NCN: [2017] UKUT 353 (AAC)

Appeal No. NT/2017/16

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Transport)
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION UNIT
Dated 13 January 2017

Before:

Kenneth Mullan	**Judge of the Upper Tribunal**
Mr Leslie Milliken	**Member of the Upper Tribunal**
Mr John Robinson	**Member of the Upper Tribunal**

Appellant:

Damien Toner

Attendances:
For the Appellant: The Appellant was present and was represented by Mr McNamee

For the Respondent: The Respondent was represented by Ms Fee BL

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 31 May 2017
Date of decision: 29 August 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED in part. We substitute our own decision to the following effect:

(i) The Appellant no longer satisfies the condition in section 12A(3)(a) of the 2010 Act to be of good repute as a Transport Manager.

(ii) The Appellant is disqualified from acting as a Transport Manager in respect of the Operator's licence ON1113748 or for any other road transport undertaking for a period of twelve months. This disqualification takes effect IMMEDIATELY on the promulgation of

this decision. The Appellant's certificate of professional competence will not be valid in any Member State during the period of disqualification.

(iii) The Appellant must complete a minimum two-day Transport Manager's course before he can apply for the disqualification to be lifted.

(iv) As the Appellant is disqualified from acting as a Transport Manager in respect of the Operator's licence ON1113748, the requirement in section 12A(3) of the 2010 Act is not satisfied. It will be, of course, for the Appellant to rectify this omission. Failure to do so (by three months from the date of this decision) will mean that Operator's licence ON1113748 will be revoked from that date as the licence holder will no longer meet the requirement to be professionally competent pursuant to section 12A(2)(d) of the 2010 Act.

(v) The following undertaking will be added to Operator's licence ON1113748:

'A compliance audit will be carried out by the Driver and Vehicle Agency (DVA) on systems and processes for providing appropriate arrangements in relation to maintenance, training, drivers' hours and record keeping. This audit should take place within six months of the date of this decision and the outcome reported to the Head of the TRU.'

SUBJECT MATTER:- Repute; effect of delay in decision-making; admissibility of cross-jurisdictional evidence

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695; Bangs v Connex South Eastern Ltd ([2005] EWCA Civ 14); 2005/7 2 Travel Group; 2005/523 Swallow Coaches Limited; 2006/351 Caledonian Coaches Limited; 2006/355 Ferguson Transport; 65/2000 AM Richardson; *Jevremovic v Serbia* ([2008] I FLR 550); *Crompton t/a David Crompton v Department of Transport* ([2003] EWCA Civ 64); 2006/73 Anthony George Everett t/a S & A UK

REASONS FOR DECISION

Background

1. This is an appeal from the decision of the Head of the Transport Regulation Unit, ("Head of the TRU") dated 28 February 2017. The decision is set out in some detail below.

2. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-

   (i) The Appellant is the holder of a goods vehicle operator's licence authorising the use of ten vehicles and ten trailers. He is also the designated Transport Manager on the licence.

   (ii) A Public Inquiry was held on 24 September 2013. No findings were made but the Department was concerned about a number of infringements. An undertaking was added that a compliance audit was to be carried out by the Driver and Vehicle Agency (DVA) on systems and processes for providing appropriate arrangements in relation to maintenance, training, drivers' hours and record keeping. Three compliance audits were carried out by the DVA and were reported on in March 2014, January 2015 and November 2015. The final report indicated an amber rating for management and administration, a green rating for maintenance, a green rating for safety inspections, servicing and maintenance, an amber rating for daily walk round checks and a red rating for drivers' hours. The report indicated improvements in some aspects, mainly maintenance, over the period. There had been no improvements in other areas.

   (iii) Following receipt of a DVA brief and reports from the PSNI, DVSA and HMRC, the Department determined that a Public Inquiry should be held in order to consider whether any regulatory action should be taken against the licence.

   (iv) The Public Inquiry call-up letter called the Appellant to the Public Inquiry in relation to his two roles as licence holder and Transport Manager. The letter set out the grounds for call-up and a number of relevant documents were attached.

   (v) The grounds were as follows;

   - 'A previous Public Inquiry was held by the Department on 24 Sept 2013. As a result of that inquiry, it was determined that a compliance audit be carried out by the Driver and Vehicle Agency (DVA) on your systems and processes for providing appropriate arrangements in relation to maintenance, training, drivers' hours, record keeping etc.
   - In addition, the Department had concerns that you may not meet the financial requirements to hold an operator's licence and the Department would revisit this matter at a later date. As a result, the Department requires you to provide financial documentation to show you have the appropriate financial levels in place to authorise your use of 10 vehicles and trailers on your licence. The Department will discuss these matters with you at the Public Inquiry. Further detail in the provision of this documentation is detailed later in this letter.

- The Department's records indicate that there have been 3 compliance audits carried out by the DVA since the Public Inquiry since the Public Inquiry of September 2013 which examined, inter alia, systems and processes in place by you which form part of the requirements to hold an operator's licence. The Department having considered the content of these audits considers that the results illustrate that you may not satisfy the Department with the statutory conditions and undertakings pursuant to the 2010 Act in particular those requirements pertaining to the applicable community rules on drivers' hours, rest periods and tachographs. Copies of these audits have been enclosed with this letter. The Department will wish to explore these matters further with you at the Inquiry.
- The DVA Public Inquiry Brief dated 28 February 2016 (enclosed), details multiple detections of roadworthiness, overweight and tachograph/drivers' hours infringements on vehicles operated by you. The Department will wish to explore further with you the matters detailed in this brief at the Inquiry.
- A report from DVSA covering the period from 1 Jan 2014-31 Jan 2016 showing encounters with vehicles operated by you detailing multiple detections of roadworthiness, overweight and tachograph/drivers' hours infringements on vehicles operated by you. The Department will wish to explore further with you these detections at the Inquiry.
- A report from HMRC which outlines multiple detections of vehicles being operated by you which were found to be using rebated fuel. A post detection audit carried out in 2013 shows that you were issued with an assessment of unpaid duty at £23,466 and a Penalty of £16,564.23. The Department will be making further inquiries in these matters and any further information received from HMRC will be provided to you ahead of the Inquiry.
- A report provided from PSNI detailing convictions against you.
- The Department notes that you are a sole Director of Cashel Truck Services Ltd. Companies House shows that this company is a dormant company. The Department may wish to explore your involvement to this company and how it relates to your business as a standard international licence holder.

The Department will also give consideration to any information provided to it between the issue of this letter and the Public Inquiry in respect to consideration of your licence. All pertinent information of this nature will be supplied to you within a reasonable timeframe before the Public Inquiry.

Legislation

The Department is considering taking regulatory action against your standard international operator's licence and will make any determination in accordance with the 2010 Act.

On the basis of the evidence before it, the Department needs to be satisfied that you meet the requirements of Section 12A(2) of the 2010 Act, to be:

i. Of good repute;

ii. Appropriate financial standing; and

iii. Professionally competent.

The Department also needs to be satisfied that you have a Transport Manager who is of good repute and is professionally competent as required by Section 12A(3) of the 2010 Act.

Furthermore, on the basis of the evidence before it the Department will need to be satisfied that you meet the undertakings required of the licence holder in relation to drivers' hours, overloading, maintenance arrangements and the availability of finance for maintenance of your vehicles.

The Department will also consider whether you continue to satisfy the requirements of good repute and professional competence as a Transport Manager designated in accordance with Article 4 of Regulation (EC) No 1071/2009 (the 2009 regulation).'

The Public Inquiry

3. The Public Inquiry was first listed for hearing on 24 June 2016. The Appellant was present and was represented by Mr McNamee. During the course of the Public Inquiry Mr McNamee made a submission concerning the admissibility of the report from the DVSA. The Head of the TRU considered that Mr McNamee was raising a point of law and requested that he raise the matter in writing with her. The Public Inquiry was adjourned in order for that written submission to be made and for it to be considered by the Head of the TRU.

