings.

14. Article 22(1) of the EU Regulation imposes an obligation on member states to lay down the rules on penalties applicable to infringements of the regulation and to "take all the measures necessary to ensure that they are implemented".

(2) Background to the proceedings

Amendments to the 1985 Act

15. When the EU Regulation first came into force, someone reading sections 18 to 22 of the Transport Act 1985 would reasonably have got the impression that meeting the requirements for and being granted a section 19 or section 22 permit was sufficient to exempt the operator of a public service vehicle from the need to obtain an O-licence. It appears that this was also the view of the Department for Transport, which no doubt explains why, until recently, sections 18 to 22 made no reference to the EU Regulation. The Department's understanding was that an operator who met the requirements for a section 19 or section 22 permit would fall outside its scope: there was therefore no possibility that a body operating in accordance with such a permit would be contravening the EU Regulation.

16. The Secretary of State now accepts that this is not necessarily the case. Accordingly, with effect from 1 October 2019, sections 18 to 22 of the 1985 Act have been amended to make it clear that a section 19 or section 22 permit may only be granted to an "exempt body" and also that the dispensation from the requirement to hold an O-licence only applies to the use of any vehicle under a section 19 or section 22 permit by an "exempt body". An "exempt body" is defined in section 18(5) to mean a body to whom the EU Regulation does not apply for one of three possible reasons – one such reason being

that the body is not engaged (and does not intend to engage) in the occupation of road transport operator (as defined in the EU Regulation) and another reason being that the body falls within the exception in article 1(4)(b) because it is engaged in road passenger transport services "exclusively for non-commercial purposes" or because road transport operator is not its main occupation.

Community transport organisations

17. Already by 2010 there were, according to research conducted by the Community Transport Association, at least 1,692 community transport organisations in England alone. The term "community transport organisation" (or "community transport company") is not a term of art but is used to describe charities and other not-for-profit organisations which provide road passenger transport services as a means of fulfilling charitable or other public benefit purposes. There is a wide variety of such organisations, ranging from small local voluntary bodies to large undertakings with annual incomes exceeding £1 million a year. Many local authorities subsidise community transport organisations through grants.

18. Overall, the largest source of income for community transport organisations in the UK is contracts made with public bodies for the delivery of passenger transport services on their behalf. Such contracts are often awarded through competitive tenders. Pressures on local authority budgets in recent years have reduced public funding for road transport services and led to increased demand for community transport. In addition, community transport organisations have been encouraged to become more self-sufficient by seeking out alternative income streams and operating on a more business-like model.

19. The vast majority of community transport organisations operate under section 19 or section 22 permits.

The claimant's campaign

20. Mr Martin Allen, a director of the claimant, has described in a witness statement how he was instrumental in forming the claimant association in early 2014 with the aim of taking action to challenge what he and some other private operators believed was the award of commercial contracts by public authorities to community transport organisations operating unlawfully under section 19 and 22 permits rather than O-licences. The claimant contends that failure to implement and enforce the EU Regulation is giving such organisations an unfair cost advantage in competing with private operators because of the higher costs involved in operating public service vehicles under an O-licence. Mr Allen has a private transport company, JA Travel Limited, which operates in Nottinghamshire and which he claims has been driven out of the market for providing transport using public service vehicles because of such unfair competition.

Involvement of the Commission

21. The first step taken by the claimant association was to complain to the European Commission. This led to the Commission commencing infraction proceedings against the UK by sending a letter of formal notice in April 2015 stating that it appeared to the Commission that permits were being granted under sections 19 and 22 of the Transport Act 1985 to certain community transport companies allowing them to engage in road

passenger transport services without fulfilling the necessary requirements under the EU Regulation.

22. To date, no further action has been taken by the Commission but the Department for Transport has been keeping the Commission informed of the steps which the Government has taken to which we refer below.

The Erewash case

23. In August 2016 solicitors instructed by JA Travel Limited and the claimant wrote to the Senior Traffic Commissioner to complain about the activities of one particular community transport organisation, Erewash Community Transport Limited. The letter explained that JA Travel had lost out to Erewash in a competitive tender held by Nottinghamshire County Council to award contracts for the provision of certain passenger transport services on the basis of lowest price. On the back of this information and the most recent annual accounts of Erewash, which showed income from providing transportation services of almost £600,000, the claimant alleged that Erewash was engaging in commercial activity without an O-licence in contravention of the EU Regulation and domestic licence regime.

24. The Senior Traffic Commissioner referred the claimant's complaint to the Driver and Vehicle Standards Agency ("DVSA"), which is an executive agency responsible for enforcing operator licensing requirements on behalf of the Secretary of State. On 18 December 2016 the claimant made further complaints to the DVSA calling on it to investigate another nine community transport organisations. Many more similar complaints were made in January 2017. In total, the claimant complained about the activities of around 100 community transport organisations. All these further complaints were based solely on the published accounts of the organisations concerned.

25. The DVSA decided in the first instance to investigate Erewash, effectively treating it as a test case. After carrying out its investigation, the DVSA on 31 July 2017 sent a letter setting out its findings, which included findings that Erewash was engaged in road passenger transport services as its main occupation and not "exclusively for non-commercial purposes": as such, it required an O-licence in order to comply with the EU Regulation and was not entitled to operate vehicles under a section 19 permit, as it was doing.

26. On the same day (31 July 2017) the Department for Transport published a guidance letter regarding the issue and use of section 19 and section 22 permits for road passenger transport. The guidance letter summarised the decision reached in relation to Erewash (without identifying the company by name) and explained the reasoning behind the decision. All holders of section 19 and section 22 permits were asked to make sure that they were complying with the relevant legal requirements. The letter also announced an intention to launch a public consultation with a view to updating current guidance and amending the Transport Act 1985 to clarify the relationship between the conditions set out in the Act and the exceptions provided for by the EU Regulation.

27. In response to the Department's letter, many community transport operators raised concerns, which led to the House of Commons Transport Committee launching an inquiry into community transport in October 2017. Its report was published in December 2017.

28. In the meantime, the DVSA had referred Erewash to the traffic commissioner. After considering the evidence and representations made on behalf of Erewash, the traffic commissioner announced on 5 January 2018 that he did not consider it appropriate to convene a public inquiry (which would be a prelude to taking any regulatory action).

29. On 8 February 2018 the Department for Transport issued its consultation paper seeking views on (amongst other things) proposed guidance on the meaning and effect of the "exclusively for non-commercial purposes" exception in article 1(4)(b) of the EU Regulation.

30. In July 2018 Mr Allen's company, JA Travel Limited, again tendered for contracts with Nottinghamshire County Council to provide passenger transport services, and again lost out to Erewash. Mr Allen again considered that he had been at an unfair disadvantage in this competition because Erewash was continuing to operate under section 19 permits.

Pre-action correspondence

31. On 10 August 2018 the claimant's solicitors sent a letter before claim to the Department for Transport under the Pre-Action Protocol alleging unlawful failure to take enforcement action against Erewash and other community transport operators for operating without an O-licence and giving notice of the claimant's intention to apply for judicial review. In its response dated 13 September 2018 on behalf of the Secretary of State, the Government Legal Department explained the reasons for the Department's "current choice that it will not pursue enforcement action, including in particular a prosecution," against Erewash (or other community transport organisations which are in a materially identical position) "*at this time*" in relation to operating without an O-licence. The reasons were said to include:

> "a lack of certainty as to the precise test, or tests, to be applied for determining whether or not an organisation, such as a charity or other 'non-profit' entity, which is providing transport services for the benefit of people in the locality that it serves is, or is not, engaging in that activity 'exclusively for non-commercial purposes'."

32. The letter further stated that responses to its consultation had reinforced the Department's understanding that "there is an ongoing legal debate" about the proper interpretation and application of article 1(4)(b) of the EU Regulation. In a subsequent letter, the Government Legal Department indicated that, if proceedings were brought with a view to clarifying the law, the Secretary of State was likely not to oppose the grant of permission to apply for judicial review. That was indeed the Secretary of State's position after these proceedings were commenced on 12 December 2018.

Outcome of the consultation

33. On 7 March 2019 the Secretary of State made the Transport Act 1985 (Amendment) Regulations 2019. These Regulations, which were laid before Parliament on 15 March and came into force on 1 October 2019, effected the amendments to sections 18 to 23 of the Transport Act 1985 referred to at paragraph 16 above. The purpose was to make clear that a section 19 or section 22 permit can only be held by an organisation that is

exempt from the licensing requirements set out in the EU Regulation. The Regulations also gave effect to an exemption that is provided for in article 1(5) of the EU Regulation, which allows member states to exempt from its provisions road transport operators engaged exclusively in national transport operations having only a minor impact on the transport market because of the short distances involved.

34. On 15 March 2019 the Department for Transport published the Government response to its consultation. This stated that in the responses to the consultation views were divided on how the non-commercial purposes exception should be interpreted. The Government response referred to the present proceedings and said that the Government would not be making any further statement or providing any guidance on what this exception means until these proceedings have been concluded. The response also announced the Department's intention to carry out a review of the current domestic permit regime in 2019 "to see if the legislation is still fit for purpose and provides the correct balance for the bus sector as a whole". There is no evidence that such a review has yet begun.

The claimant's case

35. In his skilfully presented argument on behalf of the claimant, Mr Segan submitted that these proceedings have been brought as a last resort. There has, he submitted, been a failure on the part of the Secretary of State extending over many years to take any enforcement action, in particular prosecution, against any community transport organisation for operating without an O-licence in circumstances where the organisation is engaged in providing passenger transport for what, on a proper understanding of the EU Regulation, is or includes a commercial purpose. To seek to excuse this lack of action, the Secretary of State has invoked a perceived lack of clarity in the meaning of the non-commercial purposes exception. Mr Segan submitted that there is not, or at least should not be, any such lack of clarity in the law. However, he argued that the only way to dispel the perception of a lack of clarity – when the Secretary of State has chosen not to bring any prosecution or use any other means of clarifying the scope of the exception – is for this court to make an order declaring how article 1(4)(b) of the EU Regulation should be interpreted.

36. To this end, the claimant has put forward a series of suggested principles. The initial formulation of these principles was revised to take account of comments made on behalf of the Secretary of State and the interested parties in their detailed grounds of resistance to the claim. In the result, there was no dispute at the hearing about the correctness of these principles.

37. Against this background, the claimant asks the court to make an order declaring the uncontested principles, or such other principles as the court thinks fit, to be correct in law.

(3) Declaratory judgments

38. There is no doubt that an order declaring the meaning or effect of a legislative provision is a kind of order which the court has power to make and often does make in proceedings for judicial review. However, the proper exercise of the power is constrained by two fundamental principles which are relevant in this case.

