NCN: [2024] UKFTT 535 (GRC)

Case Reference: D/2024/51

First-tier Tribunal
General Regulatory Chamber
Transport

Heard on: 30 April 2024
Decision given on: 25 June 2024

Before

JUDGE KENNETH MULLAN
MEMBER KERRY PEPPERELL
MEMBER GARY ROANTREE

Between

ADAM CURYLO

Appellant

and

REGISTRAR OF APPROVED DRIVING INSTRUCTORS

Respondent

Representation:
For the Appellant: The Appellant did not have formal representation but was accompanied by Mr Kent, as a witness
For the Respondent: Mr Russell

Decision: The appeal is allowed

REASONS

Background

1. This appeal is from a trainee driving instructor who made an application for a trainee licence under s.129 of the Road Traffic Act 1988 ("the Act") which was refused. A licence under s.129(1) is granted "for the purpose of enabling a person to acquire practical experience in giving instruction in driving motor cars with a view to undergoing ….. such part of the examination ….. as consists of a practical test of ability and fitness to instruct".

2. The circumstances in which trainee licences may be granted are set out in s.129 of the Act and in the Motor Cars (Driving Instruction) Regulations 2005 ("the Regulations"). In order to qualify as an approved driving instructor an applicant must pass the qualifying examination, which is in three parts: the written examination; the driving ability and fitness test; and the instructional ability and fitness test (see reg.3(2)). Each part must be passed in the stated order and before the next part is attempted. Three attempts at each part are permitted but the whole examination must be completed within two years of passing the written examination (but subject to reg.3(4)(c) which permits a further attempt at the Part Three test outside the period if the booking was made within it). Failure so to complete requires the whole examination to be retaken. A trainee licence may be granted under s.129 of the Act once the driving ability and fitness test has been passed. The holding of a trainee licence is not a prerequisite to qualification; on the contrary, many applicants qualify without having held such a licence.

3. The Appellant's name is not now and has never been on the Register.

4. On 1 February 2023 the Appellant made an application to commence registration. In that application, answered 'no' to the question 'Have you been convicted of a motoring offence?' He also answered 'no' to the question 'Do you have any endorsements on your driving licence'.

5. He also affirmed a declaration that he understood that he must tell the Registrar within 7 days if he was convicted of any offence, including motoring offence.

6. On 9 February 2023, the Registrar wrote to the Appellant in the following terms:

> 'I refer to your application to become an Approved Driving Instructor. On your application you failed to declare that you received 3 penalty points for exceeding speed limit on a public road on 20 September 2020.
>
> This will not affect your application, but I should advise you of the obligation which lies on every motorist, and particularly on a driving instructor, to show due regard for the motoring laws. You will appreciate that the personal example

of an instructor in this respect is just as important as their skill in giving driving instruction.
Although no further action will be taken on this occasion, I must point out that if it becomes necessary in the future to consider whether or not you are a 'fit and proper' person to have your name included in the register your record as a whole will be taken into account.'

7. On 1 December 2023, the Appellant submitted an on-line application for a trainee licence.

8. In the application, the Appellant declared a motoring offence for exceeding the speed limit on a public road on 12 September 2023. The Registrar stated a routine check of the DVLA database confirmed the offence on 12 September 2023 but also the commission of the same speeding offence on 20 September 2020.

9. The Registrar has submitted that the failure to notify him of the offence committed on 12 September 2023 is a clear breach of the declaration he made on his application to start the qualification process submitted on-line on the 01 February 2023.

10. Considering these offences, the Registrar considered that the Appellant was not a fit and proper person to hold a licence which allowed him to teach.

11. Following notification to the Appellant that the Registrar was considering the refusal of his application for the second licence, the Appellant made representations to the Registrar. After considering those representations, the Registrar decided to refuse the application and notified the Appellant of that decision by way of email correspondence dated 27 December 2023. The Appellant has appealed against the decision dated 27 December 2023.

