**IN THE UPPER TRIBUNAL** **Appeal No. T/2016/39**
**ADMINISTRATIVE APPEALS CHAMBER**
**(TRAFFIC COMMISSIONER APPEALS)**

**ON APPEAL from the DECISION of Mr Nicholas Denton, TRAFFIC COMMISSIONER for the South East of England**

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| **Dated:** | 8 July 2016 | |
| **Before:** | Mr M R Hemingway | Judge of the Upper Tribunal |
| | Mr L Milliken | Member of the Upper Tribunal |
| | Mr D Rawsthorn | Member of the Upper Tribunal |
| **Appellant:** | Mr Daren Michael Smith | Trading as DMS Scaffolding |

**Attendances:**

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| **For the Appellant:** | In person |
| **For the Respondent:** | No attendance |

**Heard at:** Field House, Bream's Buildings, London, EC4A 1DZ

**Date of Hearing:** 4 October 2016

**Date of Decision:** 7 November 2016

**DECISION OF THE UPPER TRIBUNAL**

IT IS HEREBY ORDERED that:

(i) The appeal against revocation of the licence be DISMISSED.

(ii) The appeal against disqualification be DISMISSED.

**Subject matter:**

Restricted licence; fitness; financial requirements; vehicle maintenance records; failure to operate from declared operating centre; overloading; whether revocation proportionate; whether disqualification proportionate.

**Cases referred to:**

Bradley Fold Travel Limited and Peter Wright v Secretary of State for Transport (2010) EWCA Civ 695; Priority Freight 2009/225; Bryan Haulage (No. 2) 2002/217.

## REASONS FOR DECISION

1. This is an appeal from a decision of the Traffic Commissioner for the South East of England ("TC") made on 8 July 2016 when he revoked the restricted operator's licence held by Daren Michael Smith ("the appellant") trading as DMS Scaffolding with effect from 0001 hours on 8 August 2016 and disqualified him from holding or obtaining any type of operator's licence in any Traffic Area and from being the director of any company holding or obtaining such a licence with effect from 0001 hours on 8 August 2016 until 0001 hours on 8 August 2021. The decisions were made with reference to sections 26 and 28 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act").

### The background

2. The factual background to the appeal appears from the documents, the transcript of the Public Inquiry and the TC's written decision. The appellant held a Restricted Goods Vehicles Licence authorising him to operate two vehicles. Such a licence required him to have available finance of £4,800.00. At all material times the appellant had a vehicle described as a MAN scaffolding lorry registration no. GN03 AZP ("the vehicle").

3. On 3 June 2015, a prohibition was issued to the appellant on account of the vehicle being overloaded by 25%. It would appear that the appellant was the driver or intended driver of the vehicle on that occasion.

4. On 1 December 2015, the vehicle was being driven whilst it was displaying false registration plates. The police intervened. The appellant accepts that he was the driver of the vehicle on that occasion and that his son, who is now said to be employed by DMS Scaffolding, was a passenger. The police officers involved were one PC French and one PC Davey. They had received information that the vehicle had been travelling using false plates, via the Automatic Number Plate Recognition ("ANPR") System. According to a witness statement of PC French the lorry was briefly followed by the officers and it stopped on the forecourt of a service station. PC French said that he went to the front of the vehicle and noted that it was displaying the correct registration plate of GNO3 AZP though there was a false plate, registration no. KU58 YRA, displayed at the back. PC French said that he then discovered some sticky Velcro pads and a false plate no. KU58 YRA under the front passenger seat. He also peeled away the KU58 YRA plate to the rear of the vehicle which revealed, underneath it, registration plate GNO3 AZP. There is no dispute about the fact that the correct registration no. for the vehicle is GN03 AZP and not KU58 YRA. PCs French and Davey did, in due course, go on to indicate at the Public Inquiry that records had revealed that the vehicle had been picked up by the ANPR System displaying the false plate (KU58 YRA) on some 60 occasions between September and December 2015. It was also said that the vehicle, again bearing those false plates, had been involved in a collision with another vehicle on 8 July 2015. Further, checks carried out by the police appeared to show concerns as to whether or not DMS Scaffolding was operating from the stated operating centre at Yard E1, Felnex Trading Estate, London Road, Wallington. It was also unclear where the company itself was based.