4. In correspondence dated 27 June 2016 Mr McNamee made the following submissions:

> 'During the course of this inquiry an issue arose in relation to records purporting to originate from the regulatory authority in Great Britain. The operator would submit that these records in so far as this public inquiry in Northern Ireland is concerned are inadmissible.
>
> There are separate regulatory regimes in Northern Ireland and Great Britain and indeed other member states in the European Union. The public inquiry in relation to the operator's licence granted in this jurisdiction is restricted in its consideration to materials and offences which arise in this jurisdiction.
>
> In any event the material which appears to have originated from Great Britain is of such a nature that it gives rise to serious concerns whether it could be fairly dealt with by the operator in this matter.
>
> It is noteworthy that the infringements completed by the DVA in the Northern Ireland jurisdiction are fully evidenced by the production of witness statements and other materials which outline the full circumstances of the infringement.
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> The materials sought to be relied upon which originate from Great Britain are simply a computer printout in relation to alleged infringements which have already no doubt been resolved within the regulatory jurisdiction of Great Britain.
>
> These materials do not give enough information to allow the operator to deal with any alleged factual scenario arising under any of the alleged infringements and would of course require a considerable amount of speculation both on behalf of the Head of the Transport

Regulation Unit and would of course place the operator in an almost impossible situation to deal with such speculative questions.

During the course of the public inquiry the operator was asked through his representative why these infringements had not been dealt with in the report of Mr John Logue who is a specialist in drivers' hours and infringements and road transport matters.

Mr Logue was contacted in this regard and has stated that he had not dealt with these matters as he believed they did not fall within the jurisdiction of the public inquiry in Northern Ireland.

Further he confirmed that his belief was that Great British regulatory matters do not fall within the ambit of the public inquiry and that this had been the stated position of the Head of the Transport Regulation Unit over the course of the past number of years in this regard.

Mr Logue's recollection coincides with the recollection of the writer herein. The issue in relation to VOSA infringements are not matters that should not be admitted into the consideration of a public inquiry in the jurisdiction of Northern Ireland.

This arises both from the fact that they are infringements that fall under another regulatory jurisdiction, not under the Northern Ireland statutory regime and further as stated above any inclusion of such matters in the form which they presently present would cause serious unfairness to the operator and the danger of widely inaccurate speculation on behalf of those conducting the public inquiry.

We hope these submissions are of assistance to the head of the Transport Regulatory Unit in its consideration of whether these infringements should be properly admitted.'

5. In a document headed 'Decision on Admissibility of Evidence' the Head of the TRU determined that the evidence from the DVSA was admissible. The Head of the TRU also directed that the Public Inquiry should be reconvened to consider matters which remained outstanding from the first hearing and that the contents of the DVSA report would be considered in the absence of DVSA witness attendance. The Head of the TRU also determined that in the context of submission which had been made concerning 'proposed improvements' she would be content to accept any evidence of 'systems and processes' which the Appellant might wish to submit.

6. The reconvened Public Inquiry took place on 7 September 2016. The Appellant was present and was represented by Mr McNamee. The transcript of the Public Inquiry notes Mr McNamee to be in agreement with the Head of the TRU that representatives from the DVA did not need to be in attendance. There was a further brief exchange about the decision of the Head of the TRU on the admissibility of the DVSA evidence.

The decision of the Head of the TRU

7. The decision of the Head of the TRU was in the following terms:

> 'Mr Damien Toner has lost his repute. He no longer satisfies the requirement to be of good repute as a Transport Manager pursuant to Section 123(a) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 and Article 6 of EC Regulation 1071/2009.'
>
> Under Regulation 15 of the Goods Vehicles (Qualifications of Operators) Regulations 2012 Mr Toner is disqualified from acting as a

Transport Manager for a period of 12 months. Whilst the disqualification is in place Mr Toner may not act as the Transport Manager for any other road transport undertaking and his certificate of professional competence will not be valid in any member state. The disqualification will take effect at 23.59 on 21 April 2017.

Mr Toner must complete a minimum 2-day transport manager's awareness course before he can apply for the disqualification to be lifted.

Operator's licence … is revoked pursuant to section 23(1)(b), 23(1)(c), 23(1)(e) and pursuant to Section 24(1)(a). The revocation will take effect at 23.59 on 21 April 2017. The licence-holder, Mr Damien Toner, no longer satisfies the requirements of Section 12A(2)(b) to be of good repute. As Mr Toner is also the designated transport manager on the licence the requirement for the licence holder to be professionally competent pursuant to Section 12A(2)(d) is no longer satisfied.

Under section 25(1) of the 2010 Act the Department orders that Mr Toner is disqualified from holding or obtaining an operator's licence for a period of 12 months with effect from 23.59 on 21 April 2017.'

The Head of the TRU's findings of fact

8. The Head of the TRU made the following findings of fact:

'The HMRC duty assessment has been reduced to zero and has not been considered as part of this inquiry.

Financial standing is satisfied.

Since the previous public inquiry in Sept 2013 DVA have reported a non compliance rate of 89% with 8 encounters resulting in 9 fines or penalties and 1 immediate prohibition. Investigations are reported as ongoing for one encounter.

I am satisfied that the DVSA report is admissible and that it sets out sufficient information that enables it to be considered a factual document on which the operator can prepare a case.

As detailed above there have been numerous encounters and prohibitions. In particular, there are 28 specific offences relating to various defects, excess weight, driver's hours and tachograph infringements and driving without evidence of the required competence. Many of the graduated penalties which are proportionate to the severity of the breach are at the higher levels. I place the same weight on DVSA reports of factual offences as I do for DVA.

This was the second Public Inquiry in less than three years. At the last inquiry the previous Head of the Transport Regulation Unit remained concerned at the number of infringements and attached an additional undertaking for DVA to carry out a compliance audit.

After that Inquiry I would have expected this operator to implement systems and processes to ensure compliance in all aspects of operator licensing. Despite three compliance audits having been carried out the operator is still not compliant with respect to all the statutory requirements and undertakings on the licence. This poses a risk to road safety and undermines fair competition.

Mr Toner cooperated fully with the DVA officers during the audits.

At the date of this Inquiry, the operator is rated compliant for maintenance and safety inspections and servicing. There is an 81% first-time pass rate.

The operator focused on profit before compliance being too busy with other aspects of the business to make the required improvements to systems and process regarding drivers' hours, tachographs, overloading and the respective record-keeping.

The operator has been ineffective at driver management and failed to monitor and analyse drivers' hours and tachographs.

Following call-up to the Inquiry a transport consultant has recently been engaged to monitor and analyse drivers' hours but no reports were presented for consideration.

Mr Toner as a transport manager failed to maintain continuous and effective management of the transport undertaking. He holds a transport manager CPC. There is no evidence of him having undertaken any refresher training.

The operator has breached the general undertakings on the licence.

Several of Mr Toner's vehicles are undertaxed which results in a financial saving while also overloaded which provides a competitive advantage and risk to road safety.

It is incumbent on the operator who chooses to tax vehicles at a reduced rate to maintain close engagement with contractors and properly select loads to be delivered. Mr Toner failed to do this leaving it to the contractor to organise.'

The reasoning of the Head of the TRU

9. In her decision of 28 February 2017 the Head of the TRU set out the following substantive reasoning:

> 'Without doubt there are some positives in this case. Following the inquiry in 2013 the operator has invested in making significant improvements in some, but not all, aspects of compliance. He cooperated with the DVA during the audits and received a green rating in audits relating to maintenance systems, servicing and safety. The first-time pass rate of his vehicles is 81% which is above average. Mr Toner has recently engaged the services of a transport manager.
>
> However these must be balanced against the ongoing failure to take opportunities to improve other compliance issues. This is Mr Toner's second Public Inquiry the first being in 2013. In the intervening period there have been three successive unsatisfactory compliance audits in respect of drivers' hours and tachographs rules and numerous prohibitions. I note with concern that there have been persistent licence failures with no attempt to make improvement until the call-up letter issued.
>
> The operator has concentrated, invested in and continues to invest in maintenance and has built new workshops and office space. While this is potentially important to the business and indeed road safety there has been a significant lack of investment by way of money, time or conduct in the overall management of all aspects of the licensing regime. The requirements to hold an operator's licence encompass a wide range of statutory obligations and are not open to being preferentially addressed over such a long period of time.

