



Appeal No. NT/2015/15

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated: 26 January 2015

Before:

Kenneth Mullan	Judge of the Upper Tribunal
George Inch	Member of the Upper Tribunal
John Robinson	Member of the Upper Tribunal

Appellant:

Peter Martin Haughey

Attendances:

For the Appellant: The Appellant was present and was not represented

For the Respondent: Ms Fee, BL, instructed by the Departmental Solicitor's Office

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 2 July 2015
Date of decision: 28 January 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED. While we allow the appeal to the extent that we find that the Respondent, in arriving at its decision of 26 January 2015, applied the wrong legislative test, we substitute our own order that the Appellant's restricted goods vehicles operator's licence is revoked with immediate effect.

SUBJECT MATTER:-

Restricted licence; Sufficiency of financial resources; Proper approach to the issue; Practice and procedure within the Department of Environment for Northern Ireland; Effective date of revocation

CASES REFERRED TO:- 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; T/2012/46 Pradeep Kumar Sharma t/a
RS Fruitstore, ([2012] UKUT 421 (AAC); 2006/313
David Lloyd

REASONS FOR DECISION

The background to the appeal

1. This is an appeal from the decision of the Head of the Transport Regulation Unit, ("Head of the TRU"), Department of the Environment for Northern Ireland ("the Department") to revoke a restricted goods vehicles operator's licence.
2. The factual background to this appeal appears from the documents in the appeal bundle, the Head of the TRU's decision and a further written submission received after the oral hearing of the appeal, and is as follows:-
 - (i) On 27 September 2012 the Department received an application for a restricted licence from the Appellant together with an application fee.
 - (ii) Prior to July 2012, goods vehicle operators licences in Northern Ireland were issued under the Transport (Northern Ireland) Act 1967 ('the 1967 Act'). Licences were only required under the 1967 Act by 'hire and reward' operators. 'Own account' operators did not require a licence. Licensing and regulation under the 1967 Act was carried out by the Driver and Vehicle Licensing Agency.
 - (iii) The Goods Vehicle (Licensing of Operators) Act (Northern Ireland) 2010 ('the 2010 Act') received the Royal Assent on 22 January 2010 and introduced a new legislative scheme for the licensing of operators of goods vehicles. The policy background leading to the passing and implementation of the 2010 Act was set out by the Department in the further written submission received after the oral hearing of the appeal. It was submitted, in summary, that '... the need for change was raised by the freight industry, public representatives and consumer organisations who were dissatisfied with the way in which freight services were being delivered under existing policy and legislation.' It was noted that there were particular concerns relating to the absence of own account licensing, environmental requirements in relation to operating centres, continuous licensing, appropriate maintenance requirements, sufficiently robust disciplinary requirements and impounding powers.
 - (iv) Article 6(1) of the Goods Vehicles (Licensing of Operators) (2010 Act) (Commencement No. 2 and Transitional Provisions) Order (Northern Ireland) 2012 ('the 2012 Order') provided that where an application for a restricted licence was received by the Department and the applicant could demonstrate that they met certain requirements the Department could issue the applicant with a temporary permit having the effect as if it were a restricted licence granted under section 12 of the 2010 Act.
 - (v) In its further written submission, received after the oral hearing of the appeal, the Department has submitted that
 - '... it is recognised that the permit scheme was an unusual and transitional arrangement with the aim of encouraging as many previously unlicensed 'own account' operators as possible to

come within the licensing regime. The Scheme afforded applicants, many of whom had no previous experience of licensing requirements, a period of time within which to apply for a licence under the Scheme but also to set aside a longer period within which licences would be considered and converted.

The Department **set aside the requirement to demonstrate fitness and finance standards** for existing own account operators **as a transitional arrangement** and conversion of a permit into a restricted licence would proceed **unless** there were any issues regarding vehicle roadworthiness, drivers hours, overloading, misuse of fuel, smuggling, financial issues ... in which case further investigations would take place and any appropriate regulatory action followed up.

A foreshortened and simplified application process was introduced ... and included a number of self-declarations including in respect of finance ...

The Department recognised that all operators should have sufficient resources to be able to properly maintain their fleets and should abide by vehicle and maintenance standards and other statutory requirements.

A permit has been treated as if it were a restricted licence and allowed operators to continue to use vehicles until their application was determined (in some cases up to approximately three years later).

The application required the operator to sign up to the list of undertakings in respect of maintenance, record keeping and observance of traffic and transport law.

A permit is subject to the same enforcement action as a restricted licence.

The outcome was that all applicants who satisfied the requirements of the foreshortened application received a permit.'

- (vi) A permit was subsequently issued to the Appellant under Article 6(1) of the 2012 Order. There is a copy of the permit in the appeal bundle at page 53. It is signed by the then Head of the TRU. The permit is undated but is stated to be valid from 1 July 2012 to 30 October 2015. The permit had the effect as if it were a restricted licence granted under section 12 of the 2010 Act. The permit was forwarded to the Appellant with a covering letter a copy of which is in the appeal bundle at page 52. As with the permit itself, the covering letter is undated.
- (vii) Article 6(2) of the 2012 Order provides that any temporary permit issued under Article 6(1), unless suspended or revoked under the Act shall cease to have effect on the grant of the restricted licence pursuant to the outstanding application.
- (viii) In its further written submission, received after the oral hearing of the appeal, the Department provided the following background information on the 'permit conversion' process:

'Conversions into full restricted licences were carried out on a random basis scheduled over 3 years until October 2015 – 98.8% were completed by March 2015.

Conversion was an administrative process based on the original application.

