

Formally handed down 21.1.2014



Case No: A20180115

IN THE CROWN COURT AT SHEFFIELD

ON APPEAL FROM
THE MAGISTRATES COURT AT SHEFFIELD

IN THE MATTER OF THE LOCAL GOVERNMENT
(MISCELLANEOUS PROVISIONS) ACT 1976

The Law Courts
West Bar
Sheffield
S3 8PH

Date: 21st January 2019

Before:

THE RECORDER OF SHEFFIELD
His Honour Judge Jeremy Richardson QC

MRS S KNIGHT JP
And
MRS L WOOD JP

Between:

ROTHERHAM METROPOLITAN BOROUGH COUNCIL Appellant

- and -

XYZ Respondent

Mr Ben Dylan Williams and Mr Freddie Humphreys (instructed by Legal Services of Rotherham Metropolitan Borough Council) for the Appellant

Miss Zaiban N Alam (instructed by Oxley and Coward Solicitors, Rotherham) for the Respondent

Hearing dates: 21st December 2018

OPEN JUDGMENT [REDACTED]

THIS IS AN OPEN JUDGMENT WHICH IS HANDED DOWN IN PUBLIC AND MAY BE REPORTED OR DISTRIBUTED PUBLICLY. THE FOLLOWING CAPTION APPEARS ON THE CLOSED JUDGMENT WHICH HAS BEEN HANDED DOWN IN PRIVATE

THE PORTIONS THAT HAVE BEEN REDACTED FOR THE OPEN JUDGMENT ARE CLEARLY MARKED

THIS IS A CLOSED JUDGMENT AND IS ONLY MADE AVAILABLE TO THE APPELLANT AND LAWYERS REPRESENTING THE APPELLANT.

THE COURT WOULD REGARD IT AS VERY SERIOUS CONTEMPT OF COURT IF THERE SHOULD BE ANY WIDER DISTRIBUTION OF THE CLOSED JUDGMENT.

THE COURT HAS FURTHER ANONYMISED THE JUDGMENT TO DELETE THE NAME OF THE RESPONDENT IN BOTH THE OPEN AND CLOSED JUDGMENT.

ANY APPLICATION TO UN-REDACT THE CLOSED JUDGMENT IN FULL OR IN PART SHALL BE MADE TO THE RECORDER OF SHEFFIELD OR TO THE ADMINISTRATIVE COURT OF THE HIGH COURT IN THE EVENT OF AN APPLICATION FOR JUDICIAL REVIEW OR ANY FORM OF APPELLATE PROCEEDINGS.

The Recorder of Sheffield:

Introduction

1. This judgment gives our reasons for accepting a claim for Public Interest Immunity (PII) in respect of certain material proposed to be deployed by Rotherham Metropolitan Borough Council (the appellant) in appellate proceedings brought under the Local Government (Miscellaneous Provisions) Act 1976 about the revocation of a Hackney Carriage licence (the licence) which had been originally granted to XYZ (the respondent) in 2000. A summary of the proceedings is set out at paragraph 6 of this judgment (*infra*).
2. We have not yet determined the appeal and will hear further evidence and submissions following the handing down of this judgment.
3. It will be necessary to hand down this judgment in two formats.
4. The first format will be the Closed Judgment which will give our full reasons and will, we hope, in due course be able to be openly available to the parties and to the public. This judgment will only be available to the appellant at present. It will be clearly indicated to be the Closed Judgment. It would be regarded as a serious contempt of court if the embargo on its publication should ever be breached prior to us un-redacting the judgment.
5. The second format will be the Open judgment. This will have significant portions redacted from the Closed Judgment. We hope to make the Closed Judgment as full as possible to enable our decision to be understood. Where portions have been redacted it will be clearly stated and the paragraphs will be numbered but marked "*redacted for the open judgment*".

