

Appeal No. T2017/04

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS**

**ON APPEAL from the DECISION of Richard Turfitt, Traffic Commissioner
For the Eastern Traffic Area dated 15 December 2016**

Before:

Marion Caldwell QC, Judge of the Upper Tribunal
Mr. D. Rawsthorn, Member of the Upper Tribunal
Mr. M. Farmer, Member of the Upper Tribunal

Appellant:

Patricia Bakewell

Appellant

Attendance:

For the Appellant: James Backhouse, Backhouse Jones, Solicitors.

Heard at: George House, 126 George Street, Edinburgh Postcode EH2 4HH

Date of Hearing: 20 June 2017

Date of Decision:

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed and the decision of the Traffic Commissioner is set aside.

SUBJECT MATTER

In what circumstances can Traffic Commissioners find that Transport Managers have lost their professional competence? Meaning of Article 9, Regulation (EC) No 1071/2009; burden of proof; adequacy of reasons; fair notice

CASES REFERRED TO:

2001/72 Alan R Brooks;
2001/45 Bryan Haulage;

D Crompton 2003 EWCA Civ 64;
McCaffrey v Secretary of State for Transport 2006 SC 664;
Muck It v Secretary of State for Transport [2006] RTR 9;

T2015/49 Matthew Reynolds [2016] UKUT 0159 (AAC);
T/2014/25/26 H Sivyver (Transport) Ltd and Simon Sivyver [2014] UKUT 0404 (AAC)

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the Eastern Traffic Area, made on 15 December 2016. In summary, the Traffic Commissioner found that the Appellant's Acquired Rights Certificate ("ARC") issued under Article 9 of Regulation (EC) No. 1071/2009 ("Regulation 1071"), could not be relied upon and, as operator and transport manager she was no longer of good repute due to lack of professional competence. She was given a period of grace of 4 months and informed that the licence would be revoked if the mandatory requirement for professional competence were not met by the end of that period. The decision is more fully set out at paragraph 48 below.
2. The decisions of the Upper Tribunal in the cases of T/2014/25/26 H Sivyver (Transport) Ltd and Simon Sivyver [2014] UKUT 0404 (AAC) and T/2015/49 Matthew Reynolds [2016] UKUT 0159 (AAC) are relevant to consideration of this appeal.
3. In Sivyver the traffic commissioner found that whilst the transport manager remained of good repute, he was not practically competent or fit to fulfil the duties of a transport manager and, as a consequence, he had lost his professional competence. The Tribunal found that once professional competence had been demonstrated by passing a relevant examination or holding a relevant and recognised qualification, professional competence could not be lost. It followed that the Traffic Commissioner had no power to find that the transport manager had lost his professional competence despite having been found to be practically wanting.
4. In Matthew Reynolds the traffic commissioner found that the operator had retained his good repute but was no longer professionally competent as a transport manager and disqualified him from acting as such until he had taken and passed the Certificate of Professional Competence ("CPC") examinations. It was accepted by both parties in Matthew Reynolds that Sivyver was correctly decided. The Tribunal analysed the relevant legislation and concluded that Regulation 1071 could not be interpreted or construed so as to empower traffic commissioners to make a finding of loss of professional competence if the transport manager holds a valid CPC qualification. The Tribunal summarised the position as follows in paragraph 24:

'That is not to say that Traffic Commissioners do not have any authority to make findings concerning a transport manager's professional competence. There will be instances when it will be open to Traffic Commissioners to make a finding that a purported transport manager does not in fact hold a valid certificate of professional competence because, for example, it is forged or it was not the holder who took the examination or that it has been suspended as a result of a finding of loss of good repute elsewhere. In such instances, it would be difficult to envisage circumstances in which such a finding would amount to a "disproportionate response". In summary, we are satisfied that bearing in mind the definition of professional competence set out in Article 8 of the Regulation which is repeated in paragraph 13(1) of Schedule 3 of the 1995 Act, it is not open to a Traffic Commissioner to find loss of professional competence unless there is a finding that the transport manager has never been professionally competent or that there has been a previous declaration that the transport manager was unfit by reason of a loss of good repute and has already had their certificate of professional competence suspended.'

Regulation 1071

5. What were previously known as “Grandfather Rights Certificates” were replaced by Acquired Rights Certificates under Regulation 1071. Regulation 1071 is binding and directly applicable in all Member States. In summary, Article 3 of Regulation 1071 sets out the requirements for engagement in the occupation of road transport operator. This includes, among other things, the need to be professionally competent (Article 3(1)(d)).
6. Each undertaking engaged in road transport must designate at least one natural person who satisfies the requirement of professional competence (Article 4(1)).
7. Article 8 sets out the conditions relating to the requirement of professional competence and that the requisite knowledge must be demonstrated by means of a compulsory written examination.
8. Article 9 provides for exemption from the Article 8 examination and is in the following terms:

“Member States may decide to exempt from the examinations referred to in Article 8(1) persons who provide proof that they have continuously managed a road haulage undertaking or a road passenger transport undertaking in one or more Member States for the period of 10 years before 4 December 2009.”

9. Chapter V deals with mutual recognition of certificates and other documents. Article 21(2) provides:

“A certificate issued before 4 December 2011 as proof of professional competence pursuant to the provisions in force until that date shall be deemed to be equivalent to a certificate set out in Annex III (model certificate of professional competence) and shall be recognised as proof of professional competence in all Member States ...”

10. The UK decided to provide exemptions under Article 9. The UK applied the provisions of Regulation 1071 to the UK operator's licence regime for goods vehicles under the Goods Vehicles (Licensing of Operators) Act 1995 (“1995 Act”) by the Road Transport Operator Regulations 2011 (“RTOR”).
11. The specific provisions relating to persons who wish to take advantage of the article 9 exemption from the CPC examination requirements in article 8, and to meet the test for holding an ARC based on 10 years' experience are set out in schedule 3 part 2 of the RTOR.

