Appeal No. T/2016/03

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

ON APPEAL from the DECISION of Kevin Rooney TRAFFIC COMMISSIONER for the North East of England
Dated 16 December 2015

Before:

Kenneth Mullan	**Judge of the Upper Tribunal**
Mr L. Milliken	**Member of the Upper Tribunal**
Mr M. Farmer	**Member of the Upper Tribunal**

Appellant:

Ian Lambert t/a IKL Transport

Attendances:
For the Appellant: Mr S. Clarke

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 2 June 2016
Date of decision: 15 June 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED. The case is remitted for a fresh public inquiry before a different Traffic Commissioner.

SUBJECT MATTER:- Duty to provide reasons

CASES REFERRED TO:- *Graham William Smith t/a Smiths Coaches* ([2014] UKUT 0120 (AAC)), *2007/459 KDL European¸2008/130 Lorna Eddie*, *2004/439 Surrey CC v Ripley*, *2005/466 Nijar Dairies*, *2006/147 Castleton Turf*, *2009/008 Severn Valley Transport*, *2009/030 Pilkingtons Accrington*, *Shaun Andrew Taylor (Operator) and Mark Taylor (Transport Manager)* ([2010] UKUT 397 (AAC)), *Eurofast (Europe) Ltd* ([2011] UKUT 46 (AAC)) *Re Poyser and Mills' Arbitration* ([1964] 2 Q.B. 467), *R(A) 1/72* and *R. (Asha Foundation) v Millennium Commission* ([2003] EWCA Civ 66)

REASONS FOR DECISION

The decision under appeal to the Upper Tribunal

1. This is an appeal from the decision of the Traffic Commissioner for the North East of England dated 16 December 2015.

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

   (i) The Appellant is the holder of a standard national goods vehicle operator's licence authorising the use of one motor vehicle and one trailer from an operating centre at an address in Cottingham. The licence was granted on 8 July 2013.

   (ii) By way of an application dated 21 January 2015 the Appellant sought to increase his authorisation to a total of three vehicles and two trailers operating from the same operating centre.

   (iii) The application attracted opposition from the local authority and representations from twelve individuals. One of the representations was withdrawn and the Traffic Commissioner ruled that two further representations were invalid.

   (iv) A public inquiry was held on 10 November 2015. The Appellant attended and was accompanied by his mother. The representors were present. The DVSA was represented by a Traffic Examiner. We address below aspects of the proceedings at the public inquiry.

   (v) Following the public inquiry further evidence was provided by the Appellant's mother in relation to planning issues. The Traffic Commissioner had permitted a period of seven days for the receipt of such evidence. In his decision the Traffic Commissioner addressed this evidence as follows:

   > 'Further evidence was provided from (the Appellant's mother) in relation to planning. She helpfully reminded me of the guidance in the Senior Traffic Commissioner's Statutory Guidance and Statutory Directions. Accordingly, given that the local authority did not attend the inquiry despite an invitation, I do not concern myself further with matters of planning law.'

   (vi) The Traffic Commissioner received additional evidence outside of the permitted seven day period and noted, in his decision, that he had not taken this evidence into account.

3. On 16 December 2015 the Traffic Commissioner made a decision to the following effect:

   > "The Goods Vehicles (Licensing of Operators) Act 1985 (as amended) ("the Act").
   >
   > Under Section 15 of the Act, the application is granted in modified form for one additional vehicle and one trailer.
   >
   > Under section 23 of the Act, the following conditions are attached to the licence:
   >
   > i. save as provided for in condition 2, movements of authorised vehicles in and out of the operating centre will take place

between 6 am and 6 pm Monday to Friday and 6 am and 2 pm Saturday only.

ii. any vehicle movements outside these times will be clearly recorded and will not exceed 12 occasions in any calendar year.

iii. Each authorised vehicle will make no more than three movements in and three movements out of the operating centre each day.

iv. All authorised vehicles will be fitted with tracking equipment and records to allow conditions 1, 2 and 3 to be monitored. Records will be provided to DVSA or the Office of the Traffic Commissioner on request.'