Respondent's reasons for decision

12. In the Statement of Case the Registrar has set out the reasons for the refusal of the application, as follows:

'6. The reasons for my decision are: -

a) The Appellant's driving licence is currently endorsed with **6** penalty points having accepted two fixed penalty notice offences for **exceeding statutory speed limit on a public road.** He had been warned about his future conduct when accepted to start the qualification process. The conditions for entry onto the register extend beyond instructional ability alone and require that the applicant is a fit and proper person. As such, account is taken of a person's character, behaviour and standard of conduct. Anyone who is an Approved Driving Instructor (ADI) is expected to have standards of driving and behaviour above that of the ordinary motorist. Teaching (generally) young people to drive as a profession is a responsible and demanding task and should only be entrusted to those with high standards and a keen regard for road safety. In committing these

offences, the latest whilst progressing through the qualification process, I do not believe that the Appellant has displayed the level of responsibility or commitment to improving road safety that I would expect to see from a potential ADI.

b) The Government increased the payment levels for serious road safety offences such as speeding, the requirement to control a vehicle (including mobile phone use), passing red traffic lights, pedestrian crossings and wearing a seatbelt. These offences contribute to a significant number of casualties. For example, in 2020 excessive speed contributed to 219 deaths, 1,674 serious injuries and 4,666 minor injuries, using a mobile phone contributed to 17 deaths, 119 serious injuries and 308 minor injuries; and careless driving, reckless, or in a hurry contributed to 204 deaths, 3,487 serious injuries and 11,126 minor injuries.

c) As an officer of the Secretary of State charged with compiling and maintaining the Register on his behalf, I do not consider that I can condone motoring offences of this nature. To do so would effectively sanction such behaviour if those who transgress were allowed a licence to teach others.

d) To allow the Appellant a licence would be unfair to other applicants who had been scrupulous in observing the law and could undermine the publics' confidence in the registration system.

Appellant's submissions

13. In his written representations to the Registrar, the Appellant made the following submissions:

'Thank you for your email of today. I hope after reading this letter that you will feel comfortable that I am, indeed, a fit and proper person to be a driving instructor.

Please be assured that I take my driving very seriously and I do not condone speeding. I consider myself to be an excellent driver with a very positive attitude to driving safely and within speed limits.

My current employment is as a private hire self employed taxi driver and have been since May 2022. Prior to this I was an HGV driver for 10 years (starting in 2012).

I have calculated, that whilst driving lorries I completed around 55,000 miles per year and, more recently, as a taxi driver it is also a very similar figure approaching 60,000 miles per annum. I passed my test in Poland in 2003.

I can only apologise and explain my circumstances over the last few years.

I offer no excuse to exceeding the speed limits on the occasions that you describe. I am obviously human and can, despite high levels of concentration, make mistakes.

However, I can explain the details as you have requested:,.

1. Fixed penalty 20th September 2020

I was driving my car on the A1079 - Pocklington to Hull. Dual carriageway National speed limit of 70mph. On overtaking I inadvertently exceeded the speed limit. The speed camera recorded my speed at 74mph.

2. Warning of exceeding speed limit on 9th February 2023. Leading to a Speed Awareness course in March 2023.

I was driving my car on Great Coates road, Grimsby in what I thought was a 40mph speed limit at 35mph (I've been informed this road used to be a 40mph limit). Unfortunately it was a 30mph speed limit. I only discovered this when I received the police notice. I decided to attend the speed awareness course (by the way, I found this very useful).

3. Fixed penalty 12th September 2023

I was driving my car on the A1079 -from York to Hull on a dual carriageway which finished and became a single carriageway, therefore speed limit reduced to 60mph. I only became aware of my excessive speed upon receiving the police notice. As far as I can remember my speed was recorded in the high 60's.

I have reflected on the above, I am taking much more notice of speed limits and with my new vehicle (see below) will be much more aware of speed limits.

All I ask is that you take into consideration my yearly average mileage. I believe that an average car driver completes 10,000 miles per year, therefore I have achieved over five times this normal amount over the last ten years.

Since starting my instructor training, I am also much more aware of modern technology and use cruise control and speed limiters to help with my speed management. Although this doesn't eradicate exceeding speed limits, it certainly helps.

I have recently helped a friend of mine to pass her driving test.

Her name is … (she prefers to be called 'Body'). Body comes from Nigeria and passed her test there and had ten years of driving in Nigeria.

Body asked me to help her improve her driving standard and through her UK driving test.

I accompanied her in her own car on two short lessons (3 hours in total) and went with her on her first UK driving test.

