



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

Case No. NT/2019/40

**ON APPEAL from the DECISION of the TRANSPORT REGULATION UNIT
(Northern Ireland) dated: 12 April 2019**

Before:

**C.G. Ward
Mr. D. Rawsthorn
Mr. A. Guest**

Judge of the Upper Tribunal
Member of the Upper Tribunal
Member of the Upper Tribunal

Appellant:

Mr Gerald Hynds

Respondent:

Department for Infrastructure

Attendance:

The Appellant:

In person

The Respondent:

Ms Ashleigh Jones, counsel

Heard at:

Royal Courts of Justice, Belfast

Date of Hearings:

10 October and 26 November 2019

Date of Decision:

6 December 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed only to the extent that the panel concludes that the appellant's repute was tarnished, but not lost. His operator's licence was correctly revoked.

Subject Matter

Revocation of licence

Loss of repute

Duration of licences and renewal

Sections 12A (2)(b) and (c), 23(1)(g) and 24(1)(a) of the Goods Vehicles
(Licensing of Operators) Act (Northern Ireland) 2010.

[2019] UKUT 0376 (AAC)

Failure to meet requirements of financial standing and good repute.

Cases referred to:

T/2012/17 NCF (Leicester) Ltd.

NT/2013/82 Arnold Transport v DOENI

T/2015/39 First line Intentional Ltd & William Labie v Secretary of State for Transport.

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Transport Regulation Unit of the Department for Infrastructure given on 12 April 2019, which (to summarise) revoked the licence of the operator (Mr Hynds) on the ground that he no longer appeared to satisfy the requirements of adequate financial standing or good repute and that those matters amounted to a material change in any of the circumstances of the licence-holder since the licence was issued.

2. It is relevant to the case to observe that Mr Hynds is aged 79 and at some point has had a stroke, which to a degree impairs his ability to produce written material and which means that when speaking he needs to be allowed a little time to marshal his thoughts and convey them. The panel treated his written submissions with some latitude and sought to conduct the oral hearings at a pace which enabled him to get his points across.

Relevant history

3. Mr Hynds had since 2008 held a standard international goods vehicle licence for 5 vehicles. This was in the standard format prescribed by Annex 1 of Regulation 1072/2009 and provided for expiry in 2013. It appears that Mr Hynds had in fact since 2008 been operating 1 vehicle rather than 5. The licence was renewed in 2013. A file note dated 30 October 2013 records that, while a licence was being issued for the period 2013-2018, Mr Hynds was informed he would still have to satisfy the Department as to any issues arising from his renewal application. Some consideration was evidently given to reducing the number of vehicles covered by the licence from 5 to 1 but in October 2013 he endorsed a letter from the Department to indicate that he wished to retain the number of vehicles permitted at 5. He evidently managed to satisfy the Department at that point and thus his licence continued.

4. Even the one vehicle has been off the road since September 2017, but there is no evidence of any complaint having been made by the Department about the operation or maintenance before then.

The 2018 renewal process

5. At an unknown date in the summer of 2018 the Department sent him the paperwork in preparation for the next renewal, which fell due on 30 August 2018. It included a form summarising the terms of the existing licence (including that it provided for a maximum number of 5 vehicles) and indicating the evidence required, if the licence was to be continued. A section asked about financial standing, drawing attention to the requirement to have available capital and reserves as at 31 July 2018 of £25,550 (being the prescribed amount in respect of 5 vehicles), and included a short questionnaire asking about loan/overdraft arrangements, the average credit balance on current account or the average debit balance on any overdraft, in each case over the last three months, any factoring/discount arrangements

and any other financial resources he had available. The form explained that a licence is continuous but is now subject to review every five years.

6. On 5 August 2018 the Department received the form duly completed by Mr Hynds and signed by him as “owner” and accompanied by the appropriate fee, by a cheque drawn on the account of “G and M Hynds”. His answer indicated that he had a £25,000 loan/overdraft arrangement and a £20,000 average credit balance and a £20,000 average debit balance on the overdraft. He indicated no factoring/discount finance facilities and that he had no other financial resources available.

7. On 30 August 2018 the Department issued the renewed licence, to 31 August 2023.

8. On the same day, an official wrote to Mr Hynds, explaining that the material he had provided failed to demonstrate the required level of capital and reserves for the type and size of licence held. The letter indicated that in consequence he was required to provide:

- a. original bank or building society statements covering the last three consecutive months along with proof of any overdraft facility; and
- b. (if he saw fit) the last three months original credit card account statements.

