



NCN: [2021] UKUT 0302 (AAC)
Appeal No. NT/2021/11

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

**ON APPEAL from the DECISIONS of the HEAD of the TRANSPORT
REGULATION UNIT
Dated 25 January 2021**

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr Andrew Guest	Member of the Upper Tribunal
Mr David Rawsthorn	Member of the Upper Tribunal

Appellants:

**Trevor Cathers ('the First Appellant')
Trevor Cathers Ltd ('the Second Appellant')**

Attendances:

For the Appellant: Mr Mark Davies

For the Respondent: Ms Ashleigh Jones

Type of hearings: Remote oral hearing via Sightlink

Date of hearings: 30 September 2021

Date of decisions: 29 November 2021

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that these appeals be DISMISSED.

SUBJECT MATTER:- Revocation; disqualification; application refusal;
decision-making in the Department

CASES REFERRED TO:- NT/2013/82 Arnold Transport & Sons Ltd v DOENI;
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; NT/2017/16 Damien Toner ([2017]
UKUT 0353 (AAC))

REASONS FOR DECISION

1. These are appeals from the decisions of the Head of the Transport Regulation Unit ('TRU') to (i) revoke the First Appellant's licence on the ground that his repute had been lost (ii) disqualify the First Appellant as a transport manager for an indefinite period and (iii) refuse the Second Appellant's application for a standard international good vehicle operator's licence.
2. The TRU is part of the Department for Infrastructure ('the Department')

Background

3. The factual background to these appeals appears from the documents and the Head of the TRU's decisions and is as follows:-
 - (i) The First Appellant is the holder of a standard international goods vehicle operator's licence issued in Northern Ireland on 1 January 2010 authorising the use of 10 vehicles and 23 trailers and is the designated transport manager on the licence.
 - (ii) The First Appellant was also the holder of a goods vehicle operator's licence in Scotland. Following a public inquiry which was held on 21 April 2016 this licence was revoked after conditions and undertakings were found to have been breached. The conditions breached were: incurring convictions in the previous five years; receiving prohibition notices issued by the DVSA or police within the past five years; and making false statements when applying for the operator's licence. The undertakings breached were: vehicles not being kept in a fit and serviceable condition; not adhering to the rules of drivers' hours; and not informing the Traffic Commissioner immediately of any changes or convictions which affected the licence. It was also found that the First Appellant's son AC had not satisfied the Traffic Commissioner that he had the necessary repute to be an operator or Transport Manager.
 - (iii) In addition to the revocation of the licence, the Traffic Commissioner for Scotland found that the First Appellant's repute was lost and disqualified him from holding or obtaining an operator's licence for a period of three years from 5 June 2016.
 - (iv) The Second Appellant is a limited company which was set up by the appellant's son who is the company's sole director. The Second Appellant applied for a standard international goods vehicle operator's licence on 17 October 2016 for five vehicles and seven trailers.
 - (v) On 10 October 2018 a 'proposal to revoke' letter was sent to the First Appellant.
 - (vi) By way of correspondence dated 5 November 2018 the First Appellant made a request for a public inquiry.
 - (vii) On 4 December 2020 the Second Appellant was informed that his application for a standard international goods vehicle operator's licence would be subject to a public inquiry.
 - (viii) A public inquiry which considered both the proposal to revoke the First Appellant's licence and the Second Appellant's application for a standard international goods vehicle operator's licence was held on 21 January 2021.

- (ix) By way of correspondence dated 25 January 2021 the First Appellant was informed that his goods vehicle operator's licence had been revoked and the Second Appellant was informed that his application for a standard international goods vehicle operator's licence had been refused. Written copies of the decisions of the Presiding Officer were attached to each item of correspondence. The covering correspondence in connection with the First Appellant failed to mention that the Presiding Officer had also decided that the First Appellant had lost his repute as a transport manager and was disqualified from acting in that capacity for an indefinite period.
- (x) Appeals against both substantive decisions of 21 January 2021 were subsequently received in the office of the Administrative Appeals Chamber ('AAC') of the Upper Tribunal. Included within the notices of appeal were applications for a stay of the decisions of 21 January 2021.
- (xi) By way of a determination dated 7 February 2021 the applications for stays of the decisions dated 21 January 2021 were refused.
- (xii) Applications for stays of the decisions dated 21 January 2021 were subsequently renewed before the Upper Tribunal.
- (xiii) By way of a determination dated 12 February 2021 Upper Tribunal Judge Hemingway granted a stay against the decision to revoke the First Appellant's licence and the decision that the First Appellant's repute as a transport manager had been lost and, as a consequence, he was disqualified from acting in that capacity for an indefinite period. It was unclear to Judge Hemingway whether there had been an intention to apply for a stay of the decision to refuse the Second Appellant's application for a standard international goods vehicle operator's licence but he determined, on an assumption that it had been made, that the application should be refused.