Unfortunately she failed due to a late change of lane without effective observation. She continued to wont me to help her. I spent a further ten hours with her and improved her driving. Body's driving improved and I am very pleased to tell you that she passed this morning (10.24am/Hull Clough road test centre/ Body's car registration number is …).

I accompanied her on this test. The examiners name is L, I introduced myself to L, explaining that I am about to go on a trainee licence. She was very accommodating and was pleased that I had accompanied Body of her test.

I have also purchased a brand new Toyota Yaris Hybrid Cross (registration number …). So, hopefully, you can see that I am taking this new career very seriously.

I believe my ORDIT trainer is also writing to this afternoon to vouch for me. I hope this ok and await the Registrars decision.

14. We observe that the Appellant's reference to having received a warning of exceeding speed limit on 9th February 2023, leading to a Speed Awareness course in March 2023, was the first indication of this further excess speed occurrence.

15. Attached to the written representations was a statement from Mr Kent which was in the following terms:

'I'm Adam's ORDIT trainer.

Adam informs me that you have emailed him today saying that you are considering not allowing him to have a 'Trainee licence'.

He has sent you a reply this afternoon.

I have been training PDI 's since 2003, an ORDIT Trainer since 2008 and achieved two straight grade 6's, 50 out of 51 in my last standards check and, obviously achieved Grade A on my last ORDIT inspection. I have also owned A… Driving Centre since 2005, having around 30 franchised instructors currently in my team.

I have and am very proud of my high standard of instructor training and only allow people of quality to join my team. I have, so far, trained 135 instructors, all qualifying as ADI's.

I have also been a manager for almost 50 years and can certainly vouch for Adams' professionalism, keeness to learn and driving standard. I am proud to have him on my team.

Please therefore be kind enough to approve him as a 'fit and proper' person.'

16. In his notice of appeal, the Appellant made submissions which were parallel to those set out in his written representations to the Registrar.

The remote oral hearing

17. The Registrar was represented at the remote oral hearing by Mr Russell. He outlined the background to the Registrar's decision and summarised the reasons for the Registrar's decision to disallow the application for a Trainee Licence.

18. The Appellant participated in the remote oral hearing and gave evidence and made submissions which were parallel to those set out in his written representations to the Registrar and in his notice of appeal.

19. Mr Kent provided evidence concerning his own background and in support of the Appellant.

Relevant jurisprudence

20. In D/2012/366 HANDA; D/2012/371 GOLDWATER, ('*Handa*') a first-tier Tribunal of the GRC said the following at paragraph 5 (ix):

> 'This appeal raises a general issue as to the approach which the Registrar should take to penalty points endorsed on the driving licences of existing and prospective ADI's. This issue was touched upon in the appeal *D/2010/Jeffrey Bell*, which concerned an inconsistency between the application form for initial registration, which requested details of fixed penalties received in the previous three years and the Registrar's policy of then taking into account all penalty points endorsed on a licence in the previous four years. It was noted in that appeal that whilst all endorsements (and accordingly all penalty points) remain on a driving licence for four years from date of offence (by virtue of s.45(5) of the Road Traffic Act 1988), only those penalty points endorsed in the previous three years are taken into account for the purposes of the "totting up procedure" in the Magistrates Court when disqualification is being considered. We are satisfied that the difference in approach between the Registrar and the Magistrates Court gives rise to confusion and a perception of disparity and unfairness. Whilst we appreciate that the Magistrates Court and the Registrar are guided by differing considerations, disqualification on the one hand and the fitness of a person to be an ADI on the other, we are nevertheless satisfied that a consistency in approach to the consequences of penalty points between the Magistrates Courts and the Registrar would be fair and proportionate. This approach would have the advantage of dispelling the confusion that currently exists as to the criteria applied by him. Whilst each case must of course be determined on its own facts and that in appropriate cases a stricter approach may be warranted, the Tribunal will in future be guided by the "totting up" procedure when considering the Registrar's case that an Appellant is not a fit

and proper person by reason of penalty point endorsements. It will be for the Registrar to justify a more stringent test.'

