Appeal No. T/2015/39

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE SCOTTISH TRAFFIC AREA (Joan Aitken)

Dated: 16th June 2015

Before:

Mr E. Mitchell	**Judge of the Upper Tribunal**
Mr A. Guest	**Member of the Upper Tribunal**
Mr S. James	**Member of the Upper Tribunal**

Appellants: **Firstline International Ltd. & Mr William Lambie**
Respondent: **Secretary of State for Transport**

Attendances:

Mr N Kelly, solicitor, for the Appellants
Mr J Komorowski, of counsel, for the Secretary of State

Heard at: George House, 126 George Street, Edinburgh
Date of hearing: 25th May 2016
Date of decision: 20th June 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal is dismissed and:

1. Firstline International Ltd's standard international licence, granted under the Road Transport (Licensing of Operators) Act 1995 ("1995 Act") is revoked under section 27 of the 1995 Act with effect from midnight on the 42nd day after this decision is issued.
2. Under section 28 of the 1995 Act, we order that Firstline International Ltd is disqualified for two years from holding or obtaining an operator's licence under the 1995 Act.

3. Under section 28 of the 1995 Act, we order that Mr William Lambie is disqualified for two years from holding or obtaining an operator's licence under the 1995 Act.
4. Under Schedule 3(16) to the 1995 Act, we order that Mr William Lambie is disqualified from acting as a transport manager for two years.
5. Those orders take effect from midnight on the 42nd day after this decision is issued.

SUBJECT MATTER:-

standard road transport licence; good repute of operator and transport manager; disqualification orders; European driving licences.

CASES REFERRED TO:-

Crompton (t/a David Crompton Haulage) v. Department of Transport [2003] EWCA Civ 64, [2003] RTR 34;
Bryan Haulage (No. 2) (2002/217);
Priority Freight (2009/225);
Márton Urbán vs Vám-és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága (C-210/10);
Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695, [2011] RTR 13;
Subesh & ors v. Secretary of State for the Home Department [2004] EWCA Civ 56, [2004] INLR 417;
Assicurzioni Generali SpA v. Arab Insurance Group [2002] EWCA Civ 1642, [2003] 1 WLR 577;
Thomas Muir (Haulage) Ltd. v Secretary of State (1998 SLT 666);
Arnold Transport & Sons v D.O.E.N.I. (NT/2013/82);
Dundee Plant Company decision (T/2013/47);
Reynolds v Secretary of State for Transport (T/2015/46) [2016] UKUT 0159

REASONS FOR DECISION

1. Did the Traffic Commissioner for Scotland wrongly revoke the licence of a road transport operator whose transport manager, who was also its director, permitted other drivers to use a driver's card issued to him under the tachograph legislation? We decide that the Commissioner was not plainly wrong to revoke the operator's licence and dismiss the appeal.

2. Another feature of this case concerned whether a driver held a European (Bulgarian) large goods vehicle licence. We take the opportunity to give the Traffic Commissioners guidance on dealing with cases where an operator claims a driver is authorised to drive on the roads of Great Britain by virtue of a European driving licence.

Background

3. The company Firstline International Ltd. ("the operator") held a standard international licence, effective from 19th September 2008, granted under the Road Transport (Licensing of Operators) Act 1995 ("1995 Act"). The operator's transport manager was Mr William Lambie (also a director of the operator). The vehicles specified on the operator's licence had a plated weight of at least 40,000 kg and were articulated vehicles.

4. The Traffic Commissioner for the Scotland Traffic Area ("the Traffic Commissioner") convened a public inquiry. The inquiry call-up papers stated this was in response to DVSA reports that:

> "the company failed to provide records for vehicle SF05BYY, that 3256 km. are unaccounted for [between July 2013 to December 2013] for this vehicle;
>
> Weekly and fortnightly rest offences have been identified in the records; and
>
> On 36 occasions Mr Lambie's digital driver's tachograph card had been used, with his permission, by another driver creating false records."

5. The 36 occasions on which it was alleged Mr Lambie's driver's card had been used by another driver were between 16th July 2013 and 21st December 2013.

6. The public inquiry was held on 18th June 2015 before the Traffic Commissioner. The operator was represented by a solicitor Mr Neil Kelly. A Driver and Vehicle Standards Agency (DVSA) traffic examiner, Mr A Leahy, also attended. Mr Lambie gave oral evidence, as did three drivers including a Mr Craig McDonald (whose involvement in the operator's business was a matter of some significance).