4. The Appellant was notified of the decision of 16 December 2015 by way of correspondence dated 17 December 2015.

The appeal to the Upper Tribunal

5. On 11 January 2016 an appeal to the Upper Tribunal was received in the office of the Upper Tribunal.

6. The Appellant set out the following Grounds of Appeal:

'A material procedural irregularity arose such to undermine the fairness of the proceedings, IN THAT:

(a) The Traffic Commissioner had taken irrelevant matters into account when reaching his decision;

(b) Having heard evidence upon matters which were irrelevant, it was incumbent upon the Traffic Commissioner to set out in detail the evidence that he considered to be irrelevant and the evidence which he considered to be relevant, stating the weight he attached to the latter. This exercise was not undertaken by the Traffic Commissioner.

(c) The Traffic Commissioner gave no reasons for imposing conditions on the licence.

No consideration was given by the Traffic Commissioner to the issue whether those persons who appeared to make representations under s.12 (4) of the 1995 Act were properly categorised as representatives within the scope of s.12 (4).

The Traffic Commissioner failed to properly analyse the written and oral evidence given by the Applicant Operator, such that no proper balancing exercise was conducted.

Whilst the Traffic commissioner recited the provisions reg. 15 of the Goods Vehicles (Licensing of Operators) Regulations 1985, he failed to have any proper regard to those provisions.

7. Before the oral hearing in the Upper Tribunal, Mr Clarke expanded on the grounds of appeal, as follows.

(i) Part of the process adopted by the Traffic Commissioner was procedurally unfair. Two matters arose under this ground.

The first was that during the course of the public inquiry the Traffic Commissioner engaged in an 'unfortunate exchange' with the Appellant regarding the application for two additional vehicles to be authorised on the licence. It was submitted that the Appellant, who was unrepresented, was '… at a considerable disadvantage when asked, in terms, whether he would be prepared to amend his application to, or accept instead, the authorisation of one additional vehicle.'

The second was that the Traffic Commissioner determined to restrict the number of vehicles using the Appellant's site by forcing the operator to resort to the use of sub-contracted hauliers. This had the effect of placing a '… restrictive and unreasonable financial burden on the Operator.'

(ii) The written decision of the Traffic Commissioner fell well below the standards for such decisions set out in the jurisprudence of the Transport Tribunal, the Upper Tribunal and the appellate courts and failed to adhere to the guidance which had been provided to Traffic Commissioners in the 'Senior Traffic Commissioner's Statutory Document 11 – Format of Decisions' ('Statutory Document 11').

It was submitted that there was a useful written decision template for Traffic Commissioners attached as Annex 1 to Statutory Document 11.' While decisions such as *2010/071 Eurofast (Europe) Ltd and others* emphasised that there was no requirement to follow a 'pre-set formula' for written decisions, the template at Annex 1 contained what might be considered to be 'essential ingredients.' Further the guidance in Statutory Document 11 summarised certain of the principles to be derived from decisions such as *English v Emery Reinbold & Strick Ltd and others* ([2002] EWCA Civ 605) and *2014/009 Hunterstrong Engineering Ltd*.

Reference was also made to several decisions of the Transport Tribunal, the Upper Tribunal and the appellate courts which emphasised the requirement for sufficient reasons, including *T/2010/052 and 053 SA Taylor and M Taylor*, *2007/104 Steven Lloyd t/a London Skips*, *2002/1 Bryan Haulage Ltd (No 1)* and *2000/57 Yorkshire Rider & 2000/62 First Bristol Buses*.

Applying those principles to the instant case, it was submitted that the Traffic Commissioner (i) had not identified the environmental issues properly raised (ii) had not indicated which of the environmental issues, if any, were made out and which were not (iii) had not identified any matters which weighed upon his decision to impose conditions and (iv) had not related any particular condition to a relevant environmental finding.

(iii) The Traffic Commissioner had taken into account irrelevant considerations including matters of planning law or consent. Further the Traffic Commissioner had set out a number of matters concerning to the Appellant which were of no relevance to the issues which were to be determined at the public inquiry but related, if anything, to the question of repute.

(iv) The Traffic Commissioner had not conducted the required balancing exercise. In the absence of an adequate fact-finding exercise it was almost impossible to determine whether or not the Traffic Commissioner had correctly applied the law.

(v) Two of the conditions set out in the decision – i and iii – amounted to an unfair and disproportionate restraint of the Appellant's trade.

(vi) The imposition of a condition which requires the fitting of non-statutory equipment, at expense is unlawful.