39. The first principle stems from the essential function of a court of law, which (at least under the UK's constitutional arrangements) is to decide disputes between the parties to cases brought before the court by one (or more) of them. All court procedures – in particular, the core procedures of receiving evidence and hearing argument – are designed for this task. It also circumscribes the extent of the court's authority. Thus, an order made by a court only binds parties to the proceedings (and those with privity of interest). The limit of the court's authority is also reflected in the doctrine of precedent under which it is only the *ratio decidendi* (or rationale for what the court has decided) which can bind another court in a later case. If no disputed issue has been decided, no such precedent can be established.

40. These constitutional and institutional constraints are particularly relevant where the judgment that a court is asked to give is not a judgment ordering any party to the case to do anything but is a judgment declaring what the law is. As Lord Bridge said in *Ainsbury v Millington* [1987] 1 WLR 379, 381:

> "It has always been a fundamental feature of our judicial system that courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

41. At any rate in public law cases, it is not always necessary that the dispute should be one that at the time of the hearing has direct practical consequences for the parties to the proceedings. *Ainsbury v Millington* was a case involving private rights in which, by the time of the appeal to the House of Lords, the issue raised had become academic in the sense that deciding it would no longer have made any practical difference to the parties' rights against each other. In *R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450, 456-457, Lord Slynn (with whom the other members of the House of Lords agreed) made it clear that the decision in the *Ainsbury* case must be read as limited to the field of private law and that, in the area of public law, although the discretion must be exercised with caution, the court may decide to hear a claim which has become academic if there is a good reason in the public interest for doing so. Lord Slynn gave as an example a case where "a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future".

42. Similarly, the dispute need not be one that has arisen from a particular set of facts already in existence. The courts recognise that it sometimes serves a useful purpose to resolve an issue which will or is likely to have practical importance in the future. So, for example, in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318, the Court of Appeal was prepared to entertain a claim to resolve a dispute between an employer and a trade union about whether the use of length of service as a criterion in selecting employees for redundancy was lawful. There was not yet any case in which this criterion had actually been used to select an employee for redundancy; but the issue was not purely academic as it was likely to affect a large number of people and, if not resolved, would lead to claims of unfair dismissal. By contrast, in *R (Rusbridger) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357, where the claimant sought a declaration that the publication of a newspaper article which advocated the abolition of the monarchy was lawful notwithstanding the literal wording of section 3 of the Treason Felony Act 1848, the House of Lords held that the claim

should be dismissed as not only had no prosecution been brought under that provision – either in that case or in any other case since 1883 – but there was no possibility that a prosecution could succeed in light of section 3 of the Human Rights Act 1998.

43. In determining whether it is appropriate to make a declaration in a case where there is a real dispute between the parties, albeit not a dispute relating to a specific set of existing facts, relevant considerations include the following.

44. First, a declaration is more likely to be appropriate where the question raised is one of pure law and less likely to be appropriate where the question is fact sensitive. That is because, where the outcome may depend on particular facts, it is generally imprudent and less likely to be useful for a court to give a ruling without having all the relevant facts of an actual case before it: see e.g. *Rusbridger*, para 23.

45. Second, before making a declaration in such a case, the court will wish to be satisfied that all sides of the argument have been fully and properly put. It will therefore wish to ensure that all those who will be directly affected by the decision are either before the court or will have their arguments made by a party which represents their interests or has materially similar interests: see *Rolls-Royce*, para 120(6), per Aikens LJ; *R (Hampstead Heath Winter Swimming Club) v Corporation of London* [2005] EWHC 713 (Admin); [2005] 1 WLR 2930, paras 23-24.

46. Third, it is always relevant to consider whether there is a better or more effective way of resolving the issue: see e.g. *Rolls-Royce*, para 120(7).

47. A second key principle relevant in the present context derives from the division of responsibility in our legal system between the civil and criminal courts. The principle is that a civil court should avoid giving a declaration on a question which it is the role of the criminal courts to decide. For this reason, where criminal proceedings have been commenced or threatened, the civil courts should not rule on whether an offence has or has not been committed: see *Imperial Tobacco Ltd v Attorney General* [1981] AC 718. In addition, even where no prosecution has been brought or threatened and no existing conduct is in issue, a civil court should only grant a declaration that particular future conduct would or would not be contrary to the criminal law if there is a cogent reason to do so, since (other things being equal) questions of criminal law are most appropriately decided by criminal courts in cases where the question whether a criminal offence has been committed has actually arisen: see e.g. *R (Haynes) v Stafford Borough Council* [2006] EWHC 1366 (Admin); [2007] 1 WLR 1365, paras 13-21.

48. In this case the claimant has, rightly, been careful not to ask the court to make an order which would decide whether any organisation has operated in a way that (subject only to any defence under section 68(3) of the 1981 Act) constitutes a criminal offence by providing road passenger transport services for which it required but did not have an O-licence. Not only would it be wrong for the court to express any opinion on such a question when the organisation concerned is not a party to the proceedings, but to do so would usurp the role of the criminal court in any potential criminal prosecution. Accordingly, this court has not been asked to decide whether the "non-commercial purposes" exception applies on the facts of any individual case.

(5) Meaning of the non-commercial purposes exception

49. If there were an ambiguity in the wording of the EU Regulation which had given rise to a dispute between the parties to these proceedings about the meaning of article 1(4)(b), it might well be appropriate for the court to resolve such a question of interpretation. As we will explain, however, there is no such dispute.

General scope of the EU Regulation

50. A community transport organisation providing transport services under a section 19 or 22 permit and without an O-licence has no need to rely on the "non-commercial purposes" exception in article 1(4)(b) unless the organisation would otherwise fall within the scope of the EU Regulation, as defined by article 1(2). This depends on whether the organisation is an "undertaking" engaged in "the occupation of road transport operator" – defined in article 2(3) as including "the occupation of road passenger transport operator".

51. As defined in article 2(4), the term "undertaking" includes any natural or legal person or association or group of persons, whether profit-making or not. The fact that an organisation operates on a not-for-profit basis, therefore, does not take it outside the general scope of the EU Regulation.

52. The "occupation of road passenger transport operator" is defined in article 2(2) to mean the activity of any undertaking operating, by means of vehicles suitable and intended for carrying more than eight passengers, "passenger transport services for the public or for specific categories of users in return for payment by the person transported or by the transport organiser." An organisation which provides passenger transport for no payment is therefore not within the scope of the EU Regulation. (It is also outside the scope of the licensing requirement provided by section 12 of the Public Passenger Vehicles Act 1981 because it does not use any vehicle for carrying passengers for hire or reward.)

53. If a community transport organisation is providing road passenger transport services in return for payment so as to fall within the general scope of the EU Regulation, and this is its main occupation (so that it cannot rely on the second limb of article 1(4)(b)), the question arises whether the services are provided "exclusively for non-commercial purposes".

Approach to interpretation

54. It is common ground that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the legislation of which it is part: see e.g. *Sociedad General de Autores y Editores de España v Rafael Hoteles SL* (Case C-306/05) [2007] Bus LR 521, para 34. Furthermore, where (as here) the provision in question is a derogation from a general rule, it should be interpreted strictly, although not so as to deprive the provision of its intended effect: see e.g. *Belgium v Temco Europe SA* (Case C-284/03) [2004] ECR 1-11237, para 17.

55. The rationale for the non-commercial purposes exception appears from recital (6) of the EU Regulation, which states:

> "In the interests of fair competition, the common rules governing the exercise of the occupation of road transport operator should apply as widely as possible to all undertakings. However, it is unnecessary to include within the scope of this Regulation undertakings which only perform transport operations with a very small impact on the transport market."

56. There was some debate at the hearing about whether, as Mr Bates for the Secretary of State submitted, the reference in this recital to the "transport market" is a reference to the EU internal market for road transport with the purpose being to remove impediments to cross-border trade, or whether, as Mr Segan for the claimant suggested, the phrase should be understood in a less technical sense. However, nothing turned on this point, as it did not result in any disagreement about what the words of article 1(4)(b) of the EU Regulation mean.

The Lundberg case

57. The same applies to reliance placed by the claimant in its written submissions on the decision of the Court of Justice of the European Union in *Criminal Proceedings against Daniel Lundberg* (Case C-317/12) (3 October 2013). In that case the CJEU was asked to interpret an EU regulation which required a tachograph to be installed in all vehicles used for the carriage of goods by road except for vehicles below a certain size which were used for "the non-commercial carriage of goods".

58. Mr Lundberg, in his leisure time, competed in car rallies as an amateur rally driver. He drove his own lorry to a fair to show his car. His participation in rallies and the fair was financed in part from his own funds and in part by sponsorship. The effect of the judgment was that he was using his vehicle for the "non-commercial carriage of goods" because he was using the vehicle as part of his hobby. The court stated (at para 24) that:

> "With regard, firstly, to the usual meaning of the concept of 'non-commercial carriage of goods', it must be noted that such a carriage occurs where there is no link with a professional or commercial activity, that is to say, where the carriage of goods is not performed with a view to earning income therefrom. As it is usually understood, the non-commercial carriage of goods therefore designates, in particular, the carriage of goods by a private individual as part of a recreational activity outside his professional activity."

59. Although in this passage the CJEU attached significance to the fact that the carriage of goods was "not performed with a view to earning income therefrom", it is (as mentioned) common ground that earning income from passenger transport services does not of itself indicate that the purposes are commercial in the present context, as the EU Regulation is only capable of applying where an undertaking is providing road passenger transport services in return for payment. Nor are the other factors relied on in the *Lundberg* case relevant for present purposes. That case was concerned with a differently worded regulation with different subject-matter, and the conclusion that the regulation applied "essentially to professional drivers and not to individuals driving for

private purposes" has no application to the type of situation with which the present proceedings are concerned.

Agreed principles

60. As mentioned earlier, all the parties to the present proceedings are in agreement about the meaning of the non-commercial purposes exception in the EU Regulation. In particular, the following principles are common ground between the claimant, the Secretary of State and the interested parties.

61. First, it is clear from the words of article 1(4)(b) that the focus is on the purposes for which the organisation is engaged in providing road passenger transport services and whether those purposes are exclusively non-commercial. This requires consideration of the totality of the road passenger transport services in which the organisation is engaged and whether any of those services is being provided at least partly for a commercial purpose. If an undertaking engages in road passenger transport services, to any extent, for purposes which are not entirely non-commercial, then that undertaking's engagement in such services does not fall within the exception.

62. Second, the fact that an organisation is a registered charity or is otherwise constitutionally prevented from distributing profits does not of itself mean that it is engaged in road passenger transport services "exclusively for non-commercial purposes". That is because the purposes for which an organisation is engaging in a particular activity may not be identical to its overall objects as an organisation.

63. Third, the mere fact that an organisation is providing road passenger transport services in return for payment does not mean that it is providing such services for purposes which are, even partly, commercial. If that were so, the exception would be otiose, since an undertaking which receives no payment in return for its services is not within the scope of the EU Regulation to begin with and therefore has no need to rely on the exception. That is because, as already indicated, such an undertaking is not engaged in the occupation of road passenger transport operator, as defined in article 2(2) of the EU Regulation.

