NCN: [2022] UKUT 137 (AAC)
Appeal No. UA/2021/000023/T

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

ON APPEAL from DECISIONS of the TRAFFIC COMMISSIONER for the South Eastern and Metropolitan Traffic Area (Traffic Commissioner S Bell)

Before:	M Hemingway:	Judge of the Upper Tribunal
	S James:	Member of the Upper Tribunal
	M Smith:	Member of the Upper Tribunal

First appellant: Van Duijn Fleet BF

Second appellant: Transportbedrijf van Duijn en Zn.Bv

Representation

For the appellant: Mr J Backhouse

For the respondent: Mr S Thomas

Heard at: Field House in London

On: 12 April 2022

Date of decision: 16 May 2022

DECISIONS OF THE UPPER TRIBUNAL

The appeals of the first and the second appellant are allowed. The decisions of the Traffic Commissioner made on 2 August 2021 and 17 August 2021 are set aside. The case is remitted to a different Traffic Commissioner for a complete rehearing at a public inquiry.

SUBJECT MATTER

Impounding.
Fairness.

CASES REFERRED TO

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695.

Appeal no: UA-2021-00358-T

REASONS FOR DECISION

1. There are, we have decided, two appeals before us. The first has been brought by Van Duijn Fleet BV ("the first appellant") from a decision of the Traffic Commissioner ("the TC") of 2 August 2021. The second has been brought by Transportbedrijf Van Duijn en Zn.BV ("the second appellant") from a decision made by the same TC on 17 August 2021. The first of those decisions was signed by the TC but the second, although it contained the TC's reasoning, was contained in a letter sent on her behalf by the Office of the Traffic Commissioner ("OTC").

2. The appeals were considered at a traditional face to face hearing which took place in London on 12 April 2022. The appellants were each represented by Mr J Backhouse. The respondent (the Driver and Vehicles Standards Agency-hereinafter "the DVSA") was represented by Mr S Thomas. We are grateful to each of them for their helpful skeleton arguments and clear oral submissions.

3. The appeals stem from the impounding of a commercial vehicle by the DVSA which, it is argued by Mr Backhouse, is owned by the first appellant or the second appellant. It is, in fact, Mr Backhouse's primary contention that it is owned by the first appellant.

4. Section 2(1) of the Goods Vehicles (Licencing of Operators) Act 1995 ("the Act") provides that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward, or for or in connection with any trade or business carried on by him, except under a licence issued under that Act. Schedule 1A of the Act permits the impounding of any goods vehicle operating on a public road for the carriage of goods which is not being used under the authority of a goods vehicle's operator's licence. In the case of heavy goods vehicles impounding is permitted by regulation 3 of the Goods Vehicles (Enforcement of Powers) Regulations 2001 ("the 2001 Regulations").

5. The 2001 Regulations provide for the making of applications for the return of impounded vehicles. The only person entitled to make such an application is the owner at the time of the impounding. Under Regulation 4 of the 2001 Regulations only four grounds for return may be relied upon. They are:

> "a. That, at the time the vehicle was detained, the person using the vehicle held a valid licence (whether or not authorising the use of the vehicle); (Ground 1).
>
> b. That, at the time the vehicle was detained, the vehicle was not being, and had not been, used in contravention of section 2 of the 1995 Act; (Ground 2).

c. That, although at the time the vehicle was detained it was being, or had been, used in contravention of section 2 of the 1995 Act, the owner did not know that it was being, or had been, so used; (Ground 3).

d. That, although knowing at the time the vehicle was detained that it was being, or had been, used in contravention of Section 2 of the 1995 Act, the owner-
(i). had taken steps with a view to preventing that use;
(ii). has taken steps with the view to preventing any further use (Ground 4)".

6. If one of the above grounds is made out by a person who has demonstrated that he/she is the owner, then the vehicle is to be returned. If such is not made out, then it is not to be returned. Applications for return are made to the Traffic Commissioner who then determines them.

7. On 19 July 2021 the DVSA impounded vehicle 27BPN2, a Volvo Artic, in the livery of Van Duijn, which was laden with frozen chips. The impounding took place at Yeading, Hayes, London.

8. On 26 July 2021 the first appellant made a written application for the return of the vehicle. On 27 July 2021 the TC indicated to the first appellant, in writing, that the completed application form was defective because it did not indicate, with clarity, which ground or grounds for return it was seeking to rely upon. On 29 July 2021 the first appellant made a further application. The TC noted that whilst the application of 26 July 2021 had appeared to rely upon ground 1 and ground 3, the application of 29 July 2021 appeared to rely solely upon ground 1.