The Public Inquiry

4. In his Skeleton Argument, Mr Davies summarised the evidence heard by the Presiding Officer at the Public Inquiry as follows:

'The public inquiry leading to the Decisions was held on 21 January 2021. The Presiding Officer heard evidence that:

- a. The First Appellant accepted that neither he nor (his son) had notified the Respondent of the results of the Scottish public inquiry, but had assumed the Scottish Traffic Commissioner would do so and that was reflected in an email (mistakenly described in the Decisions as a letter) from their then representatives **[163]** (cf. §9 of the Decisions **[310]**);
- b. The First Appellant ran the business with (his son) but was still planning to retire with that retirement having been delayed because of the Application (cf. §11 of the Decisions **[310]**);
- c. That the haulage work was mainly carried out in Scotland, England and into Europe via Dover with occasional work undertaken in Northern Ireland and with the vehicles returning to the Operating Centre when not in use for a prolonged period (cf. §12 of the Decisions **[310]**);
- d. That the Second Appellant had essentially taken over the business of the First Appellant since 2016 despite not having a licence and that significant changes had been made to make improvements in respect of compliance,

including regarding tachograph analysis, with these changes reflected in the very positive DVA audit (cf. §13 of the Decisions [310]); and

- e. That, contrary to what had been occurring to date, if the Application were granted the Second Appellant proposed to move its operations to Northern Ireland so as to be able to comply with the requirement to keep its vehicles at the Operating Centre (cf. §14 of the Decisions [311]).
5. The Presiding Officer made the following findings and reached the following conclusion in respect of the First Appellant:

'In determining this case I need to include findings in respect of the delay which has occurred, and I do so both as a matter of general principle and with focus on the parties and the circumstances applying in this case. I need to consider the reasons for the delay, and whether a fair hearing is still possible. My understanding is that the delay from 2017 to 2019 resulted from an absence of suitably qualified and experienced individuals to preside at the enquiries. Subsequently the earlier delay was compounded by the restrictions imposed because of the Covid pandemic. Whilst these reasons are unfortunate, I do not find that they show bad faith on the part of the Department. In deciding whether a fair hearing is possible I also take note that the reasons the inquiry was being called or communicated to (the First Appellant) and his son when the original decision to do so was made. The primary evidence justifying an inquiry was the decision of the Scottish Traffic Commissioner and this was in their possession. In these circumstances I find that a fair hearing is possible in principle despite the delay. In the following paragraphs I will include my findings pertaining to the impact of the delay on the individual cases.

It is a matter of record that (the First Appellant) lost his repute and was disqualified for 3 years in relation to the licence he held in Scotland with effect from 3 June 2016. At that time, he held a licence in Scotland as well as the one under consideration in Northern Ireland. If, when the Scottish Traffic Commissioner dealt with the inquiry in 2016, (the First Appellant) had held another licence in another traffic area in England or Wales, the other licence would have been brought into the proceedings in Scotland using the procedure applicable to "multiple licence holders" and both licences would have been revoked upon a finding of loss of repute.

The "multiple licence holder" procedure does not apply to licences held in Northern Ireland hence the need for a notice to be sent to (the First Appellant) in October 2018 of the proposal to revoke and the request from the operator for a public inquiry. Whilst this procedural route was correctly followed it is the case, in my view, that revocation of the Northern Ireland licence was inevitable if the case had been determined then. Repute is not divisible between jurisdictions and there had been no application at that time to ask the Traffic Commissioner to lift the period of disqualification and/or restore repute.

It follows from my findings in the last paragraph that the delay in listing this inquiry has resulted in (the First Appellant) being able to continue to operate under the auspices of his Northern Ireland licence for longer than would have otherwise been the case. If he had done so by using his approved operating centre and his sole trader licence, I anticipate that I would have been able to consider the case before me as akin to an application for repute to be regained. However what (the First Appellant) has done in the period since 2016 is continue his business operation in Scotland as if the revocation and disqualification ordered by the Traffic Commissioner had not happened. By keeping the authorised vehicles there, employing drivers who are based there and operating from there the order has been circumvented from 2016 until now.