7. Following the inquiry, the Traffic Commissioner produced a detailed set of reasons for her decision, extending over 19 pages. Briefly, the Commissioner made the following findings:

(a) she was not impressed by the operator's delay in revealing the identity of the driver who had apparently used Mr Lambie's driver card. Having previously been

referred to by the nickname “smash heid” or “that boy smash”, this was in fact Mr Craig McDonald;

(b) Mr Lambie had a severe visual impairment yet he did not disclose this to the DVLA in his application for a driver’s card. This was done deceitfully, in order to obtain a driver’s card that Mr Lambie knew he would not use given his visual impairment;

(c) Mr Lambie allowed Mr McDonald to use his driver’s card without knowing whether or not he “had LGV [Large Goods Vehicle] driving licence entitlement”;

(d) given Mr Lambie’s initial statement to DVSA that “drivers” had used his card, no certain finding could be made as to who had in fact used Mr Lambie’s driver’s card. There remained a “cloud of suspicion” on this point;

(e) Mr Lambie had only partially complied with DVSA requests to disclose records;

(f) it was telling that the operator’s company secretary, responsible for much of the operator’s administration, did not attend the public inquiry. Had she attended, “she would have been able to give critical evidence about how records were kept”;

(g) Mr Lambie obfuscated when giving oral evidence about the operator’s compliance with tachograph legislation. The Traffic Commissioner was unable to find that “Mr Lambie made proper arrangements to ensure that the licence undertakings in respect of drivers’ hours and tachographs had been met”;

(h) certain positive findings were made to the operator’s credit including: there was no history of overloading; “safety inspection records seemed extremely clean as were the driver defect reports”, and Mr Lambie had made valiant efforts to overcome the disability arising from his sight loss.

8. Having correctly directed herself to the relevant authorities, the Traffic Commissioner considered what regulatory response was appropriate. She relied in particular on the following matters:

(a) “disrespect has been shown to the licensing regime”;

(b) the Traffic Commissioner was not satisfied she had been told the truth about which drivers used Mr Lambie’s driver’s card;

(c) were she not to revoke the operator’s licence, “I would be undermining the purposes of the licensing regime which are road safety and fair competition”.

9. The Traffic Commissioner concluded that the operator and its transport manager had lost their good repute, which the Commissioner found was an appropriate and proportionate regulatory response. Accordingly, the 1995 Act required the Commissioner to revoke the operator's licence. She revoked the licence with effect from 1st August 2015.

10. The Traffic Commissioner also found that Mr Lambie had lost his "professional competence" as transport manager. She also made disqualification orders in respect of the operator and Mr Lambie under section 28 of the 1995 Act. The operator's order prevented it from holding or obtaining an operator's licence for two years from 1st August 2015. Mr Lambie's order prevented him from holding or obtaining an operator's licence in his own name, again for two years from 1st August 2015.

11. Finally, the Commissioner made an order under Schedule 3(16) to the 1995 Act which disqualified Mr Lambie from acting as a transport manager, for two years from 1 August 2015.

12. Before the Traffic Commissioner's decisions came into effect, on 8th July 2015 she granted an application for a stay of her decisions pending determination of the operator's and Mr Lambie's appeals to the Upper Tribunal.

Proceedings before the Upper Tribunal

13. The written grounds of appeal to the Upper Tribunal were drafted by Mr Lambie himself. They were:

(a) the Traffic Commissioner gave insufficient credit for his 30 year history of compliant transport management;

(b) "I have been registered blind for over ten years making this job extremely difficult at times. I have adapted by employing people around me whom I can trust";

(c) the Traffic Commissioner's decision was unduly harsh. Other regulatory sanctions could have been imposed which were "more acceptable", for example "if a new CPC holder had to be introduced into the company I could have continued in a lesser role";

(d) the decision had a severe impact on the operator's employees and "some of them like myself have disabilities and are over the age of 55". They would find it difficult to obtain alternative employment;

(e) Mr Lambie had a "reasonable answer" to the claims against him and "this will be submitted on the day of the appeal".

14. There are two appellants, Firstline International Ltd. and Mr William Lambie.

15. Following a hearing on 20th November 2016, on 7th January 2016 the Upper Tribunal allowed the appeals. The Secretary of State for Transport applied to the Upper Tribunal for permission to appeal to the Court of Session against its decision. The Upper Tribunal directed that the Secretary of State be made a respondent to the appeal proceedings. Under the Tribunal Procedure (Upper Tribunal) Rules 2008, the default position on traffic commissioner appeals is that there is no respondent, only an appellant/s (see the definition of "respondent" in rule 1(3)). If another person wishes to be added as a respondent to the appeal, a direction of the Upper Tribunal is required under rule 9.

16. In response to the Secretary of State's application, the Upper Tribunal reviewed its decision under rule 45(1) of the 2008 Rules and decided to set aside its decision on the ground that "when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision".

17. The Upper Tribunal directed a re-hearing of the appeal before a differently-constituted panel of the Upper Tribunal. Since the Upper Tribunal's decision has been set aside, it is of no direct ongoing relevance. However, its decision has influenced the submissions made to ourselves. For that reason, we briefly describe why the Upper Tribunal set aside its decision.

