

Appeal No. T/2016/47

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

**ON APPEAL from the DECISION of Joan Aitken TRAFFIC COMMISSIONER for
Scotland
Dated 15 July 2016**

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr S. James	Member of the Upper Tribunal
Mr A. Guest	Member of the Upper Tribunal

Appellant:

George R Cran Transport Ltd

Attendances:

For the Appellant: Mr N. Kelly

Heard at: George House, 126 George Street, Edinburgh, EH2 4HH
Date of hearing: 6 February 2017
Date of decision: 5 May 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED and the matter be remitted to the Traffic Commissioner or Deputy Traffic Commissioner for rehearing and determination.

SUBJECT MATTER:- Repute; assessment of evidence; credibility

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; T/2011/29 David Pritchard
and Vehicle and Operator Services Agency

REASONS FOR DECISION

The decision under appeal to the Upper Tribunal

1. This is an appeal from the decision of the Traffic Commissioner for Scotland (TC) dated 15 July 2016.
2. The factual background to this appeal appears from the documents and the Traffic Commissioner's decision and is as follows:-
 - (i) By way of an application dated 2 December 2015, George Cran Transport Ltd made an application for a standard national goods vehicle operator's licence and authorisation for two vehicles and two trailers.
 - (ii) The sole director of the applicant company was Mr George Cran.
 - (iii) The nominated transport manager was Mr Phillip Esson.
 - (iv) The TC directed that the application had to be heard at a Public Inquiry.
 - (v) The Public Inquiry was first listed for 16 June 2016 but was eventually held on 8 July 2016 at Edinburgh. Details of the Public Inquiry are set out below.
3. On 15 July 2016 the TC made a decision to the following effect:

'The application by George R Cran Transport Ltd is refused as I am not satisfied as to the repute of the applicant company and director Mr George Robert Cran in terms of section 13A(2)(b) of the Goods Vehicles (Licensing of Operators) Act 1995.
4. The Appellant was notified of the decision of 15 July 2016 by way of correspondence dated 18 July 2016.

The appeal to the Upper Tribunal

5. On 25 August 2016 an appeal to the Upper Tribunal was received in the office of the Upper Tribunal.
6. The Appellant has set out the following Grounds of Appeal:

'As per letter sent on 15th August 2016, I feel I have carried out all the requirements for the application of the operator's licence.

...

When I had my repute taken away from me in 2008, and served my ban for 4 years, I now feel I have done my sentence as before 2006 and until 2008 no other Transport Manager for Ian Hendry had been pulled to a Public Inquiry, therefore I have learnt from my lesson and should be considered as a responsible operator.

Since 2006 I have had no convictions or have ever been pulled by a Traffic Commissioner.

See letter attached from Lindsays, stating if I had a nominated Transport Manager then I should have been considered for the operator's licence.

As in my letter I feel I have been victimised for my repute, therefore I have applied for 2 licences and I hope to be considered for 1 licence

to be compliant and if required the Traffic Office can check on me on a regular basis to see if I am complying with the Road Traffic Regulations.'

7. Attached to the Notice of Appeal were two items of correspondence. The first was a letter dated 16 May 2016 from the Appellant to the 'Compliance Team Scotland' and was clearly submitted in support of the initial application for an operator's licence. The second was the correspondence from 'Lindsays' referred to in the Notice of Appeal and which was dated 14 November 2013.
8. In the file of papers which is before us is a copy of correspondence dated 15 August 2016 from the Appellant to the office of the Upper Tribunal. It is clear that this is the correspondence referred to by the Appellant in the Notice of Appeal. In this correspondence, the Appellant stated:

'I am writing to appeal against the decision to refuse the application by George R Cran Transport Limited in terms of section 13A(2)(b) of the Goods Vehicles (Licensing of Operators) Act 1995.

I feel unfairly treated and victimised, and that the decision has been based purely on my past behaviour from a number of years ago. I have made no attempt to deny my previous wrongdoing. I wholly admit to being misleading and being untruthful in the past. However, I have "served my time", and I have learnt my lesson. If given the opportunity to prove myself, I intend to be fully compliant with the rules and regulations going forward.