The situation has been compounded by the transfer of business operation to a company which does not hold a licence in any jurisdiction. Whilst there are positives in relation to the maintenance regime and generally in the drivers' hours compliance these do not outweigh the seriousness of the failures committed by (the appellant) and his son in these circumstances I have no hesitation in finding that TC no longer has repute in relation to the current licence and order revocation of the licence ... (the First Appellant) is the transport manager on this licence and I also ordered that his repute is lost in this regard ... it is a mandatory requirement that once repute as a transport manager is lost disqualification must be ordered and I make that order for an indefinite period.

6. The Presiding Officer made the following findings and reached the following conclusion in respect of the Second Appellant:

'Turning to the application by (the Second Appellant), much of what I have said in relation to the sole trader licence applies to this application. AC applied to the Scottish Traffic Commissioner in July 2016 for a licence which was refused on the ground that he had not demonstrated the necessary repute. This finding would have a major bearing on the subsequent application made to the Department in October 2016.

Since that date AC has operated through the company (the Second Appellant) as sole director and transport manager undertaking the work in Scotland in the same way that occurred before the licence held there by his father was revoked. I find that it is more likely than not that (the First Appellant) and (his son, AC) knew that what they were doing was outside the scope of the licence held in Northern Ireland. To think that it was permissible would make a mockery of the initial revocation and disqualification. AC told me in the inquiry that his refresher training had included sections on operating centres and legal entities and appeared to accept that he knew that what they were doing was wrong.

Whilst the delay in hearing the application by (the Second Appellant) is unfortunate AC had a choice of actions whilst a hearing was pending. He could have spent time helping his father develop business in Northern Ireland, improving the compliance regime and building his own repute but this was not the route taken. I accept that the compliance regime applying now to the operation in Scotland appears good although I question how rigorous the disciplinary system is in respect of drivers' hours' infringements. However I do not find that these improvements outweigh the negative effect of the unlawful operation. I was told that the intention if a licence is granted is to move operations to Northern Ireland and in support I was provided with two offers of work. I note that both offers were sent to the inquiry just before the hearing, one is undated and the other dated 18 January 2021. I suspect that these were solicited specifically for the inquiry and I am concerned, based on past actions, that if a licence is granted the business model in Scotland would continue.

For all the reasons set out above I do not find that repute has been made out by the applicant company and refuse the application accordingly ...'

Grounds of appeal and outcome sought

7. In his Skeleton Argument, Mr Davies set out the following summary grounds of appeal on behalf of the Appellant and the response from the Respondent:

'6. The Appellants appeal upon the following grounds:

- “1. The Delay of 4-years between the calling-in for Public Inquiry of (the First Appellant) ON1114045 was in all the circumstances unconscionable and unlawful;
 2. By reason of the delay between the calling-in of the applicant (‘the Second Appellant) and the Public Inquiry, a period of some 4 years, the Applicant’s guarantee of the Right to the Peaceful Enjoyment of Property was unlawfully and unfairly interfered with;
 3. The delay of 4-years in determining the application of (the Second Appellant) was in all the circumstances unconscionable and unlawful.”
7. The Respondent (not unfairly) summarises the grounds of appeal as ‘delay’ and accepts that the delay was ‘substantial and not in line with a timely determination’. The Respondent does not, however, accept that the delay was too long or that it caused any injustice or prejudice to the Appellants, nor that it was unlawful.’

General principles on the operation of the Act and Regulations

8. At paragraphs 10 to 13 of the decision in NT/2013/82 Arnold Transport & Sons Ltd v DOENI, the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

‘Some General Principles

10. An operator’s licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of the 2010 Act as amended, have been met. [The expression Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, (“the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.
11. The grant of an operator’s licence does not mean that an operator can then proceed on the basis that the requirements that must be met in order to obtain a licence can thereafter be disregarded. In our view it is clear both from the terms of the 2010 Act and from Regulation 1071/2009 that these are continuing obligations, which an operator is expected to meet throughout the life of the licence. It is implicit in the terms of s. 23, which gives the Department power to revoke, suspend or curtail an operator’s licence, that this can take place at any time and for any reasonable cause, including matters covered by the requirements of s. 12 as amended. It is explicit in s. 24, which provides that a standard licence shall be revoked if at any time it appears that the licence-holder is no longer (i) of good repute, (ii) of appropriate financial standing or, (iii) professionally competent. The underlining, in each case is ours. First, we wish to stress that once it appears that the licence-holder is no longer of good repute, or of appropriate financial

standing or professionally competent the licence must be revoked because the Act makes it clear that there is no room for any exercise of discretion. Second, the use of the expression 'at any time' makes the continuing nature of the obligations crystal clear.