The Appeal

6. On 9th February 2018 the Appellant revoked the licence of the respondent. He appealed to Sheffield Magistrates Court. That court allowed the appeal of the respondent on 18th May 2018. The appellant local authority now appeals against that decision. It is a feature of this type of proceeding that there is a second right of appeal and the hearing is *de novo*. In simple terms, the Crown Court re-hears the case and makes up its own mind on the material before it, regardless of whether that material was before the lower court or the licencing authority at either of the earlier hearings. The Crown Court will allow the appeal if in its view the decision which is the subject of appeal was wrong. In this case, that is the decision of the magistrates' court.
7. Put very basically: the licencing authority revoked the licence; the magistrates court reversed that decision and granted the licence. We must make our decision on appeal (the second appeal) afresh based upon what is before us.
8. In this judgment we do not see it is necessary to set out the relevant law relating to the powers of this court. The above summary will suffice for this purpose.

9. The appeal came before me on 5th September 2018 for directions. I directed that the issue of the claim to PII be determined by the full court on 21st December 2018. It was hoped the entire case could be the subject of disposal on that date. In the end, it was only possible for the PII issue to be resolved. The balance of the case is held over until after this judgment is handed down on 21st January 2019.
10. It will be helpful if we set out the backdrop to this appeal. It must be remembered that we have not heard any submissions about the appeal in its full form. We have simply heard argument on the PII issue.

The Backdrop to the Appeal

11. The backdrop to this appeal may be shortly stated.
12. A Hackney Carriage driver must be a fit and proper person to hold such a licence. It must be remembered that it is a licence that the local authority may issue and there is no right to obtain one. This judgment is not the correct vehicle to set out what is meant by a fit and proper person in the context of being a Hackney Carriage driver. The concept of being a fit and proper person is distinctly occupation and context specific. The factors to consider whether a person is a fit and proper person to be a school-teacher or Barrister or Solicitor is necessarily different to factors relating to a taxi driver. There will be some overlap, of course, but we wish to emphasise that such an expression must be judged in the way we have just described – occupation and context specific.
13. Certain it is the holder of a Hackney Carriage licence must be a fit and proper person and that must embrace, inter alia, an ability to drive a car safely and be free of any serious driving convictions. It must also embrace public safety because of the interaction with the public in the course of trading as a driver of a taxi. We cover this more fully at paragraph 55 of this judgment (infra).
14. The respondent was a taxi driver. He obtained a licence from the appellant local authority on 20th June 2000. There have been three episodes of the appellant having his licence revoked by the appellant local authority and the magistrates then, upon appeal, reinstating it. There has been, hitherto, no further appeal to this court by the local authority.
15. The basic history is this: the licence of the respondent was revoked in February 2011 by the Licensing Board of the appellant. He appealed to Rotherham Magistrates Court and that appeal was allowed. His licence was reinstated. The same happened – a revocation and a reinstatement – in 2014.
16. We have briefly explained the history of these proceedings at paragraph 6 (supra). We deliberately do not set out any of the circumstances of this case as we shall have to resolve the appeal following handing down this judgment in its redacted public format to all the parties, and in its full open format to the appellant alone.
17. The appellant was desirous of making available to this court material which it asserted was subject to PII. The respondent was made aware of the

application to treat the material as being covered by PII. Accordingly, submissions were made on two fronts – procedural and substantive.

The Submissions of the Parties

The Appellant

18. The appellant submits that the court is permitted to determine a claim by a party that certain material is covered by PII. Counsel have very helpfully set out the argument fully in written submissions which we have considered with great care. The argument was more fully developed during the course of oral submissions in an open hearing.
19. Put very shortly Mr Williams covered the following areas in his very able argument deployed on behalf of the appellant. We are very conscious that by simply covering the headings, we are in no way doing full justice to the nuance and force of the argument. However, we feel we must, at least, cover the ground rather superficially when describing his argument.
20. He started by setting out the nature of these appellate proceedings in the context of licencing. He then went on to explain how PII is utilised on occasion in all form of proceedings – family cases (indeed, I have given a High Court judgment in the Family Division in one such case) – criminal cases (all judges in the criminal courts have experience of this from time to time) – immigration cases and inquests. Mr Williams cited a number of authorities where the precise nature of the duties of the licencing authority were examined in detail and, he argues, there must be an analogous power invested in this court to grant PII to material relevant to an issue to be determined when it is necessary.
21. The argument in its shortest form is that this court has the power to entertain a PII claim.