9. It further indicated that audited accounts certified by a properly qualified person and not more than 18 months old could be used as a substitute for bank statements, generally only in the case of “an established and substantial limited company/plc with a turnover of more than £5.6m (subject to statutory updating)”. There was and is no suggestion that Mr Hynds’ business is carried on through a company at all, much less one with a turnover of such an amount.

10. He was asked to return the documents by no later than 13 September 2018.

11. Mr Hynds responded by enclosing a copy letter from the Bank of Ireland addressed to Mr and Mrs Hynds giving details of their overdraft facility and a set of copy bank statements covering the period from 4 May to 13 July 2018 on an account in the name of “Gerald and Margaret Hynds t/a Bargainland”.

12. Analysis by the Department established (a) that less than the required 3 months’ worth of statements had been provided and (b) that those which had been provided indicated an average undrawn balance insufficient to support a licence for one vehicle, much less 5.

13. On 2 October 2018 the Department wrote to Mr Hynds pointing out that his evidence did not demonstrate the required amount of finance and informing him of the need to submit further statements to make up the three month period and reminding him of the need for copies and printouts to be certified by a bank representative. It further drew attention to the fact that the

funds held in the account to which the statements related was a joint account and so a statutory declaration from Mrs Hynds was required to indicate that the funds would be available to support Mr Hynds' obligations as licence holder. A reply was required by 16 October 2018. Mr Hynds was warned that failure to comply might result in regulatory action being taken against the licence.

14. This resulted in no reply from Mr Hynds and on 14 February 2019 the Department then responded to the apparent impasse by issuing a letter advising Mr Hynds that it was giving consideration to revoking his licence on the grounds that he no longer appeared to satisfy the requirement to be of good financial standing in view of the apparent failure to provide appropriate evidence; that he no longer appeared to satisfy the requirement to be of good repute in view of the apparent failure to respond to correspondence and that since the licence was issued there had been a material change in the circumstances of the licence holder- in that he no longer appeared to meet the two above requirements. It gave him the opportunity to make representations and/or to request a public inquiry and, if he elected the latter, to submit further financial evidence. Finally, it required further evidence directed to explaining the apparent mismatch between the licence (in Mr Hynds' name alone) and the bank account (in joint names). The letter was accompanied by a "Financial Guidance Note for Operators".

15. On 25 February 2019 Mr Hynds telephoned to say that the business had always operated as a partnership.

16. On 4 March 2019 a letter dated 28 February 2019 was received from McCotter & Co Ltd, accountants, explaining that they acted as accountants and taxation advisers for Mr Hynds. They explained that he was, and had been for many years, in partnership with his wife. They enclosed unaudited partnership accounts for the year ended 31 December 2017, a letter from the Bank of Ireland confirming (as had previously been evidenced) that Mr and Mrs Hynds had an overdraft of £25,000 and single credit card statements from Barclaycard (dated 2 February 2019, showing a balance of £0 and a credit limit of £6,500) and from First Trust Visa (dated 7 November 2016, showing a balance of £0 and a credit limit of £2,100, accompanied by an explanation – not otherwise evidenced – that the card had not been used since November 2016). McCotter & Co expressed the hope that the evidence would enable the licence to be renewed for one vehicle.

17. No request was made for a public inquiry to be held.

18. There is a record dated 12 April 2018 that a phone call took place between an official and Mr Hynds. The note on the Department's system records:

"Call to Operator re ongoing finance issue. Advised as the accounts received were not provided by a chartered accountant or a registered body, we cannot accept them. Mr Hynds said he received a certificate of his licence last summer, he has it on the wall until either 2021 or

2023 (he couldn't remember which) that he has provided bank statements before and wouldn't do so again. I asked him if he was refusing to provide the information and he said it has been provided before, wouldn't be provided again and he terminated the call."

19. The Department's case management system (p68) contains an entry dated on 10 April 2019 clearly referring to the call having taken place. The paperwork appears explicable only on the footing that the note of the call was compiled at least 2 days after it took place. However, it has not been disputed that a call in such terms did take place and the discrepancy (if such it be) does not appear to be of significance.

20. On 12 April 2019 the Department wrote to Mr Hynds giving the decision which is the subject of the appeal. The decision was on the grounds foreshadowed in the letter of 14 February 2019 and summarised at [14] above.

