

Neutral Citation Number: [2016] UKUT 0128 (AAC) Appeal No. T/2015/57

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

**ON APPEAL FROM THE DECISION OF Miss J N Aitken
TRAFFIC COMMISSIONER for Scotland**

Dated: 19 July 2015

**Before: A Gamble, Judge of the Upper Tribunal
 S James, Member of the Upper Tribunal
 M Farmer, Member of the Upper Tribunal**

Appellant: Mr A Adams

Respondent: DVSA

**Attendances: Mr A Adams
 Ms C Evans, Solicitor of Woodfines LLP, Solicitors for the
 Respondent**

**Heard at: George House, 126 George Street, Edinburgh EH2 4HH
Date of Hearing: 13 January 2016
Date of Decision: 9 March 2016**

DECISION OF THE UPPER TRIBUNAL

The appeal is refused. The decision of the Traffic Commissioner for Scotland dated 19 July 2015 is confirmed.

Subject Matter: Judicial recusal

**Ownership of detained vehicle
Use of detained vehicle without an operator's licence and contrary to section 2(1) of the Goods Vehicle (Licensing of Operators) Act 1995.
Order for Expenses (Costs)**

Cases referred to:

Porter v Magill [2001] UKHL 67

REASONS FOR DECISION

1. This is an appeal by Mr Alastair Adams, the Appellant, against the decision of the Traffic Commissioner for the Scottish Traffic Area dated 19 July 2015. By that decision she refused an application by the Appellant dated 23 June 2015 for the return of a Volvo FH12 with the registration number B6498 HK, the vehicle, which had been detained by DVSA Examiners on 5 June 2015.
2. The Traffic Commissioner took her decision after a hearing which she conducted on 16 July 2015.
3. The hearing of the appeal took place before us on 13 January 2016. The Appellant attended, accompanied by his wife Mrs Vari Adams. He was unrepresented.
4. By a letter dated 4 January 2016 Woodfines, Solicitors applied for DVSA to be added as a party to the appeal. Ms Evans renewed that application orally at the beginning of the hearing. The Appellant had no objection to it. Under rule 9(1) of the Upper Tribunal Rules 2008 we directed that DVSA be added as the Respondent. Accordingly Ms Evans represented the Respondent thereafter. She relied on the response to the appeal attached to the above letter, questioned the Appellant and made oral submissions.
5. When giving oral evidence during the hearing the Appellant referred to the vehicle being kept at a site near a Tesco store in Lesmahagow, South Lanarkshire. He then asked the three of us if we knew where that site was. Unsurprisingly, the two members, neither of whom reside in Scotland, indicated that they did not. However the presiding judge said that he was aware of the location of the Tesco store. The Appellant responded by saying "I know that you know, Alan" or words to that effect. The judge took an immediate decision not to pursue that remark and the hearing proceeded. On reflection, the judge considered that the Appellant may have been inferring that he was aware to a degree of the judge's background. The judge has never to his knowledge met the Appellant before the hearing. He has no prior knowledge of the Appellant's haulage operations apart from what is contained in the Upper Tribunal bundle. Ms Evans made no motion for the judge to recuse himself. The judge did not consider himself to be obliged to do so at his own hand. He did not recuse himself. In doing so he applied the test for apparent bias laid down by the House of Lords in *Porter v Magill* [2001] UKHL 67. The judge did not consider that his continuing to sit in these proceedings after the Appellant made the remark quoted above would have led a fair minded and informed observer to conclude that there was a real possibility of him being biased i.e. showing favour or disfavour either to the Appellant or the Respondent.
6. The ground on which the vehicle was detained is laid out in section 2(1) of the Goods Vehicles (Licensing of Operators) Act 1995, quoted by the Traffic Commissioner in paragraphs 3 and 42 of her decision. The powers and procedures in regard to detention are laid out in section 2A of the above Act along with schedule 1A to that Act and regulations made thereunder. Those legislative provisions are referred to in paragraph 43 of the Traffic Commissioner's decision. The relevant regulations are the Goods Vehicles (Enforcement Powers) Regulations 2001 as amended by the Goods Vehicles (Enforcement Powers) Regulations 2009. The Traffic Commissioner expresses the matter before her with admirable clarity in paragraph 41:

“41. This is a case in which DVSA consider that Volvo FH12 B6498HK is being used as a commercial vehicle on the roads of the United Kingdom without there being an operator’s licence.”

7. As narrated in paragraph 1 above, the application for the return of the vehicle dated 23 June 2015 was made by the Appellant as an individual. Under regulation 10A(1) of the 2001 Regulations an application for the return of a detained vehicle must be made by its “owner”. “Owner” is defined in the interpretation provisions of regulation 2 of those Regulations, so far as relevant, as being “the person who can show to the satisfaction of an authorised person that he was at the time of (a vehicle’s detention) the lawful owner” of that vehicle. For the purposes of the present case “the authorised person” was the Traffic Commissioner. The Traffic Commissioner lucidly sums up the effect of these provisions in paragraph 11 of her decision as follows:

“A necessary preliminary to success in any claim for the return of a detained vehicle is that the applicant must be able to demonstrate entitlement to make the application, that is as owner of the detained vehicle”.