Conversion followed the normal two stage process of an initial application fee followed by payment of a grant fee once the application process was completed and decision made.

For a permit the initial application required the applicant to pay the initial application fee, agree to undertakings and self-declare in respect of finance, operating centre etc.

In order to maintain equity conversions of permits into a full restricted licence the grant of a restricted licence was completed in line with statutory requirements and policy decisions, and was based on the self-declaration, including that the applicant had appropriate finances, made on the original application form, unless there were any issues regarding vehicle roadworthiness, drivers hours, overloading, misuse of fuel, smuggling, financial issues such as bankruptcy etc ... in which case further investigations would take place and any appropriate regulatory action followed up.

Once administrative conversion was complete, applicants were required to pay the 'grant' fee to obtain a full restricted licence, in some cases up to three years later.

Once the 'grant' fee was received the licence documents would issue.

- (ix) The Department has submitted that following the issue of a permit to the Appellant '...An equitable consideration of the application meant that the conversion of the permit and decision to grant the licence, alongside other permit holders, based on initial self-declaration, was in line with policy to **set aside the requirement to demonstrate fitness and finance standards** for existing own account operators, **as a transitional arrangement.**' (The emphasis in this quotation is that of the Department)
- (x) On 27 June 2013 the Appellant was informed that his application for a restricted goods vehicle operator's licence had been granted. The Appellant was also informed that a 'grant fee' was now due. In separate correspondence also dated 27 June 2013 the Department sought a copy of a maintenance contract and details of inspections.
- (xi) The Appellant failed to pay the 'grant fee' in time, indicating in a telephone conversation on 29 July 2013 that he had insufficient funds to pay the fee. An extension of time to pay the relevant fee was granted on two occasions. Payment was received in the Department on 5 September 2013.
- (xii) On 27 September 2013, the then Head of the TRU recommended that the late payment of the fee should be accepted under section 47(5) of the 2010 Act but that a warning letter be sent to the Appellant stressing that any future fees must be paid within the given deadline. A recommendation was made that a 'full set of financial evidence is

requested to assess whether or not the operator continues to have access to the appropriate funds.'

- (xiii) In correspondence dated 8 October 2013 the Appellant was informed that the late payment had been accepted and that his operator's licence continued in force for a five-year period. A copy of the licence was enclosed with the correspondence. The Appellant was advised that certain outstanding issues required to be addressed including the provision of his maintenance contract and recent original bank statements or other financial documents as evidence that he had financial resources of £3100 available during a 31 day period.
- (xiv) No response was received to the correspondence dated 8 October 2013 and a reminder was forwarded to him on 31 October 2013. Telephone calls were made to the Appellant on 26 and 27 November 2013 without reply.
- (xv) In correspondence dated 20 February 2014, the Appellant was informed that the Department was considering making a direction under section 23(1) of the 2010 to revoke the Appellant's licence.
- (xvi) On 25 March 2014 a copy of a copy of a maintenance contract was received from the Appellant together with two statements from a branch of the Bank of Ireland in the Republic of Ireland.
- (xvii) In correspondence dated 21 May 2014 the Appellant was requested to provide 'original bank statements or properly authenticated bank documents.'
- (xviii) On 28 May 2014 two pages of statements from an account with the Bank of Ireland were received in the Department from the Appellant.
- (xix) In correspondence dated 27 August 2014 the Appellant was informed that the statements did not 'demonstrate access to the required level of finance' and that the correspondence was a 'final attempt' at resolving the issue of the provision of original bank statements or properly authenticated copies in his name showing access to the required financial resources over a three-month period. The Appellant was provided with a relevant Guidance Note. The Appellant was informed that if he failed to meet this 'final request' the Department would have no option but to reinstate the 'Propose to Revoke' procedure.
- (xx) In yet further correspondence dated 6 November 2014 the Appellant was informed that the Department was serving notice on him that it was considering making a direction to revoke his operator's licence on certain specified grounds. The Appellant was given the opportunity to make written representations and to request a Public Inquiry in order to provide further evidence as to why his licence should not be revoked. He was informed that if no response was received by 4 December 2014 his operator's licence would be revoked.
- (xxi) In correspondence dated 26 January 2015 the appellant was informed that his operator's licence was revoked with retrospective effect from 5 December 2014.
- (xxii) The operator's licence was returned by the Appellant on 3 February 2014.

- (xxiii) On 17 February 2015 an appeal against the decision dated 28 January 2015 was received in the office of the Upper Tribunal.
- (xxiv) As part of the appeal, the Appellant indicated that he had not made an application for a stay of the decision appealed against.

The submissions of the parties

3. The Appellant set out the following grounds of appeal:

'I am unsatisfied with the revoking of my operator's licence as I feel I did provide sufficient information for the Department to process my case. The reason provided for revoking my operator's licence was highlighted as an issue with bank statements. I did forward all required banking information which was printed via 365 Online Banking. Although these were not original statements I did explain that my accountant requires all originals. I cannot understand why the statements were not accepted. I require the operator's licence in order to earn a living and feel that this small issue should not have ended in the revoking of my licence.'