21. Mr Hynds informed us that thereafter he approached an official in Belfast (his previous contact having been with the unit in Leeds which is responsible for Northern Ireland cases) and raised with the official the possibility of reducing the number of vehicles to 1, but was informed that it was too late for such a step.

Mr Hynds's appeal

22. Mr Hynds's appeal to the Upper Tribunal, evidently written with help, made (in essence and to summarise) the following points (given the issue about the identity of the licence-holder, I note that all are written using the pronoun "we"):

- a. they have always kept the lorry and trailers regularly serviced
- b. they had sent in their accounts in July 2018 and been told that these were not enough, but failed to understand why what had been acceptable in 2013 was not acceptable for the renewal from 2018-2023
- c. they are financially sound (details were given of the various assets they own)
- d. the reason there are not more takings showing on their bank statements is that the lorry was taken out of service on September 2017 due to the loss of a contract
- e. their credit cards are all clear
- f. they had been treated unfairly by the Department's Belfast office who would not listen and said they had to apply for a new licence
- g. The Department was incorrect in relying on McCotter & Co being unregistered.

Financial standing

23. Section 12A of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 ("the 2010 Act") makes it a requirement for a licence that the Department is satisfied that the operator has "appropriate financial standing".

What constitutes “appropriate financial standing” is set down first by Regulation (EC) No 1071/2009. Article 7 requires an undertaking to

“demonstrate, on the basis of annual accounts certified by an auditor or a duly accredited person, that, every year, it has at its disposal capital and reserves totalling at least EUR 9,000 when only one vehicle is used and EUR 5 000 for each additional vehicle used.”

The Euro figures are converted on a standardised basis and at the time their equivalents were £7,950 and £4,400 respectively. Article 7 does permit Member States to derogate (depart from) some of its provisions, but not from the requirement for accounts to be certified by an auditor or a duly accredited person.

24. The purpose of the financial requirement is to ensure that there are sufficient funds available to allow vehicles to be maintained for safe use on public roads so that other road users are not put at risk and, by imposing limits on all operators with a given type of licence and size of fleet, that safety is not undermined in the interests of securing a perceived competitive advantage.

25. The renewal application was clearly made on the basis of a licence for 5 vehicles. That was the basis of the existing licence. It was summarised on the renewal application form and Mr Hynds signed it. The Department correctly advised him that £25,550 was required, using the figures shown above.

26. The Department was correct not to accept the figures on the completed financial standing questionnaire. To say in the circumstances of the case that Mr Hynds had both a credit and a debit balance of £20,000 was a nonsense. The panel also notes that in his response, Mr Hynds indicated that he had no other financial resources available.

27. The bank statements subsequently provided confirmed the extent to which the overdraft had already been used. The Department was correct in its conclusion that on average only £4,141 remained undrawn, well below the figure required for 5 vehicles.

28. The Department was entitled to require a statutory declaration from Mrs Hynds. It remains somewhat opaque why Mr Hynds alone was the licence holder when the evidence was that all the business interests were held via his partnership with Mrs Hynds, but nonetheless that was the basis of his renewal application. Mr and Mrs Hynds have a number of business interests including running a shop and the concern of the Department to ensure by means of obtaining the statutory declaration that partnership resources would sufficiently be available to be devoted to the vehicles to be covered by the licence was a legitimate one. No statutory declaration was provided in connection with the 2018 renewal.

29. Although McCotter & Co's letter requested that the licence be renewed for 1 vehicle, the licence had already been renewed (albeit its continuance was liable to be in some jeopardy, as the letter of 2 October 2018 had indicated). To vary the licence from 5 to 1 required an application to be made under section 16(1)(b) of the 2010 Act, in respect of which a further fee would be payable; however, none was made. Even taking into account both the credit card statements (and the evidential value of the 2016 statement, even accompanied by the explanation McCotter & Co provided, was at best limited), the shortfall from the figure required for 5 vehicles could still only be bridged if the accounts they provided were in an acceptable form. While there are some indications in the Department's file notes that the accounts might have been considered acceptable had they been from a source permitted by Regulation 1071/2009, they were not from such a source; the Department made the appropriate enquiries including contacting McCotter & Co themselves and indeed it is not in dispute that McCotter & Co were not within the terms required by the Regulation. We emphasise at this point that we are not intending to cast any aspersions on McCotter & Co, merely to note that the firm was not in a position to provide the accounts the particular Regulation required. (It is for that reason also that, whilst we note Mr Hynds's comment that the firm's accounts have been acceptable to HM Revenue and Customs and others, it does not help him in the present context. It does not follow that what is acceptable for tax purposes is acceptable in a different legal regime where different public interests are at stake.)