12. The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.
13. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: "*actions speak louder than words*", (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'

The proper approach on appeal to the Upper Tribunal

9. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the 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.’

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.’

General principles on delay in decision-making and the effect of delay

10. In paragraphs 21 to 37 of its decision in NT/2017/16 Damien Toner ([2017] UKUT 0353 (AAC)), the Upper Tribunal reviewed the jurisprudence (both at common law and in the context of the duties of a decision-making authority under the Human Rights Act 1998) relevant to delay in decision-making and the effect of delay on the reliability of the decision when eventually promulgated. This analysis was in a Northern Ireland case where the decision-making authority was the TRU. To avoid prolixity, we do not replicate paragraphs 21 to 37 in this decision.

The timeline in the instant case

11. The dates which are relevant to the degree of delay in the instant case are as follows.
12. In his Skeleton Argument, Mr Davies set out a chronology and from that the relevant dates are as follows:

‘18 January 2016	Scottish public inquiry call-up letter in connection with the First Appellant’s Scottish licence
21 April 2016	Public inquiry in Scotland
4 May 2016	Date of decision on the Scottish licence

10 May 2016	Email from the Appellants' then representatives regarding the notification of the Respondent about the Scottish public inquiry
14 October 2016	Date of correspondence from the Second Appellant to the TRU making reference to the pending application and its purpose
17 October 2016	Date of the application in Northern Ireland by the Second Appellant
24 October 2016	Request for further information regarding the application
31 October 2016	Response by the Second Appellant to the request for further information (including reference to the refusal of a licence to him in Scotland and that the grounds for refusal being that he was involved with the First Appellant's Scottish licence which was 'under review' at a Public Inquiry).
10 October 2018	'Propose to revoke' notice sent to First Appellant
6 November 2018	First Appellant requests a public inquiry in response to 'propose to revoke' notice
21 January 2021	Public Inquiry in Northern Ireland
25 January 2021	Date of decisions under appeal

The extent of the delay and the reasons offered for it

13. In plain terms there was a delay of four years and three months in the processing of the Second Appellant's application for a standard international good vehicle operator's licence.
14. We are not aware of the precise date on which the Department was made aware that the First Appellant's licence in Scotland had been revoked. We do know that the Department was aware in October 2016 of concerns with the First appellant's Scottish licence and that there were subsequent delays of:
 - (i) Almost two years before the First Appellant was notified of the Department's proposal to revoke his Northern Ireland licence; and
 - (ii) A further two years and two months before a Public Inquiry, consequent on the First Appellant's request for one to be held, and the holding of that Inquiry.
15. In her Skeleton Argument, Ms Jones offered the following reasons for the delays which had occurred:

'The role of Head of TRU is a post held by an administrative Grade 7 within the Department for Infrastructure. Being an administrative grade the post

holder is not subject to the specialised criteria applied, for example, when one applied to be a Traffic Commissioner in GB.

For the 2 years leading to May 2019 the post holder was absent through illness and the Department was unable to fill that post. During this time, in November 2018, the issues were further compounded by the Unit being moved from its location at that time to the Department's head-quarters. The Unit lost access to a hearing room, and the head-quarters, containing the Minister's Office, was unable to accommodate public inquiries.

In May 2019, following the resignation of the existing post-holder a new Head of TRU was appointed. As above, this being an administrative grade, the new post holder had no experience of judicial functions and was in no position to immediately recommence public inquiries. At this time there was a backlog of 59 cases, directed to be heard at public inquiry but not yet listed.

The Head of TRU therefore engaged with the Office of the Traffic Commissioner and in November 2019 the first of four Deputy Traffic Commissioners from GB were appointed under Section 28 of the Northern Ireland Act 1998. They were engaged to consider submissions, provide training, and presiding over public inquiries, making decisions on behalf of the Department under delegated authority. The first public inquiry in NI since June 2018 was held on 29th November 2019.