(vii) It is an offence to breach licence conditions and an operator faces criminal penalties in the Magistrates' court if it does so.

8. At the oral hearing of the appeal Mr Clarke added to the written grounds of appeal and expanded on the submissions made in his Skeleton Argument. At the oral hearing, the focus narrowed to the issue of the adequacy of the reasoning in the Traffic Commissioner's decision.

The reasoning of the Deputy Traffic Commissioner

9. The narrative which is attached to the formal notice is in seven sections with the following headings:

Background

The Public Inquiry on 10 November 2015

Post-Inquiry Correspondence

The Law

Consideration

Decision

Further Matters

10. Each of these sections has been prepared with care and attention and could not be said to be imprecise in any way. Nonetheless it is only the section which is headed 'Consideration' which could be said to allude to any concept of reasoning. The 'Consideration' section has four paragraphs, as follows:

'I had taken the opportunity to visit the site about one week before the public inquiry. Whilst not able to enter the site, I formed a similar conclusion to Traffic Examiner Freeman. However, whether or not a site is itself suitable depends greatly on the behaviour of the operator using it. It was abundantly clear from the public inquiry (the Appellant) had a very poor relationship with his neighbours on the opposite side of the road.

This relationship has clearly generated a great deal of representation against (the Appellant's) application and that has caused significant delay to his plans to grow his business. My assessment of him at the public inquiry was that he knows how to act with maturity and has the potential to become, if not a good neighbour, at least an acceptable one. It is not my role as a Traffic Commissioner to resolve disputes between neighbours. I confine myself to the law as set out above.

I have seen no evidence that (the Appellant) has operated more than one vehicle at any one time. The activity on the licence is indicative of an operator who has more vehicles in possession that authority to operate but who is specifying the vehicle in use at that time. I make no adverse finding in relation to this allegation.

(The Appellant) indicated his agreement to a number of conditions in relation to his application and ongoing operation. He also indicated that he would be content with authority for one extra vehicle and one trailer.'

The relevant jurisprudence

11. In *Graham William Smith t/a Smiths Coaches* ([2014] UKUT 0120 (AAC)), the Upper Tribunal noted that during the course of the public inquiry the Traffic Commissioner had an exchange with the Appellant's representative to the following effect:

'… either we will reach some form of agreement or I will do a full written decision and everything will remain on the cards.'

12. Following a short adjournment the Appellant's representative had stated:

'We would certainly not put you to the trouble of a full written decision.'

13. An oral decision was given by the Traffic Commissioner and, on the same date, a letter was sent from her office confirming the substance of the decision. No reasons for the decision were given in the letter.

14. At paragraphs 16 to 18 of its decision the Upper Tribunal stated the following in connection with the practice of the delivery of an *ex tempore* decision by a traffic Commissioner and the subsequent requirement to provide reasons for that decision:

'16. We accept that the interactive nature of a public inquiry, and the Traffic Commissioner's duty to engage with an operator in order to test the evidence and to encourage adherence to high standards and the regulatory regime, may mean that some cases can best be dealt with either informally or robustly, depending upon the circumstances. Many operators leave the public inquiry room chastened and resolving never to return, having been given the clearest of reasons for the Traffic Commissioner's concerns but also, at the end of the day, having been given a chance to improve or to offer undertakings, and keep trading. These cases do not always require a written decision. Indeed, we believe that Traffic Commissioners should be, and generally are, well able to exercise judgement and adapt their approach according to the gravity of the case and the likely outcomes.

17. However, where revocation, substantial reduction in vehicles authorised, or significant suspension are likely outcomes, or some form of disqualification is likely, the jurisprudence requires a demonstrably structured and judicious approach, which it can be very difficult to achieve without reflection and the discipline of preparing a written decision.

18. In any event, whether or not a Traffic Commissioner is adept at giving a thorough and accurate *ex tempore* judgment, sufficient reasons to satisfy the law and any appellate body should always be given, albeit in a manner proportionate to the circumstances.'