18. In the set aside decision, the presiding Upper Tribunal Judge stated that the Tribunal had overlooked sections 13A and 27(1) of the Goods Vehicles (Licensing of Operators) Act 1995. The Upper Tribunal confirmed the Traffic Commissioner's finding that the operator had lost its good repute. But it also decided that the Traffic Commissioner had erred in deciding that revocation of the operator's licence was a proportionate regulatory response. Section 27(1), however, requires a Traffic Commissioner to revoke an operator's licence if s/he finds that an operator has lost its good repute.

19. Mr Kelly for the Appellants supplied a skeleton argument for the re-hearing. At the re-hearing, he confirmed that his client now relied exclusively on the grounds in that argument as amplified at the hearing.

Legal Framework

The regulatory legislation

20. Section 2(1) of the 1995 Act prohibits any person, which includes a limited company (see the definition of "person" in Schedule 1 to the Interpretation Act 1978),

from using a goods vehicle on a road in Great Britain for the carriage of goods for hire or reward, or in connection with any trade or business, without an operator's licence issued under the Act.

21. Section 27 of the 1995 Act *requires* a traffic commissioner to direct revocation of a standard operator's licence in certain cases, including where it appears to the commissioner that "the licence-holder no longer satisfies the requirements of section 13A(2)". These are the requirements to be met on an initial application for a standard licence and include that an applicant must be of "good repute".

22. Section 27 also requires a traffic commissioner to direct revocation of a licence if the operator's designated traffic manager no longer satisfies the requirements of section 13A(3). Those requirements include that the manager "is of good repute (as determined in accordance with paragraphs 1 to 5 of Schedule 3)".

23. Within Schedule 3 to the 1995 Act:

(a) paragraph 1(1) provides that "in determining whether an individual is of good repute, a traffic commissioner may have regard to any matter but shall, in particular, have regard to (a) any relevant convictions of the individual or of his servants or agents; and (b) any other information in his possession which appears to him to relate to the individual's fitness to hold a licence";

(b) paragraph 1(2) provides that "in determining whether a company is of good repute, a traffic commissioner shall have regard to all the material evidence including, in particular (a) any relevant convictions of the company or of any of its officers, servants or agents; and (b) any other information in his possession as to the previous conduct of…(ii) any of its directors, in whatever capacity, if that conduct appears to him to relate to the company's fitness to hold a licence";

(c) paragraph 8(1) provides that "the requirement of professional competence falls to be satisfied by an individual". Where a company is required to establish professional competence, it does so by having a transport manager who is "of good repute and professionally competent" (paragraph 8(2));

(d) paragraph 13(1) provides that an individual shall be regarded as professionally competent "if, and only if" s/he possesses a qualification of a certain type (e.g. a certificate of competence recognised by the Secretary of State).

24. In *Reynolds v Secretary of State for Transport* (T/2015/46) [2016] UKUT 0159 (AAC) the Upper Tribunal held that a finding of unfitness cannot support a finding that an individual has lost professional competence as a transport manager. Professional competence is only lost if an individual does not meet the requirement to possess a qualification of a particular type.

25. Schedule 3(15) to the 1995 Act prevents a traffic commissioner from finding that a transport manager is not of good repute or is not professionally competent unless certain requirements, for example as to notification, have first been complied with. Before making such a finding, a traffic commissioner must also consider whether it would be a "disproportionate response" (Schedule 3(16)(1)).

26. The 1995 Act does not, in terms, require road transport operator licensing decisions to be proportionate regulatory responses. However, the 1995 Act scheme is the legal mechanism by which the United Kingdom Government seeks to ensure that, in relation to Great Britain, domestic law is compatible with European Union rules about regulation of the road haulage industry. The principal European instrument is Regulation (EC) No. 1071/2009 which prohibits an operator's access to the road haulage industry unless the operator is of "good repute". Article 6(2)(a) of the Regulation provides as follows:

> "The [regulatory] procedure shall determine whether, due to specific circumstances, the loss of good repute would constitute a disproportionate response in the individual case. Any such finding shall be duly reasoned and justified.
>
> If the competent authority finds that the loss of good repute would constitute a disproportionate response, it may decide that good repute is unaffected."

27. And so the Regulation adopts the device of forcing a proportionality analysis into the assessment of good repute. There is, arguably, an element of artificiality here because, in everyday terms, good repute is a free-standing concept. But that is how the Regulation chose to integrate a proportionality requirement into the regulatory scheme.

28. The Court of Appeal in *Crompton (t/a David Crompton Haulage) v. Department of Transport* [2003] EWCA Civ 64, [2003] RTR 34 held:

> "if loss of repute is found the inevitable sanction is revocation…There must therefore be a relationship of proportionality between the finding and the sanction, and that relationship has a direct bearing on the approach to be adopted in any set of circumstances to the question of whether or not the individual has lost his repute."

29. In response to *Crompton* the Transport Tribunal (the predecessor to the Upper Tribunal) revisited its approach to determinations of good repute. In *Bryan Haulage (No. 2*) (2002/217), it held:

> "[T]he question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the

> question becomes 'is the conduct such that the operator ought to be put out of business?' On appeal, the Tribunal must consider not only the details of cases but also the overall result."