5. Having received a report from the aforementioned police officers the TC decided, unsurprisingly, to hold a Public Inquiry. A call-up letter of 1 April 2016 was sent to the appellant. The letter indicated that the TC had concerns that an unauthorised operating centre

was being used and also made reference to the prohibition. It was stated that the appellant should prepare evidence of financial resources and an indication of the sort of documentary evidence required was given. Further, a request was made for documentation concerning the maintenance of the vehicles again with a specific indication as to the type of documentation which would be required. The letter, overall, was clear, specific and detailed.

**The Public Inquiry**

6. It had originally been intended that the Inquiry would take place on 17 May 2016. However, it was postponed, initially to 8 June 2016, because the appellant had already booked a holiday prior to the date being fixed. He did not attend on 8 June 2016 stating that he had not received written notification, that he had only discovered the Public Inquiry had been fixed for that date when he had received a telephone call from the TC's clerk on 7 June 2016 and that, in any event, he had badly injured his back. A new date of 7 July 2016 was fixed and the Public Inquiry did proceed on that date. Attendees included the appellant, his wife Michelle Smith, PC French and PC Davey.

7. The transcript is a full document, extending to some 33 pages and we do not need to refer to all of it. The following, however, is a summary of what appeared to us to be the most salient points as contained in it.

8. As to the issue of the false number plates, the appellant, backed up by his wife, said that he had been ill with a heart problem for some time and had only rarely been involved in the driving of the vehicle himself. Pausing there though, he did not dispute that he had been the driver on 1 December 2015 nor, it seems, on 3 June 2015 but he did assert he was not the driver on 8 July 2015. He and his wife suggested (see page 6 of the transcript - page 152 of the appeal bundle) that two former drivers who had subsequently been dismissed might have been utilising the false number plates in order to avoid receiving parking tickets. He claimed complete ignorance of the use of the false plates even on the occasion when he had contact with PCs French and Davey. He denied a suggestion made by the officers that with respect to the 1 December 2015 incident his son had probably removed the false plate from the front of the vehicle, put it under the passenger seat and then absented himself from the scene. That, suggested PC French, would explain why the genuine number plate appeared on the front of the vehicle after it had been stopped whereas the ANPR System which had alerted the police to the vehicle had indicated that a false plate was being used on the front of the vehicle.

9. As to the collision of 8 July 2015 the appellant appeared, initially at least, to deny any knowledge of it but then said that whilst he had not been the driver himself he had been alerted as to the fact of the collision and had then attended the scene. It is apparent from the transcript, though, that he only conceded his presence when PC Davey produced a photograph showing a person fitting his description at the scene. He said, essentially, that he had not had any involvement in the actual collision and that he had subsequently been informed that the person who had been driving the vehicle on his behalf (the driver does not appear to be named anywhere in the documentation) had not been at fault. It was said in evidence that the driver of the other vehicle had not been able to claim on his insurance as a result of the vehicle having false number plates. We are not clear as to whether or not that difficulty might have been ultimately resolved.

10. As to the prohibition, it was put to him by the TC that his actual loading capacity would have been exceeded by something in the region of 60% given that the entire weight of the vehicle amounted to a 25% overload. The appellant said he had not been present when the vehicle had been loaded. He had carried out "a quick walk round check" but that had not revealed the problem. He thought that the difficulty might have been caused by boards which had formed part of the load becoming heavier as a result of its having rained though he could not specifically remember whether it had been raining on that day or not.

11. As to maintenance issues, the appellant had provided the TC with a maintenance contract. However, he had not provided any safety inspection sheets nor the previous three months driver daily defect reports, nor a forward planner. That was despite the fact that such documentation had been specifically requested in the call-up letter. The appellant and his wife asserted that, despite the omission, the vehicle was regularly maintained and it was said that the evidence had not been produced because of distractions caused by the appellant's health difficulties, his having had an operation for a heart problem.

