Appeal No. NT/2015/32

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

ON APPEAL from the DECISION of the DEPUTY HEAD of the TRANSPORT REGULATION UNIT
Dated 13 May 2015

Before:

Kenneth Mullan	**Judge of the Upper Tribunal**
Mr John Robinson	**Member of the Upper Tribunal**
Mr Leslie Milliken	**Member of the Upper Tribunal**

Appellant:

Mark Lyons t/a Lyons Haulage

Attendances:
For the Appellant: The Appellant was present and was represented by Mr Sullivan BL

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

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 10 November 2015
Date of decision: 15 March 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED. In accordance with paragraphs 82 to 92 below our decision will take effect from 23.59 on 14 April 2016

SUBJECT MATTER:- Restricted licence; temporary permit; fitness to hold; Public Inquiry; fairness of proceedings

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI [2013] UKUT 618 AAC; Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695; NT/2013/82 Arnold Transport & Sons Ltd v DOENI [2014] UKUT 162 (AAC); Nolan Transport v VOSA & Secretary of State for Transport (T/2011/6, [2012] UKUT (AAC) 221); Leedale Ltd [2015] UKUT 289 (AAC)

REASONS FOR DECISION

1. This is an appeal from the decision of the Head of the Transport Regulation Unit, ("Head of the TRU") to refuse the Appellant's application for a restricted goods vehicles operator's licence.

2. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-

   (i) Prior to July 2012, goods vehicle operators' licences in Northern Ireland were issued under the Transport (Northern Ireland) Act 1967 ('the 1967 Act').

   (ii) 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.

   (iii) 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.

   (iv) The Appellant made an application for a standard international licence under the 1967 Act. The application was refused in August 2012 on the grounds that the Appellant did not satisfy the requirement as to good repute.

   (v) At an informal meeting, held on 18 September 2012 before the then Head and Deputy Head of the Transport Regulation Unit the Appellant was informed that he could apply for and would be granted a temporary permit as an 'own account' operator for a period of twelve months after which his application would be assessed before a decision would be taken in connection with the grant of a restricted licence.

   (vi) On 26 September 2012 the Department received an application for a standard licence from the Appellant. The application was refused on 3 December 2012 under section 10(2) of the 2010 Act.

   (vii) On 10 October 2012 the Department received an application for a restricted licence from the Appellant. The Appellant was issued with a temporary permit with authorisation for four vehicles and 4 trailers valid until 30 October 2015.

   (viii) On 13 November 2013 the Department received an application for a standard international licence from the Appellant. This application was withdrawn on 20 December 2013.

   (ix) In paragraph 9 of the decision the Head of the TRU noted:

   > '(The Appellant) has links with licence No ON1113722 held by Mrs Janet Lyons trading under the same trading name, Lyons Haulage. At a Public Inquiry on 17 November 2012 into this licence, (the Appellant) attended and gave evidence on behalf of Mrs Lyons [she was too unwell to attend] that in relation to Lyons Haulage *'we all trade together'*. It was asserted at that Inquiry that (the Appellant's) own licence (permit) allowed him to *'run his own limb of the business without relying on Mrs Lyons'*. Following an appeal to the Upper

Tribunal the decision to revoke Mrs Lyons' licence was upheld and the licence was revoked with effect from 20 April 2014.'

(x) In paragraphs 10 to 13 of the decision the Head of the TRU noted:

'The Department notes that DVSA (GB) have reported 1 encounter during 2013/14 which was clear.

The Department further notes that DVA (Northern Ireland) have reported 13 encounters with vehicles being operated by (the Appellant) between March 2009 and 11 September 2012. These included but were not limited to infringements relating to roadworthiness, overweight, tachograph/drivers infringements and no vehicle licence.

Six further encounters have been reported by DVA since October 2012 of which one, on 16 October 2012, was clear. This is a non-compliance rate of 83%. The failures related to failure to record data, drivers rest, no operator's licence, overweight, tachograph calibration and wear on tyres.

(The appellant's) criminal record indicates 27 convictions many of which are 'spent' under the rehabilitation of offenders. However the Department notes there are convictions from 2012 onwards including fines for assault on police, resisting police, obstructing an authorised examiner, no road freight vehicle licence and overloading.'

(xi) In the response to the notice of appeal, Ms Jones set out the following background to the Public Inquiry:

'Given the compliance and other issues in respect of (the Appellant's) application which had come to the Department's attention the Department considered, under Section 32(1) of the 2010 Act, that it was appropriate to make a determination on the application for a restricted licence at Public Inquiry. The Public Inquiry was convened in accordance with Regulation 18 of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 and Schedule 1 Article 1(1) and the grounds for calling the Inquiry were communicated to the Appellant in the Call up letter dated the 11th November 2014 and its enclosures. The Call up letter can be found at pages 1-8 of the appeal bundle and the enclosures appear thereafter. The Public Inquiry took place on the 10th December 2014. A copy of the transcript from the Inquiry can be found at pages 425-491 of the Appeal bundle.'

(xii) The Public Inquiry proceedings are summarised by the Head of the TRU at paragraphs 24 to 47 of her decision.

(xiii) At paragraphs 48 to 73 of her decision the Head of the TRU set out her findings of fact and conclusions arising from the 'balancing exercise'. The latter included positive findings at paragraphs 61 to 66 and negative findings at paragraphs 67 to 73.

(xiv) In paragraphs 74 and 75 the Head of the TRU stated:

'During the Public Inquiry Mr Curran referred to an incident on 26 November 2014. I refused to admit into evidence at the inquiry as it was not prior notified. As requested Mr Curran submitted information Post Inquiry. However this related to an encounter not directly

connected with the temporary permit per se. I have therefore not considered its content in coming to this decision.

During the Inquiry (the Appellant) agreed to submit documentation and records Post Inquiry including documents relating to finance, the submission that work carried out was for 'own account' rather than hire and reward, and encounters with DVA. No additional evidence was provided in support of a number of (the Appellant's) submissions in oral evidence.'

(xv) The Head of the TRU set out her substantive reasoning at paragraphs 76 to 86 of her decision, as follows:

'I find that (the Appellant) has taken action to satisfy the requirement to ensure vehicles and trailers are not overloaded by installing, servicing and calibrating a weighbridge.

Tachograph charts were presented at the enquiry but no evidence of any analysis or follow up actions was presented. I find that … assertions that he was dismayed with what he saw but that (the Appellant) was willing to be compliant did little to convince me that (the Appellant) has the appropriate systems in place to ensure drivers hours and tachograph legislation is adhered to or that he will do so in the future.