64. Fourth, 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 a purpose of providing a particular road passenger transport service is simply to generate revenue or profits which can then be used to fund or subsidise other road passenger transport services which are themselves being provided entirely for social or other non-commercial purposes, the organisation will not be able to rely on the exception. The same will be true if any of its road passenger transport services is being provided wholly or partly for the purpose of generating revenue or profits which can then be used to fund activities outside the field of road passenger transport undertaken exclusively for charitable or other non-commercial purposes.

65. Fifth, beyond this, the question whether an organisation is "engaged in road passenger transport services exclusively for non-commercial purposes" is one of fact, to be answered on the basis of an examination, in the round, of features of the organisation and its activities from which the purposes for which it engages in road passenger transport services can be ascertained or inferred. Relevant considerations include:

(1) the level of the payments received by the organisation for providing its road passenger transport services;

(2) whether or to what extent the organisation is providing services under contracts won in competitive procurement or tender exercises;

(3) the size and scale of its operations in the market for road passenger transport services; and

(4) the extent to which the organisation relies upon the support of unpaid volunteers to deliver its road passenger transport services or, in so far as it relies on paid staff, whether they are paid at levels comparable to the staff paid by commercial operators to perform similar roles.

(5) Conclusions

66. As we have indicated, the principles set out above are not in dispute between the parties to these proceedings. Nor did any of the parties identify any issue regarding the proper interpretation of the non-commercial purposes exception about which they now disagree. In the absence of such an issue, an argument in the abstract about whether or not the law is clear is not itself a question of law on which a court can adjudicate. That is not to say that there is or will be no dispute about how the question whether a community transport organisation falls within the exception is to be answered on the facts of any particular case. Indeed, it is apparent that in some cases the application of the test is likely to be far from straightforward. We are not asked, however, nor – as explained earlier – could the court properly be asked in these proceedings, to decide whether, as a matter of fact, any particular organisation does or does not fall within the exception.

67. We conclude that there is no issue or dispute between the parties to these proceedings for the court to resolve or which the court is actually being asked to resolve. In these circumstances, it is not appropriate to make any declaration about the meaning of the non-commercial purposes exception; and even if the court were to do so, such a declaration would not, for the reasons given earlier, have any binding legal force.

68. By the same token, however, these proceedings have not borne out the assertions made by the Government in pre-action correspondence (and in its response to its consultation) that there is a lack of certainty or clarity as to the test to be applied for determining whether or not an organisation such as a charity or other 'non-profit' entity which is providing passenger transport services is, or is not, engaging in that activity "exclusively for non-commercial purposes". No issue about the legal test to be applied has been identified. It follows that the Secretary of State cannot appeal to such an alleged lack of certainty or clarity regarding the correct legal test to justify a decision not to take action to enforce the provisions of the EU Regulation. Applying the test to particular facts may be difficult. But that is not, of itself, a good reason for choosing not to enforce the law. This is particularly so in the present context where article 22(1) of the EU Regulation requires national authorities to take all necessary measures to ensure that the provisions of the EU Regulation are implemented. If the Secretary of State considers that prosecution (or other enforcement action) is otherwise appropriate, the fact that the organisation concerned denies that, on the agreed or alleged facts, it is operating in breach of the regulation would not justify a refusal to take such action.

Neutral Citation Number: [2019] EWHC 3319 (Admin)

Case No: CO/4989/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2019

Before:

LORD JUSTICE LEGGATT
and
MR JUSTICE LEWIS

- -

Between:

THE QUEEN (on the application of) BUS AND COACH ASSOCIATION LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and -	
(1) COMMUNITY TRANSPORT ASSOCIATION **(2) MOBILITY MATTERS CAMPAIGN LIMITED**	**Interested Parties**

- -

James Segan (instructed by **Martin Lee & Co**) for the **Claimant**
Alan Bates (instructed by the **Government Legal Department**) for the **Defendant**
Richard Drabble QC (instructed by **Russell-Cooke LLP**) for the **Interested Parties**

Hearing date: 19 November 2019

- -

Approved Judgment

Lord Justice Leggatt (giving the judgment of the court):

Introduction

1. Regulation (EC) No 1071/2009 of the European Parliament and of the Council dated 21 October 2009 (the "EU Regulation"), which has direct effect as part of UK law, establishes rules which govern admission to, and the pursuit of, the occupation of road transport operator. There is an exception from these rules for "undertakings engaged in road passenger transport services exclusively for non-commercial purposes".

2. On this claim for judicial review, Bus and Coach Association Limited, a campaign organisation dedicated to representing the interests of commercial bus and coach operators in the UK, is asking the court to declare what the words of this exception mean. The claimant says that there is, or should be, no lack of clarity about their meaning; but the court should nevertheless make a declaratory order because an alleged lack of clarity is being relied on by the Secretary of State for Transport as a reason for not prosecuting certain community transport organisations which are allegedly providing road passenger transport services in England and Wales for commercial purposes in breach of the EU Regulation.

3. The Secretary of State has defended the claim on the basis that there is "legal uncertainty" as to the proper interpretation of the "non-commercial purposes" exception and that this is a relevant factor to take into account in deciding whether it is in the public interest to bring a criminal prosecution or take other enforcement action. However, the Secretary of State when acknowledging service of these proceedings did not oppose the grant of permission to apply for judicial review, "in view of the potential benefit of the proceedings in providing judicial clarification of the relevant law".

4. Two interested parties have been joined. They are the Community Transport Association, which represents organisations providing community transport services in the UK; and Mobility Matters Campaign Limited, which campaigns on behalf of community transport organisations. The interested parties have common representation.

5. In this judgment we will:

   (1) outline the relevant legal framework;

   (2) summarise the background to the proceedings;

   (3) identify the principles to be applied in deciding whether it is appropriate for the court to make an order declaring what the law is in a case of this kind;

   (4) consider whether or in what respect there is any real dispute about the law between the parties to these proceedings; and

   (5) explain our reasons for concluding that it is not appropriate to make a declaratory order in this case, as there is no such dispute, and that it is the responsibility of the Secretary of State to enforce the law as it stands.

(1) The legal framework

The 1981 Act

6. Section 12(1) of the Public Passenger Vehicles Act 1981 prohibits the use of a "public service vehicle" on a road for carrying passengers for hire or reward except under a "PSV operator's licence" granted in accordance with the Act. Pursuant to section 12(5), it is a criminal offence to use a vehicle in contravention of this rule (unless the operator establishes a defence under section 68(3) of the Act by proving that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence).

7. A "public service vehicle" is defined in section 1 of the Act as a vehicle used for carrying passengers for hire or reward which is either adapted to carry more than eight passengers or is used for carrying passengers at separate fares in the course of a business of carrying passengers.

8. PSV operator's licences, commonly known as "O-licences", are granted by traffic commissioners who are appointed by, but act independently of, the Secretary of State. To obtain an O-licence, an applicant must satisfy requirements of having an effective and stable establishment in Great Britain, being of good repute, having appropriate financial standing and having the requisite professional competence. The applicant must also have a designated transport manager who satisfies requirements of good repute and professional competence. The relevant requirements derive from the EU Regulation.

The 1985 Act

9. The prohibition in section 12(1) of the Public Passenger Vehicles Act 1981 against using a public service vehicle without an O-licence is subject to exemptions provided for in sections 18 to 23 of the Transport Act 1985. These exemptions apply to bodies operating under two kinds of permit:

   (1) A permit granted under section 19 to a body concerned with education, religion, social welfare, recreation or other activities of benefit to the community. Such a permit does not cover the use of a public service vehicle for the carriage of members of the general public or with a view to profit or incidentally to an activity which is itself carried on with a view to profit.

   (2) A "community bus permit" granted under section 22 to a body concerned for the social and welfare needs of one or more communities to provide a "community bus service". This is defined in subsection (1) as a "local service" provided by such a body without a view to profit, either on the part of that body or of anyone else. For this purpose, a "local service" means a service using public service vehicles for the carriage of passengers by road at separate fares on which passengers may travel for less than 15 miles (see section 2 of the Act).

10. Local authorities and other bodies designated by the Secretary of State may grant section 19 permits in relation to the use of public service vehicles other than large buses (defined as vehicles adapted to carrying more than 16 passengers). Section 19 permits

for large buses and community bus permits issued under section 22 may only be granted by traffic commissioners.

11. Bodies operating vehicles under section 19 or section 22 permits have to comply with some regulatory requirements including a requirement to have adequate facilities or arrangements for maintaining any vehicle used under the permit in a fit and serviceable condition. But these requirements are much less onerous than the regime applicable to bodies that require an O-licence.

The EU Regulation

12. Underlying the UK licensing regime is the EU Regulation, which took effect on 4 December 2011. As set out in article 1(2), the EU Regulation applies to "all undertakings established in the Community which are engaged in the occupation of road transport operator." Article 1(4) specifies certain categories of undertakings to which, by way of derogation from this general rule, the EU Regulation does not apply (unless otherwise provided for in national law). These include:

> "(b) undertakings engaged in road passenger transport services exclusively for non-commercial purposes or which have a main occupation other than that of road passenger transport operator;"

13. It is the meaning of the first part of this exception which is the subject of the present proceedings.

14. Article 22(1) of the EU Regulation imposes an obligation on member states to lay down the rules on penalties applicable to infringements of the regulation and to "take all the measures necessary to ensure that they are implemented".

(2) Background to the proceedings

Amendments to the 1985 Act

15. When the EU Regulation first came into force, someone reading sections 18 to 22 of the Transport Act 1985 would reasonably have got the impression that meeting the requirements for and being granted a section 19 or section 22 permit was sufficient to exempt the operator of a public service vehicle from the need to obtain an O-licence. It appears that this was also the view of the Department for Transport, which no doubt explains why, until recently, sections 18 to 22 made no reference to the EU Regulation. The Department's understanding was that an operator who met the requirements for a section 19 or section 22 permit would fall outside its scope: there was therefore no possibility that a body operating in accordance with such a permit would be contravening the EU Regulation.

16. The Secretary of State now accepts that this is not necessarily the case. Accordingly, with effect from 1 October 2019, sections 18 to 22 of the 1985 Act have been amended to make it clear that a section 19 or section 22 permit may only be granted to an "exempt body" and also that the dispensation from the requirement to hold an O-licence only applies to the use of any vehicle under a section 19 or section 22 permit by an "exempt body". An "exempt body" is defined in section 18(5) to mean a body to whom the EU Regulation does not apply for one of three possible reasons – one such reason being

that the body is not engaged (and does not intend to engage) in the occupation of road transport operator (as defined in the EU Regulation) and another reason being that the body falls within the exception in article 1(4)(b) because it is engaged in road passenger transport services "exclusively for non-commercial purposes" or because road transport operator is not its main occupation.

