



NCN: [2023] UKUT 59 (AAC)
Appeal No. UA/2022/001319-T

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

**ON APPEAL from a DECISION of the DEPUTY TRAFFIC COMMISSIONER for the
East of England Traffic Area.**

Appellant: LKW Trans Ltd

**Deputy Traffic Commissioner
Decision dated:** 31 August 2022

**Appeal to Upper Tribunal
dated:** 26 September 2022

Reference no: OF20288168

Date of Upper Tribunal Hearing: 23 January 2023

Place of Hearing: Field House, London

Representation: Patrick Sadd of Counsel for the Appellant

Before: Judge Rupert Jones: Judge of the Upper Tribunal
Ms Sarah Booth: Member of the Upper Tribunal
Mr Stuart James: Member of the Upper Tribunal

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the Deputy Traffic Commissioner to revoke the Appellant's operator's licence is quashed. The case is remitted for a reconvened public inquiry to take place before a different Traffic Commissioner.

SUBJECT MATTER

Proceeding with a Public Inquiry in the Appellant's absence. Revocation of Operator's Licence.

REASONS FOR DECISION

Introduction

1. This is an appeal against a decision of the Deputy Traffic Commissioner for the East of England ('the DTC') made in chambers dated 31 August 2022 whereby he revoked the Appellant's standard national operator's licence under section 27(1)(a) of the Goods Vehicles (Licensing of Operators) Act 1995. This was on the basis of the Appellant's 'failure to provide satisfactory evidence of regularisation of driver employment and to attend the inquiry [on 31 August 2022]'.
2. The background was set out in the written decision of the Deputy Traffic Commissioner a copy of which is attached to the Appellant's Notice and Grounds of Appeal. The events are set out in more detail below but, in summary, they are as follows.
3. The Appellant attended a first public inquiry before the Deputy Traffic Commissioner on 20 June 2022. In his decision dated 20 June 2022 (which is not being appealed and would now in any event be out of time) the Deputy Traffic Commissioner suspended the Appellant's licence for 28 days. The Deputy Traffic Commissioner stated that as a condition of the survival of the operator's licence the Appellant should 'undertake to employ drivers on a PAYE basis from 1 August 2022'.
4. There was a second public inquiry on 31 August 2022 to which Appellant was called on 9 August 2022. It proceeded in the Appellant's absence as neither its director, Mr Hudescu, nor any representative attended. By a decision dated 31 August 2022, the Deputy Traffic Commissioner for the East of England Traffic Area revoked the Appellant's operator's licence under section 27(1)(a) of the Goods Vehicles (Licensing of Operators) Act 1995.
5. On 26 September 2022, the Appellant lodged at the Upper Tribunal ('UT') Grounds of Appeal dated 25 September 2022 challenging the DTC's decision. By email dated 26 September 2022 the Appellant also sought a stay from the DTC of the order of revocation. By email dated 26 September 2022, the DTC granted a stay of the revocation decision pending this appeal.

Factual background

The First Public Inquiry: June 2022

6. The Appellant holds a standard international operator's licence OF2028168 granted in the Eastern Traffic Area in December 2019 authorising 4 vehicles and 4 trailers [6] following an application in November 2019.
7. In September 2021 the Appellant applied to vary its licence to increase its vehicle authorisation from 4 to 10 vehicles and to remove authorisation for trailers.
8. In response to the variation application Traffic Examiner Mike Brown carried out a desk based assessment and interview of the Appellant producing a report on 13 September 2021. Subsequently the DVSA compiled a maintenance investigation

report dated 22 November 2021 following a visit to the Appellant's operating centre on 29 October 2021.

9. By letter dated 10 February 2022 the Appellant was notified that the Traffic Commissioner for the East of England ['ETA'] was proposing to refuse the variation application and to revoke the Appellant's licence and to disqualify its director and Transport Manager, Elvis Hudescu: the Appellant was notified that it could request a public inquiry in accordance with section 29(1) of the Goods Vehicles (Licencing of Operators) Act 1995.
10. In response, Mr Hudescu requested a public inquiry. The Appellant and Transport Manager were subsequently called to public inquiry listed for hearing on 20 June 2022 by letter dated 4 May 2022.
11. In advance of the Public Inquiry, Mr Hudescu as director and Transport Manager for the Appellant, provided a witness statement dated 17 June 2022.
12. A transcript of the public inquiry held on 20 June 2022 before DTC Nick Denton was made. Mr Hudescu attended the public inquiry and was legally represented.
13. In the course of the hearing the employment status of the Appellant's drivers was canvassed. At the conclusion of the Appellant's evidence the DTC discussed what his decision was likely to be, stating:

