IN THE UPPER TRIBUNAL **T/2015/36**
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Before:	**Kenneth Mullan**	**Judge of the Upper Tribunal**
	Mr S. James	**Member of the Upper Tribunal**
	Mr J. Robinson	**Member of the Upper Tribunal**

Appellant: **W Martin Oliver Partnership**
Respondent: **Driver and Vehicle Standards Agency (DVSA)**
On Appeal From: **Deputy Traffic Commissioner for the North East of England**
Determination Date: 4 February 2016

DETERMINATION ON AN APPLICATION TO ADDUCE FRESH EVIDENCE

Background

1. On 2 July 2014 Vehicle Registration PO56DFG ('the detained vehicle') was detained under regulation 3 of the Goods Vehicles (Enforcement Powers) Regulations 2001, as amended ('the 2001 Regulations').

2. An application by the W Martin Oliver Partnership ('the Appellant') claiming ownership and return of the detained vehicle, made under regulation 10 of the 2001 Regulations, was received in the office of the Traffic Commissioner, on 18 July 2014.

3. An initial Hearing took place on 30 July 2014. On 22 September 2014 the application for the return of the detained vehicle was refused by the Traffic Commissioner for the North East of England. An appeal against the decision dated 22 September 2014 was heard by the Upper Tribunal on 27 February 2015. In a decision dated 5 March 2014 the Upper Tribunal allowed the appeal, remitted the case for re-hearing before the Traffic Commissioner and issued directions.

4. On 20 May 2015 the application for the return of the detained vehicle was refused by the Deputy Traffic Commissioner for the North East of England following a second Hearing on 13 May 2015. The Deputy Traffic Commissioner determined that the applicant had not satisfied him in accordance with regulation 4(3)(a) that at the time the vehicle was detained the user of the vehicle held a valid operator's licence

(whether or not authorising the use of the vehicle). The Deputy Traffic Commissioner directed that the Driver and Vehicle Services Agency ('DVSA') could dispose of the vehicle once the period for appeal had concluded.

5. On 17 June 2015 an appeal against the decision of the Deputy Traffic Commissioner dated 20 May 2015 was received in the office of the Upper Tribunal.

6. The appeal was listed for oral hearing on 27 November 2015.

7. On 18 November 2015 amended grounds of appeal and an application to adduce fresh evidence was received in the office of the Upper Tribunal from Mr Tinkler, the Appellant's Solicitor. The amended grounds of appeal and application to adduce fresh evidence had been prepared by Mr Clarke, Counsel for the Appellant.

8. It was noted that the fresh evidence was a report of an expert witness which was appended to the application. In the application itself, it was submitted that:

> '… the evidence ought to be admitted in the interests of justice, in that it:
>
> a. Remedies the unfairness complained of in the Appellant's Grounds of Appeal, and
>
> b. Demonstrates that the evidence given by Traffic Examiner Morrow on the topic was flawed.'

9. The 'evidence given by Traffic Examiner Morrow' referred to in the second bullet point is oral evidence which was given by the Traffic Examiner during the course of a Public Inquiry held on 13 May 2015.

10. On 18 November 2015 the two Specialist Members of the Tribunal were requested not to consider the contents of the report of the expert witness. They complied with that request. The report was also not considered by the Judge.

11. On 23 November 2015 a Case Management Direction, which had been agreed with the Specialist Members of the Tribunal, was issued to the parties to the proceedings. In summary, it was directed that the application to adduce fresh evidence was, at that stage, refused. Counsel for the Appellant was informed that the application could be renewed at the oral hearing of the appeal and that if the application was renewed, that the Upper Tribunal would be seeking submissions on how the application complied with the general jurisprudence on the admission of fresh evidence in tribunal proceedings and, in particular, how that jurisprudence has been applied in the transport appellate jurisdiction.

12. The parties to the proceedings were also asked to note that the fresh evidence which was the subject of the relevant application had not been considered by the Upper Tribunal. It would only be so considered if any renewed application was successful.

13. On 23 November 2015 three documents were received from Mr Thomas who was representing the DVSA ('the Respondent'). These documents were (i) a Skeleton Argument (ii) written submissions and (iii) a 'Chronology'. The application to adduce fresh evidence was not addressed in any of these documents.

14. On 25 November 2015 a further document headed 'Skeleton Argument on behalf of DVSA in response to amended Grounds of Appeal' was received in the office of the Upper Tribunal from Mr Thomas. In this document, Mr Thomas submitted:

> 'In view of the preliminary ruling of the Tribunal not to admit new evidence that could have been adduced at the original hearing DVSA reserves its right to oppose any oral application by the Appellant to introduce any such evidence or in the alternative to call rebuttal evidence.'