30. And in *Priority Freight* (2009/225) the Transport Tribunal said:

> "In our view before answering the 'Bryan Haulage question' it will often be helpful to pose a preliminary question, namely: how likely is it that this operator will, in future, operate in compliance with the operator's licensing regime? If the evidence demonstrates that it is unlikely then that will, of course, tend to support a conclusion that the operator ought to be put out of business. If the evidence demonstrates that the operator is very likely to be compliant in the future then that conclusion may indicate that it is not a case where the operator ought to be put out of business."

31. *Bryan Haluage* and *Priority Freight* (together with the similar decision in *Bradley Fold*, upheld on appeal to the Court of Appeal: [2010] EWCA Civ 695) avoid the disproportionate regulatory responses prohibited by European law. Within the legislative strait-jacket of the 1995 Act, this is done by finding that an operator has not lost its good repute if revocation would shut down an operator that ought not to be put out of business. In considering revocation, all relevant circumstances must be taken into account and it should not be assumed, in a reflex fashion, that an operator is responsible for its drivers' failures (Court of Session in *Thomas Muir (Haulage) Ltd. v Secretary of State* (1998 SLT 666)).

32. It is equally acceptable, however, for a traffic commissioner expressly to consider whether, in the light of his/her adverse regulatory findings, revocation is a proportionate response. In fact, there is merit in considering proportionality as a matter of course because it assists in identifying the appropriate regulatory response where there are regulatory shortcomings but these do not justify putting an operator out of business. This is also in accordance with European law. In the road transport case of *Márton Urbán vs Vám-és Pénzügyőrség Észak-alföldi Regionális Parancsnoksága* (C-210/10) the Court of Justice of the European Union held:

> "24…the measures imposing penalties permitted under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 86)."

33. Paragraph 16(2) of Schedule 3 *requires* a traffic commissioner, if s/he determines a person is no longer of good repute or professionally competent, also to "be

disqualified (either indefinitely or for such period as the commissioner thinks fit) from acting as a transport manager".

34. Where a traffic commissioner has directed revocation of an operator's licence under section 26 or 27, section 28(1) gives the commissioner power also to order that the holder of the licence be disqualified "from holding or obtaining an operator's licence". Section 28(4) also gives a traffic commissioner power to make a disqualification order in respect of a director of a company whose licence has been revoked. The order prevents the director from holding or obtaining an operator's licence in his/her own name during the currency of the order.

Jurisdiction of the Upper Tribunal

35. Section 37(2) of the 1995 Act confers on the holder of an operator's licence a right of appeal to the Upper Tribunal against a revocation direction under section 27. Section 37(4) confers a right of appeal to the Upper Tribunal against a disqualification order made under section 28.

36. Paragraph 16(4) of Schedule 3 to the 1995 Act confers on a transport manager a right of appeal to the Upper Tribunal against an order disqualifying the person from acting as a transport manager.

37. Paragraph 14(1) of Schedule 4 to the Transport Act 1985 provides:

> "…the Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport".

38. So far as matters of fact are concerned, the Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, [2011] RTR 13. The Court applied *Subesh & ors v. Secretary of State for the Home Department* [2004] EWCA Civ 56, [2004] INLR 417 where Woolf LJ held:

> "44…The first instance decision is taken to be correct until the contrary is shown…An appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category."

39. Part of the rationale for this decision was that the "material before the [Tribunal] will consist only of the documents placed before the Deputy Commissioner and the transcript of the evidence; the Tribunal will not have the advantage that the Deputy Commissioner had of seeing the parties and the witnesses, hearing them give evidence and assessing their credibility both from the words spoken but also the manner in which the evidence was given".

40. It should not be overlooked that the Court of Appeal also drew attention to the appellate distinction between 'primary facts' and other findings of fact. The Court referred to Clarke LJ in *Assicurzioni Generali SpA v. Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577:

> "16. Some conclusions of fact are…not conclusions of primary fact…They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

41. The Upper Tribunal's powers of disposal on allowing an appeal are found in paragraph 17(2) of Schedule 4. The Tribunal may make "such order as it thinks fit" or remit the matter for "rehearing and determination".

Drivers' cards

42. The tachograph legislation provides for the issue of drivers' cards that are unique to a particular driver. Regulation 3(1) of the Passenger and Goods Vehicles (Recording Equipment) (Tachograph Card) Regulations 2006 provides that a person commits an offence if the person "uses or attempts to use a driver card on which he is not identified as the holder". Regulation 3(2) provides that a person commits an offence if s/he permits any use or possession of a driver card in contravention of regulation 3(1).

Intra-European recognition of driving licences

43. The relevant European instrument is Directive 2003/59 of the European Parliament and of the Council of 15 July 2003 "on the initial qualification and periodic training of drivers of certain road vehicles for the carriage of goods or passengers". The Directive requires driving licences issued by one Member State to be recognised by other Member States.