'It's unlikely to be revocation, disqualification because I do accept that there are some positive elements here....there are some things which do require improvement...the position on drivers' hours is still unsatisfactory in my view, too long has been taken to get this right and...and there's not sufficient evidence it is sufficiently right for me to just let this go with a warning....I don't want there to be a next time in this room here Mr Hudescu because if there is I think you'll be in severe danger of losing your licence. So you need to get it right from now on. You're not there yet, you still need to get it right from now on. You're not there yet, you still need to do a lot more especially on the drivers' hours, so you need to go and think about how to do that' [241-242]

14. In arriving at his decision, the DTC carried out a balancing exercise. One of the serious negatives had been the extent of off-card driving and the Appellant's inability to discipline drivers who were not employed by the operator. He stated:

Mr Hudescu's practice of using "self-employed" drivers is a factor in the problems which have arisen. It is difficult if not impossible to manage and discipline drivers if you don't employ them. There are virtually no legitimate ways in which an HGV driver can be self-employed, unless he or she turns up in an HGV with their own operator's licence (not the case here). That is why, if this licence is to survive, the company must undertake to employ drivers on a PAYE basis from 1 August 2022 onwards, and not to use so-called self-employed drivers.

15. The DTC suspended the Appellant's operator's licence for 28 days, stating:

The operator must now use the period of suspension to ensure that its new systems are fit for purpose, recruit drivers on an employed basis and undergo a change in culture under which everyone, from the top down, understands the need to adhere to rules on drivers' hours and working time. If the company is not willing to undertake to employ drivers on a PAYE basis

from 1 August, then the licence will be revoked at that point on the grounds that the operator lacks the required good repute (Section 27(1)(a) of the 1995 Act refers).

The Deputy Traffic Commissioner's leading up to the August 2022 public inquiry

16. Thereafter the Appellant sought to provide evidence of PAYE payments on behalf of its drivers, in support of their being employed, to which the Office of the Traffic Commissioner ('OTC') responded on behalf of the DTC. The relevant undisputed chronology is as follows:
 - a. By email dated 30 July 2022 the Appellant sent 'Employee Pay Details'.
 - b. By letter dated 9 August 2022 sent as an attachment to an email of the same date sent at 18:23, the OTC notified the Appellant that the DTC considered the 'Employee Pay details' 'falls a long way short of evidence that your company is now paying drivers on a PAYE basis from 1 August 2022'. 'No evidence has been provided beyond a spreadsheet, and even the entries of that imply that some drivers are not going to be put on PAYE for many more months.'
 - c. The same letter called the Appellant to a reconvened public inquiry on 31 August 2022 starting at 3pm. The letter required the Appellant to confirm its attendance noting that, 'The Traffic Commissioner is unlikely to allow a postponement unless the circumstances are exceptional'.
 - d. On 10 August 2022 the Appellant emailed the OTC attaching 'PAYE for employers annual statement for tax year 2021-2022' as well as an email from 'OAS Accounting' to the Appellant setting out when national insurance is paid, an extract from a Government website 'PAYE for employers: annual statements', copies of employment contracts, and bank statements.
 - e. On 30 August 2022 the OTC's team leader Sharon Lenton emailed the Appellant: 'Further to your email [not referenced] and our telephone conversation. I write to inform you that the Traffic Commissioner does require to attend [sic] the public inquiry tomorrow at 3 pm. The Traffic Commissioner has some further questions which have been prompted by the documentation provided eg the contracts of employment omit the salary to be paid and stipulate working hours of 0 hours per week. Additionally please bring to the Inquiry the August payslips for your employees showing PAYE and NI deductions. If you have any questions do not hesitate to contact me.'
 - f. On 31 August 2022 the DTC proceeded in the Appellant's absence with the reconvened public inquiry and revoked the Appellant's licence.
 - g. On the same date the OTC's team leader Sharon Lenton set out a record of a call with the Appellant at 3 pm that day prior (30 August) to the scheduled start of the reconvened public inquiry as notified in the call-in letter.