15. On 25 November 2015 two substantive documents were received in the office of the Upper Tribunal from Mr Tinkler. The first of these was headed 'Application to Adduce Fresh Evidence – Skeleton argument for the Appellant'. This document had been prepared, once again, by Mr Clarke. It set out, in some detail, arguments in support of a renewed application in conformity with the terms of the Case Management Direction issued on 23 November 2015. The second document was headed 'Skeleton argument for the Appellant.' This document was intended to be a reply to the Skeleton Argument received from Mr Thomas on 23 November 2015.

16. On 26 November 2015 e-mail correspondence was received in the office of the Upper Tribunal from Mr Thomas. In this correspondence, Mr Thomas submitted that:

> 'An application has been made to adduce fresh evidence. Yesterday a skeleton argument was served on us. Because of court commitments we have not been able to prepare a response in reply and will make oral representations tomorrow. In the meantime the only case law we will refer to is attached. Both Transport Tribunal cases:
>
> 1. Pedlow
> 2. Thames Materials'

17. The oral hearing took place on 27 November 2015. The Appellant was represented by Mr Clarke. The Respondent was represented by Mr

Thomas. The Tribunal, as a preliminary issue, heard oral arguments on the application to adduce fresh evidence. The Tribunal rose to make its determination on the application and, following consideration, informed Mr Clark that the application was refused. The Tribunal informed Mr Clark that written reasons for the refusal would be issued, in due course.

18. Following a consultation with his client, Mr Clarke made an application, under rule 17(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules') to withdraw the appeal. The Upper Tribunal consented to the withdrawal of the appeal under rule 17(2) of the 2008 Rules.

19. On 7 January 2016 Mr Thomas made an application for a copy of the Upper Tribunal's 'decision'. The basis for the application was as follows:

> 'Currently the vehicle is in the DVSA compound incurring daily storage charges. Once the decision is received we will be in a position to contact the Appellant's representatives. If the matter is concluded at that stage DVSA can release the vehicle for sale.'

20. On 12 January 2016 the clerk to the Upper Tribunal was informed that the Appellant, at the oral hearing of the appeal, through his Counsel Mr Clarke, had made an application to withdraw the appeal under rule 17(1)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and that the Upper Tribunal consented to the withdrawal of the appeal under rule 17 (2). The clerk was informed that, in these circumstances, there was no requirement for a 'decision' as that term would normally be understood but that a 'Disposal Order' had been prepared. The clerk was advised that Rule 17(5) of the 2008 Rules provides that 'The Upper Tribunal must notify each party in writing that a withdrawal has taken effect.' She was directed that Disposal Order should, therefore, be issued to the parties.

21. The effect of the withdrawal of the appeal was stated in the Disposal Order to be that the decision of the Deputy Traffic Commissioner dated 20 May 2015 remained extant. The practical effect was that the Deputy Traffic Commissioner's direction that the detained vehicle could be disposed of could then be implemented.

The submissions of the parties

22. We are grateful to Mr Clarke for his carefully-prepared Skeleton Argument on the application to adduce fresh evidence and to Mr Thomas and him for their oral submissions at the appeal hearing.

23. In his Skeleton Argument Mr Clarke made reference to the Upper Tribunal's request for submissions on how the application complied

with the general jurisprudence in the admission of fresh evidence in tribunal proceedings and, in particular, how that jurisprudence had been applied in the transport appellate jurisdiction. Mr Clarke submitted, in addition, that it was appropriate to consider the more recent jurisprudence of the Court of Appeal on the topic.

24. In relation to the Tribunal's approach, Mr Clarke set out Rule 15(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 and noted that Rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 made an identical provision.

25. Mr Clarke turned to the guidance which was given in the 'Digest of Decisions on Appeal from Traffic Commissioners'[1] ('the Digest') on the Tribunal's approach to applications to receive fresh evidence. He noted that two factors were identified at page 101 of the Digest as being of relevance to the issue but submitted that the first of these was not relevant to the particular circumstances of this case. We return to that submission below. The second factor was identified in the Digest as follows:

> 'Second, and subject to the first point, the tribunal has consistently followed the practice of the Court of Appeal when deciding whether or not to admit fresh evidence.'