44. Article 53 of the Treaty for Accession of Bulgaria and Romania to the EU requires those States to "put into effect the measures necessary for them to comply, from the

date of accession, with the provisions of…directives". The annex to the Treaty sets out a range of modifications, exceptions and transitional provisions to the general application to Romania and Bulgaria of EU law. Although EU law concerning regulation of road haulage operators is subject to certain transitional provisions, no provision is made in the Treaty of Accession to alter the application of Directive 2003/59/EC.

45. Directive 2003/59 divides vehicles into categories. There are four categories of Large Goods Vehicle (LGV): C1 (replacing the old HGV Class 3); C1+E; C (replacing HGV Class 2); and C+E (replacing HGV Class 1).

46. The Directive provides that, from the age of 18, a person may drive a C+E lorry if they hold an initial CPC (Certificate of Professional Competence) awarded on the basis of (a) course attendance and a test, or (b) on the basis of (more detailed) tests (Article 6 of the Directive). The Member State can decide whether to adopt option (a) or (b). Under option (a), course attendance must be for at least 280 hours and include at least 20 hours of driving practice. Option (b) requires a theoretical test of at least 4 hours and a practical driving test of at least 90 minutes.

47. A national of one EU State cannot simply turn up in another member State and take an initial CPC test. The person may only do so if s/he is "normally resident" in that State (article 9 of the Directive). Accordingly, Bulgarian driving licence rules must prevent UK nationals from taking their initial CPC test there unless the person is normally resident in Bulgaria. For this purpose, "normal residence" means "the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties, or, in the case of a person with no occupational ties, because of personal ties which show close links between that person and the place" (Article 14 of Regulation 3821/85).

Conclusions

Ground 1 – the arguments

48. Mr Kelly for the Appellants argued the Traffic Commissioner's findings were not justified on the evidence. In particular, the Commissioner's finding that the operator was "deliberately dishonest" is a particularly serious finding that needs to be "carefully considered" but was not. Before finding that certain witnesses were lying, it was incumbent on the Commissioner carefully to explain why she rejected their evidence as untruthful. The Commissioner failed to discharge this obligation relying instead on a general impression that a "dark cloud of suspicion" had not been lifted.

49. At the hearing before the Upper Tribunal, it was clear that Mr Kelly's principal objection was to the Traffic Commissioner's rejection of Mr Lambie's evidence that,

before he allowed Mr McDonald to use his driver's card, he was satisfied Mr McDonald held a valid Bulgarian driver's licence. As we understood the argument, Mr Kelly contended the Commissioner was bound to conclude that Mr Lambie genuinely believed that Mr McDonald had a valid licence to drive large goods vehicles on the roads of Great Britain. Mr Kelly also argued the Commissioner misunderstood the transcript of Mr Lambie's interview with DVSA officials. He had not stated that "drivers" used his driver's card (the relevance of that being the Commissioner placed adverse reliance on a shift in Mr Lambie's evidence). According to the Commissioner's findings, Mr Lambie altered his evidence by claiming at the inquiry that a single driver had been permitted to misuse his driver's card.

50. For the Secretary of State, Mr Komorowski argued there was no flaw in the Commissioner's findings concerning the truthfulness or reliability of Mr Lambie's evidence such that the Upper Tribunal was entitled to intervene.

Ground 1 - conclusion

51. We need carefully to analyse the way in which the operator put its argument that Mr Lambie genuinely believed that Mr McDonald held a valid European driving licence. We note the following:

(a) in advance of the public inquiry, the operator's case was that an individual referred to only by the nickname 'Smash Heid' had at some point used Mr Lambie's driver's card. Mr Lambie had declined to identify this individual even though the inquiry call-up papers clearly identified this as a regulatory issue;

(b) the DVSA evidence was that, on 36 occasions, someone other than Mr Lambie had used his driver's card. Mr Lambie cannot have used the card given his severe visual impairment;

(c) on 13th January 2014, DVSA made a second written request for the operator to supply copies of driver's licences for all drivers used between 1st July 2013 and 31st December 2013. When copies were supplied, at some point after the inquiry call-up letter was sent to the operator on 13th February 2015, there was no copy licence for Mr McDonald;

(d) a copy of an official-looking document written in a Cyrillic language, which may well be Bulgarian, dated 2nd October 2013, was supplied by the operator but with no translation. The word "McDonald" does not appear in the document and it is not a driver's licence in the form required by the Directive. It does not include the EU 12-star symbol nor, as required by Annex I to the Directive does it meet the following requirements: "a security background pattern designed to be resistant to counterfeit by

scanning, printing or copying, using rainbow printing with multicolour security inks and positive and negative guilloche printing. The pattern shall not be composed of the primary colours (CMYK), shall contain complex pattern designs in a minimum of two special colours and shall include micro lettering";

(e) during an interview with a DVSA examiner on 24th June 2014, Mr Lambie said drivers' licences were checked and copies retained every six months. He also admitted he had wrongly permitted his driver's card to be misused. He was asked "would you have knowingly provided your driver card for other drivers to use", to which he responded "yes". He was also asked whether it was correct that his driver's card was "used by other drivers to carry out periods of driving and duty", to which he responded "yes";