Mr Toner has improved maintenance however it is appropriate that I ask myself whether I can be satisfied about the likelihood of compliance in other matters going forward. In receiving the call up letter the operator received legal advice and subsequently engaged the services of a transport consultant in June 2016. Following that part of the Inquiry heard in June 2016 the operator was afforded an opportunity to demonstrate how he was progressing with compliance and to present reports and plans for improvement to the reconvened enquiry in September 2016. Albeit that his transport consultant had suffered a family bereavement immediately prior to the reconvened enquiry … there appears to have been little effort made by Mr Toner to progress matters in the intervening period. At the reconvened inquiry the operator gave verbal proposals with no indication that he intended to seriously and robustly follow-up on necessary actions to improve, indeed it appears that this may be only when his workshop and office are completed.

I have considered the positives in respect of maintenance and safety and the fact that this demonstrates that Mr Toner can put systems and processes in place if, it appears, he wants to. However he has steadfastly failed to make improvements in relation to non-compliance in respect to drivers' hours and tachograph analysis and overloading. Given the number of times he has been advised of failings and that prohibitions have also been received in the intervening period the Department finds that it cannot have trust that compliance in this regard will now be achieved within a short period. The operator has delayed this matter for far too long and has rather belatedly made recent efforts to ensure the Department that non-compliance will be addressed. I give some credit to Mr Toner for commencing this action however this has been presented as a solution which is both ill-defined and too little and too late. It does not, in my assessment, make him any more capable of discharging operator licensing requirements in the future I asked myself the 'Priority Freight' questions - is this an operator capable of ensuring future compliance? Based on the evidence above I must conclude 'no'.

If the evidence demonstrates that future compliance is unlikely then that will, of course, tend to support an affirmative answer when I turned to ask myself the 'Bryan Haulage' question - are the actions of the operator so bad that he ought to be put out of business? There appears to have been no action taken to ensure that vehicles were not overloaded with the operator stating that unless there was a weighbridge at the premises where a trailer was lifted there was no way of knowing of the vehicle was overloaded. However vehicles remained both undertaxed and overloaded, at significant saving and competitive advantage and risk to road safety. Mr Toner's directions to drivers amounted to advice that it shouldn't be necessary to proceed to a weighbridge and that they should not take a trailer *'if the tyres looked'* as if there was an overweight issue.

The Department's appropriate concerns over drivers' hours and tachograph infringements have been belittled at the Inquiry with an attempt to pass the blame to the drivers. I accept the drivers also have a responsibility to ensure they adhere to the rules. However Mr Toner has been entirely ineffective in his driver management and as the licence holder and transport manager he is both responsible and

accountable. The persistent lack of analysis or monitoring in respect of drivers hours and tachograph is meant that Mr Toner had no idea what his drivers were doing at any time.

In contravening the conditions on the licence, failing to notify the Department of prescribed events, namely offences and penalties and not fulfilling the undertakings on the licence Mr Toner has gained an unfair competitive advantage and risked road safety over other compliant operators who invest both their own time and money in ensuring compliance.

Even after undertaking a careful balancing exercise and giving Mr Toner as much credit as I can I am satisfied that this is a classic example of an operator putting commercial considerations over compliance with operator licensing requirements. On the evidence above as a result of Mr Toner's actions and indeed failure to take action on many occasions, it is entirely proportionate to determine that the operator is no longer of good repute to hold an operator's licence … Under Section 24(1) of the 2010 Act the Department must therefore revoke the licence and does so …'

10. The Head of the TRU then added further paragraphs in relation to the other aspects of her decision. This included reasoning on the period of disqualification as both an operator and Transport Manager.

11. The Head of the TRU then added the following paragraph:

> I apologise to Mr Toner for the delay in issuing this decision. This is a complex case and it has taken longer than expected to make a determination. I acknowledge that I had undertaken to notify Mr Toner of the outcome within 28 days and have fallen short of that. For these reasons the Department gives an immediate direction (A STAY) under Section 26(2) of the 2010 Act that the orders and directions set out in the decision above shall not take effect until the expiry of the time within which an appeal may be made to the Upper Tribunal and if such an appeal is made until the appeal has been disposed of.

The appeal to the Upper Tribunal

12. An appeal against the decision of the Head of the TRU was received in the office of the Upper Tribunal on 14 March 2017.

13. The Appellant set out the following grounds of appeal:

> '1. The decision maker took into account material which should not properly have been admitted, namely the DVSA reports.
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> 2. The decision maker took into consideration material which could not properly be addressed by the Appellant thus creating an unfairness to him which could not be remedied at the hearing.
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> 3. The decision maker ignored the fact that the last Head of the TRU refused to place any weight on DVSA material because of the reasons set out above.
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> 4. The decision maker has failed to understand the evidence of the Operator in relation to the loading of vehicles and the presence of weight bridges. The decision maker has shown a complete lack of knowledge as regards the industry practices

in this area and has drawn erroneous conclusions because of same.

5. The decision maker failed to appreciate that the Appellant's vehicles were not 'under taxed' but taxed at the appropriate rate for the work which the Operator conducted.

6. The decision maker has failed to give proper weight to the audit reports which indicated only quite minor difficulties with the Operator.

7. The decision maker has ignored the investment made by the Operator in installing his own garage/service facilities and employing a mechanic onsite.

8. The decision maker has ignored the situation extant at the time of the Public Inquiry which showed that the Operator had facilities onsite to check compliance with drivers' hours and had engaged an independent expert to oversee the drivers' hours' requirements. The decision maker must make a decision based on the present conditions – she cannot find, as she appears to have, that these improvements by the Operator are 'too late'. It is submitted on behalf of the Appellant that the decision maker must make the decision as regards the Operator at the time of the public inquiry not in relation to the position which existed some months prior to the public inquiry.

9. The decision maker ignored the 81% compliance record and failed to give it the proper weight it deserved in arriving at the decision to find the Appellant had lost his repute and hence that the licence would be revoked.

10. The decision maker has not made a proportionate decision in all of the circumstances of this matter. She has made a decision which will allow the Operator to reapply in 12 months' time – thus even on the decision maker's case the alleged loss of repute seems to be considered to be one that can be remedied with the passage of 12 months. The decision maker, even on her own case, has failed to juxtapose the impact that this short period of disqualification is going to have on his business. The effect of finding of loss of repute will deprive 12 people of their jobs and livelihoods. This seems to be, even on the decision maker's case, an entirely disproportionate decision and one, which it is admitted on behalf of the Appellant, is entirely unjustified in any event.

11. The public inquiry in this matter finished on 7 September 2016. The decision however was not made until 28 February 2017, despite an undertaking to have it made within 4 weeks. The time lapse of itself on 5 months is such as to render the decision ineffective. It purports to revoke a licence on 21 April 2017 – a point which is eight months distant from the inquiry and at which time the decision maker can have no accurate notice as to the circumstances of the business.

12. The decision maker appears to have acknowledged the unfairness that may accrue to the Appellant due to this unjustified and unjustifiable delay. It is submitted on behalf of the Appellant that both in terms of proportionality, fairness and

natural justice that this decision to revoke this operator's licence should be set aside.'

The Skeleton Arguments

14. In advance of the oral hearing, Skeleton Arguments were prepared by Mr McNamee and Ms Fee.

15. In his Skeleton Argument, Mr McNamee made submissions which were parallel to those set out in the original grounds of appeal albeit in expanded detail. In her Skeleton Argument Ms Fee responded to the grounds of appeal.

The oral hearing of the appeal before the Upper Tribunal

16. The appeal was listed for oral hearing on 31 May 2017. At the oral hearing, both Mr McNamee and Ms Fee expanded on the grounds set out in the Skeleton Arguments. Gratitude is extended to both representatives for their detailed and constructive observations, comments and suggestions.

The proper approach on appeal to the Upper Tribunal

17. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

> 'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: *"the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view"*. The Tribunal sometimes uses the expression *"plainly wrong"* as a shorthand description of this test.'

18. At paragraph 4, the Upper Tribunal had stated:

> 'It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.'