26. Mr Clarke referred to the decision of the then Transport Tribunal in *Thames Materials Ltd* (2002/40). It is important to note that this decision is cited in the Digest as setting out the tribunal's practice and approach to the admission of new evidence on appeal. Mr Clarke referred to paragraph 7 of the decision:

> 'In deciding whether or not to admit fresh evidence the Tribunal has consistently applied the conditions laid down by the Court of Appeal in *Ladd v. Marshall (1954) 1 WLR 1489,* …….The relevant *Ladd v. Marshall* conditions, bearing in mind the prohibition on taking into account circumstances which did not exist at the time of the determination subject to appeal, are as follows:-
> (i) The fresh evidence must be admissible evidence.
> (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.
> (iii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
> (iv) It must be evidence which is apparently credible though not necessarily incontrovertible.

[1] https://www.judiciary.gov.uk/wp-content/uploads/2011/03/tc-digest-aug-2014-revision.pdf

> We would have thought that the first condition hardly needed to be stated but it is quite apparent from the terms of Mr Clarke's statement that it needs to be stressed. There are authorities which indicate that condition (ii) is the critical condition.'

27. Mr Clarke turned to *Ladd v Marshall* itself. He referred to the following statement of Denning LJ (as he then was) setting out the test in unequivocal terms:

> 'The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. 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; secondly, 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.'

28. Mr Clarke noted that the principles in *Thames Materials* were most recently considered in the decision of the Upper Tribunal in *Cornwall Busways Limited* (2015 UKUT 0314 (AAC), T/2015/10) in '… which the Tribunal reaffirmed the approach in Thames Materials'. We would note, at this stage, that the former Transport Tribunal, has consistently endorsed the approach set out in *Thames Materials* – see the decision of the Tribunal in *2002/75 Hazco Environmental Services* at paragraph 4 and *2005/118 M&J Tinworth* at paragraph 3.

29. Mr Clarke then turned to the approach of the Court of Appeal to the question of the proper approach to applications to adduce fresh evidence noting that '… clearly matters have moved on from when the decision in *Ladd v Marshall* was handed down.' Conceding that the Tribunal had consistently followed the practice of the Court of Appeal, Mr Clarke submitted that the Appellant relied on the test in his arguments before us.

30. Mr Clarke noted that the 'highest hurdle' for the admission of fresh evidence was to be found in the test for criminal appeals as set out in section 23 of the Criminal Appeal Act 1968. He made reference to the observations of Lord Judge CJ at paragraph 39 of the decision in *R v Erskine* (2010) 1 All ER 1196, as follows:

> '… virtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focussing on the interests of justice.'

31. Mr Clarke submitted the Court of Appeal in *R v Chattoo* ([2012] EWCA Crim 190) provided a summary of the principles to be applied when deciding whether or not to receive expert evidence under section 23. He asserted that the test for the admission of fresh evidence could be stated as follows:

> 'a. Is the fresh evidence
>
> i. capable of belief;
>
> ii. capable of founding a ground of appeal;
>
> iii. admissible in the proceedings from which the appeal lies; and
>
> b. is there a reasonable explanation for the failure to adduce the evidence in the [court] below.'

32. Mr Clarke submitted that in the circumstances of the present case all four tests were satisfied. At this stage, we set out Mr Clarke's submissions in connection with limb 'b' above, namely whether there is '… a reasonable explanation for the failure to adduce the evidence.' Mr Clarke stated:

> 'Proceedings before the Traffic Commissioner are No-cost proceedings, conducted in an environment in which those appearing before the Traffic Commissioners are encouraged to appear in person. That is why such proceedings are conducted on an informal inquiry basis.
>
> This Public Inquiry was conducted by the Appellant in person; the DVSA were represented by a very capable solicitor. Whilst it is not suggested that the Appellant was in any way misled, he clearly did not have the legal knowledge to identify and litigate the points raised in this appeal. Given that the earlier appeal Tribunal had directed as it did on the issue of technical evidence, it is unsurprising that the Appellant did not seek expert evidence on the topic: as far as he knew, the DVSA had not sought to rely upon any technical evidence. Thus it need not "……be shown that the evidence could not have been obtained with reasonable diligence for use at the trial….." (Denning LJ in *Ladd v. Marshall*) for he was not on notice as to the issue.'

33. Mr Clarke added that if the submissions thus far were:

> '… insufficient of itself to persuade the Tribunal to admit the fresh evidence, and accepting the general reluctance on the part of the Tribunal to admit evidence without a reasonable explanation for the failure to adduce the evidence below, we invite the Tribunal to bear in mind that the ultimate test for admission of evidence under the Criminal Appeal Act 1968, s.