4. As was noted above, the Appellant attended the oral hearing of the appeal. At the oral hearing he made submissions in connection with his grounds of appeal. He conceded that the two bank statements which he had forwarded to the Department and which were received in the Department on 25 March 2014 related to the same bank account in Bank of Ireland in the Republic of Ireland. The bank account was a Euro account and the sums set out in the statements were in Euros. He submitted that he used the Republic of Ireland bank account in connection with a contract which he had in the Republic of Ireland for the installation of water meters. That business was based entirely in the Republic of Ireland.
5. The Appellant submitted that the further bank statements which he had forwarded to the Department and which had been received in the Department on 28 May 2014 related to the same bank account in Northern Ireland. The bank account in Northern Ireland was a sterling bank account and the sums set out in the statements were in sterling. He submitted that he used the Northern Ireland bank account in connection with any work which he was doing in Northern Ireland.
6. At the oral hearing, the Respondent was represented by Ms Fee BL. Ms Fee had prepared a Skeleton Argument for which we were grateful. Ms Fee submitted that the proper test to be applied on appeal was that set out by the Court of Appeal for England and Wales in *Bradley Fold Travel Limited & Peter Wright v Secretary of State for Transport* ([2010] EWCA Civ. 695). Having set out the provisions of sections 12C, 12D and 23 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010, Ms Fee submitted that:

'The level of financial reserves for holders of standard national and international licences to satisfy the requirement of "financial standing" is fixed by EU Regulation 1071/2009 at €9,000 for the first vehicle and €5,000 for each additional vehicle.

Restricted licence holders are required to have sufficient resources to maintain their fleet in a fit condition. The Department follows the determination of the Senior Traffic Commissioner in GB that applicants for and holders of a restricted licence should be able to demonstrate a reduced rate of financial resources (sterling equivalent) of less than

50% of that applied to standard licence holders in order to obtain and hold a licence. Therefore, restricted licence holders are required to demonstrate that resources of £3,100 must be available for the first vehicle and £1,700 for each additional vehicle. The applicant was advised by letter of 6th November 2014, that the Department were considering revocation under Section 23(1) of the 2010 Act due to the failure to meet the requirements of Section 12D of the 2010 to satisfy the Department of his financial standing.

...

The Department revoked the licence on the following grounds in Section 23(1):-

- Under Section 23(1)(e) that any undertaking recorded in the licence has not been fulfilled, namely the failure to provide evidence of appropriate financial standing;
- Under Section 23(1)(g) that since the licence was issued or varied, there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence, namely that the appellant did not appear to meet the financial standing requirements of the 2010 Act;

It is submitted that the Department properly revoked the appellant's licence on the basis that the appellant failed to provide – by way of original bank statements or other original documents – that he had sufficient finances to meet the requirements of Section 12D of the 2010 Act. The Department requires original financial documents in order to prevent a situation arising such as arose in the case of **David Lloyd 313/2006**.

The appellant, not having sufficient finances, failed to notify the Department that there was a material change of his circumstances relevant to the issue of his licence.

Section 12(C)(4) provides that there must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence, in a fit and serviceable condition. The undertaking on the licence/permit, which is treated as a restricted licence, is that "motor vehicles and trailers, including hired vehicles and trailers, are kept in a fit and serviceable condition." This has been widely interpreted as including having financial resources in a similar way that Regulation 1071/2009 sets financial standing for a standard licence.

The requirements in Sections 12(C) and (D) allow the Department to ensure that a safe operation is maintained as the availability of financial resources impacts on road safety and fair competition.

The Department requires the appellant to establish that it has sufficient resources to maintain his vehicles in a fit and serviceable condition and have not been provided with any evidence that the apparent lack of available resources, will not prejudice this obligation – as per **Pradeep Kumar Sharma t/a RS Fruitstore, 2012/46**.

The Department respectfully submits that this appeal should be dismissed.'

The different requirements for restricted and standard licences

7. In *T/2012/46 Pradeep Kumar Sharma t/a RS Fruitstore*, ([2012] UKUT 421 (AAC)), the Upper Tribunal was considering an appeal against a decision of the Traffic Commissioner to revoke a restricted goods vehicle operator's licence held by the Appellant. The Appellant was informed that the licence had been revoked on the ground of a lack of financial standing, as a result of a material change since the grant of the licence, and lack of fitness. It was accepted that the intimation that revocation on the ground of lack of fitness was in error.
8. Section 13(2) of the Goods Vehicles (Licensing of Operators) Act 1995 ('the 1995 Act') provides that:
 - '(2) On an application for a restricted licence a traffic commissioner must consider—
 - (a) whether the requirements of sections 13B and 13C are satisfied, and
 - (b) if the commissioner thinks fit, whether the requirement of section 13D is satisfied.
9. The Upper Tribunal, in *T/2012/46*, stated, at paragraph 6:

'Since the Appellant will only use a goods vehicle for the carriage of goods for or in connection with the business which he carries on he only needs a 'restricted licence', (see s. 3(3) of the 1995 Act). This is, of course, the kind of licence which he was originally granted. Before a restricted licence can be granted the Traffic Commissioner must be satisfied that the requirements of ss.13B and 13C of the 1995 Act are satisfied. In addition, if the Traffic Commissioner thinks fit, he can consider whether the requirements of s.13D of the 1995 Act are met.'
10. The emphasis here is our own. The requirements in ss.13B and 13C, in relation to which the TC must be satisfied are concerned with fitness and driver's hours, maintenance, operating centres etc. The requirement in ss.13D, in relation to which the TC can consider, if he thinks fit, is as follows:

'The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition (see section 13C(4) is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose.'
11. In paragraphs 11 to 13 the Upper Tribunal stated:
 - '11. We turn now to the provisions of s.13D of the 1995 Act. By contrast with the provisions which we have just considered the Traffic Commissioner only has to consider s. 13D if he "*thinks fit*". In other words he has discretion as to whether or not it is appropriate to take this provision into account. The terms of s. 13D, (which applies to both standard and restricted licences), are that:

"The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable

condition (see section 13C(4) is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose".