Community transport organisations

17. Already by 2010 there were, according to research conducted by the Community Transport Association, at least 1,692 community transport organisations in England alone. The term "community transport organisation" (or "community transport company") is not a term of art but is used to describe charities and other not-for-profit organisations which provide road passenger transport services as a means of fulfilling charitable or other public benefit purposes. There is a wide variety of such organisations, ranging from small local voluntary bodies to large undertakings with annual incomes exceeding £1 million a year. Many local authorities subsidise community transport organisations through grants.

18. Overall, the largest source of income for community transport organisations in the UK is contracts made with public bodies for the delivery of passenger transport services on their behalf. Such contracts are often awarded through competitive tenders. Pressures on local authority budgets in recent years have reduced public funding for road transport services and led to increased demand for community transport. In addition, community transport organisations have been encouraged to become more self-sufficient by seeking out alternative income streams and operating on a more business-like model.

19. The vast majority of community transport organisations operate under section 19 or section 22 permits.

The claimant's campaign

20. Mr Martin Allen, a director of the claimant, has described in a witness statement how he was instrumental in forming the claimant association in early 2014 with the aim of taking action to challenge what he and some other private operators believed was the award of commercial contracts by public authorities to community transport organisations operating unlawfully under section 19 and 22 permits rather than O-licences. The claimant contends that failure to implement and enforce the EU Regulation is giving such organisations an unfair cost advantage in competing with private operators because of the higher costs involved in operating public service vehicles under an O-licence. Mr Allen has a private transport company, JA Travel Limited, which operates in Nottinghamshire and which he claims has been driven out of the market for providing transport using public service vehicles because of such unfair competition.

Involvement of the Commission

21. The first step taken by the claimant association was to complain to the European Commission. This led to the Commission commencing infraction proceedings against the UK by sending a letter of formal notice in April 2015 stating that it appeared to the Commission that permits were being granted under sections 19 and 22 of the Transport Act 1985 to certain community transport companies allowing them to engage in road

passenger transport services without fulfilling the necessary requirements under the EU Regulation.

22. To date, no further action has been taken by the Commission but the Department for Transport has been keeping the Commission informed of the steps which the Government has taken to which we refer below.

The Erewash case

23. In August 2016 solicitors instructed by JA Travel Limited and the claimant wrote to the Senior Traffic Commissioner to complain about the activities of one particular community transport organisation, Erewash Community Transport Limited. The letter explained that JA Travel had lost out to Erewash in a competitive tender held by Nottinghamshire County Council to award contracts for the provision of certain passenger transport services on the basis of lowest price. On the back of this information and the most recent annual accounts of Erewash, which showed income from providing transportation services of almost £600,000, the claimant alleged that Erewash was engaging in commercial activity without an O-licence in contravention of the EU Regulation and domestic licence regime.

24. The Senior Traffic Commissioner referred the claimant's complaint to the Driver and Vehicle Standards Agency ("DVSA"), which is an executive agency responsible for enforcing operator licensing requirements on behalf of the Secretary of State. On 18 December 2016 the claimant made further complaints to the DVSA calling on it to investigate another nine community transport organisations. Many more similar complaints were made in January 2017. In total, the claimant complained about the activities of around 100 community transport organisations. All these further complaints were based solely on the published accounts of the organisations concerned.

25. The DVSA decided in the first instance to investigate Erewash, effectively treating it as a test case. After carrying out its investigation, the DVSA on 31 July 2017 sent a letter setting out its findings, which included findings that Erewash was engaged in road passenger transport services as its main occupation and not "exclusively for non-commercial purposes": as such, it required an O-licence in order to comply with the EU Regulation and was not entitled to operate vehicles under a section 19 permit, as it was doing.

26. On the same day (31 July 2017) the Department for Transport published a guidance letter regarding the issue and use of section 19 and section 22 permits for road passenger transport. The guidance letter summarised the decision reached in relation to Erewash (without identifying the company by name) and explained the reasoning behind the decision. All holders of section 19 and section 22 permits were asked to make sure that they were complying with the relevant legal requirements. The letter also announced an intention to launch a public consultation with a view to updating current guidance and amending the Transport Act 1985 to clarify the relationship between the conditions set out in the Act and the exceptions provided for by the EU Regulation.

27. In response to the Department's letter, many community transport operators raised concerns, which led to the House of Commons Transport Committee launching an inquiry into community transport in October 2017. Its report was published in December 2017.

28. In the meantime, the DVSA had referred Erewash to the traffic commissioner. After considering the evidence and representations made on behalf of Erewash, the traffic commissioner announced on 5 January 2018 that he did not consider it appropriate to convene a public inquiry (which would be a prelude to taking any regulatory action).

29. On 8 February 2018 the Department for Transport issued its consultation paper seeking views on (amongst other things) proposed guidance on the meaning and effect of the "exclusively for non-commercial purposes" exception in article 1(4)(b) of the EU Regulation.

30. In July 2018 Mr Allen's company, JA Travel Limited, again tendered for contracts with Nottinghamshire County Council to provide passenger transport services, and again lost out to Erewash. Mr Allen again considered that he had been at an unfair disadvantage in this competition because Erewash was continuing to operate under section 19 permits.

Pre-action correspondence

31. On 10 August 2018 the claimant's solicitors sent a letter before claim to the Department for Transport under the Pre-Action Protocol alleging unlawful failure to take enforcement action against Erewash and other community transport operators for operating without an O-licence and giving notice of the claimant's intention to apply for judicial review. In its response dated 13 September 2018 on behalf of the Secretary of State, the Government Legal Department explained the reasons for the Department's "current choice that it will not pursue enforcement action, including in particular a prosecution," against Erewash (or other community transport organisations which are in a materially identical position) "*at this time*" in relation to operating without an O-licence. The reasons were said to include:

> "a lack of certainty as to the precise test, or tests, to be applied for determining whether or not an organisation, such as a charity or other 'non-profit' entity, which is providing transport services for the benefit of people in the locality that it serves is, or is not, engaging in that activity 'exclusively for non-commercial purposes'."

32. The letter further stated that responses to its consultation had reinforced the Department's understanding that "there is an ongoing legal debate" about the proper interpretation and application of article 1(4)(b) of the EU Regulation. In a subsequent letter, the Government Legal Department indicated that, if proceedings were brought with a view to clarifying the law, the Secretary of State was likely not to oppose the grant of permission to apply for judicial review. That was indeed the Secretary of State's position after these proceedings were commenced on 12 December 2018.

Outcome of the consultation

33. On 7 March 2019 the Secretary of State made the Transport Act 1985 (Amendment) Regulations 2019. These Regulations, which were laid before Parliament on 15 March and came into force on 1 October 2019, effected the amendments to sections 18 to 23 of the Transport Act 1985 referred to at paragraph 16 above. The purpose was to make clear that a section 19 or section 22 permit can only be held by an organisation that is

exempt from the licensing requirements set out in the EU Regulation. The Regulations also gave effect to an exemption that is provided for in article 1(5) of the EU Regulation, which allows member states to exempt from its provisions road transport operators engaged exclusively in national transport operations having only a minor impact on the transport market because of the short distances involved.

34. On 15 March 2019 the Department for Transport published the Government response to its consultation. This stated that in the responses to the consultation views were divided on how the non-commercial purposes exception should be interpreted. The Government response referred to the present proceedings and said that the Government would not be making any further statement or providing any guidance on what this exception means until these proceedings have been concluded. The response also announced the Department's intention to carry out a review of the current domestic permit regime in 2019 "to see if the legislation is still fit for purpose and provides the correct balance for the bus sector as a whole". There is no evidence that such a review has yet begun.

The claimant's case

35. In his skilfully presented argument on behalf of the claimant, Mr Segan submitted that these proceedings have been brought as a last resort. There has, he submitted, been a failure on the part of the Secretary of State extending over many years to take any enforcement action, in particular prosecution, against any community transport organisation for operating without an O-licence in circumstances where the organisation is engaged in providing passenger transport for what, on a proper understanding of the EU Regulation, is or includes a commercial purpose. To seek to excuse this lack of action, the Secretary of State has invoked a perceived lack of clarity in the meaning of the non-commercial purposes exception. Mr Segan submitted that there is not, or at least should not be, any such lack of clarity in the law. However, he argued that the only way to dispel the perception of a lack of clarity – when the Secretary of State has chosen not to bring any prosecution or use any other means of clarifying the scope of the exception – is for this court to make an order declaring how article 1(4)(b) of the EU Regulation should be interpreted.

36. To this end, the claimant has put forward a series of suggested principles. The initial formulation of these principles was revised to take account of comments made on behalf of the Secretary of State and the interested parties in their detailed grounds of resistance to the claim. In the result, there was no dispute at the hearing about the correctness of these principles.

37. Against this background, the claimant asks the court to make an order declaring the uncontested principles, or such other principles as the court thinks fit, to be correct in law.

(3) Declaratory judgments

38. There is no doubt that an order declaring the meaning or effect of a legislative provision is a kind of order which the court has power to make and often does make in proceedings for judicial review. However, the proper exercise of the power is constrained by two fundamental principles which are relevant in this case.

39. The first principle stems from the essential function of a court of law, which (at least under the UK's constitutional arrangements) is to decide disputes between the parties to cases brought before the court by one (or more) of them. All court procedures – in particular, the core procedures of receiving evidence and hearing argument – are designed for this task. It also circumscribes the extent of the court's authority. Thus, an order made by a court only binds parties to the proceedings (and those with privity of interest). The limit of the court's authority is also reflected in the doctrine of precedent under which it is only the *ratio decidendi* (or rationale for what the court has decided) which can bind another court in a later case. If no disputed issue has been decided, no such precedent can be established.

40. These constitutional and institutional constraints are particularly relevant where the judgment that a court is asked to give is not a judgment ordering any party to the case to do anything but is a judgment declaring what the law is. As Lord Bridge said in *Ainsbury v Millington* [1987] 1 WLR 379, 381:

> "It has always been a fundamental feature of our judicial system that courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

41. At any rate in public law cases, it is not always necessary that the dispute should be one that at the time of the hearing has direct practical consequences for the parties to the proceedings. *Ainsbury v Millington* was a case involving private rights in which, by the time of the appeal to the House of Lords, the issue raised had become academic in the sense that deciding it would no longer have made any practical difference to the parties' rights against each other. In *R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450, 456-457, Lord Slynn (with whom the other members of the House of Lords agreed) made it clear that the decision in the *Ainsbury* case must be read as limited to the field of private law and that, in the area of public law, although the discretion must be exercised with caution, the court may decide to hear a claim which has become academic if there is a good reason in the public interest for doing so. Lord Slynn gave as an example a case where "a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future".