(The Appellant) made the application for a restricted licence in October 2012. Since that date (the Appellant) has had several convictions which he has not declared to the Department within 28 days as required by the undertakings on the permit and licence application namely that he failed to notify the Department that on 13/11/12 he was convicted of obstructing an authorised examiner and fined £185, on 18/12/2012 he was convicted of operating without a road freight licence and fined £400 and of exceeding maximum authorised weights and also fined £400 and on 2/7/13 was fined a total of £200 relating to two overweight offences.

I accept that the process of finalising this application has taken longer than (the Appellant) believed it would however although (the Appellant) remained licensed for own account work throughout the permit he did not appear to use that time to put systems and processes in place which would have demonstrated that he was complying with his statutory requirements in respect of the undertakings agreed to by an operator for holding any licence, permit, restricted or standard.

I have concerns that (the Appellant) is using the terminology of the trading name Lyons Haulage in such a way that he is attempting to cloud the issue. He claims that the trading name Lyons Haulage comprises two entities but did not take the opportunity to present to me any documents which would have supported this claim.

(The Appellant) agreed that he has been carrying out Hire and Reward work on his permit. This has led to an unfair competitive advantage over those operators who are compliant within the licensing regime. In doing so he has not been required to demonstrate the requirements which need to be satisfied for a standard licence including the higher financial standing, repute and professional competence. This in turn leads to concerns over road safety.

> (The Appellant) has been operating on a permit for approximately two years and while this is the final stages of an application process I turned to consider the impact of the refusal of the licence. During the Inquiry (the Appellant) stated that he contracted out hire and reward work to subcontractors but that he was the only operator in the area that could carry out the type of work that he undertook. He agreed that if a licence were not to be granted he may be able to continue to contract out.
>
> I turned then to ask myself if (the Appellant) can be trusted to be compliant into the future. I listened to … representations that he would be prepared to invest time with (the Appellant) because he believed '*everyone deserves a second chance*' and that (the Appellant) intends to be compliant. However I ask myself why, in a period of two years, knowing that the licence application needed to be finalised did (the Appellant) not avail himself of the opportunity to improve his systems, processes and record-keeping. I can only consider that with the exception of rectifying previous overloading non-compliance that he has neglected to consider the full responsibilities of an operator in respect of the undertaking signed up to and his statutory requirements. I therefore reject the representation that if an application were to be granted with further undertakings or conditions attached to the licence that (the Appellant) would be willing to be compliant in the future.
>
> I also turned to consider that (the Appellant) has been operating for Hire and Reward without an operator's licence. That in itself flies in the face of demonstrating fitness to hold a licence and is a significant concern to the Department in considering if (the Appellant) could be trusted to be compliant into the future on a restricted licence if it were to be granted.
>
> For all the reasons above I determined that (the Appellant) has failed to satisfy the Department that all the requirements under Section 12 (B) relating to fitness to hold a licence, and 12 (C) as they relate to restricted licences have been met. **Therefore the Department is required to refuse the licence under Section 12 (5) of the Goods Vehicles (Licensing of Operators) Act (NI) 2010 and does so.**
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> In accordance with Article 6 (2) (B) of the Goods Vehicles (Licensing of Operators) (2010 Act) (Commencement No 2 and Transitional Provisions) Order (Northern Ireland) 2012 **the temporary permit No 2609 shall cease to have effect at 23:59 on 10 June 2015.'**

(xvi) The Appellant was notified of the decision of the Head of the TRU on 13 May 2015.

The submissions of the parties

3. On 21 May 2015 an appeal against the decision of the Head of the TRU was received in the office of the Upper Tribunal

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

> 'I believe that the decision made was unfair as it was heavily influenced by DVA Representatives. It was very clear from the notes that a lot of time and effort went into preparing evidence for the Public Inquiry.

On numerous interviews over the past nine years with DVA Traffic Examiners, myself and my wife and the following (named individuals) …

In the interviews I have been told on more than one occasion that each of the DVA Officers will work together and do their upmost to put me out of business. On one particular interview between my wife and (named individual) he was rude and arrogant and left my wife extremely upset and distressed to which he entered the interview with the words 'Mrs Lyons I will put you out of business'. It is my belief that if I was of ethnic minority I could take this to court under the Discrimination Act.

The Representative I had (named individual) was an oversight on my part as he did not know any of the background about myself or my business. I feel he was inexperienced as he failed to fill out Annex A to the call-up letter and so for this reason I ask that all comment made by (named individual) be disregarded from the notes of the Public Inquiry.

I would just like to make the point that I have never had an Operator Licence or permit revoked.

The Department gave me a permit on October 2012 by Mr Donald Armstrong. I was then called for an interview by Mr Armstrong in Belfast at which he told me that after one year I would be converted to hold a full restricted licence.

After the year passed (October 2013) I then sought the conversion that Mr Armstrong had stated that I would receive. Upon contacting for the conversion of my licence I spoke to a (named individual) who kept "putting me off" for different reasons which I believe were excuses. For one full year I phoned every month only to be met with excuses such as "they were too busy to talk to me and to phone back". It wasn't until October 2014 (one year later) that I was enlightened that I would have to attend a Public Inquiry.

I have researched and my findings are that in 4000 applicants for a full restricted licence, I was the only one to be called to a Public Inquiry which makes me ask the question what was the grounds for the Public Inquiry and what made me differ so much from the other 3999 applicants? This actually leads me to believe that there is discrimination in play.

The family business I require the restricted licence for has been ongoing from 1948. It was passed from my grandfather … to my father … who then passed it onto myself … I also have a 17-year-old son whom I hope to pass it onto one day. This business has always been run at this address, helping the rural community and the farming community for the past 67 years.

I believe that the above points are solid grounds to appeal the decision of the …. Head of Transport Regulation Unit.