It is not apparent from the papers before us whether the Traffic Commissioner ever considered that it was appropriate to take s.13D of the 1995 Act into account. If he did he did not explain why this was appropriate when the Appellant did not own a vehicle but had explained throughout that he only hired vehicles.

12. It seems to us that the best indication of what has happened is to be found in the terms, on the one hand, of the financial checklist, (quoted at paragraph 2(ii) above), the terms of the referral dated 15 May 2012, (see paragraph 2(vi) above), and in the decision letter dated 4 August 2012, (see paragraph 2x above) and on the other the letter of 6 July 2012, which uses the expression 'financial resources'. Each of the documents in the first category refers to 'Financial Standing' or to a figure of £3,100 or to both. 'Financial standing' is the expression used in s.13A(2)(c) of the 1995 Act to describe one of the mandatory requirements for a standard licence. There is a similar contrast in the amounts which are required. The figure of £3,100 represents the amount agreed by Traffic Commissioners in relation to the financial resources which may be required under s.13D, if the Traffic Commissioner 'thinks fit'. By contrast the figure of £8,500, which must be shown in relation to the first vehicle authorised under a standard licence is set by reference to Article 7 of Regulation (EC) No 1071/2009 of the European Parliament and of the Council, ("Regulation 1071/2009")
13. 'Financial standing, is defined in s. 13A(2)(4)(c) by reference to 'Article 5 of the 2009 Regulation', in other words Regulation 1071/2009. That Regulation, according to Article 1, *"governs the admission to and the pursuit of, the occupation of road transport operator"*. By virtue of Article 2(3) 'road transport operator' includes the occupation of 'road haulage operator'. The occupation of 'road haulage operator' is in turn defined in Article 2(1) as meaning: *"the activity of any undertaking transporting goods for hire or reward by means either of motor vehicles or combinations of vehicles"*. In other words the 2009 Regulation applies to the first limb of s. 2(1) of the 1995 Act, [s. 2(1)(a)], but not to the second limb, [s. 2(1)(b)], which is confined to the use of goods vehicles for the carriage of goods for or in connection with any trade or business carried on by the operator. Since the provisions of the 2009 Regulation do not apply to the circumstances in which a restricted licence can be issued, (see s. 3(3) of the 1995 Act), there is no requirement, when applying for or renewing, such a licence to show that there are resources available which would satisfy the requirement of 'financial standing' as defined in Article 5 of the 2009 Regulations.'
12. What the Upper Tribunal is stating is that the TC must first consider whether it is appropriate to take s.13D of the 1995 Act into account. That is because section 13(2) offers the TC a discretion to consider, if he thinks fit, whether the requirement in section 13D is satisfied. There is also a requirement to explain why it was thought appropriate to consider section 13D. Thereafter the test for restricted licences is not one of 'financial standing', applicable to standard licences, but one of having 'sufficient financial resources', for the purpose of

the provision of facilities for maintaining vehicles in a fit and serviceable condition.

13. In relation to the case which was before them, the Upper Tribunal concluded, at paragraph 14:

‘14. What appears to have happened here is that the TAO has, in many of its dealings with the Appellant, overlooked the fact that this is a restricted licence and instead has treated it, for the purposes of any financial requirement, as a standard licence. None of those who considered the matter thereafter appear to have spotted this error, which was then compounded by the terms of the decision letter dated 4 August, which failed to reflect the terms of the decision which the Traffic Commissioner actually made. The result, in our judgment, is that the licence was revoked on a false basis, which means, in turn, that the appeal must be allowed.’

The applicability of T/2012/46 to this case

14. In Northern Ireland the applicable legislation is the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 (‘the 2010 Act’). Section 13(2) of the 1995 Act is replicated in section 12(2) of the 2010 Act. Section 13D of the 1995 Act is replicated in section 12D of the 2010 Act.
15. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, Upper Tribunal said the following, at paragraph 4 of its decision,

‘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.

16. It is clear from the chronological narrative which has been set out above that the Department had not given any active consideration to the issue of finance during the period between the Appellant’s application for a restricted goods vehicle operator’s licence on 27 September 2012 and the initial notification to him on 27 June 2013 that his licence had been granted. The transitional procedure which was implemented by the Department following the introduction of the 2010 Act allowed the Appellant to be granted a temporary permit having the effect as if it were a restricted licence granted under the Act. Consideration was then given as to whether the temporary permit could be converted to a full licence. The Department has conceded that consideration of the conversion to a full licence involved the ‘... setting aside of the requirement to demonstrate fitness and finance standards for existing own account operators.’ We comment below on the adoption of that transitional procedure.

17. The Department only commenced making further enquiries on the question of finance after the restricted licence had been granted on 27 June 2013 and when the Appellant acknowledged and admitted that he did not have the funds to pay the 'grant fee' for the licence. Although it is nowhere conceded in these terms, it was at that stage that it occurred to the Department if the Appellant did not have sufficient funds to pay the 'grant fee' it could also be the case that he did not have sufficient funds to satisfy other requirements for the grant or retention of a full restricted goods vehicle operator's licence.
18. Despite that, following the payment of the 'grant fee' on 5 September 2013, the Appellant was notified, in correspondence dated 8 October 2013, that the late payment of the grant fee had been accepted and that his restricted goods vehicle operator's licence continued in force for a period of five years.
19. The first intimation by the Head of the TRU that he (as he then was) was concerned about finance is in the internal TRU memorandum dated 27 September 2013, which is to be found at page 17 of the bundle. A recommendation is made by a caseworker that:

'... As the operator has indicated that he had insufficient funds, financial evidence is required. On assessment of the financial evidence, the Department will be able to determine if the operator meets the financial obligations of holding an operator's licence.'
20. The Head of the TRU indicates that he:

'...supports the recommendation that a full set of financial evidence is requested to assess whether or not the operator continues to have access to the appropriate funds.'
21. An immediate question which arises is whether this is sufficient to indicate that the Head of the TRU 'thinks it fit' to consider whether the requirement in section 12D is met?
22. Further correspondence was sent to the appellant on 8 October 2013. Amongst other things, the Appellant is advised that:

'One of the requirements of holding an operator's licence is to provide evidence to demonstrate that you have ready access to **sufficient resources to maintain you vehicle**. The type and size of licence applied for requires a sum of £3100 to have been available during a 28 day period.