42. Similarly, the dispute need not be one that has arisen from a particular set of facts already in existence. The courts recognise that it sometimes serves a useful purpose to resolve an issue which will or is likely to have practical importance in the future. So, for example, in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318, the Court of Appeal was prepared to entertain a claim to resolve a dispute between an employer and a trade union about whether the use of length of service as a criterion in selecting employees for redundancy was lawful. There was not yet any case in which this criterion had actually been used to select an employee for redundancy; but the issue was not purely academic as it was likely to affect a large number of people and, if not resolved, would lead to claims of unfair dismissal. By contrast, in *R (Rusbridger) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357, where the claimant sought a declaration that the publication of a newspaper article which advocated the abolition of the monarchy was lawful notwithstanding the literal wording of section 3 of the Treason Felony Act 1848, the House of Lords held that the claim

should be dismissed as not only had no prosecution been brought under that provision – either in that case or in any other case since 1883 – but there was no possibility that a prosecution could succeed in light of section 3 of the Human Rights Act 1998.

43. In determining whether it is appropriate to make a declaration in a case where there is a real dispute between the parties, albeit not a dispute relating to a specific set of existing facts, relevant considerations include the following.

44. First, a declaration is more likely to be appropriate where the question raised is one of pure law and less likely to be appropriate where the question is fact sensitive. That is because, where the outcome may depend on particular facts, it is generally imprudent and less likely to be useful for a court to give a ruling without having all the relevant facts of an actual case before it: see e.g. *Rusbridger*, para 23.

45. Second, before making a declaration in such a case, the court will wish to be satisfied that all sides of the argument have been fully and properly put. It will therefore wish to ensure that all those who will be directly affected by the decision are either before the court or will have their arguments made by a party which represents their interests or has materially similar interests: see *Rolls-Royce*, para 120(6), per Aikens LJ; *R (Hampstead Heath Winter Swimming Club) v Corporation of London* [2005] EWHC 713 (Admin); [2005] 1 WLR 2930, paras 23-24.

46. Third, it is always relevant to consider whether there is a better or more effective way of resolving the issue: see e.g. *Rolls-Royce*, para 120(7).

47. A second key principle relevant in the present context derives from the division of responsibility in our legal system between the civil and criminal courts. The principle is that a civil court should avoid giving a declaration on a question which it is the role of the criminal courts to decide. For this reason, where criminal proceedings have been commenced or threatened, the civil courts should not rule on whether an offence has or has not been committed: see *Imperial Tobacco Ltd v Attorney General* [1981] AC 718. In addition, even where no prosecution has been brought or threatened and no existing conduct is in issue, a civil court should only grant a declaration that particular future conduct would or would not be contrary to the criminal law if there is a cogent reason to do so, since (other things being equal) questions of criminal law are most appropriately decided by criminal courts in cases where the question whether a criminal offence has been committed has actually arisen: see e.g. *R (Haynes) v Stafford Borough Council* [2006] EWHC 1366 (Admin); [2007] 1 WLR 1365, paras 13-21.

48. In this case the claimant has, rightly, been careful not to ask the court to make an order which would decide whether any organisation has operated in a way that (subject only to any defence under section 68(3) of the 1981 Act) constitutes a criminal offence by providing road passenger transport services for which it required but did not have an O-licence. Not only would it be wrong for the court to express any opinion on such a question when the organisation concerned is not a party to the proceedings, but to do so would usurp the role of the criminal court in any potential criminal prosecution. Accordingly, this court has not been asked to decide whether the "non-commercial purposes" exception applies on the facts of any individual case.

(5) Meaning of the non-commercial purposes exception

49. If there were an ambiguity in the wording of the EU Regulation which had given rise to a dispute between the parties to these proceedings about the meaning of article 1(4)(b), it might well be appropriate for the court to resolve such a question of interpretation. As we will explain, however, there is no such dispute.

General scope of the EU Regulation

50. A community transport organisation providing transport services under a section 19 or 22 permit and without an O-licence has no need to rely on the "non-commercial purposes" exception in article 1(4)(b) unless the organisation would otherwise fall within the scope of the EU Regulation, as defined by article 1(2). This depends on whether the organisation is an "undertaking" engaged in "the occupation of road transport operator" – defined in article 2(3) as including "the occupation of road passenger transport operator".

51. As defined in article 2(4), the term "undertaking" includes any natural or legal person or association or group of persons, whether profit-making or not. The fact that an organisation operates on a not-for-profit basis, therefore, does not take it outside the general scope of the EU Regulation.

52. The "occupation of road passenger transport operator" is defined in article 2(2) to mean the activity of any undertaking operating, by means of vehicles suitable and intended for carrying more than eight passengers, "passenger transport services for the public or for specific categories of users in return for payment by the person transported or by the transport organiser." An organisation which provides passenger transport for no payment is therefore not within the scope of the EU Regulation. (It is also outside the scope of the licensing requirement provided by section 12 of the Public Passenger Vehicles Act 1981 because it does not use any vehicle for carrying passengers for hire or reward.)

53. If a community transport organisation is providing road passenger transport services in return for payment so as to fall within the general scope of the EU Regulation, and this is its main occupation (so that it cannot rely on the second limb of article 1(4)(b)), the question arises whether the services are provided "exclusively for non-commercial purposes".

Approach to interpretation

54. It is common ground that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the legislation of which it is part: see e.g. *Sociedad General de Autores y Editores de España v Rafael Hoteles SL* (Case C-306/05) [2007] Bus LR 521, para 34. Furthermore, where (as here) the provision in question is a derogation from a general rule, it should be interpreted strictly, although not so as to deprive the provision of its intended effect: see e.g. *Belgium v Temco Europe SA* (Case C-284/03) [2004] ECR 1-11237, para 17.

55. The rationale for the non-commercial purposes exception appears from recital (6) of the EU Regulation, which states:

> "In the interests of fair competition, the common rules governing the exercise of the occupation of road transport operator should apply as widely as possible to all undertakings. However, it is unnecessary to include within the scope of this Regulation undertakings which only perform transport operations with a very small impact on the transport market."

56. There was some debate at the hearing about whether, as Mr Bates for the Secretary of State submitted, the reference in this recital to the "transport market" is a reference to the EU internal market for road transport with the purpose being to remove impediments to cross-border trade, or whether, as Mr Segan for the claimant suggested, the phrase should be understood in a less technical sense. However, nothing turned on this point, as it did not result in any disagreement about what the words of article 1(4)(b) of the EU Regulation mean.

The Lundberg case

57. The same applies to reliance placed by the claimant in its written submissions on the decision of the Court of Justice of the European Union in *Criminal Proceedings against Daniel Lundberg* (Case C-317/12) (3 October 2013). In that case the CJEU was asked to interpret an EU regulation which required a tachograph to be installed in all vehicles used for the carriage of goods by road except for vehicles below a certain size which were used for "the non-commercial carriage of goods".

58. Mr Lundberg, in his leisure time, competed in car rallies as an amateur rally driver. He drove his own lorry to a fair to show his car. His participation in rallies and the fair was financed in part from his own funds and in part by sponsorship. The effect of the judgment was that he was using his vehicle for the "non-commercial carriage of goods" because he was using the vehicle as part of his hobby. The court stated (at para 24) that:

> "With regard, firstly, to the usual meaning of the concept of 'non-commercial carriage of goods', it must be noted that such a carriage occurs where there is no link with a professional or commercial activity, that is to say, where the carriage of goods is not performed with a view to earning income therefrom. As it is usually understood, the non-commercial carriage of goods therefore designates, in particular, the carriage of goods by a private individual as part of a recreational activity outside his professional activity."

59. Although in this passage the CJEU attached significance to the fact that the carriage of goods was "not performed with a view to earning income therefrom", it is (as mentioned) common ground that earning income from passenger transport services does not of itself indicate that the purposes are commercial in the present context, as the EU Regulation is only capable of applying where an undertaking is providing road passenger transport services in return for payment. Nor are the other factors relied on in the *Lundberg* case relevant for present purposes. That case was concerned with a differently worded regulation with different subject-matter, and the conclusion that the regulation applied "essentially to professional drivers and not to individuals driving for

private purposes" has no application to the type of situation with which the present proceedings are concerned.

Agreed principles

60. As mentioned earlier, all the parties to the present proceedings are in agreement about the meaning of the non-commercial purposes exception in the EU Regulation. In particular, the following principles are common ground between the claimant, the Secretary of State and the interested parties.

61. First, it is clear from the words of article 1(4)(b) that the focus is on the purposes for which the organisation is engaged in providing road passenger transport services and whether those purposes are exclusively non-commercial. This requires consideration of the totality of the road passenger transport services in which the organisation is engaged and whether any of those services is being provided at least partly for a commercial purpose. If an undertaking engages in road passenger transport services, to any extent, for purposes which are not entirely non-commercial, then that undertaking's engagement in such services does not fall within the exception.

62. Second, the fact that an organisation is a registered charity or is otherwise constitutionally prevented from distributing profits does not of itself mean that it is engaged in road passenger transport services "exclusively for non-commercial purposes". That is because the purposes for which an organisation is engaging in a particular activity may not be identical to its overall objects as an organisation.

63. Third, the mere fact that an organisation is providing road passenger transport services in return for payment does not mean that it is providing such services for purposes which are, even partly, commercial. If that were so, the exception would be otiose, since an undertaking which receives no payment in return for its services is not within the scope of the EU Regulation to begin with and therefore has no need to rely on the exception. That is because, as already indicated, such an undertaking is not engaged in the occupation of road passenger transport operator, as defined in article 2(2) of the EU Regulation.

64. Fourth, 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 a purpose of providing a particular road passenger transport service is simply to generate revenue or profits which can then be used to fund or subsidise other road passenger transport services which are themselves being provided entirely for social or other non-commercial purposes, the organisation will not be able to rely on the exception. The same will be true if any of its road passenger transport services is being provided wholly or partly for the purpose of generating revenue or profits which can then be used to fund activities outside the field of road passenger transport undertaken exclusively for charitable or other non-commercial purposes.

65. Fifth, beyond this, the question whether an organisation is "engaged in road passenger transport services exclusively for non-commercial purposes" is one of fact, to be answered on the basis of an examination, in the round, of features of the organisation and its activities from which the purposes for which it engages in road passenger transport services can be ascertained or inferred. Relevant considerations include:

(1) the level of the payments received by the organisation for providing its road passenger transport services;

(2) whether or to what extent the organisation is providing services under contracts won in competitive procurement or tender exercises;

(3) the size and scale of its operations in the market for road passenger transport services; and

(4) the extent to which the organisation relies upon the support of unpaid volunteers to deliver its road passenger transport services or, in so far as it relies on paid staff, whether they are paid at levels comparable to the staff paid by commercial operators to perform similar roles.

(5) Conclusions

66. As we have indicated, the principles set out above are not in dispute between the parties to these proceedings. Nor did any of the parties identify any issue regarding the proper interpretation of the non-commercial purposes exception about which they now disagree. In the absence of such an issue, an argument in the abstract about whether or not the law is clear is not itself a question of law on which a court can adjudicate. That is not to say that there is or will be no dispute about how the question whether a community transport organisation falls within the exception is to be answered on the facts of any particular case. Indeed, it is apparent that in some cases the application of the test is likely to be far from straightforward. We are not asked, however, nor – as explained earlier – could the court properly be asked in these proceedings, to decide whether, as a matter of fact, any particular organisation does or does not fall within the exception.