I require my licence for two trucks and two trailers to run my business and without this in place it will see two drivers, two mechanics, one secretary, my wife and myself signing onto Jobseeker's Allowance which I have never claimed for in my life

5. In her response to the notice of appeal dated 31 July 2015, Ms Jones addressed the grounds which had been put forward by the Appellant. In connection with the Appellant's assertion that the decision was unfair and had been influenced by the 'DVA representatives, she submitted:

> 'The Respondent would contend that preparation for any Public Inquiry must be carried out with due diligence in order to ensure a fair and equitable process for either an applicant or a licence holder. It is necessary that the Appellant and the Transport Regulation Unit are provided with complete disclosure of all evidence which is to be relied on during the Public Inquiry. In all cases where there are encounters with the DVA the Department will request a full brief detailing compliance issues, offences or prohibitions. Representatives from that organisation are required to attend the Public Inquiry. The DVA brief in the extant case followed a similar format to other briefs prepared for other cases and provided the factual account and evidence into compliance issues, offences or prohibitions to which this operator had involvement.
>
> The Respondent would contend that diligent preparation of papers does not support any contention that there has been influence exerted. The Respondent would state that the Transport Regulation Unit and the Driver & Vehicle Agency are separate business areas within the Department of Environment. Staff in the Driver & Vehicle Agency have separate roles, responsibilities and line management structures to those in the Transport regulation Unit, which ensures that the two functions are entirely independent of each other. There are no members of Driver & Vehicle Agency staff within the Transport Regulation Unit and equally there are no members of Transport Regulation Unit staff in Driver & Vehicle Agency.
>
> The Head of the Transport Regulation Unit conducted her hearing in a fair and balanced way and asked the Appellant to raise any issues he wished with the DVA's brief. The Head of the Transport Regulation Unit in her decision stated her findings of fact and conducted the balancing exercise correctly. Her decision was arrived at fairly following full consideration of the evidence before her.

6. Ms Jones addressed the Appellant's submission that during the course of numerous interviews he had been informed that officers from the DVA would 'work together' and 'do their utmost to put me out of business', as follows:

> 'The Head of the Transport Unit contends that this was not adduced as evidence during the Public Inquiry and therefore should not be considered as part of the Appeal. The Respondent would also point out that the Transport Regulation Unit is entirely independent of the Driver & Vehicle Agency …
>
> The Appellant had asserted at the Public Inquiry that he had been stopped more regularly than was noted in the brief. The Head of the Transport Regulation Unit asked him if he had evidence to which he confirmed that he had noted encounters in his diary but that he had not brought that to the Public Inquiry. The Head of the Transport Regulation Unit permitted the Appellant to provide this post Inquiry for her consideration. No such evidence, nor any other documents were received by the Respondents.'

7. In response to the assertion that the comments of his representative during the course of the Public Inquiry should be disregarded, Ms Jones has submitted:

> 'The Head of the Transport Regulation Unit would point to the transcript at page 428-429 whereby the appellant specifically states that he would wish for Mr Ian Isaac to represent him. The Respondent would state that in hearing

this appeal the entirety of the transcript should be considered and no part of it disregarded.'

8. Ms Jones acknowledged that the appellant was correct to state that he had never previously had an operator licence or permit revoked but contended that applications for licences made by the Appellant had been refused and that the licence of the Appellant's wife had been revoked. Ms Jones also addressed the narrative set out by the Appellant concerning the informal meeting which had been held with the former Head and Deputy Head of the TRU and subsequent disallowance:

'The Respondent contends that this did not amount to any guarantee to (the Appellant) that his permit would be converted to a full restricted licence and refutes that it would be converted after 1 year. There has been no evidence produced either in the notice of appeal or at the Public Inquiry to substantiate the allegation that such a conversion would be made.

Furthermore at the Public Inquiry (the Appellant) stated,

> "..So he told me; look … be more compliant in the next twelve months and in twelve months we'll come back here again and look at it…"

The Respondent contends that this demonstrates that the Appellant was aware that the application would require further consideration.'

9. Ms Jones refuted any suggestion that officers within the TRU were 'putting off' the Appellant as had been asserted by him. She submitted that the Department had:

'… engaged in the normal processing and preparation of the case in the required way before coming to a decision as to whether or not to grant a restricted licence. The Appellant was in no way prejudiced by the timeframe in so doing as he had the benefit of a temporary permit throughout this process.'

10. Ms Jones referred to the Appellant's assertion that out of 4000 applications for a full restricted licence his application was the only one which had been the subject of a Public Inquiry, as follows:

'During the duration of the temporary permit scheme and application process for bringing 'own account' operators into the restricted licencing process, 4082 applications were received. To date, the Appellant is the only permit holder to have been called to a Public Inquiry. However all applications are processed in the same way and all were assessed using the same criteria. If during that administrative exercise it is noted that there has been a history of non-compliance, or other issues against the licence holder an operator check will be requested from one or more authorities, including the DVA. Other authorities from which requests could be made include the DVSA, HMRC and PSNI. Following receipt of an authority's operator check the Department will consider whether or not an operator satisfies the requirements of the Goods Vehicle (licencing of Operator's) Act (Northern Ireland) 2010 and may decide to call the operator to a Public Inquiry.'

11. Ms Jones submitted that given the circumstances of the present case it was a 'proportionate and appropriate action to call a Public Inquiry' and that the grounds for it were set out to the Appellant in the 'Call Up' letter of 11 November 2014. She added that it was the Respondent's view that each of the other applications were decided on their individual merits and that it would not be appropriate to comment on the specific circumstances of other permit holders.

12. Ms Jones submitted that no evidence had been presented during the course of the Public Inquiry or in the notice of appeal to substantiate any claim of discrimination. She noted that the Equality Act 2010 did not apply in Northern Ireland but that provision for the prohibition against unlawful discrimination was made in section 75 of the Northern Ireland Act 1998. She submitted, however, that the Department denied that any unlawful discrimination had taken place nor that the Appellant had made out any case of such discrimination. Ms Jones submitted that the fact that the Appellant was involved in a family business which had been in operation for some time was not the point of the appeal.

13. Ms Jones also submitted that the Respondent wished to draw the attention of the Upper Tribunal to the following disclosures made by the Appellant during the course of the Public Inquiry:

    '1. He claimed his wife had been operating 3 vehicles in July and August 2014 after her licence was revoked- pages 450-451 of the appeal bundle;

    2. He accepted that vehicles which he operated were not taxed- pages 453-454 of the appeal bundle;

    3. He admitted that he was accepting and performing hire and reward work on numerous occasions in contravention of his temporary permit- pages 455, 457,458, 459 of the appeal bundle;

    4. This acceptance was only as a result of protracted questioning from the Head of the Transport Regulation Unit;

    5. The Appellant failed to provide the evidence post hearing requested of him to corroborate his oral evidence -page 455, 488 of the appeal bundle;

    6. The Appellant failed to declare convictions within 28 days, which he is required to do so under the terms of his temporary permit -Page 570 of the appeal bundle.'