Please forward your most recent original bank or building society statements covering the period ...'

The emphasis is, again, our own. The Appellant is advised of the type of 'financial' evidence which might be acceptable.
23. The language used in the correspondence of 8 October 2013 reflects the wording of section 12D of the 2010 Act, which, as noted above, is concerned with the Department's considerations when determining an application for a restricted licence.
24. There is a further internal TRU memorandum at page 24, dated 10 December 2013, prepared by a Caseworker. It states:

'This licence follows a conversion from a permit ... a letter was issued to the operator requesting ... to provide recent bank statements covering a 28 day period. The bank statements were requested following confirmation from the operator himself that he does not have sufficient funds.'

25. The Caseworker recommends that the 'propose to revoke' procedure is instigated on the grounds of a failure to fulfil the undertaking to notify changes, material change, Appellant may not be of appropriate **financial standing** and good repute. This is the first time that the phrase 'financial standing' has been used.

26. Further correspondence is sent on 14 February 2014. Here the Appellant is advised that the department was considering a direction to revoke under section 23(1) of the 2010 Act. There are two grounds cited. The second is that:

'Under Section 23(1) that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence, namely that you have failed to demonstrate that you are of appropriate **financial standing**.'

27. The emphasis is our own. The Appellant provided documentation in response. On 21 May 2014 further correspondence was forwarded to the Appellant. Amongst other things it states:

'As evidence of **financial standing**, you forwarded a copy of an online account statement as well as a copy of what appears to be a statement from a separate account. In order for the department to properly assess your financial standing, please forward original bank statements or properly authenticated bank documents.'

The emphasis is our own.

28. Further documents were provided by the Appellant on 28 May 2014. At page 37 of the appeal bundle there is what is described as a 'Task Note 2', dated 20 August 2014 and which reads, in part:

'Can you please revert to the operator highlighting this is a final attempt to resolve this matter as they haven't demonstrated compliance with Section 12D of the Goods Vehicles (licensing of Operators) Act (NI) 2010. They must provide evidence that shows they have sufficient finance for one vehicle, currently £3100. The operator must produce evidence that shows they have access to, on average, £3100, over a three month period. Any evidence produced must be bank/building society statement originals or properly authenticated copies in the name of the operator ...'

This is the first specific reference for the Appellant to section 12D of the 2010 Act.

29. On 27 August 2014 further correspondence was forwarded to the Appellant. In this correspondence the Appellant is informed:

'**Under Section 12D of the above-named [2010] Act, all operators must ensure that the provision of the facilities and arrangements for maintaining vehicles in a fit and serviceable condition is not prejudiced**

by reason of having insufficient financial resources for that purpose. In your case, with the current authorisation of 1 vehicle, you need to demonstrate that you have access to an average of at least £3100 over a 3-month period.

You forwarded Bank Statements on 24 May 2014, which do not demonstrate access to the required level of finance firm. Unfortunately, as this evidence has now been requested on a number of occasions, this is as a final attempt to resolve this matter.'

30. Once again, the emphasis is our own. The Appellant was then provided with an opportunity to provide the relevant bank statements by 27 September 2014. As we have previously noted, the appellant was also provided with a copy of the Departments Guidance Note 13.

31. Further correspondence was forwarded to the Appellant on 6 November 2014. In paragraph 1 of this correspondence there is a reference to 'evidence of financial standing'. In paragraph 4 there is a reference to section 12D of the 2010 Act. The Appellant is then informed:

'Given your failure to satisfy the Department that you are of **appropriate financial standing to meet the requirements of Section 12D of the above named Act**, the Department is considering making a direction under Section 23 (1) of the 2010 Act to revoke your operator's licence...'

32. Once again the emphasis is our own. Two grounds are specified for the proposal to revoke the licence. The second of these is that:

'... That since the licence was issued or varied there has been a material change in any of the circumstances of the licence holder that were relevant to the issue or variation of the licence, namely that you do not appear to meet the **financial standing requirements of the 2010 Act.**'

33. In correspondence dated 26 January 2015 the appellant was informed that his operator's licence was revoked with effect from 5 December 2014. In the second substantive paragraph of the correspondence, the Appellant is informed:

'As you have not taken the opportunity to request a public enquiry, the Department has determined that your licence should be revoked with effect from 5 December 2014 in accordance with the ground stated in the Department's letter.'

The 'Department's letter' referred to is the letter forwarded to the Appellant on 6 November 2014.

34. At pages 47 to 48 of the appeal bundle, there is a file note of a telephone conversation with the Appellant which took place on 29 January 2015. In the third bullet point there is a reference to the Appellant not having demonstrated financial standing. At pages 49 to 50 there is a further file note of a telephone conversation which took place with the Appellant on 29 January 2015. In the third bullet point there is a reference to 'financial cover to hold an Op licence'.

35. In *T/2012/46, Pradeep Kumar Sharma t/a RS Fruitstore*, the Upper Tribunal's first substantive finding was that:

'It is not apparent from the papers before us whether the Traffic Commissioner ever considered that it was appropriate to take s.13D of the 1995 Act into account.'