67. We conclude that there is no issue or dispute between the parties to these proceedings for the court to resolve or which the court is actually being asked to resolve. In these circumstances, it is not appropriate to make any declaration about the meaning of the non-commercial purposes exception; and even if the court were to do so, such a declaration would not, for the reasons given earlier, have any binding legal force.

68. By the same token, however, these proceedings have not borne out the assertions made by the Government in pre-action correspondence (and in its response to its consultation) that there is a lack of certainty or clarity as to the test to be applied for determining whether or not an organisation such as a charity or other 'non-profit' entity which is providing passenger transport services is, or is not, engaging in that activity "exclusively for non-commercial purposes". No issue about the legal test to be applied has been identified. It follows that the Secretary of State cannot appeal to such an alleged lack of certainty or clarity regarding the correct legal test to justify a decision not to take action to enforce the provisions of the EU Regulation. Applying the test to particular facts may be difficult. But that is not, of itself, a good reason for choosing not to enforce the law. This is particularly so in the present context where article 22(1) of the EU Regulation requires national authorities to take all necessary measures to ensure that the provisions of the EU Regulation are implemented. If the Secretary of State considers that prosecution (or other enforcement action) is otherwise appropriate, the fact that the organisation concerned denies that, on the agreed or alleged facts, it is operating in breach of the regulation would not justify a refusal to take such action.

Neutral Citation Number: [2019] EWHC 3319 (Admin)

Case No: CO/4989/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2019

Before:

LORD JUSTICE LEGGATT
and
MR JUSTICE LEWIS

- -

Between:

THE QUEEN (on the application of) BUS AND COACH ASSOCIATION LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR TRANSPORT	**Defendant**
- and -	
(1) COMMUNITY TRANSPORT ASSOCIATION **(2) MOBILITY MATTERS CAMPAIGN LIMITED**	**Interested Parties**

- -

James Segan (instructed by **Martin Lee & Co**) for the **Claimant**
Alan Bates (instructed by the **Government Legal Department**) for the **Defendant**
Richard Drabble QC (instructed by **Russell-Cooke LLP**) for the **Interested Parties**

Hearing date: 19 November 2019

- -

Approved Judgment

Lord Justice Leggatt (giving the judgment of the court):

Introduction

1. Regulation (EC) No 1071/2009 of the European Parliament and of the Council dated 21 October 2009 (the "EU Regulation"), which has direct effect as part of UK law, establishes rules which govern admission to, and the pursuit of, the occupation of road transport operator. There is an exception from these rules for "undertakings engaged in road passenger transport services exclusively for non-commercial purposes".

2. On this claim for judicial review, Bus and Coach Association Limited, a campaign organisation dedicated to representing the interests of commercial bus and coach operators in the UK, is asking the court to declare what the words of this exception mean. The claimant says that there is, or should be, no lack of clarity about their meaning; but the court should nevertheless make a declaratory order because an alleged lack of clarity is being relied on by the Secretary of State for Transport as a reason for not prosecuting certain community transport organisations which are allegedly providing road passenger transport services in England and Wales for commercial purposes in breach of the EU Regulation.

3. The Secretary of State has defended the claim on the basis that there is "legal uncertainty" as to the proper interpretation of the "non-commercial purposes" exception and that this is a relevant factor to take into account in deciding whether it is in the public interest to bring a criminal prosecution or take other enforcement action. However, the Secretary of State when acknowledging service of these proceedings did not oppose the grant of permission to apply for judicial review, "in view of the potential benefit of the proceedings in providing judicial clarification of the relevant law".

4. Two interested parties have been joined. They are the Community Transport Association, which represents organisations providing community transport services in the UK; and Mobility Matters Campaign Limited, which campaigns on behalf of community transport organisations. The interested parties have common representation.

5. In this judgment we will:

   (1) outline the relevant legal framework;

   (2) summarise the background to the proceedings;

   (3) identify the principles to be applied in deciding whether it is appropriate for the court to make an order declaring what the law is in a case of this kind;

   (4) consider whether or in what respect there is any real dispute about the law between the parties to these proceedings; and

   (5) explain our reasons for concluding that it is not appropriate to make a declaratory order in this case, as there is no such dispute, and that it is the responsibility of the Secretary of State to enforce the law as it stands.

(1) The legal framework

The 1981 Act

6. Section 12(1) of the Public Passenger Vehicles Act 1981 prohibits the use of a "public service vehicle" on a road for carrying passengers for hire or reward except under a "PSV operator's licence" granted in accordance with the Act. Pursuant to section 12(5), it is a criminal offence to use a vehicle in contravention of this rule (unless the operator establishes a defence under section 68(3) of the Act by proving that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence).

7. A "public service vehicle" is defined in section 1 of the Act as a vehicle used for carrying passengers for hire or reward which is either adapted to carry more than eight passengers or is used for carrying passengers at separate fares in the course of a business of carrying passengers.

8. PSV operator's licences, commonly known as "O-licences", are granted by traffic commissioners who are appointed by, but act independently of, the Secretary of State. To obtain an O-licence, an applicant must satisfy requirements of having an effective and stable establishment in Great Britain, being of good repute, having appropriate financial standing and having the requisite professional competence. The applicant must also have a designated transport manager who satisfies requirements of good repute and professional competence. The relevant requirements derive from the EU Regulation.

The 1985 Act

9. The prohibition in section 12(1) of the Public Passenger Vehicles Act 1981 against using a public service vehicle without an O-licence is subject to exemptions provided for in sections 18 to 23 of the Transport Act 1985. These exemptions apply to bodies operating under two kinds of permit:

   (1) A permit granted under section 19 to a body concerned with education, religion, social welfare, recreation or other activities of benefit to the community. Such a permit does not cover the use of a public service vehicle for the carriage of members of the general public or with a view to profit or incidentally to an activity which is itself carried on with a view to profit.

   (2) A "community bus permit" granted under section 22 to a body concerned for the social and welfare needs of one or more communities to provide a "community bus service". This is defined in subsection (1) as a "local service" provided by such a body without a view to profit, either on the part of that body or of anyone else. For this purpose, a "local service" means a service using public service vehicles for the carriage of passengers by road at separate fares on which passengers may travel for less than 15 miles (see section 2 of the Act).

10. Local authorities and other bodies designated by the Secretary of State may grant section 19 permits in relation to the use of public service vehicles other than large buses (defined as vehicles adapted to carrying more than 16 passengers). Section 19 permits

for large buses and community bus permits issued under section 22 may only be granted by traffic commissioners.

11. Bodies operating vehicles under section 19 or section 22 permits have to comply with some regulatory requirements including a requirement to have adequate facilities or arrangements for maintaining any vehicle used under the permit in a fit and serviceable condition. But these requirements are much less onerous than the regime applicable to bodies that require an O-licence.

The EU Regulation

12. Underlying the UK licensing regime is the EU Regulation, which took effect on 4 December 2011. As set out in article 1(2), the EU Regulation applies to "all undertakings established in the Community which are engaged in the occupation of road transport operator." Article 1(4) specifies certain categories of undertakings to which, by way of derogation from this general rule, the EU Regulation does not apply (unless otherwise provided for in national law). These include:

> "(b) undertakings engaged in road passenger transport services exclusively for non-commercial purposes or which have a main occupation other than that of road passenger transport operator;"

13. It is the meaning of the first part of this exception which is the subject of the present proceedings.

14. Article 22(1) of the EU Regulation imposes an obligation on member states to lay down the rules on penalties applicable to infringements of the regulation and to "take all the measures necessary to ensure that they are implemented".

(2) Background to the proceedings

Amendments to the 1985 Act

15. When the EU Regulation first came into force, someone reading sections 18 to 22 of the Transport Act 1985 would reasonably have got the impression that meeting the requirements for and being granted a section 19 or section 22 permit was sufficient to exempt the operator of a public service vehicle from the need to obtain an O-licence. It appears that this was also the view of the Department for Transport, which no doubt explains why, until recently, sections 18 to 22 made no reference to the EU Regulation. The Department's understanding was that an operator who met the requirements for a section 19 or section 22 permit would fall outside its scope: there was therefore no possibility that a body operating in accordance with such a permit would be contravening the EU Regulation.

16. The Secretary of State now accepts that this is not necessarily the case. Accordingly, with effect from 1 October 2019, sections 18 to 22 of the 1985 Act have been amended to make it clear that a section 19 or section 22 permit may only be granted to an "exempt body" and also that the dispensation from the requirement to hold an O-licence only applies to the use of any vehicle under a section 19 or section 22 permit by an "exempt body". An "exempt body" is defined in section 18(5) to mean a body to whom the EU Regulation does not apply for one of three possible reasons – one such reason being

that the body is not engaged (and does not intend to engage) in the occupation of road transport operator (as defined in the EU Regulation) and another reason being that the body falls within the exception in article 1(4)(b) because it is engaged in road passenger transport services "exclusively for non-commercial purposes" or because road transport operator is not its main occupation.

Community transport organisations

17. Already by 2010 there were, according to research conducted by the Community Transport Association, at least 1,692 community transport organisations in England alone. The term "community transport organisation" (or "community transport company") is not a term of art but is used to describe charities and other not-for-profit organisations which provide road passenger transport services as a means of fulfilling charitable or other public benefit purposes. There is a wide variety of such organisations, ranging from small local voluntary bodies to large undertakings with annual incomes exceeding £1 million a year. Many local authorities subsidise community transport organisations through grants.

18. Overall, the largest source of income for community transport organisations in the UK is contracts made with public bodies for the delivery of passenger transport services on their behalf. Such contracts are often awarded through competitive tenders. Pressures on local authority budgets in recent years have reduced public funding for road transport services and led to increased demand for community transport. In addition, community transport organisations have been encouraged to become more self-sufficient by seeking out alternative income streams and operating on a more business-like model.

19. The vast majority of community transport organisations operate under section 19 or section 22 permits.

The claimant's campaign

20. Mr Martin Allen, a director of the claimant, has described in a witness statement how he was instrumental in forming the claimant association in early 2014 with the aim of taking action to challenge what he and some other private operators believed was the award of commercial contracts by public authorities to community transport organisations operating unlawfully under section 19 and 22 permits rather than O-licences. The claimant contends that failure to implement and enforce the EU Regulation is giving such organisations an unfair cost advantage in competing with private operators because of the higher costs involved in operating public service vehicles under an O-licence. Mr Allen has a private transport company, JA Travel Limited, which operates in Nottinghamshire and which he claims has been driven out of the market for providing transport using public service vehicles because of such unfair competition.