23, is whether it is in the interests of justice to do so. In exceptional circumstances that Court has admitted fresh evidence in the absence of a reasonable explanation for the failure to adduce it at trial: see *R. v. Solomon* [2007] EWCA Crim 2633 at paragraphs 19, 25 and 31 of the judgement of Lord Phillips CJ.

In that respect it is submitted that the fresh evidence would have made a difference to the outcome of, at least, the Deputy Traffic Commissioner's ruling on those particular topics; for the fresh evidence demonstrates that Mr Morrow was incorrect on a number of important points upon which the Deputy Traffic Commissioner placed reliance.'

34. At the oral hearing on 27 November 2015, Mr Clarke submitted that limbs (i) and (iv) in the Ladd v Marshall test, namely that the fresh evidence must be admissible evidence and that it must be evidence which is apparently credible though not necessarily incontrovertible were satisfied in this case. Mr Thomas agreed with that submission.

35. Mr Clarke expanded on the arguments which he had made in his Skeleton Argument. He resubmitted that matters had moved on since 1954 and the decision in *Ladd v Marshall*. The emphasis was on the interests of justice as an exception to the general principle. The general principle was now subject to a more generous interpretation. He submitted that a decision not to admit the fresh evidence in this case would give rise to an injustice. He repeated that the Court of Appeal had in exceptional circumstances admitted fresh evidence in the absence of a reasonable explanation for the failure to adduce it at the trial.

36. In respect of limb (ii) of the *Ladd v Marshall* test, Mr Clarke submitted that the focus had to be on diligence in the sense that the evidence could have been obtained. Mr Clarke re-emphasised the points which he had made in his Skeleton Argument concerning the nature of the proceedings before the Traffic Commissioner, in particular the Public Inquiry; that there was no requirement for legal representation in such proceedings and that those who appear are encouraged to do so in person; that in the particular circumstances of the case the Appellant was not put on notice that he would require expert evidence; and the Appellant, at all stages, was a litigant and not a lawyer.

37. In respect of limb (iii) of the *Ladd v Marshall* test, Mr Clarke made reference to sub-paragraph (o) of paragraph 68 of the decision of the Deputy Traffic Commissioner. The findings made in paragraph 68 were supplemented by the reasoning in paragraph 72. The reasoning there went to the credibility of Mr Gary George, who was said to be the operator of the vehicle, with consequences beyond the remit of the Public Inquiry. The Deputy Traffic Commissioner had used his findings to found his decision. The findings were based on an assessment of

certain evidence which was incorrect. The fresh evidence challenged the evidence which was given by Traffic Examiner Morrow. The Deputy Traffic Commissioner might have arrived at a different decision had he had the benefit of the fresh evidence before him.

38. In his submissions on limb (ii) of *Ladd v Marshall*, Mr Thomas noted that the Appellant had been through regulatory proceedings before. He referred to a previous decision of the Upper Tribunal dated 5 March 2015, to which the appellant had been a party, and, in particular, to paragraphs 26 and 27 of that decision. Mr Thomas also referred to correspondence dated 12 March 2015 which had been sent to Mr George and to the statement of the Traffic Examiner dated 17 March 2015. Mr Thomas submitted that it could not be said that the Appellant was unaware of the nature of proceedings or of the issues which had arisen. Mr Thomas also referred to correspondence dated 13 March 2015 from Mr George to the Senior Traffic Examiner which was prepared but which was never sent.

39. In relation to limb (iii) of *Ladd v Marshall*, Mr Thomas submitted that when the case was looked at as a whole the admission of the further evidence could have no bearing on the case. Mr Thomas made reference to paragraph 71 of the decision of the Deputy Traffic Commissioner and his reasoning in paragraph 73.

Analysis

40. We begin by considering the proper approach to be adopted when the Upper Tribunal, in an appeal against a decision of a Traffic Commissioner, is met with an application by a party to the proceedings to adduce new or fresh evidence. We have no hesitation in confirming that the proper approach is as set out in the decision of the then Transport Tribunal in *Thames Materials* and confirmed by the Upper Tribunal in *Cornwall Busways Limited*. We have already noted that the decision in *Thames Materials* has a conclusive basis in the decision of the Court of Appeal in *Ladd v Marshall*. Further, we have noted that the former Transport Tribunal has been consistent in its application of the principles in *Thames Materials*.