21. In D/2013/77 D ANDERSON, D/2013/81 M IBRAR, D/2013/83 A THOMAS and D/2013/85 J. BOYCE, ('*Anderson &* Boyce') a First-tier tribunal of the GRC said the following at paragraph 7(xv):

> 'Our main concern relates to the fixed penalty notices for the use of a mobile phone when driving. We say that because the 3 penalty points, for the speeding offence in 2009, no longer count towards the 'totting up' provisions and will be removed from the Appellant's licence in November 2013. In D/2012/366 Handa and D/2012/371 Goldwater the Tribunal considered the correct approach to the fact that all endorsements (and therefore penalty points) remain on a licence for 4 years, (by virtue of s. 45(5) of the Act), whereas penalty points only count towards disqualification under the 'totting-up' procedure for a period of 3 years. The Tribunal said this at paragraph 5(ix):
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> > "*Whilst each case must of course be determined on its own facts and that in appropriate cases a stricter approach may be warranted, the Tribunal will in future be guided by the 'totting-up' procedure when considering the Registrar's case that an Appellant is not a fit and proper person by reason of penalty point endorsements it will be for the Registrar to justify a more stringent test*".
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> We are not aware of any specific justification put forward by the Registrar as to why he took into account the penalty points for speeding in 2009. There is a two year gap between the speeding offence and the first mobile phone offence. Given the difference between the two offences it seems to us that this gap is not merely relevant but makes it difficult to justify taking the 2009 offence into account. Had the 2009 offence been a further mobile phone offence different considerations might have applied.'

22. At paragraph 8 (xi) and (xii), the First-tier Tribunal added:

> '(xi) Another point raised by the Appellant, namely the age of these offences, requires more detailed consideration. We have already referred when dealing with the appeal of Thomas, above, to the decision of the Tribunal in the appeals of D/2012/366 Handa and D/2012/371 Goldwater. The question which we must now consider is whether or not it is appropriate to apply the principle set out in that decision to the facts of the present case. The general principle is that the Registrar and the Tribunal should, normally, have regard only to those endorsements and penalty points which would still count towards disqualification under the totting-up procedure. If that principle were to be strictly applied to the present case only the penalty points imposed in 2010 would be taken into account.

(xii) However it is important to note that the Tribunal made it perfectly clear that it was not laying down an unqualified principle to which there are no exceptions. The point is so important that we repeat the quotation from Handa and Goldwater, which we set out in the previous appeal.

23. Applying those principles to the facts of the case before it, the First-tier Tribunal concluded, at paragraph 8 (xiii) to (xviii):

> 'It follows that we must consider whether this is a case in which a stricter approach should be followed and whether a more stringent test is justified. In coming to a conclusion on this point we believe that it is instructive to consider what would have been likely to happen if the Appellant had complied with the obligation to report each fixed penalty notice, within 7 days. Past experience suggests that following receipt of a report of the first fixed penalty notice the Registrar would have written to the Appellant, first, to say that he would take no further action, second, to remind the Appellant of his obligation as an ADI to set a good example and to drive to a higher standard than other motorists and third, to warn him that the matter would be taken into account should the Appellant offend again. Following notification of a second offence of speeding some two months later the strong probability must be that the Registrar would have written to the Appellant to warn him that he was considering the removal of his name from the Register. Whether or not the Registrar would have done so is more difficult to assess because it would have depended on the view the Registrar took about the Appellant's explanation. Our best estimate is that the probability is that the Appellant's name would have been removed, though it is possible that it would have remained, subject to a stern warning. We have no doubt at all about the consequences of notification of the third offence, which occurred on 21 April 2010. By that stage the Appellant would have received 9 penalty points in a period of just under a year. In our view it is inconceivable, in that situation, that the Registrar would have done anything other than remove the Appellant's name from the Register. As we have already pointed out in the previous appeal we are not aware of any successful appeal by an Appellant with more than 6 penalty points so the prospect of a successful appeal against the removal of the Appellant's name, in that situation, is, in our view, vanishingly small.
>
> In our judgment the consequences of complying with the obligation to report convictions and fixed penalties only have to be stated to make it quite clear that this is a case in which a stricter approach is appropriate and a case in which the Registrar and the Tribunal are justified in applying a more stringent test. To take any other course would be to reward and encourage non-disclosure and to disadvantage those who, fully and correctly, comply with their obligations. Rewarding and encouraging non-disclosure is not in the public interest nor will it contribute to maintaining public confidence in the Register.