In March 2020 the pandemic commenced and all staff were required to work from home. Only 3 of 13 staff members had laptops. A significant period followed with severely restricted activity. It took the Department a couple of months to move all staff on to laptops and facilitate home working. Preparation of paper files was further hampered with a Departmental Direction that papers were not to be printed or stored at home.

The Unit worked to develop a process for online hearings, and purchase software licences and train staff. At this time the first lockdown started to end and in-person hearings became an option. Due to ongoing backlogs within the Courts Service, alternative accommodation had to be found, and the first call up letter was issued on 23 October 2020, with a hearing date set for 26 November 2020.

At this time the backlog of public inquiries sat at 73. The prioritisation of hearings was directed by the Minister for Infrastructure, with road safety concerns to be considered first (Priority 1), followed by applications (Priority 2), then less serious regulatory matters (Priority 3). This was balanced alongside the preparedness of case files, with stale files having to be updated and cleared. The (Appellants') cases, being the second oldest application at that time conjoined with a concern over illegal operations, was the sixth public inquiry listed by the Department.

In addressing the backlog that has accrued the Respondent has worked hard to ensure that this is cleared and the functions carried out at pace. Since November 2020 the Department has concluded 37 public inquiries, with call up letters issued for a further 17 to be held during September and October 2021.'

Our view on the reasons advanced for the delay in decision-making

16. We begin with some comments on the significance of the role and function of the TRU and its Head.
17. The TRU was established following the passing of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 (the 2010 Act). The Explanatory Notes to the 2010 Act set out the following background and policy objectives:

'The need for change to the licensing system in Northern Ireland has been raised by the freight industry, public representatives and consumer organisations, who are dissatisfied with the way in which freight services are delivered under existing policy and legislation.

There is considerable concern with regard to the absence in Northern Ireland of "own account" licensing. Own account operators (those operators who carry their own goods in the course of their business or trade), who make up around three quarters of the industry, are not required to be licensed. In Great Britain, all operators must be licensed.

Northern Ireland has much weaker freight licensing enforcement powers. This issue, combined with the fact that only one sector of the industry is regulated, has given industry representatives and enforcement teams both in Northern Ireland and Great Britain cause for concern.

Goods vehicles make a significant contribution to the number of people killed or seriously injured in Northern Ireland. There is evidence of illegal operators undercutting the legitimate freight industry, thus threatening the viability of many within the industry and contributing to the poor road safety record.

There is presently no sanction within road freight legislation against operators who do not pay attention to the environmental standards of the operating centre. Operating centres have the potential to affect a considerable number of households in Northern Ireland. Present licensing arrangements fall short of offering any effective environmental safeguards.

The aim of the Act is to address these concerns and weaknesses and to have, in one dedicated statute, the primary powers to deal with all matters relating to the regulation of road freight operators in Northern Ireland. It will bring the system largely (but not wholly) into line with the system currently in place in Great Britain.'

18. The Department's roles and functions under the 2010 Act are described on the TRU's own website as follows:

'The Department issues goods vehicle operator's licences and works to ensure that licence holders meet the standards set for entry into the commercial vehicle operator industry and to minimise the environmental and road safety impact around goods vehicle operating centres.

The Department, through the Driver & Vehicle Agency (DVA) has the power to stop and inspect vehicles, issue fines in respect of maintenance or drivers hours infringements and can impound vehicles if they are discovered on the public road without a goods vehicle operator's licence when one is required.

TRU works with statutory bodies to monitor licence holder compliance and has the authority to call operators to hearings and public inquiries and take regulatory action including the curtailment, suspension and revocation of operator's licences and, in extreme cases, disqualification of people from holding a goods vehicle operator's licence.

The Department also has responsibility for developing and maintaining policy in respect of the relevant legislation. It is around this policy and legislation that the licencing, compliance and regulation functions have been developed.'

19. The Department has published very detailed 'Practice Guidance and Instruction Documents' (<https://www.infrastructure-ni.gov.uk/articles/goods-vehicle-licensing-practice-guidance-documents>) which are described as setting out '... the legal basis for, and the way the Department will approach, the exercise of its statutory functions. These are designed to explain how the legislation impacts goods vehicle operators and provided advice to those applicants and operators who are regulated by the Department.' The Practice Guidance and Instruction Documents are based on the parallel 'Statutory Guidance and Statutory Directions' published by the Senior Traffic Commissioner' in Great Britain.