12. The TC heard some evidence and received some information from PC French concerning the operating centre. The appellant said that he continued to operate from the Felnex Trading Estate. He explained that he had previously had an agreement with the former owners of the premises and that he now had an agreement with a security firm that looked after the premises for the new owner. He was not able to give any details regarding the new owner or the security firm. The TC commented concerning the information he had given that "it all seems very vague". The information from the police was to the effect that when a check had been made at what was claimed to be the operating centre at night-time, the vehicle did not appear to be there. Further, it was said that sightings of the vehicle on ANPR cameras suggested it was not making journeys from the claimed operating centre during the morning nor back to it during the evening.

13. As to finance, it is clear that, at the Public Inquiry, bank statements in the name of the appellant's father and his son were provided. It was said, as we understand it, by the appellant and his wife, that the account in the name of his father was actually a joint account, the appellant himself being the other account holder. However, the documentation provided did not show that to be the case. After some discussion the TC permitted the appellant to lodge further documentation regarding finance with him on the following morning. However, ultimately, the TC decided that the documentation which had been provided to him did not demonstrate that sufficient finance in the name of the licence holder was available.

**The TC's decision**

14. The TC produced his written decision on 8 July 2016. A good deal of the decision is taken up with background circumstances and a review of the evidence which had been provided prior to and at the Public Inquiry. The TC then went on to explain his decision in these terms:

> "Findings
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> 17. After having considered the written and oral evidence, I make the following findings:

a) Daren Smith has failed to provide sufficient evidence of the necessary funds to support the licence. The requirements of Section 13D of the 1995 Act are therefore no longer fulfilled (Section 26(1)(h) refers);

b) he has failed to produce any evidence that preventative maintenance inspections of the vehicle have ever been carried out or that drivers have conducted any walk round checks (Section 26(1)(f) refers);

c) he is not keeping the vehicle at the authorised operating centre (Section 26(1)(a) refers). The centre is now a building site; a police visit out of hours found that the vehicle was not there; ANPR evidence strongly suggests that the vehicle is being kept elsewhere; Mr Smith cannot remember the name of the security company who supposedly gave him permission to park at the centre (building site);

d) Mr Smith has on numerous occasions used or permitted the use of a vehicle with false number plates;

e) he has no effective system to prevent overloading. A prohibition and a fixed penalty were incurred in June 2015 for an overload of 25% (Sections 26(1)(c)(iii) and (ca) refer);

f) cumulatively, the issues listed above make him entirely unfit to hold a licence. On the balance of probability I find that Mr Smith must have known full well that his vehicle was using false plates. His actual presence on at least two occasions on which the vehicle was displaying false plates makes it very difficult to believe that he had no knowledge of this. The only other explanation is that he was so distant from his business and the operation of his vehicle that he failed to realise that it was being used in a highly illegal way frequently and over an extended period of time (60 sightings of the vehicle displaying false plates over a four month period). Negligence of this magnitude would in any case render him unfit to hold a licence.

**Conclusions**

*Balancing act, Priority Freight and Bryan Haulage questions*

18. There is nothing positive to put in the balance against these negative findings. Despite an explicit request in the call-up letter, Mr Smith brought no documentation or records (beyond a maintenance agreement) to show that his maintenance arrangements are satisfactory. I found Mr Smith an extremely unreliable, not to say mendacious, witness. For instance, he initially claimed that he was not present on the scene of the accident with the BMW car in July 2015. When we viewed photographs of the incident however, he started to relate what had happened and how the accident had occurred. A photograph of him at the scene was amongst the photographs presented.

19. On the evidence before me at the inquiry, I conclude that I can have absolutely no confidence in his ability to run a safe or legal operation. The extent, nature and duration of the operator's wrongdoing mean that Mr Smith deserves to go out of business. Revocation of the licence under the Sections listed at the start of this decision is a fully merited outcome.

Disqualification

20. I have deliberated on whether to disqualify Daren Smith under Section 28 from holding or obtaining a licence. I have decided to do so for a period of five years, which reflects the seriousness of his dishonest conduct, which was frequent and long lasting, as well as the malign effects his use of false plates have had on other road users who have been involved in collisions with his vehicle. There can be no place in the industry for operators who practice fraud on this scale."

15. We have corrected a typographical error concerning the date of the prohibition at paragraph 17(e) of the decision. It is clear, from the above, that the TC resolved all matters of substance which were in issue against the appellant, concluded that he had been dishonest and concluded that there was nothing to weigh in the balance in his favour when undertaking a proportionality exercise concerning the questions of revocation and disqualification.