14. Ms Jones submitted that the proper approach to appeals from a decision of the TRU to the Upper Tribunal was that set out in *Bradley Fold Travel Limited & Peter Wright v Secretary of State for Transport* ([2010] EWCA Civ. 695). In relation to the scope of the appeal and the burden of proof she submitted:

    > 'The Respondent would therefore state that this appeal before the Upper Tribunal should consider the material placed before the Respondent and found within the appeal bundle. The Burden of Proof, the Respondent would submit, is on the Appellant to satisfy the Head of the Transport Regulation Unit that they satisfy the legislative requirements set out below. In this appeal it is further submitted that the Burden of Proof is upon the Appellant to establish the grounds at 5 above.

15. The 'grounds at 5 above' referred to by Ms Jones are the *Bradley Fold* test. Ms Jones then set out the relevant legislative provisions.

16. Ms Jones made reference to jurisprudence of the Upper Tribunal in connection with the test of 'fitness to hold' and submitted:

    'The Respondent would state that it came to a balanced and appropriate decision that the Appellant had failed to satisfy the legislative requirement for fitness to hold. In so coming to this decision the Respondent must refuse the application for a restricted licence.'

17. Finally Ms Jones referred to the assertion by the Appellant of discrimination and unfair treatment:

> 'The Appellant has made unsubstantiated allegations that he believes he may be the subject of discrimination and that he was treated unfairly compared to other operators. The Respondent would contend that it is for the Appellant to provide details in support of these grounds.
>
> In the case of *NT/2014/02 Janet Lyons t/a Lyons Haulage*
>
> > *'13 The third ground of appeal asserts that the Appellant was unfairly treated as compared to other licence holders and operators. Further details in support of this ground were promised but they have not been made available to us. It follows that there is nothing to support this ground of appeal and that we reject it. In any event appeals such as this almost always turn on their own particular facts. Since the facts of individual cases vary considerably the prospect of a ground such as this being argued successfully is virtually non-existent*"

18. Ms Jones made reference to the conclusions of the Head of TRU, in paragraphs 83 and 84 of her decision, on compliance in the future:

> 'The Respondent would submit that consideration of the issues of trust and fair competition was appropriate.
>
> In the case of **T/2012/34 Martin Joseph Formby t/a G & G Transport**,
>
> *'Traffic commissioners must be able to trust those to whom they grant operator's licences to operate in compliance with the regulatory regime. The public and other operators must also be able to trust operators to comply with the regulatory regime.'*
>
> In the case of **NT/2013/82 Arnold Transport & Sons Ltd,**
>
> *'12 The Tribunal has stated on many occasions that operator's licencing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, must feel able to trust the operators to comply with all relevant parts of the operator's licencing regime. In addition other operators must be able to trust their competitor's to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.*
>
> *13 It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold and operator's licence will be called into question…*
>
> *16 The impact of unfair competition is insidious in that it gradually and subtly undermines the confidence of compliant operators that their competitors will comply with the regulatory regime and thus compete fairly. What matters is the perception that other operators are competing unfairly not whether they are achieving any benefit as a result. Once rumours, of unfair competition spread, (or clear evidence of it become apparent), the assumption will be made that it must be advantageous because there would be no point in running the risks involved if it was not…'*

The hearing before the Upper Tribunal

19. At the oral hearing of the appeal the appellant was represented by Mr Sullivan of Counsel. Mr Sullivan apologised for not having prepared a skeleton argument indicating that he had been instructed in the matter some ten days prior to the oral hearing. He had taken instructions from the appellant immediately prior to the oral hearing.

20. Mr Sullivan advanced three grounds of appeal on behalf of the Appellant. The first of these, and the main ground which the appellant wished to advance, was that he had been unfairly treated by the Department. Mr Sullivan noted that the appellant had set out this ground in his notice of appeal and wished to expand on this ground in oral submissions. He wished to have the opportunity to explain his reasons for this submission.

21. Mr Sullivan indicated that the Appellant submitted that he had an acceptable level of repute, adequate financial standing and did have the necessary facilities in place to operate his licence.

22. Mr Sullivan made reference to paragraph 70 of the decision of the Head of the TRU. In that paragraph the Head of the TRU had noted that the Appellant '… had failed to produce documentation, his diary records, to support his contention that his drivers/vehicles had been stopped more often than was recorded.' Mr Sullivan submitted that this requirement was not made clear to him at the Public Inquiry. It was also not made clear that he was expected to provide any documentation in addition to the documentation which he had brought with him on that day. Mr Sullivan submitted that the appellant took issue with the submission that he failed to provide additional information. He reiterated the appellant's assertion that this requirement had not been made clear to him as part of the Public Inquiry.

23. Mr Sullivan also made reference to paragraph 36 of the decision of the Head of the TRU. In this paragraph the Head of the TRU had stated:

> 'I asked (the Appellant) on a number of occasions throughout the inquiry to submit to me any documents such as invoices, receipts, delivery notes, contracts with sub-contractors or any other documents he wished to submit in support of his claim that the work carried out, with particular reference to the transactions in the bank account for November 2014 was on his own account and that he had contracts in place for sub-contracting some of the work. He agreed to do so but no documents have been received for consideration.'

24. Mr Sullivan submitted that it was the Appellant's recollection that he provided bank statements for three months. The only issue was with the month of November.

25. Mr Sullivan made reference to paragraph 73 of the decision of the Head of the TRU. In this paragraph the Head of the TRU had stated:

> 'Since July 2014 until November 2014 there have been 4 encounters, none clear, which included prohibitions for overloading and excessive tyre wear and a defect notice for having no tachograph calibration plate.'

26. Mr Sullivan submitted that the Appellant would say that he was unaware of any encounters between July 2014 and November 2014.

27. Mr Sullivan stated that he had gone through the decision of the Head of the TRU with the Appellant and that these were his only grounds of appeal.

28. Mr Sullivan noted that it was not disputed by the Appellant that he did carry out 'hire and reward' work without the necessary licence. Equally it was not

disputed that his name was recorded as a Director for a period after he was disqualified from so acting. It was not disputed that the Appellant had a number of criminal convictions. Finally, it was not disputed that he had failed to notify the Department as required. Mr Sullivan acknowledged that the Appellant accepted that these facts of themselves did not stand in his favour. Nonetheless, the Appellant would say that even with those factors he should be deemed to be fit to hold the licence for which he had applied.

29. We reminded Mr Sullivan of the principles which had been set out by the Upper Tribunal in NT/2013/52 & 53 *Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*, ([2013] UKUT 618 AAC) ('*Fergal Hughes*') concerning the proper approach on an appeal from a decision of the TRU to the Upper Tribunal. The Upper Tribunal had noted, at paragraph 8:

> 'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place.'