19. In light of one of the issues which arises in this appeal, we are of the view that it is worth replicating the detail of paragraphs 34-40 of the decision of the Court of Appeal for England and Wales in Bradley Fold Travel Ltd:

> ‘The first issue raised by this ground is to identify the breadth of the review which the Transport Tribunal (and, thus, now the Upper Tribunal) must undertake. On behalf of the Operator and Mr Wright, it is argued that the language of para 8 of Sch 4 to the 1985 Act ("full jurisdiction to hear and determine all matters whether of law or of fact") did not permit the Transport Tribunal to limit itself simply to a review of the "reasonableness/rationality" of the Deputy Commissioner's conclusions but required the actual evidence to be addressed and consideration given to the extent to which relevant features of the case had been ignored. This requires an analysis of the effect of the jurisdiction and its proper function as an appellate body from the decision of the Deputy Commissioner.
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> The first point to make (the contrary not being suggested) is that the function of the Transport Tribunal is not equivalent to an appeal to the Crown Court against a conviction in criminal proceedings in the Magistrates' Court which is treated, in effect, as a new first instance hearing with evidence (which may or may not be the same as was called before the magistrates) being called a second time. Although there is a power to permit further evidence (see para 8(2), subject to para 9(2) which does not permit any appeal to take into consideration any circumstances which did not exist at the time of the determination subject of the appeal), whether or not to permit such evidence is clearly a matter for the tribunal: it does not arise in this case as no attempt was made to rely on it.
>
> Thus, although the jurisdiction is to hear and determine matters of both fact and law, the material before the Transport Tribunal will consist only of the documents placed before the Deputy Commissioner and the transcript of the evidence; the tribunal will not have the advantage that the Deputy Commissioner had of seeing the parties and the witnesses, hearing them give evidence and assessing their credibility both from the words spoken but also the manner in which the evidence was given. Recognising that advantage both in relation to credibility and findings of fact, in *Biogen Inc v Medeva Ltd* [1997] RPC 1, 38 BMLR 149, Lord Hoffmann explained (at 45):
>
> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance . . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

The extent to which those considerations are appropriate was considered in *Assicurzioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577, in which Clarke LJ (as he then was) gave guidance in relation to appeals based on errors of fact in these terms:

> "15 In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a 're-hearing' under the Rules of the Supreme Court and should be its approach on a 'review' under the Civil Procedure Rules.
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> 16 Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

The approach to appeals in cases such as this was further considered in *Subesh and others v Secretary of State for the Home Department* [2004] EWCA Civ 56, [2004] INLR 417 in relation to the statutory regime then in force by which an appeal lay from the Adjudicator (who heard the evidence) to the Immigration Appeal Tribunal. Paragraph 22 of Sch 4 of the Immigration and Asylum Act 1999 conferred an unqualified right of appeal on any party, not limited by reference to any particular issue.

Giving the judgment of the court, Laws LJ analysed the authorities (both general and specific to asylum and immigration). Having made the preliminary points that the IAT's jurisdiction was not limited by *Wednesbury* considerations (*see Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680) (see [1948] 1 KB 223) and that it was "commonplace" that "an appellate court which has not heard the material oral testimony must be slow to impose its own view" (see 40 and 41), he approached the question of what was meant by error - as opposed to mere disagreement - sufficient to justify interference with its decision. He said, the emphasis being his (at 44):

> "The answer is, we think, ultimately to be found in the reason why (as we have put it) the appeal process is not merely a re-run second time around of the first instance trial. It is because of the law's acknowledgement of an important public interest, namely that of finality in litigation. The would-be Appellant does not approach the appeal court as if there had been no first decision, as if, so to speak, he and his opponent were to meet

> on virgin territory. The first instance decision is taken to be correct until the contrary is shown. As Lord Davey put it in *Montgomerie* [[1904] AC 73 at 82-3], '[i]n every case the Appellant *assumes the burden* of shewing that the judgment appealed from is wrong' (our emphasis). The burden so assumed is not the burden of proof normally carried by a Claimant in first instance proceedings where there are factual disputes. An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. The divide between these positions is not caught by the supposed difference between a perceived error and a disagreement. In either case the appeal court *disagrees* with the court below, and, indeed, may express itself in such terms. The true distinction is between the case where the appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category."
>
> Thus, Laws LJ made it clear that the question was whether the appellate tribunal "concluded on objective grounds that that a different view from that taken by the Adjudicator was the right one, or (and we mean it to be the same thing) whether reason and the law impelled them to take a different view" (53). For my part, this reasoning applies equally and with as much force to appeals from the Commissioner to the Transport Tribunal; neither do I read the recent decisions emanating from that tribunal to which we have been referred as suggesting to the contrary.'

Analysis

20. We begin by addressing the submissions which have been made by Mr McNamee on question of the effect, if any, of the delay between the conclusion of the reconvened Public Inquiry and the date of the issue of the decision of the Head of the TRU. As was noted above, the relevant dates are 7 September 2016 for the reconvened Public Inquiry and 28 February 2017 for the date of the decision. It is also important to note that all aspects of the decision were directed to take effect from 23.59 on 21 April 2017. We have also observed that:

    (i) At the outset of the reconvened Public Inquiry on 7 September 2016, the Head of the TRU indicated that she would 'try' to issue a written decision within 28 days.
    (ii) At the conclusion of the reconvened Public Inquiry the Head of the TRU outlined the range of options which were available to her including curtailment, suspension, revocation and disqualification as a transport manager. The Appellant was asked to outline the effect on his business of a period of suspension or a curtailment.
    (iii) The Head of the TRU granted an immediate stay of the decision including that the orders and directions set out in the decision would not have any effect until the expiry of the time limit for bringing an appeal to

the Upper Tribunal or, if such an appeal was brought, the date of the final disposal of the appeal.

21. It has long been recognised, as an integral aspect of the principles of natural justice, that a delay in decision-making, whether in judicial or extra-judicial proceedings, has the potential to cause adverse effects and impact on the reliability of the decision when eventually promulgated. In paragraphs 3 and 4 of the decision of the Court of Appeal for England and Wales in *Bangs v Connex South Eastern Ltd* ([2005] EWCA Civ 14) ('*Bangs*'), Lord Justice Mummery summarised the context of delay in decision-making, as follows:

> '3. The likely effects of delayed decision-making, which can be serious, are relevant in determining what is a reasonable time. A tribunal's delay prolongs legal uncertainty and postpones finality. It increases anxiety in an already stressful situation. It may cause injustice. A claimant in the right is wrongly kept out of his remedy and a defendant in the right has to wait longer than is reasonable for the allegations and claims against him to be rejected.
>
> 4. It is self evident that delay may also have a detrimental effect on the quality and soundness of the decision reached. This is more likely to occur where the decision turns less on the interpretation and application of the law than on the resolution of factual disputes, on which the tribunal has heard contradictory oral evidence from witnesses. Excessive delay may seriously diminish the unique advantage enjoyed by the tribunal in having seen and heard the witnesses give evidence and may impair its ability to make an informed and balanced assessment of the witnesses and their evidence.'

22. Although those remarks were made in the context of the right to a fair trial under article 6(1) of the European Convention on Human Rights (which we address in more detail below), the principles are equally apposite to the effects of delay in decision-making, as part of the general principles of natural justice or fairness.

23. Those principles have been applied in a number of cases in the former Transport Tribunal. In 2005/7 2 Travel Group, the Tribunal stated at paragraph 14:

> '14. In any event, Mr Laprell continued, it was disproportionate for the Traffic Commissioner to revoke the licence when he did. We think that the proportionality approach has to be seen in context. If the operator cannot establish that he meets the requirement of financial standing, as a question of fact, he is then in breach of the Act and revocation is mandatory, as the Traffic Commissioner observed. (So also if the operator is not professionally competent: see the Court of Appeal's comments in the Anglo Rom case, set out at page 40 of the Tribunal's Digest in its website www.transporttribunal.gov.uk). But, as with the issue of repute (see 2002/217 Bryan Haulage Ltd v. VI (No.2) also available under the heading "Decisions" on the website and see also p.11 of the Digest), proportionality must be approached to reflect Article 1 of the First Protocol that an operator's licence is a possession of which an operator is not lightly to be deprived (see the Court of Appeal in the Crompton case at p.34 of the Digest). This approach imports a requirement of fairness and reasonableness into a traffic

commissioner's decision-making. Put the other way, an unreasonable haste or a failure to provide opportunity to deal with a new matter (as mentioned above) would not be proportionate. Such an approach was adopted by the Tribunal in two recent cases. In 2003/30 Helms Coaches Ltd it was held that it was unfair to refuse a short adjournment to permit financial evidence to be obtained if readily available; and in 2004/362 & 2004/72 Britannia Hotels Ltd & Alexander Langsam (t/a Britannia Airport Hotel) it was held that surrenders of licences ought to have been accepted and that revocation for loss of repute and of financial standing was disproportionate.'