In our experience when the Registrar becomes aware that an ADI, (or prospective ADI), has failed to comply with an obligation to disclose, convictions, fixed penalties or the like he invariably asks for an explanation for the failure. In our view it is important that that opportunity is given because there may be cases in which the explanation justifies the Registrar taking a different course. The Registrar will need to consider any explanation put forward asking questions such as: Is it credible? Is it acceptable? Does it explain or justify the non-disclosure?

In the present case the Appellant has said in effect: *'Believe it or not I forgot about the fixed penalties and that is why I did not report them'*. We find it difficult to believe that the Appellant forget not once, not twice but three times. We find it all the more difficult to believe because he must have known that between April 2010 and May 2012 he was within three penalty points of losing his licence under the totting-up provisions. In our view the explanation given by the Appellant is not acceptable nor does it justify the non-disclosure.

It seems to us that, once the Registrar is satisfied that there is no acceptable explanation for non-disclosure and no justification for taking a different course, he is entitled to take into account all the offences which have not been disclosed. In the present case that means that the Registrar was correct to have regard to the fact that for a time the Appellant had 9 penalty points on his licence, albeit three were taken off in May 2013 and three more can be removed on 17 July 2013.

In our view the combination of non-disclosure, which is a serious matter in its own right, and the fact that for three years the Appellant had 9 penalty points on his licence means that the Registrar was correct in concluding that the Appellant cannot meet the requirement to be a fit and proper person to have his name on the Register. The Appeal is accordingly dismissed.'

Reasons

24. We begin by dissecting the decision of the First-tier Tribunal in *Handa*. The First-tier Tribunal stated that 'the appeal **raised a general issue as to the approach which the Registrar should take to penalty points endorsed on the driving licences of existing and prospective ADI's'**. The emphasis here is our own. While the First-tier goes on to describe and compare the line taken in the Magistrates Court and the more general procedure for 'totting up', it is clear that the First-tier Tribunal's focus is on the Registrar. That is as it should be as the decisions of the Registrar are at the heart of this jurisdiction.

25. The First-tier Tribunal goes on to note that, as of the date of its decision, there was an inconsistency between the application form for initial registration, which requested details of fixed penalties received in the previous three years and **the Registrar's policy of then taking into account all penalty points endorsed on a licence in the**

previous four years. Once again, the emphasis is our own. Once more, this highlights that the focus of the first-tier Tribunal is on a review of the Registrar's policy.

26. The First-tier Tribunal then noted all endorsements (and accordingly all penalty points) remain on a driving licence for four years **from date of offence** (by virtue of s.45(5) of the Road Traffic Act 1988). This was an accurate observation of the law at that time and we observe that the law remains the same at this time – see https://www.gov.uk/penalty-points-endorsements/endorsement-codes-and-penalty-points. What often goes unnoticed in discussions in this jurisdiction about the duration of endorsements on a driving licences is given emphasis here by the First-tier Tribunal in noting that the points remain on the licence from the date of the offence.

27. The First-tier Tribunal then observed a further incongruence in that only '… those penalty points endorsed **in the previous three years** are taken into account for the purposes of the "totting up procedure" in the Magistrates Court' when disqualification is being considered while as noted above, the Registrar's policy (at that time) was to take into account all penalty points endorsed on the licence **in the previous four years**.

28. The First-tier Tribunal, while appreciating that the Magistrates Court and the Registrar are '… guided by differing considerations, disqualification on the one hand and the fitness of a person to be an ADI on the other thought that gives rise to confusion and a **perception of disparity and unfairness**.' The First-tier tribunal decided that it was time to remedy that perception. Accordingly, it decided that ' … a consistency in approach to the consequences of penalty points between the Magistrates Courts and the Registrar would be fair and proportionate'.

29. The practical effect would be that the First-tier Tribunal would, in the future be guided by the approach of the Magistrates Court when considering whether the Registrar's case that an Appellant is not a fit and proper person by reason of penalty point endorsements.

30. The First-tier Tribunal entered a caveat that each case '… must of course be determined on its own facts and that in appropriate cases a stricter approach may be warranted'. Finally, the First-tier Tribunal noted that it would be for the Registrar to justify a more stringent test.