20. Within the Practice Guidance and Instruction Documents the significance of the role and function of the Head of the TRU is emphasised. For example, in Practice Guidance Document No.9, 'The Principles of Decision Making and the Concept of Proportionality' the following is noted at paragraphs 68 and 69:

'... complex cases or cases where there is an element of doubt must be escalated to the Head of TRU for direction or decision.

69. The Head of TRU will undertake an assessment of the relevant case including the relevant evidence, risk to road safety, impact on fair competition and make a balanced and proportionate written decision on the way forward. If the decision is for a preliminary hearing or public inquiry the Head of TRU will assume responsibility to manage the case from that point forward, or allocate to a presiding officer acting under delegated authority from the Department.'

21. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, which was one of the first cases in which the Upper Tribunal considered the provisions of the 2010 Act, the Upper Tribunal said the following, at paragraph 3 of its decision:

'The 2010 Act came into force in June 2012. As from 1 July 2012 it made the Department of the Environment in Northern Ireland, ("DoENI"), responsible for the regulation of the operation of goods vehicles in Northern Ireland. Within DoENI the powers conferred on the Department by the 2010 Act are exercised by the Transport Regulation Unit, ("TRU"). **The Head of the TRU is the Department's official in authority and he is the equivalent in Northern Ireland of a Traffic Commissioner in Great Britain.**'

22. The emphasis here is our own.
23. Against that background we find the reasons which have been offered for the delay in the decision-making in this case to be insupportable. Taking each in turn, we agree with Mr Davies that the fact that it is wholly irrelevant that the

Head of the TRU is a post held by an administrative Grade 7 with the Department. We have highlighted the significance of the role and function of the TRU within the organisation tasked with monitoring compliance with the strict requirements set out in the 2010 Act and how the parallel requirements in Great Britain are exercised by the Traffic Commissioners. It is a matter for the Department itself to decide on the appropriate grade for the holder of the office of the TRU. If the grade which it has chosen is not appropriate to the role, however, and the post holder is not, as a result, capable of undertaking its functions at the required level, then the Department must suffer the consequences when they are adverse to those affected.

24. Parallel remarks are applicable to the further explanation of the further delay caused by the appointment in May 2019 of an individual to the post of Head of the TRU who was clearly initially inexperienced. The May 2019 appointment was consequent on the absence of the previous post holder due to illness for a period of two years. In those circumstances, we would have envisaged that the Department would have ensured that the next appointment would have the necessary skills and attributes to assume all of the relevant functions from the first day of appointment. Once again, that the Department did not appear to do so, and that the failure to do so led to even further delay is deplorable. We do not understand that when it was apparent that the new post holder did not have sufficient experience to hold public enquiries that it took a further six months to engage with the office of the Traffic Commissioners in Great Britain to seek appointment of Deputies to help out in Northern Ireland. We would add that it is axiomatic that we empathise with the previous post-holder's personal circumstances but fail to comprehend why the situation was allowed to drift for a period of two years before a replacement was sought.
25. We turn to certain practical difficulties which, it is submitted, further compounded the delay period. These included the requirement to move to alternative accommodation and the consequences of the Covid-19 pandemic. We cannot agree that these matters, while undoubtedly causing difficulties, excused the significant delay which occurred. All of society was affected by Covid-19 including those responsible for the provision of public services. Nonetheless, with the deployment of creativity and energy, which qualities were apparently lacking here, most public service providers returned to the resumption of work and output after an initial period of upheaval.
26. We direct the Department to note that this is not the first decision in which the Upper Tribunal has commented on the quality of the decision-making within the TRU. It is clear that the lessons which have been outlined in previous decisions have not been learnt and that the present decision-making process is redolent of carelessness and inattention and which appears to be systemic.

Does the delay in decision-making affect the fairness of the decisions which were made?