36. In this case, the first references to section 12D are in the 'Task Note 2' of 20 August 2014 and the correspondence dated 27 August 2014 with a repeat in the correspondence dated 6 November 2014.
37. It is arguable that this is sufficient evidence that the TRU considered that it was appropriate to take section 12D into account. The letter of 6 November 2014 is very important, however, as there is a cross-reference to that letter in the decision letter of 26 January 2015 informing the appellant that his licence had been revoked.
38. The second major concern in *T/2012/46, Pradeep Kumar Sharma t/a RS Fruitstore* was that the TC had applied the wrong test. More specifically the concern was that the test which had been applied in that case was that of 'financial standing' which is relevant to standard licences and not one of having 'sufficient financial resources', for the purpose of the provision of facilities for maintaining vehicles in a fit and serviceable condition, which is applicable to restricted licences.
39. In this case, on the one hand, we have concluded that the TRU did not apply the correct test. The 'Task Note 2' of 20 August 2014 (which the appellant would not have received) and the letters of 17 August 2014 and 6 November 2014 (the 'Propose to Revoke' letter) make specific mention of section 12D. However, there is mention in both pieces of correspondence which the Appellant did receive to 'financial standing'. As was noted above the correspondence of 6 November 2014 is pivotal as it is cross-referenced in the further correspondence of 26 January 2015 in which the Appellant was informed that his licence had been revoked from 5 December 2014.
40. The Skeleton Argument, prepared for the oral hearing of the appeal, is set up in terms of the revocation decision being based on Section 12D.
41. We are wholly satisfied that the decision-making process giving rise to the conversion of the temporary permit to a full restricted goods vehicle operator's licence and the further decision-making following the initial notification of grant, the subsequent actual grant and the revocation of the licence is redolent of confusion and lack of clarity in the Department as to the legislative basis on which enquiries as to the Appellant's financial position should be actioned. In our view, the Department's obvious concerns as to the Appellant's ability to make provision of the facilities and arrangements for maintaining his vehicle in a fit and serviceable condition were identified at too late a stage in the decision-making process. In our estimation, the perplexity and ambiguity which unfolded after the conversion of the permit and grant of the licence have their basis in the adoption of a 'temporary permit' and conversion scheme which relied on self-declaration and which abandoned the usual legislative requirements relating to finance and fitness.
42. It is not clear to us why the Appellant was informed, on 8 October 2013 that his operator's licence continued in force for a five-year period. At that stage, the Department was alert to the fact that the Appellant's financial position might be problematic. Rather than withhold the licence at that stage, pending further

enquiries, the licence remained in force until its eventual revocation on 26 January 2015.

43. We are not satisfied that the Head of the TRU, when taking action to revoke the Appellant's licence, had the correct legislative test in mind. The key piece of correspondence was that of 6 November 2014. There is a cross-reference to that letter in the decision letter of 26 January 2015 informing the appellant that his licence had been revoked. As was noted above, in the correspondence dated 6 November 2014, the Appellant was informed that:

'Given your failure to satisfy the Department that you are of appropriate financial standing to meet the requirements of Section 12D of the above named Act, the Department is considering making a direction under Section 23 (1) of the 2010 Act to revoke your operator's licence...'

44. 'Financial standing' is not mentioned in Section 12D of the 2010 Act. The requirement in section 12D is based on a sufficiency of financial resources. The Upper Tribunal in *T/2012/46, Pradeep Kumar Sharma t/a RS Fruitstore* emphasised the requirement for those adjudicating on applications for goods vehicles operators' licences to be alert to the specificity of the legislative requirements and to recognise the key differences between the prerequisites for standard and restricted licences.
45. In *T/2012/46, Pradeep Kumar Sharma t/a RS Fruitstore*, the Upper Tribunal, in paragraph 16 of the decision, made recommendations for alterations in existing practice and procedure. While we are addressing a different legislative scheme, we make a parallel recommendation that the Head of the TRU should provide general guidance to TRU staff in relation to the distinction between standard and restricted licences and the information required in relation to each. If necessary appropriate alterations will have to be made to standard letters and documents.
46. We have noted that the correspondence dated 26 January 2015 provided for an effective date of revocation of 5 December 2014. It is unclear why it was thought appropriate for the revocation to have a retrospective effect. We have noted that the correspondence which was sent to the Appellant on 6 November 2014, indicated that should there be no response to that correspondence by 4 December 2014 the licence would be revoked. Although it remains unclear, it may be that 5 December 2014 was chosen as the effective date of revocation as it was the day after the expiry of the deadline. If that is the case, the choice is arbitrary and wrong. It is difficult to envisage a situation in which a retrospective date of revocation is appropriate and justified.
47. We are concerned, in addition, that the practical consequence of the correspondence dated 26 January 2015 was to put the Appellant out of business immediately. We are unsure why the Department did not consider a prospective effective date of revocation to give appropriate time to the Appellant for an orderly winding up of his business. It is imperative, in our view, for the Department, when making decisions to revoke an operator's licence gives critical attention to the effective date of revocation. Cogent and rational reasons need to be given for the choice of effective date of revocation, particularly, as in a case such as this, where the significance of the revocation is to terminate the operation of a business.'

48. As in *T/2012/46, Pradeep Kumar Sharma t/a RS Fruitstore*, we are satisfied that having applied the wrong legislative test, the licence was revoked on the wrong legal basis and, accordingly, the appeal must be allowed.