15. The Upper Tribunal then reviewed the relevant jurisprudence on assessment of evidence, consequent findings of fact, a properly conducted balancing exercise, proportionality and adequacy of reasoning, in paragraphs 19 to 22 of its decision, as follows:

19. In <u>2002/1 Bryan Haulage Ltd (No1)</u> the tribunal stated:

" In order to take action under s.26 or to make a finding of loss of good repute under s.27 or to make an order of disqualification of directors under s.28 of the Act, the Traffic Commissioner was obliged to make an assessment of the nature, number and gravity of the breaches of regulations revealed by Mr Prime's investigations and whether there was any evidence of instruction, encouragement or acquiescence on the part of the Appellant. That assessment and the Traffic Commissioner's findings of fact based upon that assessment should be clearly set out in his decision. They are not. In relation to the Appellant's systems and the steps taken by the Appellant to prevent breaches of the regulations, the Traffic Commissioner was further obliged to make an assessment of the evidence and make appropriate findings of fact, indicating the weight, if any, to be given to that evidence. It is not apparent from the Traffic Commissioner's decision that such an assessment was made or that he made the appropriate findings of fact. It is a further requirement that the Traffic Commissioner consider the weight, if any, to be attached to the Appellant's general record, performance, reputation and enforcement history. Again, such an assessment is not evident from the substance of the decision. In the absence of any adequate reasoning, it is impossible to assess what matters were taken into account by the Traffic Commissioner, the weight he placed upon those matters and whether he made the appropriate balancing exercise when considering the extent to which he should exercise his enforcement powers. In the circumstances we are satisfied that the appeal must succeed."

20. In <u>2007/104 Steven Lloyd t/a London Skips</u> the tribunal re-affirmed that there are three main ingredients in a properly conducted balancing exercise. First, all the relevant factors should be identified. Second, each relevant factor should be assessed. And third, the analysis must indicate the weight or significance that has been attached to the relevant factors and reasons for the various judgments made should be given. Thus, if one factor or group of factors outweighs another or others, some explanation should be disclosed in order to provide a rational justification for the conclusion reached. The tribunal stressed the need for a Traffic Commissioner to make it clear that he had in mind all the factors, both favourable and unfavourable, which were capable of influencing the decision in question.

21. In <u>Shaun Andrew Taylor and Mark Taylor [2010] UKUT 397 (AAC)</u> the tribunal said:

   'Not only is the operator entitled to see what the Traffic Commissioner had in mind when reaching a decision, it is also important for the Upper Tribunal to be able to do so, if the decision is appealed. There is, clearly, no need to set out those trivial factors that could have no influence on the decision either on their own or in combination with other matters. And, as the tribunal has repeatedly recognised, a Traffic Commissioner cannot be expected to balance one factor against another with the precision of a set of scales. But the Traffic Commissioner should set out the basis on which the decision has been reached with sufficient clarity and detail to enable others to see the rationale and justification for the decision. In short, reasons have to be adequate and intelligible.'

16. Applying those principles to the circumstances of the case which was before them, the Upper Tribunal concluded in paragraphs 26 and 27:

’26. There are two principal reasons why the right to adequate and intelligible reasons in a case like this is non-negotiable and cannot be dispensed with, even by apparent agreement. First, an appellant is entitled as a matter of law to know why an adverse decision has been reached, and the decision-maker is obliged to demonstrate that they have conducted the appropriate balancing exercise and reached a decision based only on relevant matters, and that they have asked themselves the correct legally required questions. The nature of a public inquiry makes it unfair to expect an operator or transport manager to make a decision that potentially deprives them of the right to adequate and intelligible reasons – especially where, as here, there is an impression that the Traffic Commissioner was suggesting that there would be no disqualification as an operator, and a reasonably swift return to trading, if a decision without adequate and intelligible reasons was accepted there and then. This impression of inappropriate negotiation is reinforced by the Traffic Commissioner’s request that Mr Carless “have a discussion” with Mr Smith so that: “either we will reach some form of agreement, or I will do a full written decision and everything will remain on the cards”.