24. The Tribunal decided to set aside those aspects of the decision of the Head of the TRU which directed the revocation of the Appellant's goods vehicle licence and disqualified the Appellant from holding or obtaining such a licence.

25. In 2005/523 Swallow Coaches Limited, the Tribunal stated, at paragraphs 4 to 7:

> '4. Mr Upton referred us to R v. North & East Devon Health Authority *ex parte* Coughlan (1999 EWCA Civ 1871) and Bangs v. Connex South Eastern Ltd (2005 EWCA Civ 14). He did not suggest there was any discrepancy between the evidence and the decision and accepted that there was no prejudice or error on the face of the decision. However, he submitted that the effect of the delay and the renewal of the licence did cause prejudice. The Company had been made to think that there was unlikely to be a curtailment and the delay in itself was prejudicial in that the Company had been unable properly to make plans while the decision hung over its head.
>
> 5. By para.9(2), Schedule 4 of the Transport Act 1985 the Tribunal may not take into consideration "any circumstances which did not exist at the time of the determination which is the subject of the appeal". It follows that since the decision is dated 3 November 2005 we are entitled to take the delay and the renewal of the licence into account. In the circumstances we did not require Mr Upton to apply formally to adduce fresh evidence but indicated that insofar as he suggested that Mr Webb had had an expectation of a particular result, this was a question of fact with which we could not deal, because evidence from the Traffic Area Office might be required, in addition to that from Mr Webb.
>
> 6. We have to say that we regard the delay in this case as serious. In view of Mr Marsh's submission to the Traffic Commissioner at the public inquiry we think that a curtailment was to be expected. However, we are unable to assess the effect of the renewal and have had to consider how best to resolve the appeal. One way would be to remit the case to the Traffic Commissioner for his further consideration: but this would be to compound the existing delay with more costs and yet more delay, for none of which the Company is responsible. Another way would be for us to substitute our own order, taking all matters into account. The latter course was urged on us by Mr Upton; and it was implicit in his realistic submission that a lesser curtailment would not be regarded as inappropriate.

7. We have ourselves considered the detail and have decided to allow the appeal and to vary the order of curtailment from 4 to 2, so that the number of authorised vehicles is reduced from 18 to 16.'

26. In 2006/351 Caledonian Coaches Limited, the tribunal had the following to say, at Paragraphs 3 to 5:

'3. At the hearing of this appeal, Mr Whiteford appeared on behalf of the Appellant. His main point related to the undue delay between the public inquiry and the production of the Traffic Commissioner's decision. The public inquiry was short (having taken only half a day) and the issues uncomplicated. There was no apparent reason for a delay of sixteen months. During that time, the Appellant's business activities had been put on hold and they were forced to operate registered routes which required substantial revision or cancellation pending an acknowledgment of its applications made to the Traffic Commissioner. Those routes had lost an estimated £50,000.

4. Mr Whiteford referred the Tribunal to *Swallow Coach Company Limited 2005/523* and submitted that the facts were similar, although in that case the delay was eight months between hearing and decision. He accepted that this was a bad case of compliance and that the Traffic Commissioner's decision, if produced shortly after the public inquiry, would not have been one that was capable of criticism at that stage. But there was nothing in the Traffic Commissioner's decision to suggest that she had taken into account the substantial delay that had taken place or the difficulties that the Appellant had encountered with the applications it had made. The Appellant felt that it had been the subject of a double penalty. Mr Whiteford submitted that much had been achieved by the Appellant in the intervening period and that before imposing such a large penalty, the Traffic Commissioner should have requested that a further monitoring exercise take place to ascertain whether the steps that the Appellant had taken were in fact effective in making the Appellant a compliant registered bus operator. In the circumstances, a fair disposal of the appeal would be to quash or substantially reduce the penalty.

5. At the beginning of this appeal, we indicated that this was the worst case of bus registration non-compliance that we had encountered and that despite the impressive steps that had been taken by the Appellant to rectify the position, the penalty that was imposed by the Traffic Commissioner would, in the ordinary course of events, have been justified. However, we agree with Mr Whiteford's submissions that the passage of some 16 months between a short, straightforward public inquiry and the decision was unacceptable and should have been taken into account when considering the appropriate penalty to be imposed in June 2006. Such consideration may have required a further monitoring exercise or simply an acknowledgment that the delay in producing the decision, along with the failure of the Traffic Area office to acknowledge or otherwise deal with the Appellant's applications and correspondence constituted a penalty in itself which had to be taken into account. We are satisfied that it was inappropriate for the Traffic Commissioner to ponder the question of whether the steps taken immediately before and after the public

inquiry by the Appellant were going to be effective when a period of 16 months had passed without the position being considered further.'

27. It has to be noted that it is not always the case that a delay in the promulgation of a decision will lead to a finding of prejudice. In 2006/355 Ferguson Transport the Transport Tribunal had the following to say at paragraphs 10 and 16 of its decision:

> '10. Finally, Mr Nesbitt argued that the six month delay between public inquiry and production of the decision was too long and should be disapproved of because of the risk that the Traffic Commissioner may have forgotten the impression that the operator had made in giving evidence. Further, the impression the Appellant and Mr Green had at the conclusion of the public inquiry was that the Traffic Commissioner would only issue a warning; it was now felt that with the passage of time, the Traffic Commissioner may have forgotten that this was the impression that she had given at the public inquiry. If there was a risk that this has occurred, then the Traffic Commissioner's decision should be reversed in any event.
>
> …
>
> 16. We do accept that a six month delay in the production of a decision is excessive and there appears to be no reason to justify such a delay. However, there is no evidence to support the contention that the delay in this case was such that prejudice, whether actual or perceived, has been suffered by the Appellant whether during the course of its business activities or in the final order that was made. We note that when considering the appropriate action to be taken in paragraph 50 of her decision, the Traffic Commissioner took the delay into account.'

28. To this analysis we have to explore the duties of a decision-making authority, such as the Head of the TRU, under the Human Rights Act 1998 (which, in short, incorporated the European Convention on Human Rights into United Kingdom domestic law).

29. Section 6(1) of the Human Rights Act 1998 provides that:

> 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'

30. In turn, the first part of article 6 of the European Convention on Human Rights provides that:

> '**In the determination of his civil rights and obligations** or of any criminal charge against him, **everyone is entitled to a fair and public hearing within a reasonable time** by an independent and impartial tribunal established by law.'
>
> The emphasis here is our own.

31. There is no doubt that the Traffic Commissioner is a public authority for the purposes of section 6(1) of the Human Rights Act 1998. That was accepted in

paragraph 14 of the decision of the Transport Tribunal in 65/2000 AM Richardson. In that paragraph it was also accepted that 'the nature of the proceedings before the Commissioner involved the determination of the Appellant's civil rights and obligations.' We have no hesitation in confirming that that the Head of the TRU is a public authority for the purposes of section 6(1) and that the proceedings before her also involved the determination of the Appellant's civil rights and obligations. We are also reminded of what was said by the Upper Tribunal in paragraph 4 of its decision in NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI.