30. Mr Sullivan indicated that he had explained the nature of proceedings before the Upper Tribunal to the Appellant but that as the Appellant had raised certain issues in his notice of appeal we should hear oral submissions from him on those issues. On that basis we were content to hear from him.

31. The Appellant's first submission was that while there may have been 'encounters' as referred to in the decision of the Head of the TRU in paragraph 73 of her decision, no offence had been committed. He did not dispute, however, that there had been encounters. He added that he had not received a summons in connection with encounters between July and December 2014.

32. The Appellant's second submission was that he had been targeted for regulatory action. He indicated that he had made a freedom of information request to the Driver and Vehicle Agency ('DVA') immediately following notification of the decision of the Head of the TRU to refuse his application for a restricted licence. Reference was made to a copy of the request which was at page 502 of the appeal bundle. The Appellant made a number of information requests, including the following:

> 'Under the Freedom of Information Act I would like to know how many of the 4000 applications for the restricted licence have been called to a public inquiry?'

33. A copy of the response from the DVA is at page 503 of the appeal bundle. In respect of the specific enquiry concerning call-ups to a Public Enquiry, the following was noted:

> 'In respect of the permit scheme, 4082 applications were received for a restricted licence. As at 9th June 2015, one applicant has been called to a Public Inquiry.'

34. The Appellant submitted that the fact that he was the only applicant out of over four thousand applicants to have his application subject to a Public Inquiry was the basis on why he felt that there was discrimination against him. He

submitted that his vehicles were stopped by the side of the road and asserted that the Department was doing everything 'in its power to get him stopped.'

35. The Appellant's third submission concerned the Public Inquiry proceedings. He indicated that he was not used to speaking in settings such as this. He submitted that he brought documentation with him which was handed to the Public Inquiry. He asserted that during the course of the proceedings he felt that he was being interrogated and that those present had only brought 'the bad things' out.

36. Finally the Appellant made submissions concerning the seventy-year history of the family business which has passed through from his grandfather, through his father to him. His own son was now working in the business. He emphasised the importance of the business in the local small rural community and the contribution which it made. The demise of the business would have an effect on other local operators and customers as well as on his family. He stated that the family also had a dairy farm. He submitted that he had been willing to work with the Department and suggested that sanctions be put in place. He asserted that 'anything' which he had put forward had been 'ruled out.'

37. Mr Sullivan summarised the Appellant's arguments. These were that at the date of the decision the Appellant was fit to hold an operator's licence. Satisfactory arrangements and facilities were in place to maintain the vehicles in a fit and serviceable condition and to comply with 'drivers' hours and tachograph' requirements. The Appellant was of sufficient financial standing. The Appellant was willing to fulfil any undertaking.

38. In reply to the Appellant's assertion that following the Public Inquiry it was not clear that he had to produce relevant documentation, Ms Jones submitted that this was a new ground of appeal which had been adduced for the first time at the oral hearing. It had not formed part of the Appellant's notice of appeal. She submitted that, as such, we ought not to take it into consideration. She added, however, that were we to consider this ground then it was her submission that it was not made out. It was evident from the transcript of the Public Inquiry proceedings that there were several references to a requirement to produce documentation post the Public Inquiry and that the appellant had failed to fulfil this obligation. Ms Jones conceded that the Appellant had brought documentation to the Public Inquiry and that receipt of these had been acknowledged.

39. In reply to the Appellant's assertion concerning paragraph 73 of the decision of the Head of the TRU and the issue of encounters between July 2014 and November 2014, Ms Jones submitted that, once again, that this was a new ground of appeal which had been adduced for the first time at the oral hearing and had not formed part of the Appellant's notice of appeal. As such, we ought not to take it into consideration. She asserted that, in any event, there was evidence that such encounters had occurred with resultant consequences. Ms Jones was referred by us to page 275 of the appeal bundle where there was a record of four encounters between July 2014 and November 2014. She submitted that this was representative of the position at the date of the Public Inquiry. She asserted that there was no evidence that the Head of the TRU had placed overdue weight on these matters.

40. Ms Jones turned to what she submitted was the only ground which was properly before the Upper Tribunal namely that the Appellant had been subject to unfair treatment. In relation to the question of unfair targeting, Ms Jones submitted that the decision under appeal was not a decision of the Department or the DVA but a decision of the Head of the TRU. The Department and the

TRU were different bodies which were not accountable to each other or inter-related. She submitted that any ground of unlawful discrimination was not made out. She asserted that had any issue of discrimination been raised at the Public Inquiry then it would have been dealt with properly. Ms Jones then made reference to the submissions which she had made on the question of unfair treatment in the Department's response to the notice of appeal.

41. Mr Sullivan was asked to respond to the record of encounters between July and November 2014 which was in the appeal bundle at page 275 and which was referred to by us during the course of the oral hearing. He indicated that the Appellant wished to refer us to a letter from the Director of Public Prosecutions which, he submitted, was in connection with at least one of those encounters. A copy of the letter was handed in and we noted that it was dated 4 August 2015 which was a considerable time after the date of the Public Inquiry. Mr Scullion submitted that, nonetheless, it was evidence that no further action had been taken in connection with one of the four July to November 2014 encounters.

42. The relevant correspondence is addressed to the Appellant and has two discrete reference numbers which are meaningless to the parties to these proceedings and to us. The correspondence states:

> 'I am writing to notify you that the prosecution service has decided, having considered the evidence currently available, not to prosecute you in relation to an incident between the 26th day of June 2014 and the 21st day of August 2014 for which papers were submitted to our offices by the police.'

43. The Appellant submitted that it was his view that this correspondence was in connection with the encounter on 21 August 2014. We return to this item of correspondence below.

The proper approach on appeal to the Upper Tribunal

44. As was noted above, in *Fergal Hughes*, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

> 'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: *"the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view"*. The Tribunal sometimes uses the expression *"plainly wrong"* as a shorthand description of this test.'

At paragraph 4, the Upper Tribunal had stated:

'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.'

General principles on the operation of the Act and Regulations

45. At paragraphs 10 to 13 of the decision in NT/2013/82 *Arnold Transport & Sons Ltd v DOENI* ([2014] UKUT 162 (AAC), the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

'Some General Principles

(a) An operator's licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of the 2010 Act as amended, have been met. [The expression Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, ("the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.

(b) …

(c) The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.