“14.— Exemption from professional competence examinations for certain transport managers

- (1) *The Secretary of State may grant a transport manager an exemption from the requirements of paragraph 13(1) of Schedule 3 to the 1995 Act for the purposes of compliance with the requirement of section 13A(3)(b) of that Act (professional competence).*

- (2) *The Secretary of State may grant an exemption under sub-paragraph (1) only if satisfied that the transport manager has continuously managed a road haulage undertaking or a road passenger transport undertaking (within the meaning of Article 9 of the 2009 Regulation) in one or more member States for the period of ten years ending on 4th December 2009.*
 - (3) *The Secretary of State may grant an exemption under sub-paragraph (1) on an application or without an application being made for it.*
 - (4) *The power conferred by sub-paragraph (1) may not be exercised after 4th December 2013.*
 - (5) *If an application is made for an exemption under sub-paragraph (1) and the Secretary of State refuses the application, the applicant may request a redetermination of the application by a traffic commissioner.*
 - (6) *Sub-paragraph (2) applies to a grant of an exemption by a traffic commissioner under sub-paragraph (5) as it applies to a grant of an exemption by the Secretary of State under sub-paragraph (1)."*
12. In October 2011 transport managers with grandfather rights and already named on an operator's licence were sent a questionnaire to complete and return to the Secretary of State for Transport. Notes explaining the new rules being introduced accompanied this. (See pages 200-207.)
 13. Holders of grandfather rights who were not listed on a licence were also able to apply for Acquired Rights.

Background to the Traffic Commissioner's findings

14. The factual background to this appeal appears from the documents, transcript of the Public Inquiry ("PI") and the Traffic Commissioner's decision. There was considerable correspondence between the Appellant's agents and the Traffic Commissioner prior to the PI and we outline below the content of some of that correspondence.
15. The Appellant trades as PP Haulage. She has held a Standard National Goods Operator's Licence since 2004. The licence authorises the operation of one vehicle and one trailer. The Appellant is both operator and transport manager. She has been named as transport manager on the operator's licence since 25 August 2004 (page 231).
16. Prior to the above, on 12 August 1982 the Appellant was issued with a CPC in terms of reg 9(8) of the Goods Vehicle Operators (Qualifications) Regulations 1977 which certified that she had satisfied the Licensing Authority that she was engaged in road transport operations before 1 January 1975 (page 85) (grandfather rights).
17. The Appellant has an ARC issued on 22 November 2011 (page 86). This replaced her grandfather rights certificate.
18. The Appellant's operating centre is in Nuneaton. Her correspondence address is her residential address in Turriff, Aberdeenshire where she has lived since at least February 2015. She advised the Traffic Commissioner of her change of correspondence address in writing on 17 February 2015 (page 70).

19. The Appellant operated a trunk route with one customer. The vehicle and driver were based at one end of the route, in the Midlands, and the transport manager at the other end of the route in Turriff. The key documentation was kept by the transport manager in Turriff. The transport manager spoke to the driver every day and saw him and the vehicle weekly.
20. The Appellant's operation came under the scrutiny of the Traffic Commissioner following the driver of her vehicle being stopped by a traffic examiner on the A90 on 2 September 2014. The driver was found, among other things, to have driven the vehicle without his driver's digital tachograph card inserted between 28 and 29 August 2014. The driver admitted this and other breaches. The Appellant dismissed the driver.
21. A subsequent visit to the Appellant's premises in Scotland by a Traffic Examiner resulted in satisfactory marking for the systems and procedures in place.
22. As a result of the Traffic Commissioner's investigation of the Appellant's operation he raised a number of concerns with her. By letter dated 20 August 2015 (page 68) the Traffic Commissioner advised her that he was considering revoking her licence (i) under section 26(1)(h) of the 1995 Act, on the grounds that she no longer had full and effective control of her business because she was now based in Turriff and the operating centre remained in Nuneaton; and (ii) under section 27(1)(a) and (b) of the 1995 Act on the grounds that she no longer satisfied the requirement to be of good repute or no longer had a stable and effective establishment in Great Britain and that, as transport manager, she may no longer be of good repute. This letter was sent to the Appellant's operating centre rather than to her correspondence address.
23. The Appellant responded to the letter of 20 August 2015 through her solicitors in Nottingham by letter dated 4 September 2015 (page 58). In summary, the letter advised the Traffic Commissioner that the Appellant had been in the haulage industry for over 50 years, as had her father before her and she had run the business for approximately 10 years by herself; that she was careful to observe correct procedures and practices; that she downloaded and checked all downloads from the vehicle herself and if she had detected what the driver had done he would have been dismissed; he had been paid a set wage and there was no reason for him to do as he had done; he had, in fact, been dismissed; she had been called to interview on 29 January 2015 by DVSA and had cooperated. The letter outlined the limited nature of the business being one vehicle and one trailer and one customer. The letter mentioned the stress and anxiety the investigation had caused the Appellant and also some recent ill health due to arthritis.
24. Thereafter, the Traffic Commissioner advised that he still had concerns and intended to hold a preliminary hearing (page 56). A preliminary hearing was fixed for 26 April 2016 to consider the false record made by the driver, a roadworthiness prohibition notice issued on 19 February 2013, "Delayed- obligatory spray suppression missing", whether the Appellant had full and effective control of the business given the distance between her correspondence address and her operating centre (page 9).
25. The preliminary hearing was adjourned at the request of the Appellant due to travel difficulties as a result of injury caused by a recent fall (page 71). Meanwhile, the Appellant was asked to provide further information of how she would meet her statutory duties during her period of ill health and to provide financial information (page 73).