9. The TC could, in her discretion, have directed a public inquiry ("PI") in order to aid her in determining the application made by the first appellant. She decided not to do so and instead made a decision on the papers. There has been some discussion as to the nature of the decision and we shall address that matter below. But, for the moment, we simply address what the TC had to say in her written decision of 2 August 2021.

10. The decision itself is, unsurprisingly, headed "*Traffic Commissioner's written decision*". There is then a side heading "*decision"* followed by the words "*the Application by Van Duijn Fleet BV for the return of vehicle 27BPN 2 is refused*". So far, so unequivocal. The TC then, having set out the law and something of the relevant history, and having addressed the issue of which ground for return the first appellant appeared to be relying upon, went on to say "*the Applicant requests that I deal with the matter without a hearing. Where cases are not straightforward, I would normally convene a hearing. However, in this case I have not done so for the reasons set out below*".

11. What is then set out below is as follows:

"**Consideration and Findings**
<u>Ownership</u>

10. The latest GV500 attached two items in support of ownership. There are copies on the front and back of a Licence card with the vehicle registration and the Applicant's company name and address. It includes the words RDW KENTEKENBEWIJS. An internet search finds:
https://www.rdw.nl/over-rdw/information-in-english/private/buying-a-car/transferring-the-ownership-of-a-vehicle

11. On the face of it, this document may be proof of ownership rather than just the GB equivalent of registered keeper. However, this needs clarification confirming the Netherlands system from Van Duijn. The other document is a hire agreement between the Applicant and what appears to be a subsidiary. I assume this was the Operator of the vehicle on the day of the impounding as the addresses are the same and both companies include Van Duijn in their title.

12. On the evidence before me, I do not find ownership made out. To assist, I need more evidence of the Netherlands vehicle ownership system before making a final decision

Was the impounding lawful?

13. The applicant does not challenge the impounding of the vehicle. I have no evidence at this point and do not seek it for the reasons below.

Whether to return the vehicle

14. Even if the Applicant proved ownership the GV500 appears to admit cabotage. This was an error in the planning system between the planners, causing miscommunication, and the vehicle was going to make a trip in the UK for the 7th time, while the planner knew that the vehicle had to leave the UK. An alarm has now been set in the system to prevent this.

15. As per paragraph 49 of SGSD No. 7: Where an applicant fails to make out a statutory ground for return there is no residual discretion under the Regulations to order return of an impounded vehicle 2016/065 & 066 Carrie McKendry & Douglas McKendry. Traffic Commissioners are a creature of statute and have no inherent jurisdiction. It is for these reasons that I have dealt with the matter on paper rather than convening a hearing. Accordingly, I have reached the decision in paragraph 1 above."

12. A letter of 3 August 2021, enclosing the TC's written decision of 2 August 2021, was sent to the first appellant. It was explained that the TC had "*decided to refuse your application for return of the vehicle*" and it was then explained "*in accordance with the provisions of regulation 10(1) any application for the return of a detained vehicle may be made no later than the date specified in the statuary notice published in accordance with regulation 9. In this instance you therefore have until 16/08/2021 for any application to be submitted*". No reference was made to a right of appeal to the Upper Tribunal at that stage.

13. What then followed was an application for return of the vehicle made by the second appellant. As indicated, such was refused by letter of 17 August 2021. The TC's reasoning on that application is set out, in that letter, in this way:

> "1. The application for the return of 27BPN2, a Volvo Artic in the livery of Van Duijn, dated 10 August 2021 is refused.
>
> 2. My written decision dated 2 August 2021 sets out the relevant legislation and case law. The application dated 10 August 2021 is from an individual and a limited company yet again. I am unclear as to why this mistake has been repeated.
>
> 3. Transportbedrijf Van Duijn en Zn.BV ("the Applicant") has not requested a hearing. Only the hire agreement is translated. On my reading of the documentation provided the owner of 27BPN2 is, more likely than not, Van Duijn Fleet BV (subject to finance implications). The Applicant is the "*Tenant*" under a hire agreement (not the owner). On balance, I find that the Applicant is not the owner and thereby the application must be refused. Even if I am wrong on that, the applicant admits breach of the cabotage rules. If so, then holding a Dutch Operator Licence is not a ground for a return either".

14. The letter of 17 August 2021 sets out the right of appeal to the Upper Tribunal.

15. On 2 September 2021 the Upper Tribunal received notice of appeal sent by Backhouse Jones Solicitors submitted on behalf of both appellants. It was asserted, in summary, that the first appellant was the owner of the vehicle and the second appellant had hired it under an agreement with the first appellant; that the first appellant asserted ownership with the second appellant only asserting it in the alternative; that the TC had erred in concluding that neither appellants owned the vehicle; that the TC erred through failing to consider all possible bases for the return of the vehicle; that the TC had erred through failing to undertake a holistic consideration as to what the basis for return might be rather than simply proceeding on the basis of inadequately completed forms; and that the TC had erred and had acted unfairly through failing to direct a PI at which matters could be explored in detail notwithstanding that neither the first nor the second appellant had asked for one.