I appreciate that I cannot be a full-time transport manager due to the time I spend employed off-shore, hence the association and support of Mr Phillip Esson, who will be fully committed to the business during my time off-shore. As you have stated, Mr Esson has the transport manager's CPC and experience of driving. I feel that he would be an excellent business partner for me should we be given the opportunity.

As for my financial standing and ability to fund the business, I will use my offshore salary to provide additional funding to sustain the company's profitability. I feel that it is unfair to hold this against me when considering the licence application. I feel that is very much an attribute that I am willing to supplement the haulage business with my personal salary. This shows commitment.

As for my relationship with Ian Hendry, I categorically deny any future working relationship with that man. I live in Aberdeen (as does he) and cannot safeguard against ever meeting with him again, however, I have absolutely no intention of having any future business relationship with him. The only way I can prove this is to be given the chance.

I only involved Judith Paterson as an aid to my recent application, and at no time during the conversation with her were Mr Hendry's business operations discussed. As it turned out Judith Paterson's assistance was far from perfect as certain aspects of the application were omitted and as such I will not be looking for her help in the future. This was purely a cost saving measure, that backfired.

I would also like to inquire about Ian Hendry's associates over the last ten years, and if they have been treated in the same way as I have. I am not aware of any others being so harshly treated and I cannot help but feel victimised, as I am still being punished for something I did (and admitted to) many years ago.

When I see my reputation being questioned in the decision, I wholeheartedly understand why but I cannot help feeling that this is unjustified, given the fact that I am willing to see the error of my ways. I will prove to you that I am capable of an honest future in the haulage business ...'

9. Before the oral hearing in the Upper Tribunal, Mr Kelly submitted a Skeleton Argument on behalf of the Appellant. Mr Kelly set out the background to the appeal, made reference to certain specific items of evidence and summarised the decision of the TC. He then set out the following grounds of appeal:

'It is respectfully suggested that this appeal can be considered in the following terms:

- 1) That (the Appellant's) disqualification had been served, that it was not an indefinite ban, and the Traffic Commissioner ought to have considered his repute as at the date of injury;
- 2) That (the Appellant) was found to be not straightforward in his answers, or credible, was a decision by the Traffic Commissioner that was plainly wrong;
- 3) (The Appellant) denies any future working relationship with IH and as such any transgressions of IH ought not to be visited upon (the Appellant).

Good repute can be lost. It is not correct to state it cannot be regained. The disqualification was not indefinite. Over four years have elapsed since the disqualification ended. Good repute has to be determined as at the date of the Inquiry. The sole ground for refusing the application is that (the Appellant) was not of good repute [para 31 of the Traffic Commissioner's decision].

The explanation for this finding is given at paragraph 30 of the Traffic Commissioner's decision. The Traffic Commissioner's reasoning for arriving at the finding GRCT, through (the Appellant) was not of good repute was (the Appellant) was not straightforward in his answers to the Traffic Commissioner at Inquiry and that the Traffic Commissioner determined he was not credible. It is noted the Traffic Commissioner has not said (the Appellant) was lying, dishonest or misleading. She has said that (given a normal definition of straightforward) that (the Appellant) was not frank or candid, (and given a normal definition of credible) not able to persuade her that something will happen or be successful. A finding that an applicant is not being straightforward is a judgement of a particularly serious kind that needs to be carefully considered given the weight attached to such evidence in arriving at the final determination. The only finding contrary to that evidence led by (the Appellant) is determined by the Traffic Commissioner. Accordingly, any decision by the Traffic Commissioner to the effect that the witness was not being straightforward needs to be accompanied by careful reasoning explaining why she was rejecting what was said as not straightforward. The Traffic Commissioner does not do so. This conclusion, in the face of the evidence led, taints the Traffic Commissioner's determination of (the Appellant's) repute and as such it is submitted the overall judgement cannot be allowed to stand.

The Traffic Commissioner does not need to be required to be persuaded vehicles can be bought. The Traffic Commissioner has to

be satisfied that the requirements of section 13 of the 1995 act are met (as listed on page 10 of the bundle). In any event (the Appellant) addresses this in his letter of appeal. The Traffic Commissioner does not refuse the application for want of Financial Standing.