The Respondent

22. The respondent, through Miss Alam, who advanced a bold and determined argument, submitted this court has no power to consider PII in this form of proceeding. She accepted that the concept of PII can and does arise in all manner of other types of cases before the courts and tribunals. She called our attention to a number of statutory provisions and procedural rules for dealing with such situations.
23. In simple terms Miss Alam asserts that, absent a specific statutory regime (and she cites the system under the Justice and Security Act 2013), there is no power to do as the appellant seeks.
24. Miss Alam also make great play with the concept of open justice and the rights of litigants under Article 6 of the Convention. That is a valid point and one which has caused us to reflect with great care on whether we should entertain the notion that we will see material whereas one of the parties will not. She submits that is simply unfair and amounts to secret justice.

25. Furthermore, unless this case is governed by the system under the Justice and Security Act 2013, embracing the Closed Material Procedure, then there is no inherent power or jurisdiction to entertain a PII claim.
26. It will be appreciated that we have greatly attenuated the argument of both sides. The much fuller arguments advanced in writing and in oral submissions by both sides have been most carefully considered. We forbear to set out a more detailed exposition of the respective contentions of each side. The submissions of both parties can be annexed to this judgment, if each side is desirous of that course. We do not regard that as essential for our judgment to be understood. We would see it as important if our decision is to be the subject of challenge.

The Procedure

27. The procedure we adopted was to determine whether PII could be properly claimed in this form of appeal, before proceeding further. In that regard we heard submissions from both sides in open court without any reference to the nature of the material. We decided that these appellate proceedings were amenable to a claim to PII. We gave a very short judgment, but made it clear our definitive reasons would be contained in this judgment. We then sat in private (absent the respondent, his counsel and solicitor and the public gallery was cleared). The only persons present, apart from ourselves, were counsel and solicitors for the appellant as well as the associate and usher.
28. We then considered in private the material asserted to be covered by PII.
29. Having considered the material, we had no hesitation in accepting the claim to PII in respect of it. We then heard further submissions as to how to proceed. Having decided upon the correct course and having agreed the statement that counsel for the appellant would make, we resumed sitting in open court. The agreed statement was read, and we adjourned the hearing of the appeal until today. We indicated we would give our reasons for this decision today and there would be (1) a Closed Judgement giving our full reasons, and (2) an Open Judgment (but redacted).
30. We will now set out the material in respect of which we have granted PII. This will not be made available in the Open Judgment. For the purposes of the Closed Judgment we have *italicised* everything which is not contained in the Open Judgment and has been redacted from it.

The PII Material

31. *Redacted for the Open Judgment*
32. *Redacted for the Open Judgment*
33. *Redacted for the Open Judgment*
34. *Redacted for the Open Judgment*
35. *Redacted for the Open Judgment*

Crown Court Approved Open Judgment (Redacted):

36. *Redacted for the Open Judgment*
37. *Redacted for the Open Judgment*
38. *Redacted for the Open Judgment*
39. *Redacted for the Open Judgment*
40. *Redacted for the Open Judgment*
41. *Redacted for the Open Judgment*
42. *Redacted for the Open Judgment*
43. We feel we need to set out the law and our decision on the PII point.
44. There are in fact three questions calling for decision (the second and third only arises if the answer to the first is in the affirmative):
 - (1) Can PII be claimed in this form of appellate proceedings in the Crown Court in a licencing appeal?
 - (2) If so, what are the principles that govern the decision?
 - (3) Having applied those principles, is it right to grant PII to the material which has been made available to us?
45. Paragraphs 31 to 42 are redacted from the Open Judgment. It will be necessary to redact further paragraphs when we answer both the first and second question. We feel that the entirety of our answer to the third question will have to be redacted.