26. By letter dated 25 April 2016, the Appellant's solicitors provided information regarding the Appellant's ability to perform her duties as Operator and transport manager from her base in Scotland; further details about the scope of the business; details of her current driver and his background; the Appellant's systems for seeing the driver and the vehicle; her system for monitoring defects reports; that there was a contract with RHA to analyse the driver's and vehicle's data; advising that the vehicle was less than two years old and there system in place for maintenance inspections through a national maintenance provider. Vouching of financial standing was provided but more was being sought. It was submitted that the Appellant was an experienced Operator who had been involved in the haulage industry for the majority of her adult life and took her responsibilities as Operator and transport manager seriously. It was submitted that the driver's hours conviction was due to one errant driver who had since been dismissed. No other issues had been identified except the prohibition notice.
27. By letter dated 6 May 2016 the Traffic Commissioner advised the Appellant that he was considering revoking her licence under sections 26(1)(h) and 27(1)(a) and (b) of the 1995 Act. (Page 78). The section 26(1)(h) grounds were stated to be insufficient financial resources; no qualified transport manager as she did not "fall within the exemption contained in Article 9 of the EU Regulation on operator licensing (EC Regulation 1071/2009) and cannot therefore seek to rely on an Acquired Rights certificate" meaning that as operator she did not satisfy professional competence. The section 27(1)(a) and (b) grounds were that she no longer satisfied the requirement to be of appropriate financial standing and professional competence in accordance with sections 13A(2)(d) and 13A(3)(b) of the 1995 Act.
28. The above letter of 6 May was sent to the Appellant's correspondence address and also to the address of the Operating Centre. The latter was returned to the Traffic Commissioner's office marked "gone away".
29. In response, by letter dated 12 May 2016 (page 83), the Appellant's solicitors in Aberdeen, asked for a Public Inquiry and meantime advised the Traffic Commissioner that further information regarding the Appellant's financial position had been requested from her bank; a copy of her Article 9 ARC confirming her status was enclosed; and, regarding her fitness, it was pointed out that the information submitted to date related to her ability to travel from Aberdeen to Cambridge for a preliminary hearing and did not affect her ability to carry out her duties as transport manager.
30. A call up letter was issued by the Traffic Commissioner dated 30 August 2016 (page 14). A PI was fixed for 17 October 2016. The issues of concern to the Traffic Commissioner were the prohibition notice; observance of rules on drivers hours and tachographs, proper record keeping; the duty to keep the vehicle fit and serviceable; and that there had been a material change in circumstances since the licence was issued in that the Appellant may not have sufficient resources; that she may not be using her operating centre and an absence of professional competence as she did not fall within the Article 9 exemption and so could not rely on her ARC. We note in passing that this letter did not state any evidence specific to the Appellant as to why the Traffic Commissioner was concerned about her ARC. Further concerns listed were that the Appellant might not have a stable establishment in the UK, be of good repute, be of the appropriate financial standing or meet the requirements of professional competence. Additionally, the Traffic Commissioner was concerned that as Traffic Manager she was not exercising continuous and effective management of the transport activities. The Traffic Commissioner notified that he intended to consider her good repute and professional competence as transport manager.

31. The Appellant instructed new solicitors, namely Backhouse Jones. By email dated 27 September 2016 they requested further details of why the Traffic Commissioner considered the Appellant could not rely on her ARC (page 128). In response the Traffic Commissioner's Office referred them to the DfT guidance on entitlement to Acquired Rights and paragraph 54 of Statutory Document 3, without further elaboration specific to the Appellant (page 125).
32. Prior to the PI the Appellant submitted maintenance documentation and vouching of financial standing to the Traffic Commissioner's Office.
33. By letter dated 7 October 2016, Backhouse Jones submitted that the Appellant met the requirements for financial standing. A letter from her GP was provided regarding her fitness (page 278). The Appellant's solicitors stated that it was their understanding that the main issue was that due to the Operator and transport manager living in Turriff while the Operating Centre was in Nuneaton there were concerns about her ability to exercise continuous and effective management over the operations. It was explained that when she moved to Turriff the Appellant put proactive systems in place and with the use of modern technology she was able to manage the operation remote from the operating centre. It was noted that the DVSA officer had been satisfied with these arrangements. Regarding maintenance, a copy of the maintenance log was provided and it was explained that the Appellant had a full repair and maintenance contract with a national maintenance provider which meant all repairs were undertaken by them rather than by the driver. It was noted that rolling brake checks had been performed twice per annum and that this was to be increased to 4 efficiency reading brake checks with test weights being applied.
34. The Appellant's solicitors again raised the issue of her ARC and stated that she had been involved in the transport industry since she left school and involved in the management of vehicles through her father's company until the early 2000s when her father died. Thereafter, she was named on the licence as transport manager and was named on the present licence granted in August 2004.
35. It was noted by the Appellant's solicitors that there was concern that she was no longer using the address in Nuneaton as an operating Centre as a letter had been returned marked "gone away". The Operating Centre was a parking area with no office facilities. It was noted that the Appellant had previously advised of her new correspondence address and that the Traffic Commissioner had, in fact, used that address for other correspondence.
36. The Traffic Commissioner responded by email dated 13 October 2016 (page 132). Regarding the ARC, the Traffic Commissioner referred to paragraphs 54, 56 and 57 of Statutory Document 3 and made specific reference to the effect of making a false declaration to obtain an ARC. Regarding Article 9 the Traffic Commissioner said that the reference to "continuously managing" was taken from Article 4 and meant as an "*authorised* transport manager". This letter failed to spell out what the specific issue was regarding the Appellant's ARC.