16. By the time the appeal came before us we had various documents including skeleton arguments provided by Mr Backhouse and Mr Thomas. Mr Backhouse, in his skeleton argument, relied upon the points which had been made in the grounds of appeal. He particularly focused upon what he argued was unfairness on the part of the TC in not directing a PI and in limiting her consideration to the somewhat sparse information which had been provided by the first and second appellant when completing the forms they had submitted when seeking return of the vehicle. Mr Thomas contended, in his skeleton argument, that the TC had properly and fairly considered the applications on the basis of the material which had been provided to her, that her overall approach had been fair in the context of adversarial proceedings (which impounding proceedings are) and that her decision was not plainly wrong. Both representatives relied upon their written arguments and expanded upon them at the hearing.

17. There was, as indicated, some discussion at the hearing about the nature of the two decisions and in particularly the earlier one, and the possible interrelationship between the two of them. Mr Backhouse, as we understand it, urged us to conclude that the two decisions have to be read together as a single composite whole. He did not regard the first decision as being a stand-alone decision because of the TC's observation at paragraph 12 that "*to assist,*

I need more evidence of the Netherlands vehicle ownership system before making a final decision".

18. We are not sure that, ultimately, it really makes very much difference. But we take the view that the decision of 2 August 2021 is a stand-alone decision in which the TC is rejecting the claim for return made by the first appellant. We reach that view notwithstanding the content of paragraph 12 referred to above, because of the indication, in terms, under the side heading "*decision*" that the application for the return of the vehicle is "*refused*". We agree, though, that the way in which matters have been explained in the written decision is, on one view, confusing. But our reason for setting aside the TC's decision of 2 August 2021 has nothing to do with that possible confusion. Rather, we take the view that there was some ambiguity as to precisely what it was that the first appellant was asserting as to the basis for the return of the vehicle. Further, there was, as is often the case where impounding decisions are challenged and return of the vehicle is sought, an issue regarding an asset of some value. In those circumstances, whilst we are very far from concluding that the TC was obliged to direct a PI, we are satisfied that a consideration as to whether she should exercise her discretion to direct one was called for. That being so, we are of the view that a reasoned explanation for the exercise of discretion not to hold a hearing was required.

19. The TC said she would normally convene a hearing in a case such as this but had decided not to do so "*for reasons set out below*". However, what was then set out was, essentially, an explanation as to why it was that she had resolved the application against the first appellant rather than an explanation as to why she had not directed a PI. Thus, we conclude there is no or an insufficient explanation for her exercise of discretion. Such was required in the circumstances of this case, as a component of the overall duty to provide adequate reasons for a decision. We set aside the TC's decision of 2 August 2021 on that basis.

20. That leaves what we have decided is essentially a separate decision of 17 August 2021 to refuse an application made by the second appellant. What is said might, on one reading, be regarded as confusing because at paragraph 3 of the TC's reasoning as set out in the letter of 17 August 2021, it seems to be suggested that the first appellant is probably the owner notwithstanding that that appellant's application has been rejected through a failure to properly evidence ownership. But we note the caveat with respect to what are described as "*finance implications*" and, in any event, we would accept that it was perfectly appropriate, in principle, for the TC to reject both applications notwithstanding Mr Backhouse's submission to us that the owner must necessarily be one or the other of the two appellants. The documentary evidence before us does not necessarily show that to be the case. But, as with the application made by the first appellant, no PI was directed and, in the case of the second appellant, there is nothing to suggest that the possibility of directing one was considered. It was certainly not addressed or explained in the section of the letter setting out the TC's reasoning or anywhere else in that letter. For essentially similar reasons, therefore, we have decided to set aside the decision of 17 August 2021.

21. As we understand it, both representatives were of the view that, if we were to set aside the TC's decisions, we ought to remit for matters to be considered afresh at a PI. That is what we do. We consider it appropriate, as is normal practice, to direct that the case be

considered by a different TC. Unless Mr Backhouse (whom we assume will continue to represent the two appellants) concedes that the second appellant could not possibly be regarded as the owner as a matter of law, then it will be necessary for the new TC to consider the claims of both appellants. But as we have indicated, it is not the case that the owner is necessarily one or other of the appellants. And of course, even if ownership is satisfactorily established by one or the other of the appellants, it will still be necessary to demonstrate an appropriate basis for the return of the vehicle.

M R Hemingway

Judge of the Upper Tribunal

Dated: 16 May 2022