32. In the case of *Jevremovic v Serbia* ([2008] I FLR 550) ('*Jevremovic*'), the European Court of Human Rights made some general remarks on the reasonableness of the length of proceedings and the factors to be taken into account in assessing whether a particular delay is unreasonable, at paragraphs 79 to 81, as follows:

> '79. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, as well as the importance of what is at stake for the applicant (see, among other authorities, *Mikulić v. Croatia*, no. 53176/99, § 38, ECHR 2002-I).
>
> 80. Further, according to the Court's established jurisprudence, a chronic backlog of cases is not a valid explanation for excessive delay, and the repeated re-examination of a single case following remittal may in itself disclose a serious deficiency in the respondent State's judicial system (see *Probstmeier v. Germany*, judgment of 1 July 1997, *Reports* 1997-IV, p. 1138, § 64, and *Pavlyulynets v. Ukraine*, no. 70767/01, § 51, 6 September 2005, respectively).
>
> 81. Finally, the Court notes that particular diligence is required in all cases concerning civil status and capacity (see *Bock v. Germany*, judgment of 29 March 1989, Series A no. 150, p. 23, § 49) and that this requirement is additionally reinforced in States where domestic law itself provides that certain kinds of cases must be resolved with particular urgency (see, in the employment context, *Borgese v. Italy*, judgment of 26 February 1992, Series A no. 228-B, § 18).'

33. In *Bangs*, noted above, Lord Justice Mummery stated the following, at paragraph 2:

> 'Under article 6 a litigant has the right to the determination of a tribunal "within a reasonable time": **Porter v. Magill [**2002] 2 AC 357 per Lord Hope at paragraph 108. This is in addition to the right to a fair trial within a reasonable time. Article 6 does not lay down what is a reasonable time. It does not even attempt to identify any of the factors relevant to determining what is a reasonable time. The question obviously depends on all the circumstances of the particular case: the nature of the tribunal, its jurisdiction, constitution and procedures, the subject matter of the case, its factual and legal complexity and difficulty, the conduct of the tribunal and of the parties and any other special features of the situation in which delay has occurred.'

34. He went on to discuss the appropriate test to be applied in assessing, in an appeal against a decision promulgated following a delay, whether that delay was excessive and has caused injustice. He stated, at paragraphs 8 and 9:

> 'The restricted right of appeal from an employment tribunal is significantly different from the right of appeal in an ordinary civil case, where there is a right of appeal on both fact and law. In ordinary civil appeals the question is not whether the court substantively or procedurally erred in law, but whether the decision of the lower court was "wrong": CPR Part 52.11(3). A decision of the court below is wrong if it erred in law and/or it erred in fact. The court may set the decision aside and order a new trial. An appeal may also succeed where, even though the decision of the lower court was not "wrong", it was unjust because of a serious procedural or other irregularity.
>
> In cases where there is a right of appeal on both fact and law it has been held that the appellate approach to cases of excessive delay is to ask whether, as a result of the delay, the decision under appeal is "unsafe" and whether it would be "unfair or unjust to let it stand": see the judgment of the Privy Council delivered by Lord Scott in **Cobham v. Frett** [2001] 1WLR 1775 at 1783D. Although it was not a case to which article 6 of the Convention applied, the approach is, in my judgment, compatible with the Convention article and the jurisprudence on it.
>
> > "In their Lordships' opinion, a legitimate basis on which the Court of Appeal could assert the right to disagree with the judge's evaluation of the evidence and of the witnesses was absent. It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party.
> >
> > …
> >
> > In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."'

35. We have already noted that in NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the Upper Tribunal had confirmed that in an appeal against a decision of the Head of the TRU the burden is on the Appellant to show that the decision was 'plainly wrong'. That reflects the Upper Tribunal's earlier statement that on appeal the Tribunal is entitled to hear and determine matters of both fact and law. In our view, therefore, the principles set out by the Court of Appeal in *Bangs* concerning the appropriate test to be applied in assessing, in an appeal against a decision promulgated following a delay, whether that delay was excessive and has caused injustice, are equally

applicable to the Upper Tribunal in deciding that issue in an appeal from the Head of the TRU.

36. There is a second aspect of the application of the Human Rights Act 1998, and by incorporation the European Convention on Human Rights, which we would wish to note, at this stage. In *Crompton t/a David Crompton v Department of Transport* ([2003] EWCA Civ 64), the Court of Appeal stated, at paragraph 19(1) to (3):

> The proper approach in law
>
> (1) Mrs Outhwaite points out, rightly, that both the Traffic Commissioner and the Transport Tribunal are public authorities for the purposes of section 6 of the Human Rights Act 1998. They must therefore act in ways compatible with Convention Rights, and so far as possible, read and give effect to domestic legislation in a manner which is compatible with Convention Rights (see section 3(1) of the 1998 Act).
>
> (2) An operator's licence is a possession for the purposes of Article 1 of the First Protocol, so the appellant was not to be deprived of it –
>
> > ".. except in the public interest and subject to the conditions provided for by law, and by the general principles of International law"
>
> The Article goes on to say that those provisions shall not –
>
> > ".. in any way impair the right of a state to enforce such law as it deems necessary to control the use of property in accordance with the general interest …."
>
> (3) In Traktorer Aktiebolag v Sweden [1989] 13 EHRR 309 it was said by the European Court of Human Rights at paragraph 59 that a licence such as this (in that case a restaurant liquor licence) can be revoked lawfully in pursuit of a legitimate aim, but the action must be proportionate. That case is also authority for the proposition that when balancing the interests of the community against individual freedoms the state has a wide margin of appreciation (see paragraph 62). The observations were an echo of what had previously been said in Sporrong and Lonnroth v Sweden [1982] 5 EHRR 35 at paragraph 69.'

37. Those principles are uncontroversial.

38. We are of the view that the delay in issuing the decision, close to a six month period is significant. In her Skeleton Argument, Ms Fee submitted that it was occasioned by '… pressure on resources and workload'. We have no reason to doubt that the TRU is a busy place. We are reminded, however, of the comments of the European Court of Human Rights in *Jevremovic* that '…a chronic backlog of cases is not a valid explanation for excessive delay.' In the bundle of papers which is before us, there is a copy of what amount to TRU internal 'case management' records for this case. Therein it is indicated that on 18 November 2016 a recommendation as to the disposal of the case had been made by someone whom we believe to be the Deputy Head of the TRU.

39. We are also somewhat perplexed that if, as submitted, the reasons for the delay in the promulgation of the decision was workload and pressure in the TRU on resources then why was this individual Appellant (and, indeed, others who were subject to regulatory proceedings) not advised about the progress of his case.

40. Looking at the substance of the decision itself, it is not that complex and, by the time the decision had been made, did not raise overtly difficult, challenging or novel issues. By the time of the conclusion of the reconvened Public Inquiry, the novel issue of the admissibility of the DVSA evidence had been addressed and disposed of. The decision runs to 16 pages. One page at the outset (and repeated at the end) contains the decision itself, three pages sets out the uncontested factual background, a further single page sets out preliminary matters there is a four and a half page summary of the evidence. The substance of the decision is contained in two pages of findings of fact and four pages of substantive reasoning. It is unclear why it took close to six months to produce that.

41. We have also noted that the Head of the TRU must have had no significant concerns about public safety as the Appellant was permitted to continue to operate during the period of initial decision-making and onward to the appeal which is before us with a stay having been granted. There is no evidence that she had given this case priority in her busy workload.

42. We turn to the effect of the significant delay in decision-making on the reliability of the decision itself. We are of the view that the delay has had an impact on the validity of the aspects of the decision which directed the revocation the operator's licence and the disqualification of the Appellant from holding an operator's licence. Revocation and disqualification are significant outcomes. In our view the delay has tainted the reasoning of the Head of the TRU as to the manner in which the case should be disposed of. The effect has been to direct a disposal which, in our view, is not rational or cogent.

43. The effect of the delay is that some six months after the conclusion of the reconvened Public Inquiry, the Head of the TRU was purporting to make a decision based on retrospective circumstances pertaining at that date but with a prospective penalty effective some seven months (21 April 2017) after it. Her reasoning as to why the licence should be revoked included her asking herself the (correct) question as to whether the Appellant was capable of discharging operator licensing requirements and being compliant in the future, noting, at the same time that there was evidence of some improvement up to the date of the reconvened Public Inquiry. Her answer was, of course, 'no'. It is our view that this conclusion might have been sustainable if a decision to that effect had been made and issued within a reasonable time period (put at 28 days post Public Inquiry by the Head of the TRU herself) but was not justifiable some six months later. As was acknowledged by the Head of the TRU herself, there was evidence of a trajectory of improvement. By the end of February 2017 that trajectory might have risen. As was noted in 2006/351 Caledonian Coaches Limited, there is nothing in the reasoning of the Head of the TRU to suggest that she had taken the significant delay into account in arriving at her substantive decision. As in 2006/351 Caledonian Coaches Limited, the appropriate response might have been a further monitoring exercise to ascertain whether the trajectory of improvement had been sustained. We acknowledge, however, that the Appellant could have been more proactive in

putting further evidence to the Head of the TRU, knowing, as he did, that one of the options available to her, was to revoke his licence.