The Public Inquiry

37. The PI was held on 17 October 2016 in Cambridge. The Appellant appeared in person and was represented by Mr. Jonathan Backhouse of Backhouse Jones, Solicitors. The transcript is at page 237 and comprises 42 pages.
38. Many of the issues originally raised by the Traffic Commissioner had either been resolved or fallen away by the date of the PI.
39. It emerged at the PI, that the Traffic Commissioner's concern regarding the Appellant's ARC had been raised by the comment in her solicitor's letter dated 4 September 2015 that she had run the business for approximately 10 years by herself. The Traffic Commissioner was concerned that when her ARC was granted in 2011 she had not continuously managed a road haulage operation for a 10-year period prior to 4 December 2009 as required by Article 9.
40. Regarding the ARC, the Traffic Commissioner said at the PI, that he did not have the original application form completed by the Appellant in 2011. The Appellant's solicitor submitted, on behalf of the Appellant, that she applied using the correct processes and forms and did not believe she would have misled anyone. He submitted that the application was considered by the Secretary of State and on that basis the ARC was issued. However, the Traffic Commissioner took the view that even in the absence of fraud or inappropriate conduct he could review the decision to grant the ARC if the requirement of having continuously managed a road haulage undertaking for the period of 10 years prior to 4 December 2009 had not, in fact, been fulfilled.
41. Mr. Backhouse submitted that Article 9 did not require the applicant to have been a "transport manager" for the relevant period but to have continuously managed a road haulage undertaking. He said the Appellant had worked in transport since she was 15 (page 19 of the transcript). The Traffic Commissioner took the view that he was now entitled to ask the Appellant to prove that she had fulfilled the requirements of Article 9 despite the fact that the ARC had been granted in 2011. The Appellant, through her solicitor, offered to give oral evidence on this point however, the Traffic Commissioner declined to hear such evidence (page 23 of the transcript).
42. At the PI, Mr. Backhouse took issue with the Traffic Commissioner that prior to the PI the Appellant had not been alerted to the fact that the Traffic Commissioner believed that she had not acted as a transport manager between 1998 and 2004 or had any evidence to that effect.
43. The remainder of the PI was taken up with the questions of the location of the operating centre and maintenance. Regarding the prohibition, the Traffic Commissioner commented that it was pretty old (p. 237). There was no further discussion about the prohibition.
44. The PI was adjourned for further written legal submissions. The Traffic Commissioner wished written submissions on which traffic area the operating centre was situated and whether he was entitled to take action if he found the ARC to be void (page 273 [page 37 of the transcript]).
45. Further submissions were provided by letter dated 29 November 2016 (page 232). The Traffic Commissioner produced an unsigned statement by DeLocia White listing the information held on the Operator Licensing records relating to the Appellant (page 231).

Written submissions

46. Mr. Backhouse provided further submissions in writing (pages 232-234). Firstly, this confirmed that the operating centre was situated in the Traffic Commissioner's traffic area. Mr. Backhouse submitted that the Traffic Commissioner did not have the power to review the Secretary of State's decision to grant the issue of an ARC. The Appellant had followed the procedure provided by the Secretary of State and had been granted an ARC in accordance with that procedure; there was no suggestion that she had done anything wrong in this regard. It was a different issue if a certificate had been obtained by fraud; that was the limited situation envisaged in Matthew Reynolds.
47. Mr. Backhouse adhered to his position that to satisfy Article 9 what was required was having managed a road haulage undertaking for the 10 year period; it was not necessary to have been nominated as transport manager on a licence during that period.

The Traffic Commissioner's decision

48. The Traffic Commissioner gave his decision by letter dated 15 December 2016 (page 280) as follows:
- *Section 26(1)(c)(iii) – prohibitions*
 - *Section 26(1)(h) – material change due to the absence of professional competence as the transport manager's Acquired Rights certificate cannot be relied upon*
 - *Section 27(1)(a) – operator does not meet the requirement of professional competence*
 - *Section 27(1)(b) – transport manager does not meet the requirement to be professionally competent.*

*To address the absence of professional competence, the Traffic Commissioner has allowed a **period of grace of 4 months** from the date of this letter. I must advise you that the licence **will be revoked** if the mandatory requirement for professional competence is not met by the end of 4 months, that is, **by 15 April 2017**.*

*The Operator is issued with a **formal warning** for the failures identified and to ensure future compliance.*

The Traffic Commissioner's Reasons for his decision

49. Ultimately, the only substantive issue remaining after the PI was the Appellant's ARC, professional competence and the consequences flowing from that. The Traffic Commissioner was satisfied as to the Appellant's financial standing. While the Traffic Commissioner had some concerns about the Appellant's abilities physically to carry out her responsibilities as transport manager, he appeared otherwise to be satisfied by the evidence and reassurances given regarding vehicle and driver management and maintenance arrangements (pages 285 - 287).

50. The Traffic Commissioner examined the legislation and concluded that for a person to obtain an exemption from the Article 8, in terms of Article 9 the person must have continuously managed a road haulage undertaking for the period of 10 years before 4 December 2009 (p. 295, paragraph 26).
51. The Traffic Commissioner's concerns about the Appellant's ARC were raised by a comment in the letter of 4 September 2015 from the Appellant's solicitors that she "*had run her business for approximately ten years, i.e. back to 2005*" (page 286, paragraph 13). The letter is summarised in paragraph 14, above. We note in passing that this is a selective quotation from that letter and the sentence is incomplete
52. The Traffic Commissioner noted that at the date of the Appellant's application for an ARC, sometime in 2011, she was named as the transport manager on her Operator's licence. He inferred from that that she would have completed the transport manager Questionnaire Acquired Rights form (page 290, paragraph 21; the blank form is at pages 200-201). He then referred to the notes to the questionnaire which stated that new ARCs could only be held by those individuals who could provide proof if asked that they have 'continuously managed' a road haulage operator... in one or more Member States for the period of 10 years ending 4 December 2009.
53. The Traffic Commissioner found that the Appellant was not someone who would intentionally provide inaccurate information (page 295, paragraph 27).
54. The Traffic Commissioner concluded that the Appellant did not continuously manage a road haulage undertaking for a period of 10 years before 4 December 2009 (page 291, paragraph 23). The evidence relied on for this finding was what he refers to as the "*admissions made in writing*" in her solicitors' letter of 4th September 2015 (page 295, paragraph 27) and information from the licensing records (p. 231) that the Appellant held an operator's licence from 25 October 1995 to September 1998 and from 25 August 2004 to the present and that she was transport manager on the latter licence for the same period. He found a gap in her relevant experience between September 1998 and 25 August 2004.
55. The Traffic Commissioner found that the ARC issued to the Appellant could not be relied upon and found that she did not meet the requirements of section 13A(3)(b) and section 13A(2)(d) of the 1995 Act (respectively, professional competence of transport manager and operator).
56. The Traffic Commissioner relied on the decision of the Upper Tribunal in Matthew Reynolds that he was entitled to look behind the ARC and to consider whether or not it was validly issued.