16. The applicant asked the TC to grant a stay pending an appeal to the Upper Tribunal but that application was refused. He then appealed to the Upper Tribunal.

**The proper approach on appeal to the Upper Tribunal**

17. The jurisdiction and powers of the Upper Tribunal when hearing an appeal from a Traffic Commissioner are governed by Schedule 4 to the Transport Act 1985 as amended. Paragraph 17(1) provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters whether of law or fact. However, it is necessary to bear in mind that such an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against a conviction from a magistrate's court, where the case effectively begins all over again and is simply reheard. Instead, an appeal before the Upper Tribunal takes the form of a review of the material before the Traffic Commissioner. In this context we have taken full account of the valuable guidance to be found in a passage from paragraphs 30-40 of the judgment of the Court of Appeal *in Bradley Fold Travel Limited and Peter Wright v The Secretary of State for Transport* [2012] EWCA Civ. 695. We also note that the appellant bears the burden of showing that the decision under appeal is wrong and that, in order to succeed, he must show that "the process of reasoning and the application of the relevant law require the tribunal to adopt a different view". Put another way, it might be said that in order to succeed an appellant has to demonstrate to the Upper Tribunal that a decision of the Traffic Commissioner is "plainly wrong".

**The proceedings before the Upper Tribunal in this appeal**

18. The appellant submitted written grounds of appeal. He argued therein, in summary, that points he had sought to make to the TC had not been considered; that evidence as to finance which he had provided to the TC had not been considered; that he takes his obligations seriously (perhaps an assertion rather than a ground of appeal as such); that he has been unwell and has had to place his trust in his employees who have let him down; that the TC did not consider the fact that his son has now given up work elsewhere to join the "family business"; and that unfairness would result if he had to dismiss his current employees.

19. We held an oral hearing of the appeal which the appellant attended accompanied by his wife. We summarised the written grounds of appeal and the appellant initially indicated that he

had nothing to add to them. He then said that the TC, in particular, had not seemed to want to listen to what he had to say about his heart condition and the consequence that he had not been able, through no fault of his own, to properly oversee the business. He did though accept that ultimately the responsibility for the way the business is run lies with him. He asserted that he had not known that false registration plates had been used. He had trusted employees who had let him down. The TC had not considered the fact that his son and other employees would lose their employment as a consequence of his decision.

**Our decision and reasoning**

20. We will say, at the outset, that we are entirely satisfied that the facts of this case demonstrate that the appellant has shown a wilful and reckless disregard to operator licence compliance from, at least, June 2015 when he received the prohibition.

21. The TC, having heard from the appellant, clearly did not find him to be a witness of truth. Indeed, he went so far as to describe him as "an extremely unreliable, not to say mendacious, witness". He only went on to give one example of mendacity being what he thought was his dishonesty in seeking to indicate that he had not been present at the July 2015 collision before acknowledging that he had only when photographs of a person bearing his likeness had been produced. However, it is clear from the findings (see paragraph 17 of the decision), that he did not accept the appellant's evidence concerning his claim that he was keeping the vehicle at the authorised operating centre. That might not be surprising given the ANPR evidence which had suggested it was being kept elsewhere along with the appellant's inability to even remember the name of the security company who had, he claimed, given him permission to continue to use the centre. It is also clear that the TC rejected his contention that he had not known about the use of false number plates and his further contentions regarding the overloading.

22. As to those matters of credibility, in our judgment the TC was right to reject the evidence regarding the operating centre. Given that the police had not been able to find the vehicle there when one might expect it to have been parked there if it was still being used as the authorised operating centre, given the ANPR evidence referred to above and given the appellant's identified vagueness regarding the name of the security company it is really very difficult to see how any other view could have sensibly been reached. Certainly, we are entirely unable to say that the TC's findings as to this were plainly wrong.