(f) during an interview with a DVSA examiner on 23rd September 2014, one of the operator's drivers, Mr Scott Henderson, said "that boy Smash" or "smash heid" must have driven a certain vehicle at certain times. Mr Henderson did not know whether Mr Lambie had loaned "smash" his driver's card. Mr Henderson denied ever having used Mr Lambie's driver's card;

(g) another driver, Mr Steven Lambie (Mr William Lambie's son), was also interviewed by the DVSA. He denied ever having used Mr William Lambie's driver's card. Mr Steven Lambie said a "boy in the garage whose name I don't know…he went by the name of smash heid" must have driven a certain vehicle at certain times. But this person "didn't really have a job" at Firstline;

(h) the transcript of the inquiry held on 18th March 2015 shows:

- shortly after the inquiry began, the Commissioner informed Mr Kelly she did not want to leave the building until she was told the identity of "smash 'ead";

- in response to questions from his solicitor, Mr William Lambie admitted he knowingly loaned out his driver's card to other drivers but he "didn't see it as an issue at the time". He now knew it was "totally wrong";

- shortly before the luncheon adjournment, Mr Lambie said, in response to a question from the Commissioner, that "Craig McDonald drove my truck";

- during the afternoon, the Commissioner asked Mr William Lambie about Mr McDonald. Mr Lambie said: "he's a guy that's just done a bit of work for me"; "he lives with his gran in Wishaw"; Mr McDonald has a driving licence and "I took a copy of it on my phone" but he no longer had the telephone; Mr McDonald stopped working for the operator when he moved away to live with his girlfriend; sometime after Mr Mc Donald began working for the operator he informed Mr Lambie that he

had a HGV driving licence; Mr McDonald did not have his own driver's card because he had a Bulgarian driving licence (his girlfriend was Bulgarian); Mr Lambie checked out Mr McDonald with the DVLA who informed him Mr McDonald was permitted to drive in the UK if he had a Bulgarian driving licence;

- Mr McDonald in fact attended the inquiry and Mr Lambie confirmed he was the individual previously referred to as 'smash heid'. Mr Lambie said he was hard to track down but, once he had got in touch with him, he was willing to attend the inquiry;

- Mr McDonald gave evidence at the inquiry. He said: he was born on 7th July 1992; he lived in Wishaw but "I go back abroad now and again to Bulgaria with my girlfriend" although later Mr Mc Donald said he had "a residency in Bulgaria" and had lived there for about four years; he said he had a Bulgarian driving licence with "LGV entitlement on it"; he passed his LGV test in Bulgaria in April or May 2013; he thought Mr Lambie had not identified him before the inquiry because he had proven difficult to track down; he had applied for driver's card from the Bulgarian authorities but it had not yet been issued.

52. What, then, did the Commissioner make of the evidence in relation to Mr McDonald / 'smash heid':

(a) there was no justification for the late revelation of smash heid's identity and "even as late as the start of the Public Inquiry Mr Lambie was keeping that to himself";

(b) even on Mr Lambie's account, he "did not know" if Mr McDonald had a valid licence. Hence, he was willing to "risk someone who did not have proper driving licence entitlement drive on the public roads of Great Britain";

(c) when initially interviewed by DVSA officials, Mr Lambie said "drivers" used his card which was not consistent with the case put at the public inquiry that a single driver had used it;

(d) no one could be certain who had in fact used Mr Lambie's driver's card. By not being truthful with the DVSA, Mr William Lambie "threw a very dark could of suspicion over the heads" of Steven Lambie and Scott Henderson (these drivers had at times driven the lorry in question). That cloud remained. Mr Lambie's evidence to the inquiry had not dispelled it.

53. We feel a dose of reality needs to brought to bear on this ground. Not only was the Traffic Commissioner being asked to accept that Mr McDonald (AKA 'smash heid') had completed many hours of driving instruction, and sat a test or tests, in Bulgaria, the Traffic Commissioner was faced with a case that developed as follows:

(a) before the inquiry Mr Lambie had failed to identify which driver/s used his driver's card;

(b) Mr Lambie's pre-inquiry evidence was, according to the Commissioner, that "drivers" had used his driver's card and that he would retain copies of the licences of all drivers. We do not accept that the Commissioner misunderstood the transcript of Mr Lambie's earlier interview with a DVSA examiner. The passages we cited above show that, on two occasions, Mr Lambie responded affirmatively to questions whether other "drivers" had used his card. He did not take the opportunity to correct the DVSA's assumption that other "drivers" had used his card;

(c) despite the Commissioner making it very clear at the start of the inquiry that a key issue was the identity of 'smash heid' this was not revealed until a relatively late stage of the inquiry;

(d) once 'smash heid' had been identified, Mr Lambie told the Commissioner he had taken a photo of his Bulgarian driving licence but not retained a copy and he no longer had the telephone he used to take the photo;

(e) Mr Mc Donald gave evidence that, now and again, he visited Bulgaria although he also said he had lived there for four years (this was during the period that he was doing work for Firstline, work that involved him driving, on the operator's case, a lorry on 36 occasions between July and December 2013). He also gave evidence that he sat his driving licence test in Bulgaria in April or May 2013. Mr McDonald did not bring his licence to the inquiry so that it could be examined by the Commissioner.