The Deputy Traffic Commissioner's revocation decision following the 31 August 2022 Public Inquiry

17. The DTC gave a two-page decision revoking the Appellant's licence following the hearing. It sets out a resumé of the history given above.
18. The DTC noted:

- a. [reference the spreadsheets provided on 30 July] ‘I did not consider that these informal spread sheets contained sufficient evidence that drivers would be employed on PAYE basis from 1 August’ [para.4].
 - b. Notice was given to the Appellant on 9 August that a public inquiry was being reconvened ‘because of the failure to provide sufficient evidence that it intended to regularise its employment of drivers’ that the Appellant lacked good repute [para.5].
 - c. The Appellant had telephoned Sharon Lenton on 10 August asking whether the further evidence at would be enough to ‘prevent the inquiry from being reconvened’; he was told that the DTC was away and not back until after 25 August : ‘ she would only be able to give [the Appellant] very short notice if the inquiry was to be vacated’ [para.6].
 - d. Having reviewed the evidence on his return on 30 August 2022 the DTC ‘... decided to maintain the public inquiry. My clerk emailed the [Appellant] on 30 August to this effect’ [para. 7].
 - e. The DTC was ‘surprised’ to be told that the Appellant was in Romania looking after his son who had a broken leg [para.9].
 - f. The Appellant had been told on 9 August that the public inquiry was being reconvened on 31 August and told that the DTC would not be able to look at further information; the Appellant ‘then chose to travel to Romania and remain there in the run-up to the inquiry’ [para.9].
 - g. The DTC would have expected the Appellant to have told ‘his clerk’[Sharon Lenton] that his stay had been extended in Romania [para 9].
 - h. ‘Instead [the Appellant appears simply to have assumed that the inquiry would not go ahead and did not trouble to get in touch’ [para 9].
 - i. ‘Travelling abroad knowing that a public inquiry was imminent and remaining abroad on the date of the public inquiry’ without contacting the OTC ‘is not the act of a reputable operator. The company should have taken the inquiry process more seriously’ [para 10].
 - j. Referring to the provision of documentation without commentary the DTC stated, ‘I...intended to discuss this information face to face with the operator, put further questions and seek further evidence. The operator’s failure to attend the inquiry has frustrated this intention’ [para.10].
 - k. Despite the Appellant ‘being given the opportunity to come to the reconvened inquiry to explain its position has failed to appear at the inquiry and failed to give any reason in advance for its inability or unwillingness to do so’ [para.11].
 - l. ‘In the circumstances I feel I have no alternative but to conclude that by refusing to engage with the inquiry in this way the operator has now lost its good repute’. The Appellant ‘was teetering on the brink of revocation at the inquiry on 20 June 2022 and its failure to provide satisfactory evidence of regularisation of driver employment and to attend the inquiry has sent it over that brink’ [para.12].
19. Therefore, in his written decision dated 31 August 2022 the Deputy Traffic Commissioner concluded at the reconvened hearing that, on the available evidence the Appellant’s director had travelled abroad knowing that the public inquiry had been listed. The DTC concluded that this was not ‘the act of a reputable operator’ and that the director in not attending had ‘frustrated’ the Deputy Traffic Commissioner’s intention of discussing ‘face to face with the operator’ the evidence that had been provided on employment and to ‘put further questions and seek further evidence’ from the Appellant. The Deputy Traffic Commissioner concluded that the Appellant’s director had ‘failed to appear at the inquiry and failed to give any reason in advance

for [his] inability or unwillingness to do so'. The Deputy Traffic Commissioner further concluded that he had no alternative 'but to conclude that by refusing to engage with the inquiry in this way the operator has now lost its good repute'.

The Law

Revocation

20. Section 13A(2) of the Goods Vehicles (Licensing of Operators) Act 1995 provides some of the requirements that must be satisfied for the grant of standard licences:

13A. Requirements for standard licences

- (1) The requirements of this section are set out in subsections (2) and (3).
- (2) The first requirement is that the traffic commissioner is satisfied that the applicant—
 - (a) has an effective and stable establishment in Great Britain (as determined in accordance with Article 5 of the 2009 Regulation),
 - (b) is of good repute (as determined in accordance with paragraphs 1 to 5 of Schedule 3),
 - (c) has appropriate financial standing (as determined in accordance with Article 7 of the 2009 Regulation), and
 - (d) is professionally competent (as determined in accordance with paragraphs 8 to 13 of Schedule 3).

.....

21. Mandatory revocation by the TC is enabled by section 27(1) of the 1995 Act:

27 Revocation of standard licences.

- (1) A traffic commissioner shall direct that a standard licence be revoked if at any time it appears to him that
 - (a) the licence-holder no longer satisfies the requirements of section 13A(2), or
 - (b) the transport manager designated in accordance with Article 4 of the 2009 Regulation no longer satisfies the requirements of section 13A(3).