It transpires from the Traffic Commissioners decision that (at para 29) "given that Mr H is in the background and is subject to an ongoing enquiry which has led to the suspension of a licence ... I have cause to be suspicious over these recent attempts by (the Appellant) at entryism into having an operator's licence". It is respectfully submitted this is not borne out by the evidence. At 139H of the transcript it is (the Appellant) who volunteers that he speaks to Mr H. Reading the transcript to page 141H it is submitted there is no evidence led which could lead any reasonable Traffic Commissioner to determine that (the Appellant) was not straightforward in his answers. The Traffic Commissioner recounts the evidence, and at paragraph 29 of her decision she creates a motive (contrary to all the evidence submitted and led at the Inquiry) that (the Appellant) and Mr H wanted to secure and operator's licence, without asking were this a device why (the Appellant) did not apply before he did, or examine the matter more fully. Furthermore, given that Mr H is subject to investigation by the Traffic Commissioner ... This is the first notification that (the Appellant) is given of this. It is not referred to in the call up letter. Natural Justice would dictate that further and better particulars be given by the Traffic Commissioner so that (the Appellant) could address them, given the Traffic Commissioner relies upon these matters in arriving at her decision. In any event a reasonable Traffic Commissioner would have offered the unrepresented (the Appellant) the opportunity of an adjournment. By referring to matters of which the Traffic Commissioner had knowledge (and (the Appellant) did not) and relying on these matters in the decision, the Traffic Commissioner fettered her discretion; an act no reasonable Traffic Commissioner would have undertaken. Whether the position that subsequently the Traffic Commissioner (or Deputy Traffic Commissioner) determines Mr H is of good repute?'

10. Mr Kelly referred to the decisions in *Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport* ((2010) EWCA Civ. 695), ('Bradley Fold'), *Asprey Trucks Ltd*, T/2010/49, ('Asprey Trucks'), *F Ahmed & H Ahmed*, 2009/516, ('F Ahmed'), *David Pritchard and Vehicle and Operator Services Agency*, T/2011/29, ('David Pritchard').
11. Having noted that the Traffic Commissioner had referred to *Asprey Trucks*, Mr Kelly submitted that the TC had misdirected herself as to the test – '... it is respectfully submitted that it was not proportionate, having regard to the findings to determine that (the Appellant) was not of good repute, and as such the appeal ought to succeed.'
12. Mr Kelly cited the decision in *F Ahmed* in support of his submission that the TC should have considered adjourning the Public Inquiry or convening a conjoined inquiry when it was known that Mr Ian Hendry was subject to the TC's regulatory regime.
13. Mr Kelly also cited the decision in *David Pritchard* as support for the proper approach to the assessment of credibility and, more importantly, the consideration of innocent explanations and provision of reasons for rejecting such explanations. It was only after that proper approach had been adopted

that a conclusion could be reached that a witness was not credible. Mr Kelly submitted that in the instant case the TC had failed to assess the credibility of the Appellant in the proper manner.