44. We would add that in her reasoning the Head of the TRU had opined that it was not proportionate to exclude the Appellant from the industry on a permanent basis and that the Appellant would benefit from a time to reflect and '… to increase his awareness and understanding of the serious nature of obligations of holding an operator's licence which he had signed up to when the licence was issued.' That was the reasoning behind the decision to disqualify the Appellant for a twelve month period. Once again, that thinking might have been defensible if a decision to that effect had been made and issued within a reasonable time period but not as sustainable some six months later. It is wholly arguable that in the intervening six months the Appellant had undertaken the appropriate degree of reflection and increased his awareness and understanding.

45. If we are wrong in our conclusions as to the effect of the delay on the aspects of the decision which ordered a revocation of the licence and a disqualification of the Appellant, we have concluded, in the alternative, that this disposal was not proportionate. We are of the view that there were alternative methods available to the Head of the TRU to ensure compliance.

46. We turn to the submission made by Mr McNamee that the decision of the Head of the TRU to admit and consider the evidence from DVSA was erroneous.

47. As was noted above, this matter was raised by McNamee during the course of the Public Inquiry on 24 June 2016. The Head of the TRU considered that Mr McNamee was raising a point of law and requested that he raise the matter in writing with her. The Public Inquiry was adjourned in order for that written submission to be made and for it to be considered by the Head of the TRU. In correspondence dated 27 June 2016 Mr McNamee made submissions. In a lengthy document dated 1 August 2016, the Head of the TRU determined that the evidence from the DVSA was admissible.

48. We have noted that there was some discussion of the issue when the Public Inquiry was reconvened on 7 September 2016. It seemed to be accepted that any further concerns that Mr McNamee had with the substance of the decision to admit the evidence should be addressed in any further appeal to the Upper Tribunal. That is the reason why the issue was addressed by Mr McNamee in his grounds of appeal and his Skeleton Argument.

49. At the oral hearing before us, we asked Mr McNamee whether he had given consideration to a discrete challenge to the determination by the Head of the TRU on this specific issue. He indicated that he had not. To the extent that the question of the admissibility of the evidence was addressed by the Head of the TRU in her substantive decision we have been prepared to consider that question and rule on it.

50. The materials at issue are contained at what is described as a 'DVSA Report 1 Jan 2014 – 31 Jan 2016' in the appeal bundle. The report runs to 58 pages and consists in a series of tables under a variety of headings. Thus, for example, at page 120 of the bundle there is a table headed 'Vehicle Roadworthiness by Checksite' and the table is populated with a series of entries recording, *inter alia*, encounters and prohibitions.

51. In paragraphs 35 to 38 of her decision, the Head of the TRU makes reference to how the DVSA material was addressed at the reconvened Public Inquiry. It is clear that Mr McNamee was given the opportunity to address the content of the DVSA report and make submissions in connection with them. In addition, the Appellant was asked questions about his systems and processes based, *inter alia*, on the contents of the DVSA report. As was noted above the Head of the TRU addressed the DVSA report in her findings of fact and took it into account in her consideration of the issues arising. She noted that there were no DVSA officers present and that was a factor to be taken into account in deciding the weight to be given to the evidence. She concluded that appropriate weight could be given to the twenty-eight offences detailed in the offence summary.

52. In his grounds of appeal, Mr McNamee raises three issues in connection with the DVSA evidence, as follows:

> 'The decision maker took into account material which should not properly have been admitted, namely the DVSA reports.
>
> The decision maker took into consideration material which could not properly be addressed by the Appellant thus creating an unfairness to him which could not be remedied at the hearing.
>
> The decision maker ignored the fact that the last Head of the TRU refused to place any weight on DVSA material because of the reasons set out above.'

53. Mr McNamee had made more detailed submissions on the issue in his written submission of 27 June 2016.

54. In her Skeleton Argument, Ms Fee made the following submissions on this discrete issue;

> 'The material in DVSA reports was properly admitted. Mr McNamee put forward no case law or legislation to support his argument that it was inadmissible. Pursuant to Regulation 5 of the Goods Vehicles (Qualification of Operators) Regulations 2012, the Department is entitled to consider any matter when determining whether an individual is of good repute and in particular may have regard to any convictions or penalties incurred by the individual or any other relevant person and any other information in its possession which appears to relate to the individual's fitness to hold a licence and the Department shall have regard to all material evidence. The DVSA report is factual, material evidence. The Appellant called no evidence at PI to challenge the content of the report, nor did he seek to establish that the content was erroneous or otherwise flawed. The Head of TRU may have regard to "all the relevant evidence".
>
> …
>
> The last Head of TRU did not refuse to consider the content of VOSA or DVSA reports.
>
> In relation to admissibility, the Head of TRU provided a fully reasoned, written decision on the admissibility of the DVSA records, dated 1st August 2016.'

55. We have no hesitation in upholding the reasoning of the Head of the TRU on this specific issue. In her 'decision' (more properly a 'determination') of 1

August 2016, the Head of the TRU has undertaken a comprehensive analysis of all of the challenges raised by Mr McNamee. There is no error in that analysis.

56. The Head of the TRU has reminded herself of the domestic legislative provisions relating to the requirement to be of good repute, including sections 12 and 12A of the 2010 Act and regulations 5 to 9 of the Goods Vehicles (Qualification of Operators) Regulations (Northern Ireland) 2012 ('the 2012 Regulations'). She has noted that the determination as to whether the provisions relating to good repute are satisfied include consideration of Articles 3 and 6 of EC Regulation 1071/2009 and, in particular, that convictions, penalties or infringements by any other relevant person may be taken into account. She has made reference to regulation 5(1) of the 2012 Regulations which provides that the Department may have regard to any matter but must have regard to any convictions or penalties incurred by any other relevant person and the interpretation of the scope of that regulation in NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI.

57. She has asserted that the definition of 'relevant person' in regulation 1(3) of the 2012 Regulations is sufficient to encompass drivers employed by the Appellant. She has also set out in some detail the provisions of regulation 5(3) and 8 of the 2012 Regulations which set out definitions of 'conviction or penalty' and 'road transport offence' which, significantly, includes convictions or penalties incurred by a relevant person under the law of any part of the United Kingdom or road transport offences under the law of any part of the United Kingdom. She concluded:

> 'Given that the DVSA records asserted that a number of drivers were driving vehicles registered to and/or specified on (the Appellant's) licence at the time of the encounter the Department considers that penalties and/or convictions incurred by them can be admitted as evidence pertaining to the repute of (the Appellant) on the basis that:
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> - A driver is a 'relevant person' being an agent and/or employee of the licence holder;
> - The nature and geographical location of such offences falls within the specific definitions contained in Northern Ireland legislation; and
> - The Department has no discretion but to have regard to the matters referred to in the DVSA records.

58. We agree with this analysis. The Head of the TRU then turned to Mr McNamee's submission that the previous Head of the TRU had made general statements that extraneous materials, such as the reports from the DVSA, should not be admitted in regulatory proceedings in Northern Ireland. She noted that Mr McNamee had provided no evidence to support this assertion and that, in any event, each individual case had to be considered on its own merits and that the TRU had an inquisitorial function. We agree with this response and have noted that when Mr McNamee's assertion was put to him by us at the oral hearing of the appeal, he could not, once again, provide evidence to substantiate his claim that a different policy had been adopted by the previous Head of the TRU.