Our substituted decision

49. In *T/2012/46, Pradeep Kumar Sharma t/a RS Fruitstore*, the Upper Tribunal, having found, in paragraph 14, that the revocation of the licence was on a false basis, considered whether it should substitute its own decision. While finding that course of action to be highly desirable, the Upper Tribunal concluded that there were too many 'loose ends' in the case. That is not the case here.

50. Section 23 of the 2010 Act provides:

'23.— Revocation, suspension and curtailment of operators' licences

(1) Subject to the following provisions of this section and the provisions of section 26, the Department may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (9)) for any reasonable cause including any of the following—

(a) that a place has, at a time when it was not specified in the licence as an operating centre of the licence-holder, been used as an operating centre for vehicles authorised to be used under the licence;

(b) that the licence-holder has contravened any condition attached to the licence;

(c) that during the 5 years ending with the date on which the direction is given there has occurred a prescribed event affecting information required to be given to the Department under section 7 or 8;

(d) that the licence-holder made, or procured to be made, for the purposes of—

(i) the licence-holder's application for the licence,

(ii) an application for the variation of the licence, or

(iii) a request for a direction under paragraph 1 or 3 of Schedule 1,

a statement of fact that, whether to the licence-holder's knowledge or not, was false, or a statement of expectation that has not been fulfilled;

(e) that any undertaking recorded in the licence has not been fulfilled;

(f) that the licence-holder, being an individual, has been adjudged bankrupt [or has become the subject of a bankruptcy restrictions order] or, being a company, has gone into liquidation, other than voluntary liquidation for the purposes of reconstruction;

(g) that since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence;

(h) that the licence is liable to revocation, suspension or curtailment by virtue of a direction under section 25(3).'

51. As was noted above, the basis on which the Department purported to revoke the Appellant's licence was on the basis of the grounds set out in section 23(1)(e) and (g). The revocation decision specified, for the purposes of section 23(1)(e), the 'undertaking recorded in the licence' was '... a failure to provide evidence of appropriate financial standing.' The 'material change in circumstances', for the purposes of section 23(1)(g) was specified as that the Appellant did '... not appear to meet the financial standing requirements of the

2010 Act'. We now know, of course, that the Appellant, as an applicant for, and subsequent holder of a restricted licence did not have to meet any 'financial standing' requirements.

52. As the Appellant had been granted a restricted goods vehicles operator's licence revocation of that licence has to be on the basis of one of the grounds set out in section 23(1).
53. In the application form for a restricted licence, which was received in the Department on 27 September 2012, the Appellant signed a declaration in the following terms:

'The Department deems that for the type of licence you are applying for, and the number of authorised vehicles on it, you will need to meet the continuing requirement to have sufficient finance to ensure the maintenance of your vehicles is not jeopardised. In signing the declaration below, you do not need to send any supporting financial documents at this stage, but the Department reserves the right to call for financial evidence if necessary.

The current financial levels are £3,100 for your first vehicle and £1,700 for each additional vehicle

"I can confirm that I have access to sufficient finance to ensure the proper maintenance and safe operation of all my vehicles."

"I declare that all the information in this form (amended, where necessary, by me) is correct.

I also affirm my compliance with all the conditions and undertakings listed in this application."

54. The declaration which is set out in the application form is not properly reflective of the requirement in section 12D of the 2010 Act. The requirement therein is '... that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose.'
55. We are unaware, of course, and with respect to the Appellant, whether the declarations which the Appellant signed to the effect that he had 'access to sufficient finance to ensure finance to ensure the proper maintenance and safe operation of all my vehicles' and that 'all the information in this form (amended, where necessary, by me) is correct' were true at the time when the application form was signed. The Department relied on this self-certification and was not pro-active at the application stage to check whether the declaration was true.
56. During the period from 8 October 2013 to 25 March 2014, the Appellant was requested, in keeping with the Department's reserved right, as set out in the application form, to call for financial evidence, to confirm his financial position. The right to call for such evidence was to ensure that Appellant was continuing to comply with the declaration which he had signed. The correspondence which was forwarded to the Appellant, during the relevant period, specified, in clear and uncertain terms, the type and form of evidence which was acceptable to the Department. The correspondence stipulated that if the evidence related to bank accounts that only original bank statements would be acceptable. That is

reflective of the advice given the Department's 'Guidance Note 13 – Financial Evidence.'

57. We are of the view that it was appropriate and necessary for the Department to require the Appellant to demonstrate that for the purposes of section 12D of the Act, the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition was not prejudiced by reason him having insufficient financial resources for that purpose. To that extent we are satisfied that it was apposite for the Head of the TRU to take section 12D of the 2010 Act into account.

58. After failing, during a five-month period, to provide the necessary evidence, the Appellant supplied a photocopy of a single page from a bank statement and a single page printed out from an internet banking website. The bank statement had been redacted but it was clear that it related to a bank account in the Republic of Ireland. The nature of the bank account to which the single page printout from the internet banking website related is, from its contents, unclear. During the course of the oral hearing before us, the Appellant confirmed that it related to the same bank account in the Republic of Ireland. In the Department's 'Guidance Note 13 – Financial Evidence', operators are informed that:

'If original bank accounts are not available, for instance if you have an online bank account, then you may provide printouts that have been stamped by the bank as verification that they show a true reflection of your account. Any such printouts must contain the account holder's name and account number, the name of the bank, and all transactions taking place within the 28 day period.'