The appeal to the Upper Tribunal

57. The Appellant was represented by Mr. James Backhouse at the Appeal to the Upper Tribunal. The appellant was present in person.
58. The grounds of appeal are at pages 305 - 308. In addition, Mr. Backhouse kindly provided a skeleton argument, which he supplemented in his oral submissions.

59. For the Appellant it is stated that the Traffic Commissioner appears to have erroneously adopted an interpretation of Article 9 as requiring an individual to have been specified as a nominated transport manager on an operator's licence continuously for the relevant period rather than simply being able to demonstrate that they have been involved in the management of transport operations for that period. The Appellant's interpretation is consistent with paragraph (11) of the Recital to Regulation 1071. The fact that the Appellant did not have an operator's licence between 1998 and 2004 does not lead to the inevitable conclusion that she was not managing a road haulage undertaking during that period. The Traffic Commissioner would appear to have rejected the other evidence which indicated that she satisfied the requirements of Article 9 without explaining why.
60. The Secretary of State in issuing ARCs under the RTOR to persons with existing grandfather rights reflected the provisions of Article 9; that can be seen from the specimen application form and guidance notes provided.
61. Even although the Appellant had duly obtained and held an ARC since 2011, the Traffic Commissioner required the Appellant to re-establish before him the validity of her entitlement based on his interpretation. It was submitted for the Appellant that the Traffic Commissioner has no jurisdiction to consider the validity of the Appellant's ARC and that the Traffic Commissioner's interpretation of Matthew Reynolds was wrong; the examples given there of a Traffic Commissioner being able to make a finding about the validity of a CPC being restricted to cases of dishonesty or where the certificate is no longer valid due to suspension or having otherwise been lost. The Matthew Reynolds and Sivyer decisions confirm there is no regulatory jurisdiction for The Traffic Commissioner to determine the validity of the process by which ARCs were issued by the Secretary of State. Indeed, this is also true of any other non-acquired rights CPCs. The Traffic Commissioner is a statutory regulator and a statutory quasi-judicial authority and as a result does not have any inherent jurisdiction to interfere with discretions of other authorities including the Secretary of State. The Traffic Commissioner in his decision in this appeal identifies no legal route whereby he has any statutory authority to remove the CPC issued under paragraph 4 of schedule 3 of the RTOR.
62. Mr. Backhouse submitted the Traffic Commissioner was seeking to rely on paragraph 24 of the Matthew Reynolds decision as creating authority to interfere with the Secretary of State's decision to issue a CPC under the RTOR provisions. That he said was a misinterpretation of the decision. The idea that Traffic Commissioners could, at this stage re-visit all ARCs and remove professional competence would drive a coach and horses through the approach, adopted by the Secretary of State in dealing with the matters in 2011. The Traffic Commissioner had no statutory power to do that; he had not cited any such power.
63. There was no basis to suggest that the Appellant had made an inaccurate declaration in her ARC application and none was adduced by the Traffic Commissioner.
64. Looking at the decision as a whole, the Traffic Commissioner had not made adequate findings in fact.
65. On a separate point, Mr Backhouse suggested that Article 9 had not removed the validity of existing grandfather rights or earlier examination-based rights. To remove such rights would infringe the right to property under Article 1 of the First Protocol of the European Convention on Human Rights.

66. Article 21 (2) of Regulation 1071 provided that certificates of professional competence issued before 4 December 2011 continued in force and effect. The Appellant had such a certificate. Therefore, she did not, in any event, need to meet the requirement of proving under Article 9 that she had continuously managed a road haulage undertaking for the relevant 10-year period, albeit she did and she could so prove. It was because of Article 21(2), he submitted, that transport managers listed on a licence completed a questionnaire and were issued with an ARC prior to 4 December 2011. Persons not listed on a licence completed a different form and had to prove their continuous management for the 10 year period.
67. It was submitted that the Traffic Commissioner's calling in letter had not given the Appellant fair notice of what exception was being taken to her ARC and, in particular, that it had been inappropriately issued because the Traffic Commissioner considered that she had not been engaged in managing a transport undertaking continuously for the relevant 10 year period.
68. It was submitted that the Traffic Commissioner's decisions and the formal warning should be set aside.