22. The burden of proof during a PI requires the Traffic Commissioner to be satisfied of the grounds for revocation as noted by Rix LJ in *Muck It Ltd and Others v. Secretary of State for Transport* (2005) EWCA Civ 1124:

“69. Turning back to sections 26 and 27 of the 1995 Act, I would conclude that for revocation to be possible under the former or mandatory under the latter, it is the commissioner who must be satisfied of the ground of revocation, and not the licence holder who must satisfy him to the contrary. That seems to me to be the natural way to regard both the language of those sections, and the situations contemplated in them. The context is that of a licence holder and the possible revocation of his licence. Revocation can only be done on some specified ground (section 26) or because one or other of the three fundamental requirements is no longer satisfied (section 27). Under section 26(4), the commissioner can only act if “the existence of” a ground comes to his notice. It is counter-intuitive to think of a licence holder being required to negative the existence of a ground raised against him. So with section 27. The commissioner must revoke if “it appears to him” that the licence holder is no longer of good repute or of appropriate financial standing or professionally competent. That seems to me to mean that the commissioner must be satisfied that the requirements are no longer fulfilled. If it had been intended to place the same

burden on the licence holder as had been placed on the original applicant, then the same language as that found in section 13 would have been used.”

23. Revocation must be proportionate: - the approach to proportionality was considered in 2002/217 *Bryan Haulage (No.2)*:

“In applying the *Crompton case* it seems to us that traffic commissioners and the Tribunal have to reconsider their approach. In cases involving mandatory revocation it has been common for findings to have been made along the lines of ‘I find your conduct to be so serious that I have had to conclude that you have lost your repute: accordingly, I have also to revoke your licence because the statute gives me no discretion’. The effect of the Court of Appeal’s judgment is that this two-stage approach is incorrect and that the sanction has to be considered at the earlier stage. Thus, the question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the question becomes ‘is the conduct such that the operator ought to be put out of business?’. On appeal, the Tribunal must consider not only the details of cases but also the overall result.”

[Emphasis Added]

24. An additional and preliminary question to that in *Bryan Haulage (No.2)* should also be asked as explained in 2009/225 *Priority Freight*:

“The third point taken by Mr. Laprell was that the Traffic Commissioner gave no reasons for concluding that ‘the conduct was such that the Appellant company ought to be put out of business’. There will be cases where it is only necessary to set out the conduct in question to make it apparent that the operator ought to be put out of business. We are quite satisfied that this was not such a case. On the contrary this was a case which called for a careful assessment of the weight to be given to all the various competing factors. In our view before answering the ‘Bryan Haulage question’ it will often be helpful to pose a preliminary question, namely: how likely is it that this operator will, in future, operate in compliance with the operator’s licensing regime? If the evidence demonstrates that it is unlikely then that will, of course, tend to support a conclusion that the operator ought to be put out of business. If the evidence demonstrates that the operator is very likely to be compliant in the future then that conclusion may indicate that it is not a case where the operator ought to be put out of business. We recognise, of course, that promises are easily made, perhaps all the more so in response to the pressures of a Public Inquiry. What matters is whether those promises will be kept. In the present case the Appellant company was entitled to rely on that old saying that ‘actions speak louder than words’.”

[Emphasis Added]

The Tribunal’s jurisdiction on appeal

25. Paragraph 17 of Schedule 4 to the Transport Act 1985 provides:

- (1) The Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport”.
- (2) On an appeal from any determination of a traffic commissioner other than an excluded determination, the Upper Tribunal is to have power-
 - (a) to make such order as it thinks fit; or
 - b) to remit the matter to—
 - (i) the traffic commissioner who made the decision against which the appeal is brought; or

(ii) as the case may be, such other traffic commissioner as may be required by the senior traffic commissioner to deal with the appeal,

for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate;

and any such order is binding on the commissioner.

(3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.

26. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 thus provides that “*the Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purposes of the exercise of any of their functions under an enactment relating to transport*”.

27. Nonetheless, in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, the Court of Appeal explained that the then Transport Tribunal (now the Upper Tribunal) is not required to re-hear all of the evidence but, instead, has the duty to determine matters of fact and law on the basis of the material which was before the TC but without having the benefit of hearing and seeing from witnesses. The court applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56, where Woolf LJ held:

“44....The first instance decision is taken to be correct until the contrary is shown...An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category.”

28. The Court of Appeal therefore explained that an appellant assumes the burden of showing that the decision which is the subject of the appeal is ‘wrong’ (what used to be referred to as ‘plainly wrong’), in order to succeed. An appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which it ought to be concluded that the different view is the right one. Put another way, an appellant, in order to succeed, must show that the process of reasoning and the application of the law requires the Upper Tribunal to take a different view.