The Law: Discussion in respect of Questions (1) and (2)

46. In this part of the judgment we set out the law relating to questions (1) and (2) which call for decision.

Question (1)

47. Our starting point is the nature of the proceedings we are conducting. This is a second appeal in a taxi licensing case where the appellant local authority has revoked the licence of the respondent pursuant to section 61 of the Local Government Act (Miscellaneous Provisions) Act 1976. This court acting in its appellate capacity has the power to determine the appeal based upon a full rehearing of the matter and we may entertain material and evidence which was not considered either by the licencing board and/or the magistrates court in the first appeal. It is an entirely fresh assessment of whatever admissible evidence is presented to us. We may allow the appeal if we determine that the decision made below was wrong in our judgment. We are not reviewing the decision or decisions below, we are deciding afresh based upon what is before us.

48. As Mr Williams pointed out in submissions, we are bound by the Magistrates Courts Rules 1981 in this type of appellate procedure and by Rule 14 in particular.
49. *Redacted for the Open Judgment*
50. We do not feel it necessary to set out the law relating to PII and the history of the development of this branch of the law of evidence. We are aware the use of PII has entered the realm of (inter alia) family law and civil proceedings as well as crime and immigration work. There is no previous case law from any court to indicate that PII has ever been claimed in this form of appellate proceedings relating to the licencing of taxis or any other form of analogous appellate work in the Crown Court. It is well known that PII is not infrequently claimed in ordinary criminal cases when a disclosure issue arises. The law relating to that is now well established.
51. *Redacted for the Open Judgment*
52. We are also aware that a taxi driver must be a “fit and proper person” to hold a licence. We take the view that is a distinctly occupation specific rubric.
53. We feel we can do no better than adopt the analysis of Lord Bingham of Cornhill CJ (with whom Mr Justice Thomas, as he then was, agreed) giving the main judgment in McCool v Rushcliffe Borough Council [1998] 3 All ER 889. The Divisional Court made it clear that there must be good reasons for a licencing authority to justify a decision that a person is not fit and proper. He indicated that such decisions are distinctly fact and context specific. It was also made clear that unless the person is fit and proper, the licencing authority are not permitted to grant a taxi licence. We have considered that case with some care.
54. We are of the view that the same principles apply when a person is being considered for revocation of a licence. The licencing authority must revoke the licence if they have good reason to adjudge the licence holder no longer is a fit and proper person.
55. Basing ourselves upon McCool it is our view that in order to be a fit and proper person in the context of being a taxi driver there is a demand that the person has the following qualities (we apologise for the use of the masculine pronoun, but it applies to women too):
- (1) He must be a proficient and safe driver;
 - (2) He must have a good driving record;
 - (3) He must have appropriate and adequate experience;
 - (4) He must be physically and mentally fit for the task of driving a taxi;
 - (5) He must be honest;