59. What is important about this documentation is that it failed to meet the requirement to provide original bank statements. As was noted by Ms Fee, the obligation to present original bank statements is to prevent the situation which arose in *2006/313 David Lloyd*. Further what was presented, particularly the single page printed out from an internet banking website, clearly did not meet the requirements set out in the Department's Guidance Note 13. At the oral hearing of the appeal, the Appellant gave evidence that for a limited period he was operating a business in the Republic of Ireland and that the bank account in that jurisdiction was used to facilitate that business. The business in the Republic of Ireland had no connection with his business in Northern Ireland for which he had a separate bank account. We have noted that in the Department's 'Guidance Note 13 – Financial Evidence', operators are informed that:

'The evidence must be those [*sic*] of the economic entity (applicant/operator) established in Northern Ireland where an authorisation has been applied for and not those of any other entity established in any other country or European Member State.'

60. The Appellant was reminded, by way of correspondence dated 21 May 2014, of the requirement to provide original bank statements or properly authenticated bank documents. In response, the appellant forwarded photocopies of two pages of a statement relating to a bank account in Northern Ireland. Once again, only photocopies were provided, not originals. Further, certain information was, once more, redacted. Finally, it is clear from the detail of the statements that the Appellant, in the period immediately following the grant of

his licence, did not have sufficient resources, in Northern Ireland, to meet the requirement for the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition.

61. We are satisfied that grounds existed to revoke the Appellant's licence. We are of the view that, given the circumstances set out above, the Department could have directed the Appellant's operator's licence be revoked for a reasonable cause within the definition in section 23(1) of the 2010 Act. We are also of the view that the ground in paragraph (e) of section 23(1) is satisfied. We would not agree that the ground in paragraph (g) is satisfied. That ground, which relates to a material change of circumstances since the licence was issued, requires knowledge of what the circumstances were when the licence was issued. As was noted above, we are unclear as to the Appellant's financial position as of the date of the grant of the licence because the Department relied on a self-declaration to that effect and did not, at that stage, actively pursue the issue.
62. We return to our comments at paragraphs 46 and 47 above in which we raised concerns about the approach which was taken by the Department to the effective date of revocation. The Department chose a retrospective revocation date which we considered to be illogical and incorrect. In addition, we were concerned that the Department failed to give consideration to a retrospective revocation date. Following notification of revocation, the Appellant returned his licence where it was received in the Department on 3 February 2015. The Appellant did not seek a stay of the revocation decision pending appeal. We are of the view that had the Appellant's licence remained extant then a prospective effective date for our own substituted revocation decision would have been appropriate. It is the case, however, that given that the Appellant did not seek a retention and maintenance of his licence pending appeal that a prospective date of revocation is without purpose. Our substituted decision is, therefore, that the Appellant's restricted goods vehicles operator's licence is revoked with immediate effect.
63. We would add the following comments. They are irrelevant to the decision which we have made on this appeal but ought to be considered in great detail by the Department, and the TRU, as a party to the proceedings.
64. We can understand that the Department was implementing a new legislative scheme and was endeavouring to process applications for new restricted licences with minimal effect on the operators. Nonetheless, the chronology which we have set out above, and which incorporates materials from the submission which was received post-hearing, demonstrates that the Department was adopting an idiosyncratic approach to the requirement to licence 'Own Account' operators. The procedure which was introduced involved the initial grant of a temporary permit having the effect as if it were a restricted licence granted under the Act. Consideration was then given as to whether the temporary permit could be converted to a full licence. The Department has conceded that consideration of the conversion to a full licence involved the '... setting aside of the requirement to demonstrate fitness and finance standards for existing own account operators.'
65. We have noted above that the decision-making process throughout was redolent of confusion and lack of clarity in the Department as to the legislative basis on which enquiries as to the Appellant's financial position should be actioned. Further, it is our view that the Department's obvious concerns as to the Appellant's ability to make provision of the facilities and arrangements for

maintaining his vehicle in a fit and serviceable condition were identified at too late a stage in the decision-making process. We repeat that in our estimation, the confusion and uncertainty which unfolded after the conversion of the permit and grant of the licence have their basis in the adoption of a 'temporary permit' and conversion scheme which relied on self-declaration and which abandoned the usual legislative requirements relating to finance and fitness.

66. We note that we addressed parallel issues in *NT/2015/26 Connolly Transport Limited* in the context of the migration of existing licences to the new scheme.
67. The operation of the Department's transitional procedure in this case led to the following. The Appellant did not have a licence under the former scheme. His application for a restricted licence was made under the new 2010 Act scheme. The process which was utilised by the Department was to grant the Appellant, under transitional arrangements, with a temporary permit having the effect as if it were a restricted licence granted under section 12 of the 2010 Act, provided that the applicant could demonstrate that he met certain requirements. The transitional permit scheme has been described as unusual. It is clear, however, that existing requirements relating to fitness and finance were set aside.
68. The Appellant was given a permit which was valid from 1 July 2012 to 30 October 2015 and had the effect as if it were a restricted licence granted under section 12 of the 2010 Act. Subsequently, the Appellant was given a full licence on 27 June 2013. The conversion from permit to licence did not involve any investigation into finance but relied on self-declaration. It was only when the Appellant appeared to be unable to pay the fee for the licence that concerns were raised about finance.
69. The Appellant had a permit and licence to operate from 1 July 2012 until revocation on 5 December 2014 during which period it was unclear whether he met the condition set out in section 12D of the 2010 Act. The purpose of that section is to ensure that the operator of a restricted goods vehicles licence, such as the Appellant, has sufficient resources for the provision of facilities and arrangements for maintaining vehicle(s) in a fit and serviceable condition. That provision is directed, above all else, at public safety.
70. Nonetheless, while we would wish the Department to take cognisance of these additional comments, they make no difference to our decision. For the reasons which are set out above the appeal must be dismissed.



**Kenneth Mullan, Judge of the Upper Tribunal,
28 January 2016**