29. The Upper Tribunal, in deciding an appeal such as this, is not permitted to take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal (see paragraph 17(3) of Schedule 4 to the Transport Act 1985). Therefore, we should not have regards to events that post-date the revocation decision of 31 August 2022 in deciding whether the TC’s decision is wrong.

The Grounds of Appeal and submissions on behalf of the Appellant

30. Mr Sadd made helpful written and oral submissions on behalf of the Appellant.

Application to admit new evidence on appeal

31. The Appellant first sought permission to admit fresh evidence in the appeal in the form of a witness statement from Mr Hudescu setting out a chronology of his contact with the Traffic Commissioner's office from July 2022. It contained the following evidence [references to the Appellant are to Mr Hudescu acting on its behalf].
32. On 30 July 2022, the Appellant emailed documentation to Sharon Lenton at the Deputy Traffic Commissioner's Office purporting to show that drivers were now employed. The Appellant received an out of office reply from Sharon Lenton. On 2 August 2022 the Appellant contacted Sharon Lenton to confirm whether the employment documentation had been received. Ms Lenton confirmed that she had. The Appellant notified Ms Lenton that he was in Romania that he would not be returning until 5 September as his son was undergoing surgery. Following receipt of the documentation the Appellant was re-called to public inquiry by letter dated 9 August 2022 in light of the Deputy Traffic Commissioner's continuing concerns regarding the employment status of the Appellant's drivers and notwithstanding the documentation provided by the Appellant which had been sought by the Deputy Traffic Commissioner following the first public inquiry on 20 June 2022.
33. The date for the re-convened public inquiry as set out in the call-in letter of 9 August 2022 was 31 August 2022. On receiving the call-in letter dated 9 August 2022 Mr Hudescu, the Appellant's director, contacted Ms Lenton at the Deputy Traffic Commissioner's Office on 10 August 2022 reminding her that he could not attend on 31 August 2022 as he was in Romania with his injured son. He was returning to the UK on 5 September 2022. The Appellant emailed further evidence in support of the drivers' employment status.
34. On 26 August 2022 the Appellant contacted Ms Lenton to inquire whether the Deputy Traffic Commissioner had reviewed the documentation and reminding Ms Lenton he was unable to attend on 31 August 2022. By email dated 30 August Ms Lenton emailed the Appellant requiring him to attend on 31 August. The email was re-directed to the Appellant's Junk folder. On 31 August 2022 the Appellant received a telephone call while in Romania from Ms Lenton enquiring why he was not at the public inquiry in light of the email she had sent the previous day. The Appellant located Ms Lenton's email in his junk folder.
35. The Appellant provided independent evidence in support of this chronology including records of telephone calls.
36. There is also a contemporaneous email dated 10 September 2022 in which the Appellant contacted Ms Lenton setting out the above chronology of contacts except it referred to the telephone call of 2 August 2022 as taking place on 1 August 2022.

Ground of Appeal

37. The Appellant appeals against the revocation of the company's operator's licence in the Appellant's absence. Mr Sadd pursued the following ground of appeal:

‘The Deputy Traffic Commissioner was plainly wrong and acted contrary to natural justice in going ahead with the public inquiry hearing on 31 August 2022 and going on to revoke the Appellant’s operator’s licence in the Appellant’s absence; in all the circumstances and given the serious risk of revocation, the inquiry hearing on the 31 August 2022 should have been adjourned and the Appellant’s director given the opportunity to attend in person before the Deputy Traffic Commissioner.’

38. Mr Sadd invited the Upper Tribunal to allow the appeal and remit the public inquiry to be heard in front of a different Traffic Commissioner.

Discussion and analysis

Preliminary issue: permission to introduce fresh evidence on the appeal

39. The Appellant seeks the Upper Tribunal’s permission to introduce fresh evidence on the appeal namely the signed statement of Mr Hudescu dated 5 January 2023 together with exhibits.
40. The fresh evidence relates to the chronology of events leading up to the reconvened public inquiry on 31 August 2022 as set out in that statement and as summarised above. Specifically, Mr Hudescu, for the Appellant, maintains that: He contacted the OTC on 2 August (Statement para.9), before the call-in letter for the reconvened public inquiry was issued on 9 August. This reference appears in the chronology provided by the Appellant under cover of an email dated 10 September 2022 to Sharon Lenton: see para.5.
41. He maintains that in the call on 2nd August he referred to his son being in hospital; the Appellant recognises that in his 10 September 2022 email to Sharon Lenton at para.6 the date of 1 August is given as opposed to 2 August in the statement which he now seeks to admit. The content of the call whether on 1 or 2 August is the same. As at 1 or 2 August the Appellant had provided purported evidence of wage arrangements to the OTC (whether in fact sufficient was in issue).
42. He maintains that on his account he again contacted the OTC on 26 August (see the statement at para.13 and see the email at para.9).
43. Neither of the August dates are referred to in Sharon Lenton’s Note prepared for the DTC. It is not clear whether this Note was before the DTC when he gave his decision on 31 August 2022. The inference from the history set out in the decision is that the Note was prepared for the DTC and therefore will have been.
44. The DTC responded to the Appellant’s application to admit fresh evidence under cover of a letter from the OTC for the East of England,