41. The appellate structure in the transport jurisdiction was the subject of significant revision with the implementation of the Tribunals, Courts and Enforcement Act 2007. Appeals from decisions of the Traffic Commissioner lie to the Upper Tribunal – see Article 7(a)(viii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008. At that stage there was an opportunity to revisit the jurisprudence of the former Transport Tribunal to determine whether that jurisprudence remained appropriate or required revision in light of the new tribunal appellate structure or in light of other procedural developments. In respect of the procedure to be adopted for applications to adduce fresh evidence, the Upper Tribunal endorsed the former procedure of the Transport

Tribunal relying on its consistency and coherency – see *Cornwall Busways Limited*.

42. Mr Clarke asked us to look at the present approach of the Court of Appeal arguing that while the Transport and Upper Tribunals have consistently followed the practice of that Court, things have moved on since the promulgation of the decision in *Ladd v Marshall* in 1954. We have noted that Mr Clarke has relied on a discrete legislative provision – section 23 of the Criminal Appeal Act 1968 - permitting the Court of Appeal to receive evidence if certain conditions are met. Mr Clarke describes the section 23 tests as representing the 'highest hurdle' for admission of fresh evidence. In our view there is a reason why there should be a specific test for the admission of fresh evidence in criminal appeals which is the avoidance of miscarriages of justice and the unlawful deprivation of the liberty of an individual. In *R v Pendleton* ([2002] 1 All ER 524), Lord Bingham set out the following background to the modern legislative scheme for criminal appeals stating, at page 528:

> 'The Criminal Appeal Act 1907 did not intend to undermine the traditional role of the trial jury but did intend to arm the new Court of Criminal Appeal with powers sufficient to rectify miscarriages of justice, of which there had been notorious recent examples.'

He added, at page 529:

> 'Although the 1907 Act has been repeatedly amended, the scheme of the Act has not been fundamentally altered … In s 23 of the 1968 Act, as amended, s 9 of the 1907 Act has been both simplified and elaborated.'

43. There is, accordingly, a specific and definite purpose to the legislative provisions for criminal appeals and the discrete provision relating to the presenting of fresh evidence. The issues in the present appeal, involving as they do the dispossession of their property, are of the greatest significance for the Appellant. This is not, however, a criminal appeal. It is our view that legislative provisions relating to such appeals, and judicial interpretation of those provisions, are not applicable in this case. We are reinforced in that view by the fact this Tribunal and its predecessor have been consistent in their application of an approach to applications to adduce fresh evidence which has not been arrogated or considered to be inappropriate or erroneous.

44. If we are wrong in the conclusions arrived at in the preceding paragraph we would argue that, in any event, we are not satisfied that the test in section 23(1)(d), namely that there is a reasonable explanation for the failure to adduce the evidence is satisfied. Equally we do not consider that there are exceptional circumstances which

would permit the admission of the fresh evidence in the absence of a reasonable explanation for the failure to adduce it.

45. For the record, therefore, we repeat that the test to be applied is whether the following conditions are met:

> ‘(i) The fresh evidence must be admissible evidence.
>
> (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.
>
> (iii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
>
> (iv) It must be evidence which is apparently credible though not necessarily incontrovertible.’

46. As was noted above, at the oral hearing, Mr Thomas conceded that limbs (i) and (iv) are met in this case. Although we have not considered the content of the expert report, we are content to accept that concession. Attention turns, therefore, to limbs (ii) and (iii).

47. In connection with limb (ii) Mr Clarke’s argument that it is satisfied is centred on the nature of the proceedings within which the Appellant has become involved. Those proceedings, he argues, are inquisitorial, informal and where parties are prompted towards self-representation. Further, the Appellant, as a non-legally qualified layperson, did not appreciate the requirement nor was put on notice to (i) prepare and respond to technical issues arising in the proceedings (ii) seek advice and guidance on the issues which did arise and (iii) pursue assistance through legal representation. In those circumstances he was not attentive to the fact that there could be evidence which had the potential to be adverse to him. If he had that awareness or been put on notice, then he could have sought the evidence which he now wished to submit.

48. We are of the view that there might have been greater force in Mr Clarke’s arguments had the Appellant been a novice in transport regulatory proceedings. It is our experience that those who are participating in such proceedings for the first time are often unsettled by the experience when it turns out to be more unfamiliar and disconcerting than they anticipated despite the best efforts of those conducting the proceedings to adopt an enabling and non-adversarial role.

49. In this case, however, the chronology demonstrates that the relevant vehicle was impounded on 2 July 2014. In detailed correspondence sent from the office of the DVSA the Appellant was advised of the legal

and evidential basis for the impounding. The Appellant sought the return of the vehicle on 18 July 2014 by completion of the relevant forms. A Hearing took place on 30 July 2014. The Appellant was provided with formal notification of the Hearing and was informed of his right to be legally represented. The Appellant was present at the Hearing but was not represented. Subsequently the Traffic Commissioner issued a decision refusing the application for the return of the impounded vehicle. The written reasons for the decision provide a summary of the Hearing and note that the Appellant took an active participation in it. The written reasons set out the legal and evidential basis for the Traffic Commissioner's decision.