Involvement of the Commission

21. The first step taken by the claimant association was to complain to the European Commission. This led to the Commission commencing infraction proceedings against the UK by sending a letter of formal notice in April 2015 stating that it appeared to the Commission that permits were being granted under sections 19 and 22 of the Transport Act 1985 to certain community transport companies allowing them to engage in road

passenger transport services without fulfilling the necessary requirements under the EU Regulation.

22. To date, no further action has been taken by the Commission but the Department for Transport has been keeping the Commission informed of the steps which the Government has taken to which we refer below.

The Erewash case

23. In August 2016 solicitors instructed by JA Travel Limited and the claimant wrote to the Senior Traffic Commissioner to complain about the activities of one particular community transport organisation, Erewash Community Transport Limited. The letter explained that JA Travel had lost out to Erewash in a competitive tender held by Nottinghamshire County Council to award contracts for the provision of certain passenger transport services on the basis of lowest price. On the back of this information and the most recent annual accounts of Erewash, which showed income from providing transportation services of almost £600,000, the claimant alleged that Erewash was engaging in commercial activity without an O-licence in contravention of the EU Regulation and domestic licence regime.

24. The Senior Traffic Commissioner referred the claimant's complaint to the Driver and Vehicle Standards Agency ("DVSA"), which is an executive agency responsible for enforcing operator licensing requirements on behalf of the Secretary of State. On 18 December 2016 the claimant made further complaints to the DVSA calling on it to investigate another nine community transport organisations. Many more similar complaints were made in January 2017. In total, the claimant complained about the activities of around 100 community transport organisations. All these further complaints were based solely on the published accounts of the organisations concerned.

25. The DVSA decided in the first instance to investigate Erewash, effectively treating it as a test case. After carrying out its investigation, the DVSA on 31 July 2017 sent a letter setting out its findings, which included findings that Erewash was engaged in road passenger transport services as its main occupation and not "exclusively for non-commercial purposes": as such, it required an O-licence in order to comply with the EU Regulation and was not entitled to operate vehicles under a section 19 permit, as it was doing.

26. On the same day (31 July 2017) the Department for Transport published a guidance letter regarding the issue and use of section 19 and section 22 permits for road passenger transport. The guidance letter summarised the decision reached in relation to Erewash (without identifying the company by name) and explained the reasoning behind the decision. All holders of section 19 and section 22 permits were asked to make sure that they were complying with the relevant legal requirements. The letter also announced an intention to launch a public consultation with a view to updating current guidance and amending the Transport Act 1985 to clarify the relationship between the conditions set out in the Act and the exceptions provided for by the EU Regulation.

27. In response to the Department's letter, many community transport operators raised concerns, which led to the House of Commons Transport Committee launching an inquiry into community transport in October 2017. Its report was published in December 2017.

28. In the meantime, the DVSA had referred Erewash to the traffic commissioner. After considering the evidence and representations made on behalf of Erewash, the traffic commissioner announced on 5 January 2018 that he did not consider it appropriate to convene a public inquiry (which would be a prelude to taking any regulatory action).

29. On 8 February 2018 the Department for Transport issued its consultation paper seeking views on (amongst other things) proposed guidance on the meaning and effect of the "exclusively for non-commercial purposes" exception in article 1(4)(b) of the EU Regulation.

30. In July 2018 Mr Allen's company, JA Travel Limited, again tendered for contracts with Nottinghamshire County Council to provide passenger transport services, and again lost out to Erewash. Mr Allen again considered that he had been at an unfair disadvantage in this competition because Erewash was continuing to operate under section 19 permits.

Pre-action correspondence

31. On 10 August 2018 the claimant's solicitors sent a letter before claim to the Department for Transport under the Pre-Action Protocol alleging unlawful failure to take enforcement action against Erewash and other community transport operators for operating without an O-licence and giving notice of the claimant's intention to apply for judicial review. In its response dated 13 September 2018 on behalf of the Secretary of State, the Government Legal Department explained the reasons for the Department's "current choice that it will not pursue enforcement action, including in particular a prosecution," against Erewash (or other community transport organisations which are in a materially identical position) "*at this time*" in relation to operating without an O-licence. The reasons were said to include:

> "a lack of certainty as to the precise test, or tests, to be applied for determining whether or not an organisation, such as a charity or other 'non-profit' entity, which is providing transport services for the benefit of people in the locality that it serves is, or is not, engaging in that activity 'exclusively for non-commercial purposes'."

32. The letter further stated that responses to its consultation had reinforced the Department's understanding that "there is an ongoing legal debate" about the proper interpretation and application of article 1(4)(b) of the EU Regulation. In a subsequent letter, the Government Legal Department indicated that, if proceedings were brought with a view to clarifying the law, the Secretary of State was likely not to oppose the grant of permission to apply for judicial review. That was indeed the Secretary of State's position after these proceedings were commenced on 12 December 2018.

Outcome of the consultation

33. On 7 March 2019 the Secretary of State made the Transport Act 1985 (Amendment) Regulations 2019. These Regulations, which were laid before Parliament on 15 March and came into force on 1 October 2019, effected the amendments to sections 18 to 23 of the Transport Act 1985 referred to at paragraph 16 above. The purpose was to make clear that a section 19 or section 22 permit can only be held by an organisation that is

exempt from the licensing requirements set out in the EU Regulation. The Regulations also gave effect to an exemption that is provided for in article 1(5) of the EU Regulation, which allows member states to exempt from its provisions road transport operators engaged exclusively in national transport operations having only a minor impact on the transport market because of the short distances involved.

34. On 15 March 2019 the Department for Transport published the Government response to its consultation. This stated that in the responses to the consultation views were divided on how the non-commercial purposes exception should be interpreted. The Government response referred to the present proceedings and said that the Government would not be making any further statement or providing any guidance on what this exception means until these proceedings have been concluded. The response also announced the Department's intention to carry out a review of the current domestic permit regime in 2019 "to see if the legislation is still fit for purpose and provides the correct balance for the bus sector as a whole". There is no evidence that such a review has yet begun.

The claimant's case

35. In his skilfully presented argument on behalf of the claimant, Mr Segan submitted that these proceedings have been brought as a last resort. There has, he submitted, been a failure on the part of the Secretary of State extending over many years to take any enforcement action, in particular prosecution, against any community transport organisation for operating without an O-licence in circumstances where the organisation is engaged in providing passenger transport for what, on a proper understanding of the EU Regulation, is or includes a commercial purpose. To seek to excuse this lack of action, the Secretary of State has invoked a perceived lack of clarity in the meaning of the non-commercial purposes exception. Mr Segan submitted that there is not, or at least should not be, any such lack of clarity in the law. However, he argued that the only way to dispel the perception of a lack of clarity – when the Secretary of State has chosen not to bring any prosecution or use any other means of clarifying the scope of the exception – is for this court to make an order declaring how article 1(4)(b) of the EU Regulation should be interpreted.

36. To this end, the claimant has put forward a series of suggested principles. The initial formulation of these principles was revised to take account of comments made on behalf of the Secretary of State and the interested parties in their detailed grounds of resistance to the claim. In the result, there was no dispute at the hearing about the correctness of these principles.

37. Against this background, the claimant asks the court to make an order declaring the uncontested principles, or such other principles as the court thinks fit, to be correct in law.

(3) Declaratory judgments

38. There is no doubt that an order declaring the meaning or effect of a legislative provision is a kind of order which the court has power to make and often does make in proceedings for judicial review. However, the proper exercise of the power is constrained by two fundamental principles which are relevant in this case.

39. The first principle stems from the essential function of a court of law, which (at least under the UK's constitutional arrangements) is to decide disputes between the parties to cases brought before the court by one (or more) of them. All court procedures – in particular, the core procedures of receiving evidence and hearing argument – are designed for this task. It also circumscribes the extent of the court's authority. Thus, an order made by a court only binds parties to the proceedings (and those with privity of interest). The limit of the court's authority is also reflected in the doctrine of precedent under which it is only the *ratio decidendi* (or rationale for what the court has decided) which can bind another court in a later case. If no disputed issue has been decided, no such precedent can be established.

40. These constitutional and institutional constraints are particularly relevant where the judgment that a court is asked to give is not a judgment ordering any party to the case to do anything but is a judgment declaring what the law is. As Lord Bridge said in *Ainsbury v Millington* [1987] 1 WLR 379, 381:

> "It has always been a fundamental feature of our judicial system that courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

41. At any rate in public law cases, it is not always necessary that the dispute should be one that at the time of the hearing has direct practical consequences for the parties to the proceedings. *Ainsbury v Millington* was a case involving private rights in which, by the time of the appeal to the House of Lords, the issue raised had become academic in the sense that deciding it would no longer have made any practical difference to the parties' rights against each other. In *R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450, 456-457, Lord Slynn (with whom the other members of the House of Lords agreed) made it clear that the decision in the *Ainsbury* case must be read as limited to the field of private law and that, in the area of public law, although the discretion must be exercised with caution, the court may decide to hear a claim which has become academic if there is a good reason in the public interest for doing so. Lord Slynn gave as an example a case where "a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future".

42. Similarly, the dispute need not be one that has arisen from a particular set of facts already in existence. The courts recognise that it sometimes serves a useful purpose to resolve an issue which will or is likely to have practical importance in the future. So, for example, in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318, the Court of Appeal was prepared to entertain a claim to resolve a dispute between an employer and a trade union about whether the use of length of service as a criterion in selecting employees for redundancy was lawful. There was not yet any case in which this criterion had actually been used to select an employee for redundancy; but the issue was not purely academic as it was likely to affect a large number of people and, if not resolved, would lead to claims of unfair dismissal. By contrast, in *R (Rusbridger) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357, where the claimant sought a declaration that the publication of a newspaper article which advocated the abolition of the monarchy was lawful notwithstanding the literal wording of section 3 of the Treason Felony Act 1848, the House of Lords held that the claim

should be dismissed as not only had no prosecution been brought under that provision – either in that case or in any other case since 1883 – but there was no possibility that a prosecution could succeed in light of section 3 of the Human Rights Act 1998.

43. In determining whether it is appropriate to make a declaration in a case where there is a real dispute between the parties, albeit not a dispute relating to a specific set of existing facts, relevant considerations include the following.

44. First, a declaration is more likely to be appropriate where the question raised is one of pure law and less likely to be appropriate where the question is fact sensitive. That is because, where the outcome may depend on particular facts, it is generally imprudent and less likely to be useful for a court to give a ruling without having all the relevant facts of an actual case before it: see e.g. *Rusbridger*, para 23.

45. Second, before making a declaration in such a case, the court will wish to be satisfied that all sides of the argument have been fully and properly put. It will therefore wish to ensure that all those who will be directly affected by the decision are either before the court or will have their arguments made by a party which represents their interests or has materially similar interests: see *Rolls-Royce*, para 120(6), per Aikens LJ; *R (Hampstead Heath Winter Swimming Club) v Corporation of London* [2005] EWHC 713 (Admin); [2005] 1 WLR 2930, paras 23-24.