23. As to the number plate issue the TC's finding was, contrary to what the appellant had claimed before him, that he had regularly either used himself or had permitted to be used false number plates. The TC did not spell out how he had reached that particular conclusion other than that he had found the appellant to be mendacious. Perhaps he could have said something more but in our view, given the material before him, such was unnecessary. He had already found himself unable, in view of strong contrary evidence, to accept what had been claimed about the operating centre and he had found that the appellant had dishonestly sought to distance himself from the July 2015 incident. Further, for him to have accepted the appellant's contentions in this regard, he would have had to have been persuaded that he had himself driven the vehicle in December 2015 when apprehended by the police and had either driven or attended at the scene of the collision in July 2015, without noticing the seemingly obvious fact that the vehicle was displaying number plates which were not genuine. We can well see why

the TC disbelieved the appellant about that and, again, we are unable to say that he was plainly wrong to do so.

24. As to overloading, it would appear, although it is unspoken, that disbelief on the part of the TC of the appellant's proffered explanation had led, at least in part, to his conclusion that he had no effective system to prevent overloading. Again, we can well see why the TC felt unable to accept that substantial overloading might have resulted from rain water rendering boards heavier than they would otherwise have been. That explanation for an overload of such magnitude is simply implausible. Again, the TC was not plainly wrong about this.

25. Turning, then, to the specific points made by the appellant, we cannot see that the TC failed to consider any points of significance which he had sought to make. Rather, we think that the appellant's complaint is really one to the effect that his account of events was not accepted and should have been. However, as we say, there were sound reasons as to why that account could not be accepted.

26. We do not think it right to say that the financial evidence offered was simply not considered. The TC clearly did spend some considerable time at the Public Inquiry, as is evident from the transcript, going through the very limited evidence which had been offered and explaining why such was not sufficient to actually demonstrate funds available to the appellant himself which is, after all, what is required. He even went so far as to permit the appellant an opportunity to provide further evidence but, for the reasons explained albeit briefly in the decision, that was not sufficient to demonstrate that the required amount in the name of the appellant as the licence holder was in place.

27. We note the appellant's contention, in both the written grounds and orally before us, that he takes his obligations as a licence holder seriously. We would only say that the evidence to which we have referred above is not supportive of that contention. We note, as a related point, the continued assertion that he has been let down by others. It is clear that the TC did not believe that otherwise he would not, for example, have found that the appellant had used or permitted the use of false number plates. Again, we can well understand that conclusion.

28. We would accept that the appellant and his wife raised concerns regarding the future employment situation of their son and that the appellant also raised concerns regarding his employees. The TC did not specifically say anything about that in his decision. It is clear, however, that he did not think very much of those points because he concluded that there was nothing positive to put in the balance. In our view he was certainly not plainly wrong to take that view. It does not seem to us that there was any actual documentary evidence before the TC to indicate that anyone else was employed in the business since the claimed dismissal of the unnamed drivers whom the appellant had sought to blame for his vehicle having been detected on some 60 occasions in a three month period being driven with false plates. In any event there is nothing before us and more importantly there was nothing before the TC to suggest that any such employees that there might be could not obtain alternative employment. As to the appellant's son, even leaving aside the question of whether he might have acted dishonestly when the vehicle was encountered by the police, the evidence of Mrs Smith was to the effect that he had done well in a previous occupation. On the face of it then, there would be nothing preventing him obtaining alternative employment. Finally as to the appellant's specific points, despite the appellant and his wife's assertion that the vehicle has been properly maintained, it is entirely clear that the documentation which had been required to evidence that had not been

produced despite the call-up letter specifically and indeed helpfully indicating, in terms, what would be needed. The TC's conclusion that there had been a failure to supply such evidence was, therefore, inevitable.

29. As to the balancing exercise, we note that the TC correctly directed himself to the *Priority Freight* and *Bryan Haulage* cases cited above. He was right, on his findings, to regard this as a serious case and he was right to conclude there was little or nothing weighing in the appellant's favour. His view as to all of this was relevant not only to the question of revocation but also to the question of disqualification. We have not been urged, in terms, to disturb the period of disqualification which is five years but, rather, as we understand it, we have simply been invited to conclude that the TC was plainly wrong in deciding that disqualification was appropriate at all. In our view, given the seriousness, both revocation and disqualification were inevitable and a period of five years is, in the circumstances, an entirely appropriate term.

30. The appeal against revocation is dismissed. The appeal against disqualification is dismissed.

**Signed**

M R Hemingway
**Judge of the Upper Tribunal**

**Dated:** **8 November 2016**