50. The Appellant was dissatisfied with the Traffic Commissioner's decision. He exercised his right to appeal to the Upper Tribunal. He completed and returned the relevant forms. His grounds of appeal and written submission to the Upper Tribunal were prepared in some detail. The grounds of appeal are comprehensive in their challenge to the Traffic Commissioner's findings and conclusions.

51. The Appellant attended an oral hearing of the appeal accompanied by Mr George. The decision of the Upper Tribunal (2015 UKUT 113 (AAC), T/2014/71) records that the Appellant and Mr George made submissions and wished to give evidence. The evidence and submissions related to the downloading of data. The Upper Tribunal allowed the appeal and directed that case be remitted to a different Traffic Commissioner to be re-heard, with clear directions as to what was to be done by the Appellant, Mr George and, if appropriate, the DVSA. The Appellant was provided with a copy of the decision of the Upper Tribunal.

52. We are of the view that if, at the outset of the regulatory proceedings leading to impounding of his vehicle, the Appellant was unaware of the nature of the pending proceedings, the extent of the regulatory regime for transport, the grounding of that regulation in legislation, the role and function of Traffic Commissioners, the appellate oversight of the upper Tribunal and, more significantly, the nature of the issues which were arising and which required to be addressed, he should, by the time he received the decision of the Upper Tribunal, have gained the relevant insight.

53. In our view, the outcome of the proceedings before the Upper Tribunal and, more importantly, the consequences for the further Hearing and decision-making by the Traffic Commissioner, were judiciously and self-evidently described by the Upper Tribunal in its decision. In paragraphs 25 to 27, the Upper Tribunal stated the following:

> '25. It was clear to the tribunal that, as a consequence of the new issues raised, **new evidence was emerging from the applicant and from Mr George which was challenged by the DVSA, and which was likely to lead to cross-**

examination and the possible need for further investigation and expert rebuttal evidence. This led to the obvious potential for unfairness - and in circumstances whereby the applicant and Mr George had not been given any proper opportunity to deal with the new issues arising at a properly convened first-instance hearing, on notice, before the Traffic Commissioner.

26. We have considered whether to remit the matter back to the same Traffic Commissioner or to a different Traffic Commissioner. Ideally, we would send the matter back to the same Traffic Commissioner **to hold a further hearing in order to make findings of fact in relation to the vehicle digital data, once the partnership or Mr George has had a proper opportunity to produce it, and - if it is not produced - to examine and test any explanations for its non-production, to draw such inferences as are appropriate, and to finally decide the matter taking account of all the evidence.** However, having regard to the fact that the Traffic Commissioner said, at the conclusion of the hearing, that the vehicle was unlikely to be returned, and to the subsequent negative judgments he made about Mr George, we think that fairness requires that the matter be remitted, to be heard again, *ab initio*, by a different Traffic Commissioner.

27. The appeal is allowed. We remit the matter back to be reheard. **Mr George should be given a proper opportunity to produce the vehicle digital data for PO56DFG, or to provide an evidentially supported explanation for his inability to do so and to face cross-examination thereon. If the DVSA wish to present any technical evidence that no operator downloads of vehicle data can possibly have taken place between 24/6/2013 and 11/7/2014, then such evidence should be served in advance of the hearing, so that the applicant has an opportunity to deal with it before a decision is made**.'

54. The emphasis in each of these paragraphs is our own. The decision of the Upper Tribunal was issued on 5 March 2015, over two months before the second Hearing before the Deputy Traffic Commissioner.

55. What should the Appellant have learned from this? From paragraph 25, the Appellant should have learned that there was a recognition that there had been a procedural unfairness in the manner in which the first Hearing had been conducted. The highlighted finding in paragraph 25 should have alerted the Appellant to the fact the emerging evidence could be the subject of challenge and that he may have to meet that challenge with his own expert rebuttal evidence.

56. From paragraph 26, the Appellant should have learned that there was going to be a new Hearing. More significantly, he was informed that the purpose of the Hearing was to make findings of fact in relation to the vehicle digital data. He was also being given the opportunity, together with Mr George, to produce the vehicle digital data and was informed that if he failed to produce that data, the Traffic Commissioner would examine any explanation for its non-production and, importantly, draw any inferences which were necessary and finally make a decision on the basis of all of the evidence which was before him. The purpose and outcomes of the new Hearing could not have been more accurately or carefully described.