Discussion and Decision

69. The Traffic Commissioner was concerned that the Appellant, and therefore the transport manager, was based in Turriff but managed the operating centre in Nuneaton. The Tribunal feels, that whilst not ideal, she has shown that she can achieve continuous and effective management of the operation in light of the fact that she only has one vehicle and one customer; she speaks by telephone to the driver every day and physically sees the driver and the vehicle at least once per week. The Traffic Examiner's report indicated there were no problems with the systems in place. Clearly, this is one specific circumstance and should not be taken as carte blanche to allow "remote" Transport Managers, especially those with larger fleets to manage. However, we would recommend to the operator that it would be sensible to apply for another operating centre in Turriff thus removing any doubt about her ability to manage the operation continuously and effectively.
70. In this case the Traffic Commissioner has, in effect, found that the Appellant was never entitled to her ARC from the date of its issue. He has therefore removed her professional competence.
71. The question of whether the traffic commissioner could remove an operator's professional competence was considered in the case of Sivyer. Having considered, (in paragraphs 15-17), the European and domestic legislation and the decision in T/2012/71 Silvertree Transport Ltd the Tribunal concluded, (paragraph 18):

"The cumulative effect of all this is that - if an individual must be regarded as professionally competent if he or she has passed the relevant written examination or is the holder of another recognised qualification etc. - then this is not something that can be 'lost' in the same way that repute can be lost".
72. We respectfully agree with the reasoning and conclusions of the Upper Tribunal in Sivyer (subject to the observations in Matthew Reynolds referred to below).

73. In the case of Matthew Reynolds the Upper Tribunal considered whether the traffic commissioner had the power to remove professional competence. The Upper Tribunal examined the terms of Regulation 1071, noting that it was directly applicable in Member States, and that it contained no empowering provision relating to declarations of loss of professional competence (see Article 14) and stated: "... *the only power that a Traffic Commissioner has in respect of transport managers is that provided under Article 10 which is to find that they are no longer fit to manage a transport undertaking by reason of loss of repute.*" (Paragraph 21.) Despite this, for reasons which the Upper Tribunal was unable to ascertain, paragraphs 15 and 16 of Schedule 3 of the 1995 Act had introduced the concept of loss of professional competence. As the Regulation did not provide such a power then insofar as paragraphs 15 and 16 of Schedule 3 purport to empower traffic commissioners to make a finding of loss of professional competence, then it should be disregarded. The Upper Tribunal added in paragraph 24 that the traffic commissioner could make findings in very limited situations concerning a transport manager's professional competence. This has already been referred to in paragraph 4 above.
74. The instances given by the Upper Tribunal are limited to instances of deception (forgery, acquired by impersonation or not being used by the person who actually obtained the qualification) or that professional competence has already been suspended due to a loss of good repute. In other words, the traffic commissioner can acknowledge that a claim to professional competence has never existed or has been previously lost.
75. The present situation is very far from those envisaged in Matthew Reynolds. This is not a case of an ARC having been obtained by deception, as the Traffic Commissioner acknowledges, and the ARC has not otherwise been suspended. In effect, what the Traffic Commissioner is purporting to do in the Appellant's case is to hold and declare her ARC as never having been valid. In other words, as null and void *ab initio*.
76. We are unable to find any specific jurisprudence on this point other than that already referred to. However, we do not consider that the Traffic Commissioner has the power to make such a finding. There is nothing to that effect in the legislation and, as the Upper Tribunal stated in Sivyer (paragraph 19), if Parliament had intended the Traffic Commissioner to have such a power then we think it would have made that clear and laid down some criteria for making such a finding. Accordingly, by declaring the Appellant's ARC to be invalid, the Traffic Commissioner erred in law.
77. If we are wrong about that, there are other reasons why the Traffic Commissioner's decision is wrong and must be set aside. In this case, the Traffic Commissioner went wrong in two, interconnected respects. He misinterpreted and misapplied Article 9 and made a finding in fact and law that the Appellant had not continuously managed a road haulage undertaking for 10 years prior to 4 December 2009 without clearly explaining how he came to that conclusion on the evidence.

The meaning of Article 9

78. Paragraph 11 of the Recital to Regulation 1071 states that it should be possible for Member States to exempt from the professional qualification examinations persons who can provide proof of continuous experience in managing transport activities. This is then implemented in Article 9 and by the ROTR. Our interpretation of these provisions is that provided a person could prove that they had continuously managed a road haulage undertaking for the relevant period then he/she would be entitled to an exemption, in this case an ARC. For example, an individual who was carrying out

all of the activities of a transport manager in all but name, such as for an operator who held a restricted licence (and therefore did not need to specify a transport manager on the licence) would have been qualified to apply. There is nothing in the provisions that require the applicant to have been in the position of licence holder or nominated transport manager on a licence during the 10-year period.

79. That would also appear to be the interpretation of the Secretary of State as demonstrated in the application forms and guidance issued in 2011 regarding ARCs. According to STC Document No. 3, in October 2011 transport managers were requested to complete and return a Questionnaire in order to populate the national register (paragraph 60). Paragraphs 54 and 55 are in the following terms:

“In line with Article 9, the previous Grandfather Rights have been replaced by new Acquired Rights certificates. The responsibility for issuing these certificates lies with the Secretary of State. They are issued on the basis of a declaration that the individuals in question can provide proof upon request that they have continuously managed a road haulage or a road passenger transport operation in one or more Member States for the period of 10 years ending on 4 December 2009. Acquired Rights certificates are being automatically issued to all transport managers exercising grandfather rights on an operator’s licence at the date of implementation. Those holding Grandfather Rights but not listed as a transport manager on an operator’s licence at that date are also able to apply for an Acquired Rights certificate.” (Our emphasis.)

*“Only transport managers with existing Grandfather Rights are eligible to apply for Acquired Rights. At the time of publication those who are not listed as a transport manager on a current operator’s licence are required to apply to the Secretary of State for an Acquired Rights certificate by **4 December 2013.**”*

80. There is a sample of the pro forma “Transport Manager Questionnaire” that was to be completed by transport managers listed on a licence at pages 200 –201, with accompanying notes at pages 202 - 207).
81. Transport managers who were not listed on a current operator’s licence required to complete the “Application form – Transport Manager Acquired Rights.” There is a sample of this form with introductory notes at pages 208 to 212; guidance notes accompanying the form are at page 213. The introductory notes state (Page 208):

“The Regulation requires that a transport manager with AR has continuously managed at least 1 road haulage undertaking or a road passenger transport undertaking for the period of 10 years before 4 December 2009. Temporary breaks in the requirement for ‘continuous management’ are legitimate and unavoidable – for example to take account of long-term sick leave or maternity leave. In view of this, we are asking applicants to explain their role as a transport manager in a road haulage undertaking or a road passenger transport undertaking from the 4 December 1999 to the present.”