8. In the light of paragraphs 6 – 7 above the Traffic Commissioner correctly and lucidly explains the points which arose in this case in paragraph 44 of her decision:

“Three issues became critical in this case. These were whether Mr Adams was the owner of the detained vehicle; whether that vehicle was being used without an operator’s licence; and lastly whether its use required there to be an operator’s licence.”

9. Dealing first with the question of ownership, the Traffic Commissioner narrates the evidence relating to that issue at length and in detail in e.g. paragraphs 12 – 15 and 27 – 29 of her decision. Thereafter in paragraphs 45 – 46 she expresses herself thus:

“45. In relation to ownership, I make the following finding of fact – that the vehicle was transferred to the ownership of A Adams Haulage Ltd on 19 May 2014 and registered to that effect with the Republic of Bulgaria. The vehicle was purchased in the United Kingdom following its first registration in 2002. For some time thereafter it was registered and used in the UK. Thereafter Mr Adams arranged its export to and registration with different number in Eire; thereafter exporting it to Bulgaria where it was registered with a different number and put into the ownership of A Adams Haulage Ltd. That was the position at the time of detention by DVSA with the only vehicle registration certificate being that issued by Republic of Bulgaria through its Ministry of Interior at Varna on 19 May 2014. All of these movements of registration and ownership were to elude and elide the enforcement and tax authorities, most notably those of the UK. I find as fact that the bill of sale produced to the hearing was created as an instrument of convenience for the purpose of this hearing and represented one of the latest instruments used to undermine and avoid goods vehicle operator licensing requirements. When enforcement struck as it did when Police Scotland and DVSA attended on the vehicle on 5 June 2015 following its use that day and on previous dates, the ownership had not been altered in proper way and remained in the arrangement which Mr Adams had entered in Bulgaria.

46. Having found that Mr Alistair Adams as an individual is not the owner of the vehicle, I cannot grant his application for the return of the vehicle.”

10. We have carefully considered all of the paragraphs in the Traffic Commissioner’s decision relating to the question of ownership of the vehicle along with the transcript of the hearing before her, all the information on file and the relevant oral evidence of the Appellant. Having done so, we are satisfied that the Traffic Commissioner’s findings of fact laid out in paragraph 45 of her decision and quoted in paragraph 9 above cannot be said to be plainly wrong. We accept the written submission made on behalf of DVSA to that effect. In our opinion, the findings of fact made by the Traffic Commissioner were well within her province as the decision maker primarily responsible for deciding issues of fact to make. Given her findings of fact in paragraph 45 she correctly drew the conclusion in paragraph 46 that she could not grant the Appellant’s application for the return of the vehicle. We are satisfied that the Traffic Commissioner correctly held that the Appellant had not brought himself within regulations 2 and 10A of the 2001 Regulations, quoted in paragraph 7 above, in that he had not satisfied her, on the balance of probabilities, that he was at the time of the vehicle’s detention its lawful owner. We are strengthened in our conclusion that the Traffic Commissioner was entitled to take the view she did of the Bill of Sale by reason that no evidence was led either before her or before us that any funds were transferred from the Appellant’s personal bank account to that of the company as consideration for the vehicle. That is so especially because the Bill of Sale specifies a consideration of 500 Lev, the Bulgarian currency.

11. In paragraph 45 of her decision, quoted in paragraph 9 above, the Traffic Commissioner found in fact that a Bill of Sale which was relied on both before her and before us by the Appellant as establishing a sale of the vehicle by a Bulgarian company which he had incorporated to himself as an individual “was created as an instrument of convenience for the purpose of this hearing and represented one of the latest instruments used to undermine and avoid Goods Vehicle Operating Licensing requirements.” We hold in paragraph 10 above that the Traffic Commissioner was entitled to make that finding. However, even if the document which was presented to us both in Bulgarian and in English translation was not “an instrument of convenience” it would and could not have had the effect contended for by the Appellant. The document bears to be signed by the Appellant both as “seller” and “buyer”. In both capacities the Appellant signs as an individual with no indication whatever that when he signs as the “seller” he was doing so as a director or other officer of the Bulgarian company. The legal validity of the document falls to be decided by the Law of Scotland as the *lex fori*, the law of the place where the legal dispute is being decided, because that law is presumed to be the same as Bulgarian law given that no evidence of Bulgarian law was led. In any event, the vehicle was situated in Scotland at the time of its detention and so Scots Law would apply also as the *lex situs*. A contract between an individual acting as such and himself also acting as such and in no other capacity for example as the director of a company has no legal validity. Thus it could not transfer lawful ownership from the Bulgarian company to the Appellant as an individual under Scots Law. We reiterate that the document is clearly not signed by the Appellant as a director of the Bulgarian company. He signs as an individual both as “the buyer” and crucially “the seller”. In fairness it should be pointed out that the Appellant’s evidence at the hearing revealed that he had no idea of any distinction between himself as an individual and the Bulgarian company, as a separate legal entity. Thus, for the reasons which we have laid out in detail in this paragraph even taking the best possible view of the Bill of Sale would not have led us to conclude that the Appellant was the lawful owner of the vehicle at the time of its detention.