27. Second, even if - in the heat of the moment - an appellant foolishly agrees to wave the absolute right to sufficiency of reasons, the Upper Tribunal most certainly has not entered into such an agreement and is also entitled to a clear demonstration as to the Traffic Commissioner’s approach and thinking. **Without an adequate and intelligible statement of reasons, whether delivered in writing or *ex tempore*, the tribunal cannot discharge its duty.**’

18. The emphasis in this final sentence is our own. The principles set out by the Upper Tribunal in *Smiths Coaches* are reflective of other decisions of the former Transport Tribunal and the present Upper Tribunal. In *2007/459 KDL European*, the Transport Tribunal was referred to the passage from *2002/1 Bryan Haulage Ltd (No1)*, cited in *Smiths Coaches*. In addition, the Tribunal was referred to *2000/57 Yorkshire Rider Ltd & 2002/62 First Bristol Buses*. At paragraph 30, the Tribunal had stated:

> ‘We have to say that the Traffic Commissioner does not give any analysis of his reasoning at all. He sets out what has occurred at the public inquiry and says that he has taken everything into account. But he then goes directly into his conclusions. What weight did he attach to the monitors’ evidence? To what extent did he accept their conclusions? What did he make of Mr Buchanan’s warnings about the unreliability of the sampling? What about traffic conditions in Bristol itself? There was overwhelming evidence to the effect that traffic congestion in the city is particularly bad: did he accept that it was a special case? We recognise the difficulties that the Traffic Commissioner faced but think that some analysis was necessary in the light of the evidence which was presented to him. In reality, all these matters were left in the air. We think that the details mentioned needed to be considered by him and that if they had been they would have driven him inexorably to the conclusion that a case for finding a failure to operate a local service was unsustainable, and outside the ambit of reasonableness. The effect of this is that the finding itself, the

attachment of the condition and the determination under s.111 of the Act must all be set aside.'

19. In paragraph 9 of *2008/130 Lorna Eddie*, the Tribunal had stated:

> '9. It is usual for operators to appeal the decisions of Traffic Commissioners either wholly or partly upon the basis that their reasons were inadequate with reliance being placed upon the Transport Tribunal's decision 2002/1 Bryan Haulage (No.1). The importance of that decision should not be overstated. Traffic Commissioner's do not need to rehearse in their decisions, the entirety of the evidence that has been put before them, neither do they have to repeat and determine every point that has been raised, only those which go the principal issues in the case. An appeal based on inadequacy of reasoning will not succeed unless it can be shown that the operator has been genuinely and substantially prejudiced by the failure to provide an adequately reasoned decision.'

20. In paragraph 7 of *2004/439 Surrey CC v Ripley*, the Tribunal had concluded:

> '7. Dealing first with the inadequacy of the reasons given in the Traffic Commissioner's decision concerning the safety and environmental issues arising out of the use of the Access by two large vehicles, we are satisfied that the SCC's case is made out. Whilst we are sure that the Traffic Commissioner had those issues at the forefront of his mind when he imposed the conditions and sought the undertaking that he did (which were willingly accepted by the Respondents'), his reasoning is not set out in his decision. **As a matter of natural justice, all parties need to know where they stand in relation to the case they sought to make out.** Unfortunately, the Traffic Commissioner's decision does not place the objecting parties in that position. As a result, his decision cannot stand.'

21. Once again, the emphasis in the quotation is our own. Similar statements were made in paragraph 6 of *2005/466 Nijar Dairies* and paragraph 4 of *2006/147 Castleton Turf*. In *2009/008 Severn Valley Transport*, the Tribunal noted, in paragraph 5:

> '5. The one criticism we have of the decision is that it was given at the end of the public inquiry without a written decision being produced subsequently. This Tribunal has previously stated that when an operator's licence is to be revoked, a written decision should accompany or follow any oral determination. It is only after the full documentation has been thoroughly read, that there can be any understanding of why the Traffic Commissioner reached his decision in this case. Decisions should contain sufficient detail to allow a person with experience of the haulage industry to understand the basis upon which the decision was arrived at.'

22. In *2009/030 Pilkingtons Accrington*, the only record of the decision was in an internal minute. The Tribunal concluded, in paragraph 5:

> '5. The Traffic Commissioner clearly felt that the Minute dated 16 January 2008, (see paragraph 2(iii) above), ought not to have been disclosed to Mr. Cunningham. In the absence of any other document from which the reason (or lack of reason) for the refusal of the application to cancel the services at short notice can be determined we disagree with that view. In our view the Appellants were entitled to know the basis on which the application was refused and they were entitled to

know whether or not the correct test had been applied. In the absence of a reasoned decision or a fully reasoned letter giving the grounds for refusal, (neither of which was provided), it seems to us that disclosure of the underlying documentation was essential. How else could the correctness of the decision be challenged? How else could the Tribunal give reasons for saying either that the decision was wrong or that it was correct?'