(d) It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying

> that: *"actions speak louder than words"*, (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'

Our analysis

46. We begin with three procedural and evidential matters. The first, which has already been addressed above, is the issue of the input provided by the Appellant at the oral hearing of the appeal before us. In connection with his first ground of appeal – that the Appellant had been unfairly treated – Mr Sullivan submitted that the Appellant wished to address this matter himself and set out his strength of feeling on the matter. Ms Jones queried whether the intention was that the Appellant give oral evidence to us. In turn, we addressed the role of the Upper Tribunal in an appeal against a decision of the Head of the TRU. We were satisfied that the Appellant wished to augment the written submissions which he had made in his notice of appeal on the issue of unfair treatment. On that basis we were content to hear from him and were satisfied that the principles in Fergal Hughes were not offended.

47. The second matter related to the submission by Mr Sullivan on behalf of the Appellant of additional and novel grounds of appeal. Ms Jones submitted that we should not consider two of the grounds advanced by Mr Sullivan as they did not form part of the notice of appeal. The Upper Tribunal has an inquisitorial and enabling role. We are satisfied that we are not restricted to consideration of the specific grounds which were raised by the Appellant in his notice of appeal. We note that the notice of appeal was prepared by the Appellant. By the time of the oral hearing the Appellant had the benefit of formal legal advice and it is understandable that the grounds of appeal have been refined. We would note, however that it is best practice for the grounds of appeal to be identified in advance of the oral hearing of the appeal through the preparation of a Skelton Argument submitted in time for consideration by the parties to the appeal and by the Upper Tribunal itself. In the instant case, for whatever reason, the Appellant appears to have considered the issue of legal representation at a very late stage and it was impractical to submit a Skeleton Argument in advance.

48. The third matter relates to the submission of evidence, in the form of correspondence from the office of the Director of Public Prosecutions which post-dated the Public Inquiry and the decision of the Head of the TRU. As was noted above, we were content to consider the evidence and submissions made in connection with it. We set out below our assessment of the context of that evidence.

49. We begin by considering the Appellant's primary ground of appeal in which he submitted that he had been the subject of unfair treatment. There are a number of strands to this ground of appeal which we consider in turn.

50. The Appellant had asserted during the course of the Public Inquiry that as an operator he had been targeted by officers of the DVA. He repeated that contention during the course of the oral hearing before us. It is clear that the primary subjects of his strongly-held views on unfair treatment are the officers of the DVA and not the Head of the TRU.

51. We address below the assertions which the Appellant has made concerning his call-up to a Public Inquiry and the conduct of the Inquiry proceedings. For the moment, however, we note that the decision under appeal to the Upper Tribunal is that of the Head of the TRU dated 13 May 2015. Ms Jones, in her response to the notice of appeal and in her oral submissions to us, emphasised that the TRU and the DVA are two separate business areas within the Department and that the intention behind that division is to emphasise the independence of the TRU. She noted that:

> 'Staff in the Driver & Vehicle Agency have separate roles, responsibilities and line management structures to those in the Transport Regulation Unit which ensures that the two functions are entirely independent of each other. There are no members of Driver & Vehicle Agency staff within the Transport Regulation Unit and equally there are no members of Transport Regulation Unit staff in the Driver & Vehicle Agency.'

52. We have noted that the independence of the TRU has been emphasised in correspondence which has been forwarded to the Appellant. In his freedom of information request the Appellant has asked 'how many staff does the DVA have in the Transport Regulation Unit?' The response from the DVA was as follows:

> 'The Transport Regulation Unit (TRU) and the Driver & vehicle Agency (DVA) are separate business areas within the Department of the Environment. Staff in DVA have separate roles, responsibilities and line management structures to those in TRU, which ensures that the two functions are independent of each other. There are no members of DVA staff within TRU and equally there are no members of TRU staff in DVA.'

53. The role and functions of the TRU in Northern Ireland are parallel to those of Traffic Commissioners in Great Britain. In paragraph 228 of its decision in *Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/6, [2012] UKUT (AAC) 221), the Upper Tribunal stated:

> "… it was made very clear on behalf of the Secretary of State that the independence of Traffic Commissioners is recognised, valued and considered to be a matter of great importance. The Tribunal shares those views".

54. The second strand to the Appellant's unfair treatment ground relates to his call up to a Public Inquiry. He has asserted that the fact that he is the only applicant out of over four thousand applicants for restricted licences to have been called to a Public Inquiry is evidence of targeting and inequity.

55. Legislative provision for Public Inquiries is to be found in Regulation 18 and Schedule 3 to the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 ('the 2012 Regulations') made under the 2010 Act. The procedural requirements for a Public Inquiry are set out in significant detail in Schedule 3.

56. The call up letter to the Public Inquiry in this case is dated 11 November 2014 and a copy of it is in the bundle of papers which is before us. In general terms, the Appellant was informed that the purpose of the Public Inquiry is to determine whether the Appellant satisfied the requirements of section 12(2),

12B, 12C and 12D of the 2010 Act. More specifically, in a section headed 'The Evidence the Department Will Consider' the Appellant was informed:

> 'Following a review of your application, a number of issues have come to light which will be explored by the Department at the Public Inquiry.'

57. The 'issues' were then set out in some detail. They included refusals of earlier applications, a withdrawal of a further application, links with another licence which had been revoked, removal of vehicles from the Appellant's temporary permit and addition of those vehicles to another licence, links with other companies and operators, links with another applications, DBA detections, vehicle taxation, unspent convictions use of contaminated or rebated fuel and DVA encounters. We have no hesitation in agreeing that in light of that background the decision to hold a Public Inquiry in connection with the Appellant's application for a restricted licence was not only reasonable but warranted.

58. We turn to the conduct of the Public Inquiry itself. We address below the specific ground of appeal relating to the requirement, set out during the Public Inquiry proceedings, for the Appellant to produce specific documentation. During the course of his oral submissions to us, the appellant made assertions concerning the fairness of the Public Inquiry proceedings with a contention that he felt that he was being interrogated. In **T/2014/77 Leedale Ltd, the Upper Tribunal said, at paragraph 90:**

> '*Public inquiries are hearings conducted by statutory regulators whose functions are to ensure road safety, fair competition and compliance. The hearings are by necessity inquisitorial and one of the functions of TCs is to probe and test the evidence put forward by an operator. The approach of TC's must be robust in those circumstances and they often have to deal with operators … who are themselves robust and who object to any form of intrusive scrutiny of their operations and react accordingly. There may be other operators or witnesses who have no or little previous experience or understanding of the public inquiry process, who may feel that they are the object of robust, unfair and intrusive scrutiny when that is not the case.'*

59. In our view, the proceedings were conducted in accordance with the principles of natural justice, and the transcript is reflective of an apposite consideration of, and adherence to such principles. The Head of the TRU conducted the proceedings in a fair, balanced and enabling manner and the Appellant was given every opportunity to give evidence, make submissions and address issues which had been raised.