12. The Traffic Commissioner's determination of the issue of ownership was effectively the end of the matter in respect of the Appellant's application for return of the vehicle. She points this out in paragraph 46 of her decision, quoted in paragraph 9 above. Likewise our upholding of her decision on the key issue of ownership, explained in paragraphs 10 – 11 above, effectively leads us to dismissing the appeal.

13. However the Traffic Commissioner went on to determine the other two critical issues she specifies in paragraph 44 of her decision, quoted in paragraph 8 above. She puts matters thus in paragraph 47:

“47. However, I am going to continue this decision on the basis that *esto* (in the alternative that) I am wrong in my finding that he was not the owner, what is my decision – that is had I found that he was the owner is he entitled to the return of the vehicle to him on the ground he stated in his application and with the explanation and evidence he gave in his application and at this hearing.”

14. For the sake of completeness therefore, we deal briefly with the Traffic Commissioner's approach to the questions of whether the Appellant had an Operator's licence and whether the vehicle was being used at the time of its detention in contravention of section 2 of the 1995 Act.

15. The Traffic Commissioner clearly and succinctly finds in paragraph 48 of her decision that the Appellant did not have an Operator's licence. She robustly concludes that paragraph by stating:

“For completeness and avoidance of doubt I make this finding that there was not an operator's licence in existence.”

That finding was not disputed by the Appellant. In our view, it is clearly correct.

16. The Traffic Commissioner then deals in some detail with the question of a contravention of section 2 of the 1995 Act in paragraphs 49 – 51 of her decision. She concludes her discussion of that question as follows in paragraph 52:

“52. I am in no doubt whatsoever that the use of this vehicle was in connection with Mr Adams' established trade or business of moving and dealing in boats; hire and reward and his and Mrs Adams' trade and business. To find otherwise would be perverse, especially given the long history which they have of undertaking such work. There was no evidence here of Mr Adams having retired and become a hobbyist. He made an oblique reference to having other reasons for moving about Europe other than pleasure (the beaches of the south of France, with Mrs Adams), or moving boats. I gently expressed to him that I hoped that those other purposes were not drug dealing or people trafficking and he said not (for which I am much relieved assuming he was telling the truth). The opacity of his replies and the absence of any genuine paperwork to support his versions of events did not assist my finding any credibility in his application.

17. We hold that the conclusion expressed by the Traffic Commissioner in paragraph 52 quoted in paragraph 16 above was not plainly wrong. Rather it was well within her province as the primary fact finder to make and express. We carefully considered the contrary oral evidence of the Appellant which was to the effect that at the time of the vehicle's detention it was not being used in his business of transporting boats. It suffices to say that we did not find that evidence convincing.

18. Therefore, for the reasons given in detail above, we consider that the Traffic Commissioner's determination of all three of the critical issues in this case was not plainly wrong. Accordingly we dismiss the appeal and confirm her decision.

19. Finally, at the conclusion of the hearing Ms Evans made an oral application for an award of expenses against the Appellant under rule 10(3)(d) and (4) of the Upper Tribunal Rules 2008. Her application was on the ground that the Appellant had acted unreasonably in "bringing" and "conducting the proceedings", especially in respect of his reliance on the Bill of Sale. In arguing that her application should be granted, Ms Evans reminded us that no permission is required to bring an appeal against a Traffic Commissioner's decision in contrast to the position in respect of other appellate jurisdictions exercised by this Chamber of the Upper Tribunal. Unsurprisingly, the Appellant strongly resisted Ms Evans' application. We refuse it. In doing so we have taken account of her point that no permission is required in Traffic Commissioners' appeals. However there is certainly no general rule in the Upper Tribunal, in contrast to the position in the Civil Courts, that expenses follow success. We consider that Ms Evans' application comes close to applying such a rule. Although we have rejected the Appellant's contention on the Bill of Sale we consider that he was entitled to put it across, albeit without eventual success. We do not consider that as a party litigant he acted unreasonably in seeking to establish lawful ownership of the vehicle on the basis of the Bill of Sale. He was entitled to dispute the conclusion of the Traffic Commissioner in regard to the effect of the Bill of Sale even although at the end of the day we did not disturb it.

(Signed)
A J GAMBLE
Upper Tribunal Judge
Date: 9 March 2016