57. From paragraph 27, the Appellant should have learned that Mr George was being given the opportunity to produce the vehicle digital data or an evidentially supported explanation of any failure to do so. The Appellant was informed that Mr George might face cross-examination at the new Hearing on any explanation of a failure to provide the relevant data. Finally the Appellant was informed that DVSA might want to produce technical evidence and, if it wished to do so, that such evidence should be served on him. Once again the instructions were succinct and clear.

58. On 12 March 2015, immediately following the issue of the decision of the Upper Tribunal, the DVSA wrote directly to the Appellant and Mr George directing them to produce digital tachograph downloads for the relevant vehicle and were informed of the legislative basis for the requirement and the consequences of a failure to comply with the direction. The response of the Appellant was to ignore the correspondence. Mr George prepared a response dated 13 March 2015 but failed to forward it. Subsequently he wrote to the DVSA on 19 May 2015 stating:

> ‘I am currently acquiring information to support my explanation as per the request of the Upper Tribunal.’

59. The Appellant was also provided with an updated statement from the Traffic Examiner.

60. Finally, the Appellant was notified of the date and time of the new Hearing before the Traffic Commissioner and, once again, was informed of his right to be legally represented. Further the correspondence reminded him that the Upper Tribunal had requested that vehicle digital downloads be produced or, in the absence of their production, an evidentially supported explanation as to why production was not possible.

61. The new Hearing took place on 13 May 2015. The appellant was not represented and was accompanied by Mr George. At the outset of the Hearing the Deputy Traffic Commissioner confirmed with the Appellant that he was not represented and was content to proceed without

representation. He noted that the DVSA was represented by a solicitor. The Appellant was asked whether he had any documentation which he wished to serve and he replied that he had not. The Appellant was given the opportunity to ask the Traffic Examiner questions after the Traffic Examiner had given his oral evidence.

62. A copy of the decision of the Deputy Traffic Commissioner was sent to the Appellant on 21 May 2015. In the covering correspondence the Appellant was advised of his right to appeal to the Upper Tribunal. The Appellant exercised that right through the submission of an appeal form which was received in the office of the Upper Tribunal on 17 June 2015. In the appeal form the appellant indicated that he did not have a representative. The grounds of appeal are detailed and included a challenge to the conclusions of the Deputy Traffic Commissioner in connection with the evidence which had been given by the officers from DVSA. There was no suggestion that he planned to produce expert rebuttal evidence in that regard.

63. The appeal was listed for oral hearing on 27 November 2015. On 18 November 2015 the application to adduce fresh evidence was received in the office of the Upper Tribunal.

64. In our view, the Appellant's attitude towards the regulatory and appellate proceedings, during the course of two Hearings before the Traffic and Deputy Traffic Commissioner and an initial hearing before the Upper Tribunal, was characterised by indifference and inattentiveness rather than diligence and conscientiousness. Despite the clear and precise terms of the remittal by the Upper Tribunal, and subsequent correspondence outlining the production requirements for the second Hearing, the response of the Appellant (and Mr George as an interested party) was to ignore the specifics of what they had to do to challenge the basis of the impounding of his vehicle.

65. By the time of the second Hearing before the Deputy Traffic Commissioner, the Appellant should have been aware of the nature and form of the proceedings, the legal and evidential basis of the decision to seize his vehicle, and the requirements to address the technical and other issues arising in the case. The Upper Tribunal was specific in alerting the Appellant and Mr George to the requirement to produce digital tachograph downloads for the relevant vehicle and warning that in the absence of their production that an evidentially supported explanation as to why production was not possible was needed. The Appellant was cautioned that a failure to produce either the downloads themselves or an appropriate explanation could lead to the drawing of adverse inferences. Further, the Upper Tribunal made a discrete reference to the potential requirement for expert rebuttal evidence.

66. By the date of the receipt of the decision of the Upper Tribunal, the Appellant should have been alert to the requirement to get assistance

with the unfolding proceedings either in the form of legal representation or expert evidence. The application to adduce the fresh evidence, in the form of expert rebuttal evidence, is based on a submission that the Appellant understood the regulatory proceedings to be typified by informality and self-representation. It is submitted that his failure to adduce the relevant evidence at the time of the second Hearing was based on '… lack of knowledge to identify and litigate the points arising'. With respect to that submission, it is rejected because it is our view that the Appellant, by the date of the second Hearing, had the relevant points identified for them several weeks beforehand and was alerted to the appropriateness of producing the type of evidence which is the subject of the application. It is also submitted that given the terms of the Upper Tribunal's remittal, '… it is unsurprising that the appellant did not seek expert evidence on the topic.' In our view, the terms of the remittal were such that the Appellant should have been on alert to seek such evidence.