My main comment, which I would like you to relay to the UT and Mr Powell, is that the appellant’s case still boils down to his assertion that he stated to us that he was in Romania caring for his injured son. No one disputes that he telephoned this office, so I am unclear how the evidence that two calls were made assists him. But you have no recollection of his mentioning his injured son (until after the inquiry): if he had done you would have made a note on VOL and referred the matter to me for consideration. The appellant has no written

evidence that he raised this issue with us prior to the inquiry. He is simply asserting that it is so, in contradiction to our record of the conversations.

45. Having weighed the arguments in the balance, we are satisfied that we should allow Mr Hudescu's statement dated 5 January 2023 to be admitted in this appeal.

46. The principles applicable to the admission of fresh evidence on appeal are very familiar. They were set out in the Court of Appeal decision of *Ladd v Marshall* [1954] 1 WLR 1489 from which the following passage is taken:

...The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible...

47. We are satisfied that the fresh evidence is admissible evidence. The evidence sought to be admitted is a signed statement by Mr Hudescu setting out his account of his contact with the Office of the Traffic Commissioner. It is direct evidence and not hearsay.

48. We address the three *Ladd v Marshall* principles to be applied in turn.

49. First, we are satisfied that the evidence could not have been obtained with reasonable diligence for use at the trial (the PI before the DTC). Until receipt of the decision letter from the Second Inquiry, the Appellant had no way of knowing that the chronology of communications taken into consideration by the Deputy Commissioner at the time his decision to proceed with the Second Inquiry in the Appellant's absence differed to the Appellant's own chronology. The Appellant was unaware of Ms Lenton's note of 31 August 2022 until in receipt of the appeal bundle. Once made aware of the discrepancy between the respective chronologies, the Appellant consulted his records and was only then in a position to seek to produce the fresh evidence.

50. The letter of 9 August 2022 calling Mr Hudescu to the Public Inquiry does not touch on the Appellant's telephone call of 2 August 2022 [Witness Statement para 9]. It follows that the fresh evidence could not have been obtained by the Appellant with reasonable diligence for use at the Inquiry as he had no means of being on notice that it would be required.

51. Second, we are satisfied that the evidence is such that, if given, it would probably have an important influence on the result of the case.

52. We accept that paragraphs 8 to 10 of the DTC's revocation decision following the August Public Inquiry are central to its determination:

8. The operator did not appear at the inquiry this afternoon. My clerk phoned Mr Hudescu to ask whether he would be attending and was told that he was in Romania looking after his son who had a broken leg.

9. I was surprised by this. Mr Hudescu had been informed on 9 August that the inquiry was being reconvened on 31 August to address the issue of driver employment, because the information provided by him on 30 July had been insufficient. He had then sent in (without commentary) further information and had been told by my clerk that I would not be able to look at it until shortly before the inquiry and that she could not say whether it was sufficient to enable the inquiry to be vacated. Mr Hudescu then chose to travel to Rumania and remain there in the run-up to the inquiry. If, as he says, his stay abroad has been extended in order to care for his son, one might have expected him to inform my clerk of this fact, knowing as he did that he was due to appear at the inquiry on 31 August (unless given prior notification that it had been cancelled). Instead, Mr Hudescu appears simply to have assumed that the inquiry would not go ahead and did not trouble to get in touch.

Consideration

10. Travelling abroad knowing that a public inquiry was imminent, and remaining abroad on the date of the public inquiry without troubling to inform the traffic commissioner either of the fact or the reason for the extended stay, is not the act of a reputable operator. The company should have taken the inquiry process more seriously. Asked to produce evidence that it was moving drivers to PAYE-based employment from 1 August 2022, it has produced only some spreadsheets suggesting that employer national insurance contributions would not be paid for at least two people until January 2023. Subsequently it produced two driver contracts which contained no mention of any salary and recorded weekly working hours as nil. No commentary was provided by the operator concerning any of this information. I therefore intended to discuss this information face to face with the operator, put further questions, and seek further evidence. The operator's failure to attend the inquiry has frustrated this intention.