31. The principles noted by the First-Tier Tribunal have never been doubted and have been emphasised and applied in a consistent manner by the First-tier Tribunal ever since. The decision of the First-tier Tribunal in '*Anderson &* Boyce' provides a good example of how the First-tier Tribunal recognised and applied the caveat entered by its counterpart in *Handa* to apply a stricter approach.

32. We turn to the application of the principles in *Handa* to the facts of the present case.

33. The Appellant's driving licence has been endorsed on two occasions for the offence of exceeding the speed limit on a public road (We will return of other aspects of the Appellant's driving licence below).

34. The first **offence**, coded as an 'SPO30', took place on 20 September 2020, and resulted in the endorsement of his driving licence with three penalty points.

35. The second offence, also coded as an SPO30, occurred on 12 September 2023, and also resulted in the endorsement of his driving licence with three penalty points.

36. The decision of the Registrar is dated 27 December 2023 (We return to aspects of the Registrar's decision-making below). As noted above, the decision was to refuse the Appellant's application for a Trainee Licence on the basis that he did not satisfy the statutory test to be a 'fit and proper person' to hold a trainee licence.

37. The evidential basis that he did not satisfy the 'fit and proper person' test was stated to be the **commission** of the two speeding offences without more. It is clear that the straightforward commission of the two speeding offences was not at the heart of the Registrar's decision making. It was, principally, the endorsement of the Appellant's driving licence with three penalty points on each occasion, leading in the Registrar's mind that at the date of his decision, the Appellant's driving licence was endorsed with a cumulative six penalty points.

38. That is not correct. Applying the principle in *Handa* that only those penalty points endorsed on the Appellant's licence within the previous three years, meaning three years before the date of the decision, should be taken into account in determining fitness, the penalty points **for the offence** on 20 September 2020 should be ignored. That means that as of the date of the Registrar's decision, 27 December 2023, **and for the purpose of the 'fit and proper person test'**, the only endorsement which could be taken into account was that which occurred on 12 September 2023.

39. We have observed that while in the Statement of Case which was prepared for the hearing and is dated 6 March 2024, the Registrar has emphasised the failure to disclose despite having been given a warning a breach of the declaration made on his application for a trainee licence, this aspect of the Appellant's conduct was not considered in the Registrar's decision of 27 December 2023.

40. The Appellant has been candid in informing the Registrar, in his written representations, that he had on 9 February 2023 accepted a warning for exceeding the statutory speed limit and had attended a speed awareness course. Accordingly, within the period from September 2020 and September 2023, the Appellant was identified as exceeding the statutory speed limit. One of the speeding offences occurred after the Appellant had attended a speed awareness course. This is not an indication of adherence to appropriate driving standards, particularly for someone who aspires to instilling those standards in (generally) young and inexperienced drivers.

41. We cannot also ignore the primary and secondary failures to disclose, the latter consequent on a written warning from the Registrar. This is also not suggestive of adherence to professional standards which are expected of ADIs.

42. Nonetheless, as of the date of the Registrar's decision that Appellant's licence was endorsed with three penalty points, for the purposes of the 'fit and proper person' test. He has a positive reference and oral testimony from his instructor. His instructor has 24 years as a ADI and is vouching for him, stating he has an excellent attitude. The Appellant explained that he drives long distances in mileage terms a year and that English is not his first language. There is evidence that he had no intention to deceive and his only justification for not informing the Registrar in September 2023 is that he forgot.

43. While the issues are finely balanced, our decision is to allow the appeal.

44. We would ask the Appellant to note the following. He has come very close to losing his opportunity to continue with the registration process for access to his chosen career as a professional ADI and on which he has already expended time and money. In our view, the Registrar would be justified in taking further regulatory action on any consequent adherence to professional standards, including but not limited to failure to disclose and, of course, any further motoring or non-motoring offences.

45. Finally, we are of the view that the standard of the Registrar's decision-making in this case has been poor. This in relation to the manner in which the substantive decision was taken, the limited communication of that decision to the Appellant and the enhancement of the Statement of Case with points which were adverse to the Appellant and which were not addressed in the initial decision.

Signed Kenneth Mullan Date: 25 June 2024

Judge of the Upper Tribunal