46. Third, it is always relevant to consider whether there is a better or more effective way of resolving the issue: see e.g. *Rolls-Royce*, para 120(7).

47. A second key principle relevant in the present context derives from the division of responsibility in our legal system between the civil and criminal courts. The principle is that a civil court should avoid giving a declaration on a question which it is the role of the criminal courts to decide. For this reason, where criminal proceedings have been commenced or threatened, the civil courts should not rule on whether an offence has or has not been committed: see *Imperial Tobacco Ltd v Attorney General* [1981] AC 718. In addition, even where no prosecution has been brought or threatened and no existing conduct is in issue, a civil court should only grant a declaration that particular future conduct would or would not be contrary to the criminal law if there is a cogent reason to do so, since (other things being equal) questions of criminal law are most appropriately decided by criminal courts in cases where the question whether a criminal offence has been committed has actually arisen: see e.g. *R (Haynes) v Stafford Borough Council* [2006] EWHC 1366 (Admin); [2007] 1 WLR 1365, paras 13-21.

48. In this case the claimant has, rightly, been careful not to ask the court to make an order which would decide whether any organisation has operated in a way that (subject only to any defence under section 68(3) of the 1981 Act) constitutes a criminal offence by providing road passenger transport services for which it required but did not have an O-licence. Not only would it be wrong for the court to express any opinion on such a question when the organisation concerned is not a party to the proceedings, but to do so would usurp the role of the criminal court in any potential criminal prosecution. Accordingly, this court has not been asked to decide whether the "non-commercial purposes" exception applies on the facts of any individual case.

(5) Meaning of the non-commercial purposes exception

49. If there were an ambiguity in the wording of the EU Regulation which had given rise to a dispute between the parties to these proceedings about the meaning of article 1(4)(b), it might well be appropriate for the court to resolve such a question of interpretation. As we will explain, however, there is no such dispute.

General scope of the EU Regulation

50. A community transport organisation providing transport services under a section 19 or 22 permit and without an O-licence has no need to rely on the "non-commercial purposes" exception in article 1(4)(b) unless the organisation would otherwise fall within the scope of the EU Regulation, as defined by article 1(2). This depends on whether the organisation is an "undertaking" engaged in "the occupation of road transport operator" – defined in article 2(3) as including "the occupation of road passenger transport operator".

51. As defined in article 2(4), the term "undertaking" includes any natural or legal person or association or group of persons, whether profit-making or not. The fact that an organisation operates on a not-for-profit basis, therefore, does not take it outside the general scope of the EU Regulation.

52. The "occupation of road passenger transport operator" is defined in article 2(2) to mean the activity of any undertaking operating, by means of vehicles suitable and intended for carrying more than eight passengers, "passenger transport services for the public or for specific categories of users in return for payment by the person transported or by the transport organiser." An organisation which provides passenger transport for no payment is therefore not within the scope of the EU Regulation. (It is also outside the scope of the licensing requirement provided by section 12 of the Public Passenger Vehicles Act 1981 because it does not use any vehicle for carrying passengers for hire or reward.)

53. If a community transport organisation is providing road passenger transport services in return for payment so as to fall within the general scope of the EU Regulation, and this is its main occupation (so that it cannot rely on the second limb of article 1(4)(b)), the question arises whether the services are provided "exclusively for non-commercial purposes".

Approach to interpretation

54. It is common ground that, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the legislation of which it is part: see e.g. *Sociedad General de Autores y Editores de España v Rafael Hoteles SL* (Case C-306/05) [2007] Bus LR 521, para 34. Furthermore, where (as here) the provision in question is a derogation from a general rule, it should be interpreted strictly, although not so as to deprive the provision of its intended effect: see e.g. *Belgium v Temco Europe SA* (Case C-284/03) [2004] ECR 1-11237, para 17.

55. The rationale for the non-commercial purposes exception appears from recital (6) of the EU Regulation, which states:

> "In the interests of fair competition, the common rules governing the exercise of the occupation of road transport operator should apply as widely as possible to all undertakings. However, it is unnecessary to include within the scope of this Regulation undertakings which only perform transport operations with a very small impact on the transport market."

56. There was some debate at the hearing about whether, as Mr Bates for the Secretary of State submitted, the reference in this recital to the "transport market" is a reference to the EU internal market for road transport with the purpose being to remove impediments to cross-border trade, or whether, as Mr Segan for the claimant suggested, the phrase should be understood in a less technical sense. However, nothing turned on this point, as it did not result in any disagreement about what the words of article 1(4)(b) of the EU Regulation mean.

The Lundberg case

57. The same applies to reliance placed by the claimant in its written submissions on the decision of the Court of Justice of the European Union in *Criminal Proceedings against Daniel Lundberg* (Case C-317/12) (3 October 2013). In that case the CJEU was asked to interpret an EU regulation which required a tachograph to be installed in all vehicles used for the carriage of goods by road except for vehicles below a certain size which were used for "the non-commercial carriage of goods".

58. Mr Lundberg, in his leisure time, competed in car rallies as an amateur rally driver. He drove his own lorry to a fair to show his car. His participation in rallies and the fair was financed in part from his own funds and in part by sponsorship. The effect of the judgment was that he was using his vehicle for the "non-commercial carriage of goods" because he was using the vehicle as part of his hobby. The court stated (at para 24) that:

> "With regard, firstly, to the usual meaning of the concept of 'non-commercial carriage of goods', it must be noted that such a carriage occurs where there is no link with a professional or commercial activity, that is to say, where the carriage of goods is not performed with a view to earning income therefrom. As it is usually understood, the non-commercial carriage of goods therefore designates, in particular, the carriage of goods by a private individual as part of a recreational activity outside his professional activity."

59. Although in this passage the CJEU attached significance to the fact that the carriage of goods was "not performed with a view to earning income therefrom", it is (as mentioned) common ground that earning income from passenger transport services does not of itself indicate that the purposes are commercial in the present context, as the EU Regulation is only capable of applying where an undertaking is providing road passenger transport services in return for payment. Nor are the other factors relied on in the *Lundberg* case relevant for present purposes. That case was concerned with a differently worded regulation with different subject-matter, and the conclusion that the regulation applied "essentially to professional drivers and not to individuals driving for

private purposes" has no application to the type of situation with which the present proceedings are concerned.

Agreed principles

60. As mentioned earlier, all the parties to the present proceedings are in agreement about the meaning of the non-commercial purposes exception in the EU Regulation. In particular, the following principles are common ground between the claimant, the Secretary of State and the interested parties.

61. First, it is clear from the words of article 1(4)(b) that the focus is on the purposes for which the organisation is engaged in providing road passenger transport services and whether those purposes are exclusively non-commercial. This requires consideration of the totality of the road passenger transport services in which the organisation is engaged and whether any of those services is being provided at least partly for a commercial purpose. If an undertaking engages in road passenger transport services, to any extent, for purposes which are not entirely non-commercial, then that undertaking's engagement in such services does not fall within the exception.

62. Second, the fact that an organisation is a registered charity or is otherwise constitutionally prevented from distributing profits does not of itself mean that it is engaged in road passenger transport services "exclusively for non-commercial purposes". That is because the purposes for which an organisation is engaging in a particular activity may not be identical to its overall objects as an organisation.

63. Third, the mere fact that an organisation is providing road passenger transport services in return for payment does not mean that it is providing such services for purposes which are, even partly, commercial. If that were so, the exception would be otiose, since an undertaking which receives no payment in return for its services is not within the scope of the EU Regulation to begin with and therefore has no need to rely on the exception. That is because, as already indicated, such an undertaking is not engaged in the occupation of road passenger transport operator, as defined in article 2(2) of the EU Regulation.

64. Fourth, 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 a purpose of providing a particular road passenger transport service is simply to generate revenue or profits which can then be used to fund or subsidise other road passenger transport services which are themselves being provided entirely for social or other non-commercial purposes, the organisation will not be able to rely on the exception. The same will be true if any of its road passenger transport services is being provided wholly or partly for the purpose of generating revenue or profits which can then be used to fund activities outside the field of road passenger transport undertaken exclusively for charitable or other non-commercial purposes.

65. Fifth, beyond this, the question whether an organisation is "engaged in road passenger transport services exclusively for non-commercial purposes" is one of fact, to be answered on the basis of an examination, in the round, of features of the organisation and its activities from which the purposes for which it engages in road passenger transport services can be ascertained or inferred. Relevant considerations include:

(1) the level of the payments received by the organisation for providing its road passenger transport services;

(2) whether or to what extent the organisation is providing services under contracts won in competitive procurement or tender exercises;

(3) the size and scale of its operations in the market for road passenger transport services; and

(4) the extent to which the organisation relies upon the support of unpaid volunteers to deliver its road passenger transport services or, in so far as it relies on paid staff, whether they are paid at levels comparable to the staff paid by commercial operators to perform similar roles.

(5) Conclusions

66. As we have indicated, the principles set out above are not in dispute between the parties to these proceedings. Nor did any of the parties identify any issue regarding the proper interpretation of the non-commercial purposes exception about which they now disagree. In the absence of such an issue, an argument in the abstract about whether or not the law is clear is not itself a question of law on which a court can adjudicate. That is not to say that there is or will be no dispute about how the question whether a community transport organisation falls within the exception is to be answered on the facts of any particular case. Indeed, it is apparent that in some cases the application of the test is likely to be far from straightforward. We are not asked, however, nor – as explained earlier – could the court properly be asked in these proceedings, to decide whether, as a matter of fact, any particular organisation does or does not fall within the exception.

67. We conclude that there is no issue or dispute between the parties to these proceedings for the court to resolve or which the court is actually being asked to resolve. In these circumstances, it is not appropriate to make any declaration about the meaning of the non-commercial purposes exception; and even if the court were to do so, such a declaration would not, for the reasons given earlier, have any binding legal force.

68. By the same token, however, these proceedings have not borne out the assertions made by the Government in pre-action correspondence (and in its response to its consultation) that there is a lack of certainty or clarity as to the test to be applied for determining whether or not an organisation such as a charity or other 'non-profit' entity which is providing passenger transport services is, or is not, engaging in that activity "exclusively for non-commercial purposes". No issue about the legal test to be applied has been identified. It follows that the Secretary of State cannot appeal to such an alleged lack of certainty or clarity regarding the correct legal test to justify a decision not to take action to enforce the provisions of the EU Regulation. Applying the test to particular facts may be difficult. But that is not, of itself, a good reason for choosing not to enforce the law. This is particularly so in the present context where article 22(1) of the EU Regulation requires national authorities to take all necessary measures to ensure that the provisions of the EU Regulation are implemented. If the Secretary of State considers that prosecution (or other enforcement action) is otherwise appropriate, the fact that the organisation concerned denies that, on the agreed or alleged facts, it is operating in breach of the regulation would not justify a refusal to take such action.