23. In *Shaun Andrew Taylor (Operator) and Mark Taylor (Transport Manager)* ([2010] UKUT 397 (AAC)), the Upper Tribunal reviewed much of the jurisprudence noted above and concluded, in paragraph 10:

> '10. Not only is the operator entitled to see what the Traffic Commissioner had in mind when reaching a decision, it is also important for the Upper Tribunal to be able to do so, if the decision is appealed. There is, clearly, no need to set out those trivial factors that could have no influence on the decision either on their own or in combination with other matters. And, as the tribunal has repeatedly recognised, a Traffic Commissioner cannot be expected to balance one factor against another with the precision of a set of scales. But the Traffic Commissioner should set out the basis on which the decision has been reached with sufficient clarity and detail to enable others to see the rationale and justification for the decision. In short, reasons have to be adequate and intelligible.'

24. In *Eurofast (Europe) Ltd* ([2011] UKUT 46 (AAC)) the Upper Tribunal noted, in paragraph 4:

> 'Traffic Commissioners already appear to feel constrained to include standard paragraphs and phrases in their decisions despite the principle that an appellate tribunal will generally assume that a first-instance decision-maker correctly understands the legal framework unless something was done or said that indicates to the contrary. In our view, the routine recitation of standard phrases adds little to the substance of a decision – what matters most is what the Traffic Commissioner thinks, and why he thinks it.'

25. We would also add the following derived from a more general discussion in the appellate courts on the question of adequacy of reasoning. In *Re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478, Megaw J. said:

> "Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons that will not only be intelligible, but which deal with the substantial points that have been raised."

26. In *R(A) 1/72*, the Chief Commissioner, considering an appeal from a delegated medical practitioner acting on behalf of the Attendance Allowance Board, said:

> "The obligation to give reasons for the decision in [a case involving a conflict of evidence] imports a requirement to do more than only to state the conclusion, and for the determining authority to state that on the evidence the authority is not satisfied that the statutory conditions are met, does no more than this. It affords no guide to the selective process by which the evidence has been accepted, rejected, weighed or considered, or the reasons for any of these things. It is not, of course, obligatory thus to deal with every piece of evidence or to over elaborate, but in an administrative quasi-judicial decision the minimum requirement must at least be that the claimant, looking at the

decision should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority. For the purpose of the regulation which requires the reasons for the review decision to be set out, a decision based, and only based, on a conclusion that the total effect of the evidence fails to satisfy, without reasons given for reaching that conclusion, will in many cases be no adequate decision at all."

27. In *R. (Asha Foundation) v Millennium Commission* [2003] EWCA Civ 66 (*The Times*, January 24, 2003), the Court of Appeal considered the approach Sedley J. had taken in *R. v Higher Education Funding Council Ex p. Institute of Dental Surgery* [1994] 1 W.L.R. 242 to the question of whether there was a duty to give any reasons at all and held that, where there is a duty to give reasons, the same approach should be taken to the question whether reasons were adequate. Sedley J.'s approach required the balancing of a number of considerations, which might vary from case to case. He said:

> "The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached or alternatively alert the recipient to a justiciable flaw in the process. On the other side of the argument, it may place an undue burden on decision makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge."

Our analysis

28. As was noted above, when the narrative of the Traffic Commissioner's decision is looked at, it is only the section which is headed 'Consideration' which could be said to allude to any concept of reasoning. It is our view that what is set out in this section fails to adequately and plainly explicate why the Traffic Commissioner has arrived at the conclusions which he did in his formal decision notice.

29. The first substantive paragraph in the 'Consideration' section does no more than explain that the Traffic Commissioner visited the relevant site, cogitate that whether a site is suitable depends on the behaviour of the operator and conclude that the Appellant had a 'very poor' relationship with his opposite neighbours.

30. The second substantive paragraph continues that the unfortunate relationship had generated representation against the application which had caused delay to his plans to expand his business. The Traffic Commissioner also sets out his assessment of the Appellant's character noting that he had the potential to become an acceptable neighbour if not a good one. The Traffic Commissioner also noted that it was not his role to '… resolve disputes between neighbours.'

31. In the third substantive paragraph the Traffic Commissioner concluded that he had seen no evidence that the Appellant had operated more than one vehicle at any one time and that he could make no adverse finding against the Appellant concerning vehicle specification and use.