[Emphasis Added]

53. It would appear from [10] that the Deputy Commissioner believed that Mr Hudescu had taken the decision to travel to Romania after being made aware of the date of the Second Inquiry. The Deputy Commissioner also believed that Mr Hudescu did not inform his clerk of his inability to attend the Second Inquiry or the reason for it until the day of the Inquiry. Both of these facts are disputed by the Appellant as set out in Mr Hudescu's statement. Taken together, the Deputy Commissioner went ahead with the second public inquiry in the Appellant's absence making a finding that the Appellant was not a reputable operator.
54. Had the Deputy Commissioner been aware of the chronology of communications as explained by Mr Hudescu in his statement, and had he accepted that the account was reliable, we accept that this would have had an important influence on his decision to proceed in the Appellant's absence, and his finding that the Appellant was not a reputable operator, and consequently on the result of the case.
55. Third, we are satisfied that the evidence contained in the statement is presumably to be believed, or in other words, apparently credible, though it need not be incontrovertible.
56. The fresh evidence comprises a signed witness statement with a statement of truth. The exhibits provided are prima facie evidence that telephone calls did take place, of most relevance being the telephone call of 2 August 2022 before the Second Inquiry was listed. The relatively contemporaneous email of 10 September 2022 support the chronology relied upon by the Appellant.

57. During the preparation of the appeal bundle, the Office of the Traffic Commissioner was on notice of the Appellant's asserted chronology, in that it was detailed in the Grounds of Appeal as provided to the Office of the Traffic Commissioner in support of the Appellant's application for the stay of the Deputy Commissioner's decision. Notwithstanding this, no caseworker telephone notes have been made available in the bundle, with the exception of the note of Ms Lenton.
58. We accept that the evidence of the Appellant, supported as it is by contemporaneous emails, telephone logs and a witness statement with a signed statement of truth may be presumed to be believed sufficient for the purposes of this limb of the test.
59. We therefore admit Mr Hudescu's statement in determining this appeal.

The Ground of Appeal

60. The Appellant argues that the Deputy Traffic Commissioner was plainly wrong and acted contrary to natural justice in going ahead with the public inquiry hearing on 31 August 2022 and going on to revoke the Appellant's operator's licence in the Appellant's absence. Mr Sadd argues that in all the circumstances and given the serious risk of revocation, the inquiry hearing on the 31 August 2022 should have been adjourned and the Appellant's director given the opportunity to attend in person before the Deputy Traffic Commissioner.
61. In light of the evidence we have now admitted, and accept to be reliable, we agree that the DTC's decision to proceed in absence and revoke the licence was plainly wrong and the appeal should be allowed.
62. We entirely understand how the DTC came to his decision based upon the material before him but the information he was provided with by the OTC was inaccurate and therefore the DTC fell into error through no fault of his own.
63. In considering this ground, we accept the accuracy of the chronology of communications between the Appellant and the Office of the Traffic Commissioner following the first Public Inquiry on 20 June 2022 ["the First Inquiry"], and prior to the second Public Inquiry of 31 August 2022 ["the Second Inquiry"] as set out in Mr Hudescu's statement.
64. We are satisfied that the chronology made available to the Deputy Traffic Commissioner at the point that he made his decision not to adjourn the Second Inquiry and to revoke the Appellant's licence as detailed in caseworker Ms Lenton's statement of 31 August 2022, and in the Deputy Commissioner's written decision dated 31 August 2022 was incomplete and inaccurate.
65. To the extent that there is different evidence, we prefer that served on behalf of the Appellant. In particular, we accept Mr Hudescu's account that there was additional contact not recorded by the OTC:

- a. A telephone call was made by Mr Hudescu to Ms Lenton on 2 August 2022

[Witness

Statement para 9], being some days prior to the call up letter and listing of the Second Inquiry (9 August 2022), at which Mr Hudescu made Ms Lenton aware that he would not be in the UK until 5 September 2022. He was already in Romania having travelled there on 15 July 2022 to visit family and his son having broken his leg on 25 July 2022. His son had follow up medical appointments on 5 & 16 August and 1 September 2022 such and Mr Hudescu had decided to stay in Romania for this period to help look after him.

b. An additional telephone call was made by Mr Hudescu to Ms Lenton on 26 August 2022 [Witness Statement para 13], at which Mr Hudescu again made Ms Lenton aware that he would not be in the UK until 5 September 2022 and so would be unable to attend the Inquiry then listed for the 31 August 2022.