54. So was the Commissioner "plainly wrong" to find that Mr Lambie permitted Mr McDonald to drive a goods vehicle on UK roads despite not knowing whether he was licensed to do so? Without hesitation, we reject that argument.

55. If the Commissioner's decision is read sensibly, and as a whole, it is clear that she rejected Mr Lambie's evidence that Mr McDonald had convinced him that he had a Bulgarian licence that permitted him to drive large goods vehicles in Great Britain. The Commissioner's reasons for doing so are clearly apparent. She found there was no good reason for the late revelation of Mr McDonald's identity and found inconsistencies in Mr Lambie's evidence about who had used his driver's card. While this feature was not spelt out in her decision, we have no doubt – given the obvious care with which the Commissioner approached this case – the Commissioner also had in mind that Mr Lambie's evidence to the inquiry was inconsistent with his earlier evidence that the operator retained copies of the licences of all of its drivers.

56. We reject the challenge to the Commissioner's findings concerning Mr Lambie's evidence. The argument pressed at the hearing – that Mr Lambie demonstrated at the public inquiry a good knowledge of driver's rules – does not assist him. In that case, Mr Lambie should have appreciated the importance of retaining copies of drivers' licences. Since the Commissioner's findings about Mr Lambie's evidence stand, the Commissioner was right to find that Mr Lambie knowingly permitted an individual to drive goods vehicles on public roads in this country without knowing whether he was licensed to do so. Flowing from that, the Commissioner cannot be criticised for taking this into account in assessing whether Mr Lambie had lost his good repute.

57. We also reject the argument that the Traffic Commissioner failed to give adequate reasons for not accepting Mr McDonald's evidence. In the circumstances, his evidence stood or fell with Mr Lambie's and the rejection of his evidence, as we have said, was adequately explained.

Ground 2 – the arguments

58. Mr Kelly criticises the Commissioner's finding that "to the outside industry it would appear incredulous were I to accept Firstline's behaviour and that of Mr Lambie". He asks "how does the Traffic Commissioner know this?" He supports this argument by reference to the *Dundee Plant Company* decision (T/2013/47). In that case, Mr Kelly said there had been no Transport Manager for 16 years, "yet due to positive features the Traffic Commissioner must have held that to the outside industry it would not appear incredulous not to revoke".

59. Mr Komorowski argues the Commissioner cannot be criticised for taking into account the regulatory 'message' that would be sent had she declined to revoke the operator's licence.

Ground 2 - conclusion

60. The Traffic Commissioner must be taken to understand the Scottish road haulage industry. She deals with it day in day out. There is no proper basis on which the Upper Tribunal could hold the Commissioner was wrong to take into account the likely effect of non-revocation on the industry's impression of the rigour with which the regulatory regime was enforced. This is clearly a relevant consideration. As the Upper Tribunal said in *Arnold Transport & Sons v D.O.E.N.I.* (NT/2013/82):

> "19…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 becomes 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. It is also corrosive

> because once rumours of unfair competition, (at the very least), begin to spread the perception that some operators are competing unfairly, (whether or not they profit by doing so), has a damaging effect. It means that normally compliant operators will feel tempted to 'cut corners' in relation to the regulatory regime in order to remain in business."

61. And regulatory action does not proceed by analogy with the facts of other regulatory decisions. The circumstances of the instant case dictate the appropriate regulatory response. Mr Kelly's argument that *Dundee Plant* called for action short of revocation carries no weight in the circumstances of this case.

Ground 3 – the arguments

62. Mr Kelly for the Appellants argues the Traffic Commissioner, in determining the appropriate regulatory response, failed to take into account certain matters which went to the operator's credit. All she took into account was the absence of regulatory action for overloading and the valiant efforts made by Mr Lambie to overcome the disabling effects of his sight loss.

63. The Commissioner failed, argued Mr Kelly, to take into account that, by the time the matter came before her, the regulatory breaches were one and a half years old, Mr Lambie had ceased loaning out his driver's card to other drivers, there were no adverse maintenance reports, a transport consultant had been instructed to advise the operator, current systems were designed to ensure regulatory compliance and the whole of the operator's fleet was equipped with digital tachograph recording equipment.

64. Mr Komorowski argued the Commissioner had not overlooked matters that might go to the operator's credit. Rather, she had rejected the argument that certain matters did in fact go to the operator's credit.