This form asked the applicant to give details of each operator for whom he/she had worked from 4 December 1999 to 4 December 2009 and to state his/her job title in those employments.

82. Thus, it would appear that there were two different procedures in place for the issuing of acquired rights certificates. One procedure applied to persons holding grandfather's rights who were already nominated on a licence as a transport manager and another procedure applied to holders of grandfather rights but who were not named as a transport manager on an operator's licence. Both were entitled to an ARC. The process of the changeover from grandfather rights to the new acquired rights certificates was completed by 4 December 2013. No such rights could be granted after that date.
83. It is quite clear from Article 9 and from these documents that what was required was experience in continuously managing a road haulage undertaking during the 10-year period to qualify for an ARC. There is no requirement either to be a licence holder or named on a licence as transport manager during the 10-year period. Indeed, the Traffic Commissioner does acknowledge this in his decision (paragraphs 24 and 26). However, that is not how he has applied Article 9 in this case. Because the Appellant was neither an operator nor a transport manager named on a licence between 1998 and 2004, he found there was a gap; this demonstrates his misinterpretation of Article 9.
84. As the Appellant was nominated as a transport manager on her licence she could have completed the transport manager questionnaire; she would then have been automatically issued with an ARC. The transport manager questionnaire required personal details of the transport manager, the number of the licence on which the transport manager was nominated, whether the transport manager was an internal or external transport manager and which certificate of professional competence qualification or exemption was currently held. The transport manager required to sign a declaration confirming that he/she would effectively and continuously manage the transport activities of the licence holder; that he/she had a genuine link to the licence holder; that he/she was resident in the European community; and understood his/her responsibilities as transport manager. The questionnaire required a signed declaration by the operator. Where the operator and the transport manager were the same person then that person required to sign the form twice.
85. The Appellant's original questionnaire or application has not been produced by the Traffic Commissioner, who was probably best placed to obtain such information should it exist. She was issued with an ARC dated 22 November 2011 by the Department for Transport (pages 86 and 87). While it is unclear whether the Appellant completed a form such as the Transport Manager questionnaire or completed an application form for transport manager acquired rights it may be assumed that she followed one of the procedures provided by the Secretary of State as she was duly issued with an ARC. That being the case, her ARC must be treated as having been validly and properly issued unless there is compelling evidence to the contrary.

86. An operator's licence is a possession for the purposes of Article 1 of the First Protocol of the European Convention on Human Rights (ECHR). The traffic commissioner as a public authority within the meaning of section 6 of the Human Rights Act 1998 must exercise his authority in a manner compatible with ECHR rights. A decision that will lead to revocation of the licence should only be made with caution and on the basis of compelling evidence after a fair consideration of all of the facts and circumstances. (For examples of the care with which such decisions should be reached and why see D Crompton 2003 EWCA Civ 64 and 2001/45 Bryan Haulage (No 2).) That would include making clear what the concern was and hearing evidence from the Appellant if she wished to give evidence relevant to the issue to be decided. Further, clear and reasoned findings in fact must be provided to underpin the decision.
87. As the Traffic Commissioner was considering a decision, which was liable to lead to the revocation of the Appellant's licence and the likely closing of her business, the burden of proof was on the Traffic Commissioner. There was no burden of proof on the Appellant to prove that her ARC was validly issued to her in 2011. (See Muck It Ltd. v Secretary of State for Transport [2006] RTR 9). The decision in Muck It was applied in the Inner House decision in McCaffrey v. Secretary of State for Transport 2006 SC 664:

[22] As we have noted in para 6, sec 27(1) obliges the traffic commissioner to revoke a standard licence if it appears to him, inter alia, that 'the licence-holder is no longer . . . of the appropriate financial standing'. Counsel submitted to us that that placed no burden of proof on the Appellants. In so submitting he cited to us the recent Court of Appeal decision in Muck It Ltd v Secretary of State for Transport. In that case the language of sec 13 of the 1995 Act (which admittedly does place an onus of proof on the applicant for a standard licence) was contrasted with that of secs 26 and 27. Reference was made to the Directive 96/26/EC, which the 1995 Act implemented, and in particular to Art 6.2, which provides that:

'Member States shall see to it that the competent authorities withdraw the authorization to pursue the occupation of road transport operator if they establish that the conditions of Article 3(1)(a), (b) or (c) are no longer satisfied.' It is the competent authorities who must establish that the conditions are no longer satisfied. The same language is carried through into sec 27. Revocation follows if it appears to the traffic commissioner that the holder is no longer of the appropriate financial standing.

[23] We agree with the Court of Appeal that there is no burden on the licence holder to demonstrate that he is still of appropriate financial standing. The reasoning based on Art 6 of the Directive is compelling. The contrast between the language of sec 13 and that of sec 27 points in the same direction. As a matter of general principle, the burden of proof should be on the party alleging that the state of affairs has changed, rather than on the one maintaining that it has remained the same.

The same principle applies where what is in issue is the removal of professional competence.