59. The Head of the TRU also addressed Mr McNamee's submission that the nature of the material provided by DVSA and the absence of witness statements gave rise to serious concerns as to whether she could address this evidence fairly and that, on the contrary, it would involve her in speculation. In response, the Head of the TRU noted the form and content of the DVSA materials:

> 'The DVSA report to the Public Inquiry is provided in the form of a printout from DVSA. The information provided refers to a number of encounters within a specified date range and the number of prohibitions arising from those encounters in respect of vehicle, drivers' hours and overloading. In addition the registration mark of the vehicle and/or the mark of the trailer is provided along with the date of the defect and a description of the defect. Information is provided as to the dates of the journeys, the registration mark of the vehicle and the goods carried. The documents also provide details of the encounter date, the vehicle being driven, the name of the driver, the offence name and description and the amount of the graduated fixed penalties and deposits paid.'

60. The Head of the TRU determined that '… the specific detail and factual nature of the report provided by DVSA does not require to be speculated upon by either the Department or the operator. We agree with this. The relevant DVSA report is factual and detailed. We agree with the further comments of the Head of the TRU that:

> 'There is nothing to prevent the operator, for example, from determining if the vehicle in question undertook the journey on a particular day, whether the records report accurately who was driving for him on the date in question and whether the record of an encounter with DVSA was erroneous. An operator could then present information from his own records to address the DVSA position. Such information may include, but not be limited to, tachograph analysis or other journey records which could indicate, for example, that drivers' hours had not been infringed, that the vehicle had a different driver or was on a different journey on any specific date, that a driver's CPC qualification was in place at a given time, or that appeals against the penalties had been initiated or completed successfully.'

61. The Head of the TRU noted that it remained open to Mr McNamee to challenge any aspect of the DVSA materials at the reconvened Public Inquiry. We have noted that no such challenge emanated at the reconvened Public Inquiry despite such an opportunity being afforded to Mr McNamee. We have also noted that at the oral hearing before us, Mr McNamee could produce no substantive opposition to the contents of the DVSA report despite having further time and opportunity to source such a challenge. We suspect that this as because there was no basis on which the Appellant could oppose the contents of the DVSA report.

62. The Head of the TRU also considered the final submission from Mr McNamee that as the infringements, prohibitions and encounters had been resolved by the regulatory authorities in Great Britain, and, accordingly, should not form the basis of additional regulatory action in Northern Ireland. We agree with the response of the Head of the TRU to this submission that the while the individual offences themselves may have been dealt with by the regulatory authorities, she was entitled to consider the cumulative effect of the offences in her consideration of the repute and fitness.

63. We would add to the analysis undertaken by the Head of the TRU the decision of the Transport Tribunal in 2006/73 Anthony George Everett t/a S & A UK. In this case the Tribunal was dealing with an appeal from the decision of the Traffic Commissioner revoking the Appellant's licence on the grounds of loss of repute. The loss of repute was described by the Tribunal as the Appellant's involvement in a Dutch company which operated vehicles in Great Britain. A question arose as to whether the Traffic Commissioner was entitled to take into account evidence obtained from the Dutch authorities being drivers' tachograph records in respect of all vehicles operated on the Dutch operating licence. At paragraph 20 of its decision, the Tribunal noted:

> '20. Mr Nesbitt made two submissions. First, that the Traffic Commissioner had no jurisdiction to consider the Dutch company's conduct and to take this into account in relation to repute under the GB licence, since the scheme of the European legislation was such that action against the Dutch company could only be taken by the Dutch authorities and not indirectly by the Traffic Commissioner in connection with a GB licence. Second, and in any event, he submitted that revocation of the GB licence was disproportionate and that the appropriate outcome was a warning or a short period of suspension.'

64. In response to this, the Tribunal determined, at paragraph 26, in response:

> 'Paragraph 1 in Schedule 3 of the 1995 Act is in very wide terms ("any other information") and we are satisfied that the Traffic Commissioner was entitled to take the Appellant's conduct as the director of the Dutch company into account in considering the issue of repute under the GB licence. This was Mr Chamberlain's submission on behalf of the Secretary of State and we have no doubt that it is correct.'

65. In our view this reinforces the accuracy of the determination by the Head of the TRU to admit the DVSA evidence. If evidence is admissible between Member States then it is admissible across discrete geographical jurisdictions within a Member State.

66. We turn to the remainder of the submissions made on behalf of the Appellant by Mr McNamee. We have no doubt that these additional submissions were directed at that aspect of the decision with which the Appellant was most concerned, namely the revocation of the licence and the disqualification of the Appellant. Mr McNamee acknowledged at the oral hearing before us that the Appellant would willingly rescind his role as a Transport Manager. As we have concluded that those aspects of the decision cannot stand, the submissions in connection with them do not require to be considered. We would, nonetheless, make the following general remarks.

67. Four of these submissions related to the manner in which the Head of the TRU assessed certain of the evidence which was before her, namely the evidence in relation to loading of vehicles and the presence of weighbridges, the evidence concerning the 'taxing' of vehicles and the weight to be given to the audit reports. We reject those submissions. In our view, the Head of the TRU undertook a rigorous and rational assessment of all of the evidence before her. She gave a sufficient explanation of her assessment of the evidence, explaining why she took the particular view of the evidence which she did. Any

conflict in the evidence before the Head of the TRU has been clearly resolved and explained. She did not, as has been asserted, misunderstand industry practices and the audit reports were placed in their proper context.

68. A further submission asserts that the Head of the TRU had, in error, had ignored the situation extant at the time of the Public Inquiry and had taken into account circumstances obtaining some months prior to the Public Inquiry. Once again, we reject this submission. Subject to what we have said about the effect of the delay in decision-making we do not agree that the Head of the TRU has erred in this regard, as asserted.

69. We turn to those aspects of the decision of the Head of the TRU concerning the Appellant's role as a Transport Manager. As was noted above, those aspects of the decision were not subjected to significant challenge by Mr McNamee. We can understand why. We are of the view that the Appellant has failed to exercise continuous and effective control, especially in relation to drivers' hours, over a significant period of time. The Head of the TRU was correct to conclude that he no longer satisfies the condition in section 12A(3)(a) of the 2010 Act to be of good repute as a Transport Manager. The solution is to disqualify him from acting as a Transport Manager and directing the appointment of a new Transport Manager.

Disposal

70. For the reasons which we have set out above, we have concluded that the aspects of the decision of the Head of the TRU which directed the revocation of the Appellant's goods vehicle licence and disqualified the Appellant from holding or obtaining such a licence are in error. We indicated above that we were of the view that there are alternative methods to ensure compliance which we address below.

71. We gave consideration as to whether the appropriate disposal was to remit the case to the TRU for reconsideration. We say the 'TRU' because although the normal remittal route from an erroneous decision of the Head of the TRU would be to the Deputy Head, the Deputy Head of the TRU may well have had an involvement in this case. As in 2005/523 Swallow Coaches Limited we are concerned that remittal would prolong proceedings which, for the reasons which go to the heart of our decision, have already been lengthy. Accordingly, we substitute our decision, to the following effect:

> '(i) The Appellant no longer satisfies the condition in section 12A(3)(a) of the 2010 Act to be of good repute as a Transport Manager.
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> (ii) The Appellant is disqualified from acting as a Transport Manager in respect of the Operator's licence ON1113748 or for any other road transport undertaking for a period of twelve months. This disqualification takes effect IMMEDIATELY on the promulgation of this decision. The Appellant's certificate of professional competence will not be valid in any Member during the period of disqualification.
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> (iii) The Appellant must complete a minimum two-day Transport Manager's course before he can apply for the disqualification to be lifted.

(iv) As the Appellant is disqualified from acting as a Transport Manager in respect of the Operator's licence ON1113748, the requirement in section 12A(3) of the 2010 Act is not satisfied. It will be, of course, for the Appellant to rectify this omission. Failure to do so (by three months from the date of this decision) will mean that Operator's licence ON1113748 will be revoked from that date as the licence holder will no longer meet the requirement to be professionally competent pursuant to section 12A(2)(d) of the 2010 Act.

(vi) The following undertaking will be added to Operator's licence ON1113748:

'A compliance audit will be carried out by the Driver and Vehicle Agency (DVA) on systems and processes for providing appropriate arrangements in relation to maintenance, training, drivers' hours and record keeping. This audit should take place within six months of the date of this decision and the outcome reported to the Head of the TRU.'

Kenneth Mullan, Judge of the Upper Tribunal,
29 August 2017