27. In paragraphs 21 and 22 of its decision in NT/2017/16 Damien Toner ([2017] UKUT 0353 (AAC)), the Upper Tribunal said the following:

'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.’
28. We have noted that the First Appellant did not seek to challenge the decision of the Traffic Commissioner for Scotland on 21 April 2016 to revoke his licence in Scotland and the Traffic Commissioner’s finding that his repute had been lost with the consequent disqualification of him from holding or obtaining an operator’s licence for a period of three years from 5 June 2016. Our conclusion, therefore, is that the First Appellant accepted the Traffic Commissioner’s findings and conclusions.
29. Mr Davies submits that delay in the holding of a Public Inquiry in respect of the First Appellant’s licence in Northern Ireland delayed the First Appellant’s retirement and caused prejudice to him ‘... insofar as his life was effectively placed on hold.’ With respect to Mr Davies we cannot accept that argument. There has been an emphasis on a submission that the First Appellant’s wish to retire consequent on his age and health problems. It is our view that if this was the First Appellant’s intention then he could have exercised it at any time. He did not do so because the Second Appellant’s application for a licence in Northern Ireland had not been determined and, as a consequence, if the family business in Northern Ireland was to continue then it would have to be conducted through the vehicle of the First Appellant’s Northern Ireland licence. We now know that not only did the family business continue but that operations were conducted unlawfully with the Second Appellant taking over the business without having a licence and operating in other geographical jurisdictions without having licences there.
30. Mr Davies also submits that the delay in the determination of the Second Appellant’s licence restricted the Second Appellant’s ability to enjoy his possessions. Once again, and with respect to Mr Davies, we cannot accept that argument. As noted above, it is clear that despite having no licence of his own, the Second Appellant had, in essence taken over the family business and was operating it in an unlawful manner.

The validity of the substantive decisions

31. We have concluded that the decisions of the Presiding Officer were not plainly wrong.
32. We have already observed that the First Appellant did not seek to challenge the decision of the Traffic Commissioner for Scotland that his repute had been lost. We have noted the observations of the Presiding Officer that:

‘If, when the Scottish Traffic Commissioner dealt with the inquiry in 2016, (the First Appellant) had held another licence in another traffic area in England or Wales, the other licence would have been brought into the proceedings in Scotland using the procedure applicable to open “multiple licence holders” and both licences would have been revoked upon a finding of loss of repute.’
33. We are also struck by the Presiding Officer’s comments that ‘... repute is not divisible between jurisdictions’. The Presiding Officer quite rightly concluded that had the First Appellant operated by using his approved operating centre and his as a sole trader licence then he might have been able to consider the case as an application that his repute had been regained. What mitigated against the Presiding Officer doing so, was, and quite correctly in our view, the fact that the First and Second Appellants continued to operate the business in Scotland (and beyond) as if the revocation and disqualification had not occurred. Further the business was, in effect, being conducted by the Second Appellant, through his limited company which did not hold a licence anywhere. We agree with the Presiding Officer’s conclusion that the First and Second Appellant’s knew what they were doing and that it was unlawful.
34. Similar conclusions were arrived at by the Presiding Officer in respect of the Second Appellant at paragraphs 23 and 24 and we accept and uphold them. We cannot ignore that the Second Appellant’s application for a licence in Scotland was refused on the basis that he had not demonstrated the necessary repute. The application had been considered by the Traffic Commissioner at the same Public Inquiry in which she considered the First Appellant’s licence. The Second Appellant did not challenge the decision to refuse his application for a licence in Scotland but, and as was noted by the Presiding Officer, continued to operate the family business in Scotland and beyond as if the revocation of his father’s licence had not occurred and his own application not been refused. Further, he was operating that business through the vehicle of a limited company which did not hold a licence.
35. We have taken into account, as did the Presiding Officer that an audit carried out by the DVA showed a marked improvement from the findings made in respect of the First Appellant’s licence in Scotland and there was evidence that the vehicles on the First appellant’s licence in Northern Ireland have enjoyed a 100% pass rate since 2016. We also accept that the First and Second Appellants did make efforts to advance the holding of the Public Inquiry in respect of the First Appellant’s licence and the Second Appellant’s licence. This positive features are, however, far outweighed by the negative aspects, as set out above.
36. The appeals are, accordingly, dismissed.

37. We are of the view that the First Appellant should be given an appropriate time for an orderly winding-up of the business. Accordingly, the revocation and disqualification will take effect from 11.59 p.m. on 17 January 2022.

A handwritten signature in black ink, reading "Kenneth Mullan", is displayed on a light grey rectangular background.

**Kenneth Mullan, Judge of the Upper Tribunal,
29 November 2021**