- (6) He must not be someone who would take advantage of his role as a taxi driver to abuse or assault passengers or otherwise indulge in criminal acts or reprehensible conduct relating to driving a taxi.
56. We are of the view that public safety is an overarching consideration of the licencing authority and this court upon appeal. That is a broad term, but one which is readily understood by anyone who is required to make this sort of decision. *[Sentence redacted for the Open Judgment]*
57. We take the view that this court – as well as the licencing authority (and we venture to suggest the magistrates court in its appellate capacity) may take into account a wide range of evidence including credible hearsay. Prejudice or ill-founded assertions must be cast aside.
58. *Redacted for the Open Judgment*
59. The local authority cannot ignore the material. It is submitted the only way it can be properly considered is by utilising PII. This occurs in every other sort of judicial proceedings and there are now well-known safeguards for consideration of such material. The court is the custodian, guardian and arbiter of fairness in this respect as in relation to every other aspect of the proceedings before it. The court is very alive to the duty imposed upon it by Article 6 of the Convention.
60. It would, indeed, be a curious phenomenon if material could be withheld from a taxi driver on PII grounds who was being prosecuted in the Crown Court for a crime, but the same material could not be the subject of PII in the same court sitting in its appellate capacity in a licencing case.
61. We have asked ourselves whether there is any specific or implied prohibition on this court entertaining a PII claim in proceedings of the type before us now. We have considered the contention of the respondent that in the absence of specific authority to entertain PII, there is no power to do as the appellant suggests. We are aware there are specific rules contained within the Criminal Procedure and Investigations Act 1996 about disclosure. The operation of the PII regime in criminal proceedings was fully explained in the very well-known case of *R v H* [2004] UKHL 3. We are also alive to the rule relating the use of PII in civil proceedings under the Civil Procedure Rules 1998 (see CPR Part 31.19). We are equally alive to the rule relating to the use of PII in family proceedings under the Family Procedure Rules (see FPR Part 21.3).
62. We are, furthermore, well-aware of the statutory regime in respect of Closed Material stemming from the Justice and Security Act 2013. This is all connected with national security. In our judgment that Act in no way assists the argument of the respondent to this appeal. It is a completely different regime and specifically covers a limited number of specialist tribunals.
63. It is our judgment that there is no prohibition on the use of PII in this type of appellate proceedings.
64. We approach this matter in the following way.

65. PII is not merely a procedural rule. There are procedural rules in several jurisdictions as to how it is handled and processed, but that is not to be confused with the key legal principle which has its foundation in public policy and is also recognised by statute, that certain material may be withheld from another party to the proceedings, but made available to the court, providing it can be properly adjudged that disclosure of the material would be harmful to the public interest. It is for the court to adjudge the issue. There is no restriction on the type of proceedings in which that rule of law may be invoked. There may be differing procedural rules in separate jurisdictions as to how that is done, but the absence of such a regimen does not prevent consideration of a claim for PII. It is our view, in the absence of such a regimen, the court must devise its own rules to provide for fair consideration of the issue.
66. Once the principle of PII being permitted to be claimed in a court, there is then the procedural conundrum to be resolved as to how to determine the tension between two important and competing public interests: (1) the public interest that justice must be openly administered where each side has access to relevant material in the case before the court so that it can be properly tested and evaluated; and (2) the equally important rubric demanding that injury should not be caused to the public interest by disclosure of certain material or information.
67. Put simply, the principles governing this issue are substantially the same regardless of the jurisdiction in which the PII claim is made. It may, however, be claimed in any court or tribunal in our judgment. The procedural rules may be different, but the principles are the same. We reiterate, PII is not a procedural device, it is a rule of law in which procedures are in place to determine whether it can be properly claimed by a party.
68. Consequently, we answer Question (1) in the affirmative. We shall now consider Question (2).

Question (2)

69. In determining this issue, we have been greatly helped by the decision of the House of Lords in R v H (supra). That case was decided in the context of disclosure of unused material in a criminal case. As there are no specific procedural rules for consideration of a claim for PII in this form of appellate proceedings we feel we must adapt the guidance given in that case in respect of the balancing act. In this case, of course, we are considering material which would be for use in the appeal hearing and not merely material for disclosure in a criminal case as unused material.
70. In our judgment the appropriate way to approach the matter is this:
- (1) The court must start its consideration of a claim for PII from the key principle that open and fair justice ordinarily demands that there must be disclosure to all parties of relevant material sought to be advanced in a case.