60. We note that the Head of the TRU made the following remarks, at one stage of the proceedings:

> 'Well can I just reiterate today that if you're not good at speaking you need to consider very carefully what it is you are going to say … I want to give you the best opportunity of presenting your case …'

61. At two stages in the proceedings, the appellant's representative made the following remarks:

> '… you know I am very appreciative of the way you've actually conducted this … and
>
> Indeed ma'am, I think you've been very just and fair with your process here.'

62. We would add, for the sake of completeness, that we agree with the submission made by Ms Jones that no actionable allegation of unlawful discrimination would lie under section 75 of the Northern Ireland Act 1998.

63. We turn to the second ground of appeal, which, as was noted above, related to the conclusions of the Head of the TRU in paragraph 73 of her decision. In that paragraph the Head of the TRU had made reference to four encounters between July 2014 and November 2014 which included prohibitions for overloading and excessive tyre wear and a defect notice for having no tachograph calibration plate.

64. Mr Sullivan's initial submission was that it was the Appellant's case that he was unaware of any encounters between July 2014 and November 2014. To be fair to the Appellant, in his oral submissions to us, he clarified that he did accept that there had been encounters but submitted that and that he had not received a summons in connection with encounters between July and December 2014. It was in this context that he submitted the correspondence from the office of the Director of Public Prosecutions, which, he submitted was in connection with one of these encounters.

65. There is no doubt that there were four encounters between July 2014 and November 2014. The brief prepared for the Public Inquiry by an officer of the DVA is included in the bundle of papers which was before us. At pages 271 to 275 is a record of what is called and 'Enforcement History' meaning details of encounters by DVA of vehicles operated by the Appellant. At page 275 there is a record of four encounters which took place on 24 July 2014, 19 August 2014, 21 August 2014 and 4 November 2014. Further details of the relevant encounters were provided on the following pages. In this regard, the Appellant was correct not to pursue a submission that they had not taken place.

66. What the Appellant did submit was that while the encounters did take place, no offence had been committed and that he had not received a summons in connection with them. The correspondence from the office of the Director of Public Prosecutions confirmed this in relation to the encounter on 21 August 2014.

67. It is important, in our view, to note the perspective given by the Head of the TRU to the evidence set out at page 10 of the Enforcement History (page 275 of the appeal bundle). The Head of the TRU, in paragraph 73 of her decision has set out in purely factual terms that the four encounters happened, that none of them was clear and that the encounters resulted in prohibitions. None of that can be repudiated. The appellant has sought to soften the impact of those encounters by asserting that no criminal offence had been committed and that he had not received a summons in connection with them. Nonetheless, the key finding is that none of the encounters was clear and that prohibitions were issued in connection with one of them. In our view, the Head of the TRU has placed this evidence in its proper context and given it appropriate weight.

68. We have also noted that the record of the four July to November 2014 encounters was wholly accurate at the date on which it was prepared. At the Public Inquiry the Appellant and his representative did not produce evidence to counter its correctness and it remained precise at the date of the decision of the Head of the TRU. Accordingly, the fact that the Appellant has produced post-Inquiry and post-decision evidence in relation to one of them is meaningless both in terms of the context of the evidence in the decision-making process and the timing of the process.

69. We turn to the Appellant's third ground of appeal which concerned the conclusions of the Head of the TRU at paragraphs 70 and 75 concerning the failure to provide documentation. There were two aspects to this ground of appeal. The first was that the Appellant had, in fact, provided certain documentation at the Public Inquiry and that the nature of the proceedings at the Public Inquiry were such that it was not made clear to him, or he could not comprehend the requirement to produce further relevant documentation.

70. The Respondent has conceded that certain documentation was provided by the Appellant at the Public Inquiry. At paragraph 23 of her decision, and under the heading 'The Evidence', the Head of the TRU has noted:

> 'At the Public Inquiry bank statements relating to one month (November 2014) were considered along with photographs relating to the operating centre. During the public Inquiry a folder was presented containing original documents – the documents were therefore not retained by the Inquiry. These included information about vehicles, job cards, a weighbridge certificate of calibration, tachograph charts/records and some policies and procedures. No records of tachographs, daily defect reporting, vehicle inspections etc were presented.'

71. A copy of the 'call-up' letter to the Public Inquiry is to be found at pages 1 to 5 of the appeal bundle. The letter is comprehensive in its detail and included several appended documents. In a section of the letter headed 'Action You Need to Take Now' the Appellant is advised of a range of financial documentation which he was required to provide before the Public Inquiry. Further the Appellant was directed to 'consider and gather evidence which will allow you to set out your case.' He was informed what the minimum documentation should be. The Appellant was also requested to complete a form indicating that he would or would not be attending the Public Inquiry and confirming that certain information was attached to his response. In our view that Appellant was informed in some detail the extent of the necessity to gather information in advance of the Public Inquiry.

72. We have a copy of the transcript of the Public Inquiry itself. We note that the Appellant was represented. During the course of the Inquiry the Head of the TRU made reference to the fact that the Appellant had been requested, through the call-up letter, to provide original bank statements for the previous three months but had only provided original bank statements for one month – November 2014. The Appellant replied that he had thought that he had provided them and the following exchange occurred:

'Appellant	I can send them up to you this evening if you like?
Head of the TRU	yes please if you would provide us with those …'

73. At a further stage in the proceedings, and after discussion of the bank statement which had been provided, the following exchange occurred:

'Head of the TRU	This is the reason why we ask for these in advance so that we can actually …
Appellant	… I think I could have sent them to the other place over there maybe …
Clerk	Yeah, well, it was checked last week. They weren't there at that stage.
Head of the TRU	But you'll provide the two of us, immediately post the Inquiry

Appellant Yep'

74. At a further stage in the proceedings, the Appellant agreed to provide receipts for work which he carried out in order to demonstrate that this was 'own account' work. The Appellant sought clarification from the Head of the TRU of the extent and scope of this disclosure requirement.

75. At a later stage in the proceedings the Appellant submitted that he kept diary entries every time one of his lorries was stopped. When asked he indicated that he did not have the diaries with him but could provide them.

76. Towards the end of the proceedings the Head of the TRU confirmed with the Appellant that he would supply financial statements for September and October 2012 and 'an appropriate audit trail.' She clarified with the Appellant the documentation which had been provided by him.