30. Before the second hearing, Mr Hynds submitted a surveyor's valuation of the various land assets held by him and his wife. Ms Jones objects to the admissibility of the evidence on the basis that it was not before the Department when the decision under appeal was taken. We do not need to rule on the admissibility question, as even if we were to take it into account, it would not in our view sufficiently assist Mr Hynds. Realising the value of land assets can be a notoriously slow process and does not provide a source of ready funds necessary to enable vehicles to be properly maintained. It might of course have been possible to use the assets as security to obtain a loan, or a greater overdraft facility than the existing one, but that was not done.

Department's ability to challenge financial standing following issue of licence on renewal

31. It formed part of Mr Hynds's case at the first oral hearing that he had been issued with a renewed licence, which he produced to the Upper Tribunal. This took the hearing in an unexpected direction, leading ultimately to the need for an adjournment.

32. Ms Jones told us that the process for licence continuation is mirrored throughout all regions by the Central Licensing Office. When the paper system is used (there is also an on-line facility), upon receipt of the fee and checklist by post, the fee is lodged and the checklist checked. The Office operates within a process period of 14 days where possible. If, however, a licence is due to expire in a shorter timeframe, the Department endeavours to

expedite those cases. When payment is made and the checklist checked, the licence is issued. Any issues arising on the checklist will be noted by the case worker so those issues can be checked, and any follow-up action taken.

33. Ms Jones sought to rely on section 15(2) of the 2010 Act, which provides

“Subject to its revocation or other termination under any provision of this Act or any other statutory provision, an operator’s licence (other than an interim licence issued under section 21) shall continue in force indefinitely.”

34. There does not appear to be an express provision in the 2010 Act authorising the 5 yearly review. There is provision for review of an operating centre under s.27, but that is a different issue. However, there is provision in s.47(1)(c) permitting fees to be charged for the continuation in force of operator’s licences, which appears to assume that there is such a process. Furthermore, the 2010 Act is designed to give effect to Regulations 1071/2009 and 1072/2009 and, as noted above, the prescribed form of licence does have an end date. Mr Hynds, beyond appealing to the “certificate on the wall”, has not sought to argue the point and we are content to proceed on the basis that the 2010 Act, construed so far as necessary to be consistent with the European legislation, at least implicitly authorises such a process.

35. In a way, the renewal process, as its operation has been described to us, is a bit of a distraction from the issues in this case. It would be a mistake to conclude that the issuing of the licence on renewal denotes that the Department is satisfied with the information and evidence provided to it. While someone coming to the regime “cold” might find that surprising, such was in any event not Mr Hynds’ position, as he had previously been advised in 2013 that the fact that he was being issued with the 2013-2018 licence did not preclude the Department from coming back with any queries it might have.

36. The requirement to have sufficient financial resources is a continuing one: see Art.7(1) of Regulation (EC) No 1071/2009 and *T/2012/17 NCF (Leicester) Ltd*.

37. In dry legal terms, the question would be whether the Department was precluded (in legal jargon, “estopped”) from expressing the view that the material provided to it was unsatisfactory when it had just issued a renewed licence. Unless a contrary intention appears in the Act conferring them, statutory powers are presumed to be exercisable from time to time as occasion requires: Interpretation Act 1978, s.12(1). There is little or no room for the doctrine of estoppel in public law where it would prevent a public body from performing its public duty. In the present context, as noted, the powers are conferred to promote safety and to ensure fair competition; particularly the former consideration would militate against there being room for any estoppel. Further, as has been noted, Mr Hynds had been informed on 30 October 2013 how the system worked, so cannot claim to have been misled

and to have relied upon such misleading.

38. We therefore conclude that for the reasons in paras 32 to 37, it was irrelevant that Mr Hynds already had “a certificate on the wall”. The Department was entitled to examine whether Mr Hynds had sufficient resources notwithstanding the issue of the licence on 30 August 2018.