66. No mention is made by Ms Lenton or in the Deputy Commissioner's written decision of 31 August 2022 of either of the above communications.
67. In this Appeal the issue is not whether a public inquiry should have been called or, as here reconvened. Given revocation was in play (see the call-in letter 9 August 2022) a public inquiry was called.
68. The issue is whether the Traffic Commissioner acted fairly in proceeding with the public inquiry in the Appellant's absence notwithstanding that revocation had been raised in the 9 August 2022 call-in letter.
69. We accept, in light of the evidence we have admitted, that the DTC was wrong to proceed with the public inquiry in the Appellant's absence on 31 August 2022.
70. The DTC learnt on 31 August that the Appellant was in Romania 'looking after his son who had a broken leg'. Given that revocation was at stake and that the DTC had called the public inquiry 'to address the issue of employment' because of concern about the evidence submitted in support, the DTC had raised the expectation that the Appellant would be given the opportunity to explain and/or provide further support to meet the requirement of proof of employer/employee.
71. We are satisfied that in the exchanges with Sharon Lenton the Appellant had notified the OTC of his absence and the reasons why on 1/2nd August before the call-in letter and before knowing of the date of the reconvened Public Inquiry. In those circumstances the OTC should have canvassed with the Appellant whether he wanted to request an adjournment of the hearing on 31 August 2022 when he was in contact with the OTC on 10 August 2022. In fairness to the Appellant the DTC should have offered another date once he became aware that the Appellant was in Romania and the reasons why he was there.
72. The Appellant's absence from the public inquiry may have had a material effect on its outcome. It is not inevitable that the result would have been the same had Mr Hudescu attended. It was implicit in his following up with the OTC as to whether the documentation supplied satisfied the DTC – that he was expecting to be able to give his account to the DTC. The lack of natural justice was material to the decision to revoke the operator's licence.

73. The 9 August Call-in letter explicitly raised concerns about the sufficiency of the evidence provided. These concerns were raised again in Sharon Lenton's email to the Appellant on 30 August 2022 '...the Commissioner does require [sic] to attend the public inquiry tomorrow at 3 pm. The Commissioner has some further questions which have been prompted by the documentation provided eg the contracts of employment omit the salary to be paid and stipulate working hours of 0 hours per week'. The opportunity to explain in person was denied the Appellant.
74. In his decision dated 31 August 2022 revoking the Appellant's licence the Deputy Traffic Commissioner unfairly relied on the Appellant's alleged failure to 'provide satisfactory evidence of regularisation of driver employment' as one of two reasons for revocation. In fact, the Appellant had provided evidence, the quality of which he was denied the opportunity to explain in a hearing before the Deputy Traffic Commissioner. In his decision, the DTC himself stated that at the reconvened public inquiry that 'I...intended to discuss this information face to face with the operator, put further questions and seek further evidence' [para.10].
75. There is no evidence that the Appellant or Mr Hudescu was 'refusing to engage with the inquiry' (Decision at para.12) which appears to have been the basis for the Appellant's revocation – nor that he 'assumed that the inquiry would not go ahead and did not trouble to get in touch'(Decision at para.9). Sharon Lenton had noted that the Appellant was to be back in the UK on 5 September 2022. In the circumstances the decision to go ahead with the re-convened public inquiry and to revoke the Appellant's licence was unfair without having engaged with the Appellant.
76. In light of the fresh evidence, it was unreasonable for the DTC to conclude that the Appellant was 'refusing to engage with the inquiry' (decision at para.12) and it was unreasonable to conclude that the Appellant travelled abroad knowing that a public inquiry was imminent, and remaining abroad on the date of the public inquiry without troubling to inform the traffic commissioner either of the fact or the reason for the extended stay' (decision at paragraph 10). The DTC relied upon mistaken facts to conclude that the Appellant was not a reputable operator and thus the decision that the Appellant had lost good repute the licence should be revoked was plainly wrong.
77. We therefore quash the DTC's revocation decision and remit the case for a reconvened public inquiry to be listed before a different Traffic Commissioner.

Conclusion

78. We are satisfied that the DTC's revocation decision has been demonstrated to be plainly wrong, it was premised on inaccurate facts and unreasonable conclusions and the Appellant was denied natural justice by the public inquiry taking place in its absence.
79. Accordingly, the appeal is allowed and the DTC's revocation decision is quashed. We remit the reconvened public inquiry to be listed before a different Traffic Commissioner.

Judge Rupert Jones

**Judge of the Upper Tribunal
Authorised for issue on 6 March 2023**