Ground 3 - conclusion

65. Mr Kelly's argument overlooks the fundamental consideration relied on by the Traffic Commissioner. She found a flagrant and quite deliberate flouting of regulatory rules. The issue was really one of trust. On our reading, the Commissioner found that the nature of the breaches were such that, despite certain matters going to the operator's and Mr Lambie's credit, those matters did not resurrect the trust that had been lost. As the Upper Tribunal has often stressed, trust is at the heart of the regulatory regime since it is not feasible for a traffic commissioner to be installed in each operating centre or each truck.

66. In any event we do not accept that the Commissioner ignored all matters going to the operator's credit apart from the absence of overloading and Mr Lambie's response to his sight loss. As Mr Komorowski argued, there is a distinction between overlooking a matter that might go to an operator's credit and finding that, properly analysed, a particular matter does not go to the operator's credit.

67. The use of a transport consultant was taken into account by the Commissioner (para. 62 of the decision) but the Commissioner noted Mr Lambie's evidence that "his rates were too expensive and there was no follow up with him". At the hearing before ourselves, Mr Kelly confirmed that the consultant had done a single day's work and had not been used again because he was considered too expensive. We do not see how the Commissioner, in those circumstances, could possibly have given any credit for the operator's engagement of a transport consultant.

68. The Commissioner noted that safety inspection reports were clean and there were no driver defect reports. We do not accept those matters were overlooked. Rather, read as a whole, the Commissioner's decision shows that those matters did not restore the regulatory trust that, on her decision, Mr Lambie and, by extension, the operator had forfeited. So far as tachograph systems were concerned, the Commissioner made the point that, of itself, sound systems do not guarantee compliance. She was not convinced they would guarantee compliance in this case – given the history of non-compliance - and we cannot say she was wrong to make that finding.

Ground 4 - the arguments

69. Mr Kelly argued that the Commissioner's decision was not in compliance with *Bradley Fold* and similar authorities. In other words, the Traffic Commissioner wrongly concluded that this operator ought to be put out of business. It was a disproportionate regulatory response. Mr Komorowski argued this conclusion was open to the Traffic Commissioner and could not be described as plainly wrong.

Ground 4 – conclusions

70. We find that the Traffic Commissioner was not plainly wrong (or even wrong) to conclude that the operator ought to be put out of business. None of the Traffic Commissioner's decisions were disproportionate regulatory responses. They were all justified by the Commissioner's conclusion that Mr Lambie could not be trusted to run a haulage business in compliance with the regulatory scheme. Given the seriousness of the regulatory breaches found by the Traffic Commissioner, she was justified in concluding that the operator ought to be put out of business and that Mr Lambie should suffer a two year disqualification order. As Mr Komorowski argued, the Commissioner cannot be criticised for concluding, as she effectively did, that the weight put in the revocation side of the balance by her adverse findings was such that

the matters going to the operator's credit did not tip the balance in favour of some less drastic regulatory response.

Ground 5

71. Mr Kelly's fifth ground was that, if the Upper Tribunal accepted his argument that revocation and disqualification were disproportionate, a suspension should instead have been considered. Given our conclusions on the other grounds of appeal, this ground falls away.

Disposal

72. Given the Traffic Commissioner's stay of her decisions, the operator has remained in business. At the hearing before the Upper Tribunal, Mr Kelly submitted that, if the appeal was unsuccessful, the Upper Tribunal should give the operator six weeks to wind down its business. Mr Komorowski for the Secretary of State did not object.

73. We dismiss the appeal and, subject to the point discussed below, uphold the Traffic Commissioner's decisions. In disposing of the appeal, we need to re-work the Commissioner's decisions, to reflect the passage of time, by providing for our decision to take effect six weeks from the day it is issued. Until that date, the Commissioner's stay of her decisions remains in place.

74. In one respect, the Traffic Commissioner erred in law. She found that Mr Lambie had lost his professional competence as transport manager but, as explained above in paragraph 24, such a finding was not open to the Commissioner since there was no evidence that he ceased to possess the necessary transport manager's qualification. We set aside that aspect of the Traffic Commissioner's findings. In practical terms, however, this makes no difference because we uphold the Commissioner's finding that Mr Lambie lost his good repute as transport manager.

European driving licences – observations

75. This part of our decision is not intended in any way to criticise the Commissioner's approach to the Bulgarian driver's licence aspect of this case. The issue was only raised at the eleventh hour and the Commissioner clearly had no time to assess the veracity of the claims made by reference to the governing European legislation.

76. However, for the benefit of the Traffic Commissioners, we point out that European law requires a licensed Large Goods Vehicle driver to retain his/her licence. It should therefore be simple enough for an operator to show that it has been satisfied that a driver is duly licensed by another member State. But, in any event, the

European driving licence rules impose residency requirements and the testing requirements are stringent throughout the EU. As a general rule, the Traffic Commissioners are entitled to be sceptical if faced with the argument that, despite the non-supply of a European licence, a UK national has a valid European driving licence.

Mr E. Mitchell, Judge of the Upper Tribunal,
20th June 2016