- (2) That key principle must not be the subject of derogation lightly or without the most rigorous examination of the material sought to be withheld on the grounds of PII.
- (3) The court must examine the nature and context of the proceedings, in particular the issue that has to be decided by the court (the statutory or regulatory framework). In the context of this appeal the nature of the appellate proceedings, the duty placed upon the decision maker (that is the local authority).
- (4) The court must examine the material carefully and in detail. That would normally be executed in a private hearing.
- (5) The court must secure a clear statement as to what public interest is engaged and how it would be injurious to the public interest if the material should be made openly available to the other parties.
- (6) The court must enquire if there is a mechanism by which the interest of open justice can be achieved, short of complete non-disclosure, perhaps by giving a general indication as to nature of the material as opposed to specific details. Can the public interest be protected by a proportionate and less draconian disclosure of generic information?
- (7) The court must in the final analysis ask itself if there is a real risk of serious injury or prejudice to a public interest if full disclosure is made to the other parties.
- (8) If the answer to question (7) is in the affirmative, then the claim to PII must be accepted, providing it has considered and ruled out any less draconian mechanism envisaged by paragraph (6).
- (9) The court must approach all these issues with the principle of minimum derogation firmly in mind.

71. In this appeal and in these types of appeal we are -- albeit we are a court -- considering an issue of licencing. That is, of course, important, but we are not finding facts which may result in the removal of a child from a parent or hearing a criminal case. We must also have well in mind the statutory regime governing a local authority when a licencing decision is to be made [*Part of the sentence redacted from the Open Judgment*]. One factor a court must have at the forefront of its evaluation is the statutory requirement that the taxi driver must be a fit and proper person.

The Decision – the answer to question (3)

72. In the result we have come to the clear conclusion that PII may be claimed in any sort of proceedings before any court; and, thus, may be considered by this court in these appellate proceedings. We have set out the way in which we must approach that issue when it arises – as it has in this appeal.
73. We must now consider our answer and make our decision.

Crown Court Approved Open Judgment (Redacted):

74. We have well to the forefront of our examination of the material the cardinal rubric of there being open justice where there is full and proper disclosure of all relevant evidence. We will not derogate from that lightly, and we shall only do so to the extent that is absolutely necessary. We are naturally anxious about the fact the respondent cannot answer any of the matters raised in the material if we allow the claim of PII to be made. There is necessarily an element of procedural unfairness to him. We must, if we can, ameliorate that.
75. We have examined the material. We have set out that material in an earlier part of this judgment in a redacted portion of the Open Judgment, but sufficiently in the Closed Judgment (paragraphs 31 to 42 – supra).
76. *Redacted for the Open Judgment*
77. *Redacted for the Open Judgment*
78. *Redacted for the Open Judgment*
79. *Redacted for the Open Judgment*
80. *Redacted for the Open Judgment*
81. *Redacted for the Open Judgment*
82. *Redacted for the Open Judgment*
83. *Redacted for the Open Judgment*
84. *Redacted for the Open Judgment*
85. *Redacted for the Open Judgment*
86. *Redacted for the Open Judgment*
87. *Redacted for the Open Judgment*
88. *Redacted for the Open Judgment*
89. We will now hear the remainder of the appeal.

Conclusion

90. In the result we have decided the following.
91. First, PII may be claimed in any form of proceedings in court. It is a rule of law and not purely a procedural matter.
92. Second, PII may, in these circumstances, attach to material in appellate proceedings involved in the licencing of taxi drivers.
93. Third, we have set out the principles governing the determination of a PII claim in proceedings such as these.

Crown Court Approved Open Judgment (Redacted):

94. In the upshot, and applying those principles, we accept the claim for PII in this appeal. We have approved the statement made at the conclusion of the hearing on 21st December 2018
95. If, as, and when we can un-redact the closed judgment we shall do so. In the mean while the closed judgment will only be available to the appellant. The open judgment with paragraphs redacted will be available to the parties and to the public at once.
96. We feel that the name of the respondent should be anonymised in fairness to him given this judgment may – once unredacted, perhaps even in its redacted format – enter the public domain. We see no reason to camouflage the appellant local authority.
97. An order encapsulating the decision of the court and its final decision on the appeal may be drafted by counsel hereafter and approved by the court.