77. In paragraph 68 of her decision, the Head of the TRU noted that the Appellant had failed to provide documentation which he agreed to provide and which would prove that work which he had carried out for an individual was 'own account' work. At paragraph 70 she noted that the Appellant had failed to produce his diary records to support his contention that his vehicles had been stopped on more occasions than had been recorded by the DVA. Finally, in paragraph 75 she noted that the Appellant had agreed to submit documentation, including documentation relating to finance.

78. In our view, the Appellant played a full and active part in the Public Inquiry Proceedings and was ably represented throughout those proceedings. The head of the TRU took an active part in enabling the Appellant to present his case and permitted him to provide additional evidence after the conclusion of the Public Inquiry. The Appellant sought clarification of the nature of the disclosure requirement. The submission by and on behalf of the Appellant that the nature of the proceedings was such that it was not clear what he was required to do by way of further information disclosure is without foundation.

79. Our conclusions on the three grounds of appeal submitted on behalf of the Appellant are sufficient to dispose of the appeal. We would add, however, that we are firmly of the view that the admission by the Appellant that it was not disputed that he did carry out 'hire and reward' work without the necessary licence, that his name was recorded as a Director for a period after he was disqualified from so acting, that he had a number of criminal convictions and that he had failed to notify the Department as required, would have been sufficient, arguably individually and most certainly cumulatively, for the application for a restricted licence to be refused. In this respect, we would agree with and endorse the conclusions of the Head of the TRU in paragraphs 81 and 83 to 84 of her decision when she stated:

> '81. (The Appellant) agreed that he has been carrying out Hire and Reward work on his permit. This has led to an unfair competitive advantage over those operators who were compliant…This in turn leads to concerns over road safety.
>
> 83. I turn then to ask myself if (the Appellant) can be trusted to be compliant into the future. I listened to Mr Isaacs representations that he would be prepared to invest time with (the Appellant) because he believed 'everyone deserves a second chance' and that (the Appellant) intends to be compliant. However I ask myself why, in a period of two years,

> knowing that the licence application needed to be finalised did (the Appellant) did not avail of the opportunity to improve his systems, processes and record keeping. I can only consider that with the exception of rectifying previous overloading non compliance that he has neglected to consider the full responsibilities of an operator in respect of the undertakings signed up to and his statutory requirements. I therefore reject the representation that if an application were to be granted with further undertakings or conditions attached to the licence that (the Appellant) would be willing to be compliant in the future.
>
> 84. I also turn to consider that (the Appellant) has been operating for Hire and Reward without an operator's licence. That in itself flies in the face of demonstrating fitness to hold a licence and is a significant concern to the Department in considering if (the Appellant) could be trusted to be compliant into the future on a restricted licence if it were to be granted.'

80. These conclusions are in keeping with the relevant jurisprudence.

81. As was noted above, Mr Sullivan confined his submissions to three grounds of appeal which we have addressed above. We would add that having considered the other grounds which the Appellant set out in his notice of appeal, we would, if required, have rejected all of those as without foundation. We have noted that the Appellant's assertion that the '… representative I had was an oversight on my part' to be disingenuous. Looking at the transcript of the proceedings of the Public Inquiry it is clear that the representative sought to assist the Appellant with industry and diligence.

Disposal

82. The decision of the Deputy Head of the TRU was not wrong and the decision to refuse the Appellant's application for a restricted licence is confirmed. The appeal is, accordingly, dismissed.

83. 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 Goods Vehicle (Licensing of Operators) Act (Northern Ireland) 2010 ('the 2010 Act').

84. As was noted above, on 10 October 2012 the Department received an application for a restricted licence from the Appellant. Subsequently, the Department issued the Appellant with a temporary permit. By virtue of Article 6(1) of the 2012 the temporary permit has effect as if was a restricted licence under section 12 of the Act.

85. On 13 May 2015 the Head of the Transport Regulation Unit ('Head of the TRU') issued a decision refusing the application for a restricted licence. At paragraph 86 of her decision the Head of the TRU stated:

> 'In accordance with Article 6(2)(b) of [the 2012 Order] the temporary permit … shall cease to have effect at 23.59 on 10 June 2015.'

86. Article 6(2)(b) of the 2012 Order provides:

‘(2) Any temporary permit issued, unless suspended or revoked under the Act, shall cease to have effect –

…

(b) where no such licence is granted on the expiry of 28 days commencing on the date specified in paragraph (3).’

87. In turn, Article 6(3) of the 2012 Order provides:

‘(3) The date referred to in paragraph (2)(b) is –

(a) the date of the Department’s refusal given in accordance of the Goods Vehicles (Licensing of Operators) Regulations (Northern Ireland) 2012 in relation to the outstanding application, or

(b) where an appeal is brought against that decision the date of disposal or withdrawal of that appeal.’

88. The effective date of the decision of the Head of the TRU is in accordance with Article 6(2)(b) and 6(3)(a) of the 2012 Order.

89. On 21 May 2015 an appeal against the decision of the Head of the TRU was received in the office of the Upper Tribunal. The effect of the making of the appeal was to defer, under Article 6(2)(b) and 6(3)(b) of the 2012 Order, the effective date of the cessation of the Appellant’s temporary permit.

90. Article 6(2)(b) and 6(3)(b) of the 2012 Order provide that where an appeal is brought against a decision refusing an application for a restricted licence, the effective date of cessation of the consequent temporary permit shall be the date of disposal of that appeal.

91. Rule 40(2) and (3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provide:

‘(2) … the Upper Tribunal must provide to each party as soon as reasonably practicable after making a decision … which finally disposes of all issues in the proceedings ….

(a) a decision notice stating the Upper Tribunal’s decision; and
(b) notification of any rights of review or appeal against the decision and the time and manner in which such rights of review or appeal may be exercised.

(3) … the Upper Tribunal must provide written reasons for its decision with a decision notice provided under paragraph (2)(a) unless –

(a) the decision was made with the consent of the parties; or
(b) the parties have consented to the Upper Tribunal not giving written reasons.’

92. A literal interpretation of these legislative provisions would mean that the Appellant's temporary permit, presently having the effect of a restricted licence, would come to an end on the date of the promulgation of this decision. Given that the Appellant is operating an existing business and that the cessation of his temporary permit would have an effect on that business, we consider that the Appellant should be permitted to continue to have his period of one further month to allow for the orderly winding-up of his business. Our decision will take effect, therefore, on 23.59 on 14 April 2016.

Kenneth Mullan, Judge of the Upper Tribunal,
15 March 2016