67. We are satisfied, therefore, that limb (ii) of the *Ladd v Marshall* is not met in this case. The expert rebuttal evidence which is the subject of the present application is evidence that could have been obtained, with reasonable diligence, for use at the public inquiry.

68. Our conclusions on limb (ii) are sufficient to dispose of the application to adduce fresh evidence. We would note, however, that although we have not considered, in detail, whether limb (iii) is satisfied, our conclusion is that it is not. As was noted above, limb (iii) is that the evidence '… must be that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive..'

69. We have not considered the fresh evidence at all. Mr Clarke informed us that it was in the nature of a report from an expert witness and goes to and challenges the evidence given at the second Hearing by a Traffic Examiner. Mr Clarke submits that the evidence would have made a difference to the rulings of the Deputy Traffic Commissioner on certain points and in connection with which the Commissioner placed reliance on the evidence of the Traffic Examiner.

70. Looking at the totality of the decision of the Deputy Traffic Commissioner and, in particular, his findings of fact at paragraph 68, in our view it could not be said that the decision was 'plainly wrong' see the decision of the Upper Tribunal in *NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*, at paragraph 8. The findings and reasoning of the Deputy Traffic Commissioner, excising the limited reasoning on the evidence of the Traffic Examiner, are more than sufficient to support the decision which was reached.

71. For the sake of completeness, we return to the submissions which were made by Mr Clarke on section 23 of the Criminals Appeal Act 1968 and associated jurisprudence of the Court of Appeal. As was

noted above, it is our view that legislative provisions relating to such appeals, and judicial interpretation of those provisions, are not applicable in this case. We noted, however, that if we are wrong in that conclusion we would argue that, in any event, we are not satisfied, firstly, that the test in section 23(1)(d), namely that there is a reasonable explanation for the failure to adduce the evidence is satisfied. For the reasons which we have set out in relation to limb (ii) of the *Ladd v Marshall* test, we are satisfied that we have not been provided with a reasonable explanation for the failure to adduce the evidence arising from the decision of the Upper Tribunal and before the second Hearing took place.

72. Equally we do not consider that there are exceptional circumstances which would permit the admission of the fresh evidence in the absence of a reasonable explanation for the failure to adduce it. In *E and R v Secretary of State for the Home Department* ([2004] EWCA Civ 49) ('*E and R*'), Carnwath LJ, at paragraph 91, indicated that the principles in *Ladd v Marshall* could also be departed from '… in exceptional circumstances where the interests of justice require.'

73. We do not consider that in this case, there are exceptional circumstances where the interests of justice require a departure from the *Ladd v Marshall* principles. We note that in *Al-Mehdawi* ([1990] 1 AC 876, [1989] 3 All ER 843) the Court of Appeal refused to depart from those principles in a case involving deportation. The facts of the case are not wholly analogous but the approach to circumstances in which a departure from the principles is justified, is instructive. Lord Bridge concluded, at page 901:

> 'But I would add that, if once unfairness suffered by one party to a dispute in consequence of some failure by his own advisers in relation to the conduct of the relevant proceedings was admitted as a ground on which the High Court in the exercise of its supervisory jurisdiction over inferior tribunals could quash the relevant decision, I can discern no principle which could be invoked to distinguish between a "fundamental unfairness," which would justify the exercise of the jurisdiction, and a less than fundamental unfairness, which would not … I am of the opinion that the decision of the Court of Appeal can only be supported at the cost of opening such a wide door which would indeed seriously undermine the principle of finality in decision making.
>
> The effect of this conclusion in a deportation case may appear harsh, though no harsher than the perhaps more common case when an immigrant's solicitor fails to give notice of appeal under section 15 within the time limited by rule 4 of the Rules of 1984.'

74. Finally, we have noted that Mr Clarke made reference, without expansion, to Rule 15(2) of the Tribunal Procedure (First-tier Tribunal)

(General Regulatory Chamber) Rules 2009 and the parallel Rule 15(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008. With respect, we do not understand the relevance of General Regulatory Chamber Rules. The Upper Tribunal rules, which do apply to us, are, of course, subject to the general 'fresh evidence' principles which we have set out above.

Kenneth Mullan, Judge of the Upper Tribunal
4 February 2016