88. Under Article 9 persons who provided proof that they had continuously managed a road haulage undertaking for the relevant period could be exempted from the Article 8 examinations. This is reflected in paragraph 14(2) of the RTOR (see paragraph 11 above). We do not consider that this puts a perpetual onus of proof on the holder of the Article 9 exemption to provide that proof again if asked at any time after the exemption has been granted. The Traffic Commissioner states in his decision at paragraph 22, “... *the onus is on the duty holder to surrender the relevant information when the request (for proof that she had managed a haulage undertaking for 10 years) is made.*” At paragraph 23 he states, “*Having been put on notice, it was for the Operator/transport manager to supply the relevant evidence without which there would be grounds for an adverse finding.*” He clearly considered that the onus was on the Appellant to prove that her ARC had been validly issued to her; in that respect he erred in law.
89. The Traffic Commissioner found as a fact that the Appellant had not continuously managed a road haulage undertaking for a period of 10 years before 4 December 2009 (page 291, paragraph 23) and so did not satisfy Article 9. The evidence for this was (i) what he refers to as the “*admissions made in writing*” in her solicitors’ letter of 4 September 2015 (page 295, paragraph 27) that she had run the business for approximately 10 years, that is since 2005; and (ii) information from the licensing records (p. 231) that the Appellant held an operator’s licence from 25 October 1995 to September 1998 and from 25 August 2004 to the present and that she was transport manager on the latter licence for the same period. He found a gap in her relevant experience between September 1998 and 25 August 2004.
90. To refer to the statement in the letter as an “admission” is to elevate a fairly general comment made for a different purpose to a status it cannot bear. Moreover, the Traffic Commissioner has not considered the complete sentence in the letter of 4 September 2015 which was that the Appellant had “*run the business for approximately 10 years by herself*” (our emphasis). In fairness, the Traffic Commissioner was not entitled to ignore the words “by herself” and their possible implications for the length of time the Appellant had managed a road haulage undertaking. In exercise of his inquisitorial duty, the Traffic Commissioner should have explored this evidence with the Appellant.
91. Further, he should not have considered that sentence in isolation. The same letter stated that the Appellant had been in the haulage industry for over 50 years, as had her father before her. Statements to similar effect were made in letters dated 24 April and 7 October 2016 (see paragraphs 25 and 33 above). The letter of 7 October 2016 explained that she had been involved in the transport industry since she left school and involved in the management of vehicles through her father’s company until the early 2000s when her father died; thereafter she was named on the licence as transport manager. There was documentary evidence that she had been engaged in road transport operations prior to 1 January 1975. A representation that she had worked in transport since she was 15 was made by her solicitor at the PI, in her presence (page 19 of the transcript). In exercise of his inquisitorial function, the Traffic Commissioner had a duty to examine and consider this other evidence and whether it could have filled “the gap”. Indeed, the Appellant offered to give oral evidence at the PI of her involvement in the haulage industry throughout the relevant period however, that offer was declined by the Traffic Commissioner (pages 22-23 of the transcript). The Traffic Commissioner has impliedly rejected the other evidence of the Appellant’s involvement in the transport industry but has not clearly explained why he has done so. By failing to investigate and weigh this other evidence and explain what he made of it, the Traffic Commissioner erred in law.

92. It is implicit in the Traffic Commissioner's decision, that he interpreted and applied Article 9 as requiring a person to have been either a licence holder or named as transport manager on a licence for the 10-year period prior to 4 December 2009. That was the view he expressed in his letter of 13 October 2016 in which he says Article 9 refers to an "authorised transport manager" (page 133). He also stated this at the PI (see pages 4 – 6 of the transcript at pages 240-242). That interpretation is also demonstrated by his reference to a gap in the Appellant's experience between September 1998 and 25 August 2004 when she was neither an operator nor a transport manager on a licence. Also, it may explain why he failed to explore the other evidence of the Appellant's experience and to hear evidence from the Appellant about her experience because, to his mind, she could not fill the gap unless she could show that she had been listed as a transport manager on a licence for the relevant 10-year period. That was a misinterpretation and/or a misapplication of Article 9 and an error of law. On a proper interpretation and application of Article 9, the gap the Traffic Commissioner found, when the Appellant was neither a licence holder nor named as a transport manager on a licence was not necessarily inconsistent with her managing a road haulage undertaking during that gap.
93. Paragraph 15 of schedule 3 to the 1995 Act provides that a traffic commissioner shall not make a finding that a transport manager is not of good repute or professionally competent unless he has served the transport manager with a notice setting out the nature of the allegations made against him. It is not enough to make a statement in general terms; the specific issues must be stated: Alan R Brooks 2001/72.
94. We agree with the submission made on behalf of the Appellant that she was not given fair notice of precisely what the Traffic Commissioner's issue was with her particular ARC and so the call up letters did not conform to the requirements of paragraph 15 of Schedule 3 to the 1995 Act. It would have helped all concerned if the Traffic Commissioner's letters had been less opaque and had specified that what was concerning the Traffic Commissioner was that this particular transport manager did not appear to have continuously managed a road haulage undertaking for the period of 10 years prior to 4 December 2009 and so when she applied for her ARC she did not, in fact, satisfy the requirements of Article 9 entitling her to exemption from the CPC examination and that he wanted evidence that she had and what sort of evidence he required. This issue did not emerge with any clarity until the PI. Given the way the letters were framed, it is easy to see why both the Appellant and her solicitors might think the Traffic Commissioner was barking up the wrong tree for she did, indeed, have an ARC, a copy of which she provided.
95. While we found Mr Backhouse's Article 21(2) argument attractive, we mean no disrespect when we say that it needed further development to allow it proper consideration.
96. For the reasons stated above and the material errors of law identified, we allow the appeal and set aside the decisions of the Traffic Commissioner. It is clear from the Traffic Commissioner's decision that he would have taken no regulatory action regarding the delayed prohibition notice issued in 2013. While we cannot set aside the non-statutory warning issued to the Appellant, in the circumstances, we recommend to the Traffic Commissioner that this should be removed from the Appellant's record.

(Signed)
MARION CALDWELL QC
Judge of the Upper Tribunal
Date: 7 September 2017