39. Nor in the panel’s view does it matter that Mr Hynds had apparently satisfied the Department in 2013. We do not have the evidence on which that was based and in any event it was based on circumstances 5 years prior to the period we are considering. The question has to be whether the Department acted lawfully and correctly in 2018 in relation to the material it had.

Conclusion on financial standing

40. In the light of the conclusion at para 38, for the reasons in paras 23 to 30 the Department was entitled to conclude that the evidence did not show that he had sufficient financial standing. That decision, far from being “plainly wrong” (the test on which the Upper Tribunal is entitled to intervene), was correct. The licence was correctly terminated.

Loss of repute

41. The panel did, however, have concerns about the decision that Mr Hynds had lost repute and recalled the parties to address this point. Mr Hynds freely admitted to us at the first hearing that he was not a man for bookwork and the paperwork in this case suggests that that is indeed so. By the phone call noted on 12th April and his appeal to “the certificate on the wall” and indication that he would not be submitting anything else, it appears that exasperation had set in when it seemed that he could never satisfy the Department’s concerns. However, he had previously not totally disengaged from the process. He had provided material, inadequate as it was, before and just after the August 2018 renewal. He had instructed his accountants to provide a response in February 2019; that was also inadequate for the reasons above but the attempt was made. In the panel’s view there was a lack of understanding on Mr Hynds’ part of what was required and a failure to appreciate the seriousness of the situation. It may be that he found the formal correspondence from the Leeds office difficult to deal with - his reaction on losing his licence was to go to the Department’s Belfast office to try to talk things through, but by then it was too late.

42. Reg 5 of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012 (SI 2012/257) provides so far as relevant that:

- “(1) In determining whether an individual is of good repute, the Department may have regard to any matter but shall, in particular, have regard to—
- (a) any convictions or penalties incurred by the individual or any other relevant person; and

(b) any other information in its possession which appears to the Department to relate to the individual's fitness to hold a licence.”

In *NT/2013/82 Arnold Transport v DOENI*, the tribunal drew importance to the word “fitness” in the above provision

“because it is critical to understanding the breadth of the requirement to be of good repute. It means, for example, that an operator who cannot be trusted to comply with the operator’s licensing regime is unlikely to be fit to hold an operator’s licence.”

43. The question of proportionality must be considered when making a finding of a loss of good repute: see *T/2015/39 First line Intentional Ltd & William Labie v Secretary of State for Transport*.

44. Ms Jones submits that a finding of loss of repute is justified, because the way in which Mr Hynds dealt with the requirement to show financial standing, culminating in a refusal to provide anything further, called into question his ability to comply with the licensing regime. The Department had provided detailed, in-depth letters setting out what was required and clear financial guidance notes, but to no avail: Mr Hynds had failed to act in accordance with multiple letters, displaying continued intransigence.

45. Mr Hynds in reply said that they (he) had been honest and truthful; he reiterated his astonishment that when things had been all right from 2008-2013 and 2013-2018 there could be a sudden change of approach; expressed regret at the inability to sort it out in the office in Belfast and commented (somewhat wearily) that “the Department will always be right”.

46. The panel finds that Mr Hynds has indeed been honest and truthful. It is not a case where he has sought to deceive or conceal, nor to gain any competitive advantage. There is no suggestion that he had been found to be non-compliant with the regulatory regime between 2008 and 2018. However, he has failed to grasp the imperatives of the regulatory regime and the fact that compliance may be looked at afresh from time to time, through fresh eyes and on the basis of evolving circumstances. Without intending criticism of the Department’s staff, we can see that he may have found the material received from the Department difficult to deal with, but he has failed to recognise sufficiently early that in view of his own difficulties with paperwork he needed appropriate help. In assessing whether a finding of loss of repute is proportionate we bear in mind too that if repute is lost, there is no clear path to regaining it. The panel’s specialist members consider that a finding of loss of repute in this case would be perceived in the industry as unduly harsh, bearing in mind in particular the lack of dishonesty and any attempt to gain competitive advantage. Nonetheless, his attempts to meet the regulator’s requirements fell far short and his eventual frustrated disengagement with the TRU was regrettable. The panel find that his repute is tarnished but could be preserved by making a compliant, properly evidenced, fresh application for a licence and by recognising his need for appropriate help, and obtaining it, with

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that and other paperwork necessary to comply with the legitimate requirements of the Department as regulator.

**C.G.Ward
Judge of the Upper Tribunal
Date:6 December 2019**