32. In an earlier section in his decision, the Traffic Commissioner had accurately summarised the legislative provisions relevant to the issues which he was required to determine. In paragraphs 17 and 18 he stated:

‘Section 23 of the Goods Vehicle (Licensing of Operators) Act 1985 (‘the Act’) gives me the power for preventing or minimising any adverse effects on environmental conditions arising from the use of a place as an operating centre. These conditions may relate to the number, type and size of motor vehicles or trailers which may at any one time be at the operating centre, the parking arrangements, and the hours of operation of any prescribed description which may be carried on there.

Regulation 15 of the Regulations sets out the considerations prescribed as relevant to this determination. These mean that I should look at the nature and use of other land in the vicinity of the operating centre and any effect the operating centre might have on it. I need to look at any information relating to the site or any land in the vicinity of the site. I must look at the number and size of vehicles kept there and the times they are to be used as well as any equipment which will be installed for the purpose of the operating centre. I also need to look at the means and frequency of ingress and egress from the land proposed to be used.’

33. The conclusions which the Traffic Commissioner reached in the first three paragraphs of the section of his decision headed ‘Consideration’ bear no relation to the legislative task specified by him in paragraphs 17 and 18 of his decision. We agree with Mr Clarke that the remarks and observations are more redolent of an analysis of the issue of repute than the more discrete issues relevant to an application for an increase in vehicle authorisation at an operating centre.

34. In paragraph 19 the Traffic Commissioner reminded himself that he was required to conduct a balancing exercise. There is nothing in the narrative of the Traffic Commissioner’s decision to indicate that any such exercise was conducted or, if it was, the outcome of that exercise.

35. In the final paragraph of the section of the decision headed ‘Consideration’ the Traffic Commissioner has stated that the appellant had agreed to a ‘… number of conditions in relation to his application and ongoing operation.’ The Traffic Commissioner also noted that the Appellant had indicated that he would be content with authority for one extra vehicle and one trailer. In his written and oral submissions, Mr Clarke has challenged the basis on which any agreement to the imposition of conditions and signifying of satisfaction of a limiting of additional authority to one extra vehicle and trailer were arrived at, particularly as the Appellant was not represented at the public inquiry. More specifically, however, the Traffic Commissioner has given no indication in his written decision as to why he thought that the conditions and limitation in authorisation were reasonable despite his comments, at paragraph 11 above, to the effect that he agreed with the view of traffic Commissioner freeman that the operating centre was suitable subject to planning consent being granted.. It appears to be the case that the Traffic Commissioner has assumed agreement with no further requirement to specify substantive reasons why the imposed conditions and limitation in authorisation was appropriate.

36. We are not satisfied, therefore, that the written reasons for the decision of Traffic Commissioner do not satisfy the tests for the duty to give reasons and adequacy of reasons set out in the authoritative jurisprudence set out above.

37. At the oral hearing of the appeal, we invited submissions from Mr Clarke on the appropriate disposal of the appeal if we were to conclude that the appeal should be allowed. Mr Clarke invited us to substitute our own decision for that of the Traffic Commissioner. His principal supporting argument was that if the matter was remitted to another Traffic Commissioner, it would be likely to be the subject of a further public inquiry with attendant expense and delay in the overall determination of the application. We are conscious of those arguments but note that the decision of the Traffic Commissioner with additional authorisation for another vehicle and trailer remains extant. More significantly, however, we have noted that there are others, objectors and representors, who have an interest in this case and who did not appear nor were represented before the Upper Tribunal. Mr Clarke has conceded that even though those interested parties would have been notified of the Upper Tribunal proceedings they might not have taken part because they did not realise that the proceedings did not involve a re-hearing of the relevant issues. For this reason, in our judgment, the only sensible course is to remit the application for a complete re-hearing. That hearing should take place before a different Traffic Commissioner who will be in a better position to stand back and to take a fresh view of the case.

38. We are conscious that we have not given consideration to the submissions which were made by Mr Clarke on other grounds of appeal including, in particular, the nature of the conditions imposed concerning the fitting of tracking equipment in connection with monitoring of vehicle movements. We are of the view that these are matters which may be raised by the Appellant at the further public inquiry.

Disposal

39. The appeal is allowed. The case is remitted for a fresh public inquiry before a different Traffic Commissioner.

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