14. At the oral hearing of the appeal Mr Kelly added to the written grounds of appeal and expanded on the submissions made in his Skeleton Argument. He began by submitting that the Appellant had come to the Upper Tribunal looking for a degree of certainty. He noted that the Appellant accepted that the outcome of the appeal would not be that he would obtain an operator's licence. The Appellant was conscious that the outcome of the appeal would be either that his appeal would be dismissed or, if allowed, that the matter would be remitted to another TC or DTC for re-hearing.
15. Mr Kelly submitted that the Appellant also accepted that the standard, which had to be achieved for the appeal to succeed, was relatively high. The task of the Upper Tribunal was not to assess whether the decision of the TC was wrong. It had to be 'plainly wrong' which was the test set out in *Bradley Fold*. Mr Kelly submitted that the decision of the TC, in refusing to grant the application, was 'plainly wrong'.
16. Mr Kelly accepted that there was a degree of 'history' to the application but submitted that the TC had concentrated too much on the history and background to the application. Mr Kelly noted that while the Appellant had been disqualified from holding an operator's licence that disqualification had ended in 2012. In her decision the TC had referred to an application made by Oil City Ltd. That application had been refused by the TC on the grounds of good repute, professional competence and for lack of evidence of having systems in place to ensure compliance. Turning to the application in the instant case, Mr Kelly submitted that there was professional competence and that there were systems in place to ensure compliance. The sole ground on which the application had been refused was a lack of good repute.
17. Mr Kelly asserted that what the Appellant wished to know was what he had to do to qualify for an operator's licence and where he had gone wrong with the most recent application. He noted that the Appellant was not disqualified and could continue to apply for an operator's licence. While he was disqualified for a period of four years the disqualification did not continue in perpetuity. The restriction on him applying or for a company of which he was a director applying for a licence had gone.
18. Turning to the decision of the TC on good repute, Mr Kelly submitted that the TC failed to supply sufficient reasons for her decision or failed to explain her reasons for arriving at a determination that the Appellant was not of good repute.
19. Mr Kelly made reference to that part of his Skeleton Argument in which he had noted the decision in *David Pritchard*. He made reference to paragraphs 64 to 69 of that decision and noted the following analysis of the decision as it appeared in the Digest of Appeals from decisions of the Traffic Commissioners:

'The approach of the Deputy Traffic Commissioner was detailed and meticulous. Possible innocent explanations were considered and reasons given for rejecting them. Only then was the conclusion reached that the witness was not credible. Whenever appropriate this approach to the assessment of credibility should be followed.'
20. Mr Kelly noted that credibility was one of the matters which the TC referred to in the instant case. Accordingly the approach in *Pritchard* was relevant and appropriate but was not followed.

21. Mr Kelly repeated that the concern of the Appellant was to uncover what he had done which was wrong and what he had to do to establish good repute. He noted that the Appellant accepted that it was for him to establish repute. He observed that the TC had made reference to the Appellant's past and accepted that it was right for the TC to refer to the Public Inquiries in 2008 and the subsequent disqualification. The TC was correct to refer to the finding that the Appellant was not of good repute in 2008. He submitted, however, that it did not follow that because the Appellant was not of good repute in 2008 that he was also not of good repute in 2015, 2016 or 2017.
22. Mr Kelly noted that the TC had found that there was sufficient financial standing for the application. He referred to paragraph 27 of the TC's decision. He noted that in that paragraph the TC had asserted that she was not satisfied that the Appellant had sufficient resources '... to buy two lorries and to be a haulage contractor.' Mr Kelly asserted that the stated reason for this conclusion linked this application back to the 'Oil City Transport Ltd' application. That latter application was refused because the TC was not satisfied that there were sufficient systems in place to ensure compliance. The reason for that conclusion was that the Appellant was working offshore. In the instant case there were sufficient systems in place to ensure compliance, namely a nominated Transport Manager who would fulfil the professional competence role.
23. Mr Kelly made reference to paragraph 20 of the TC's decision where she, in turn, referred to a number of criteria for an operator's licence which she had then accepted had been met. He submitted that these conclusions were significant as the emphasis then turned to the 'repute' condition. Mr Kelly noted that the TC's 'sole explanation' in respect of repute was to be found at paragraph 30 of her decision. Mr Kelly submitted that there had to be additional reasoning beyond what was to be found in paragraph 30. The TC was under a duty to indicate why the Appellant was not straightforward in his answers. He submitted that this was the reason why the decision of the TC was plainly wrong and asserted that, based on the available evidence, no other TC would have arrived at the determination that the Appellant was not being straightforward.
24. Mr Kelly noted the exchanges which had taken place during the course of the Public Inquiry in connection with Mr Ian Hendry. He submitted that Scotland was a small country, that the North East of Scotland was a small part of that country and the road haulage industry was a small community where everyone knew everyone else. It was in this context that the Appellant knew Mr Hendry. Mr Kelly accepted that Mr Hendry had a chequered history with the office of the TC.
25. Mr Kelly submitted that the transcript of the Public Inquiry demonstrates that that the Appellant had volunteered information about his relationship with both Mr Hendry and Ms Paterson. He asserted that if there had been anything untoward about the relationship between the Appellant and Mr Hendry and Ms Paterson then it would have been more likely that the Appellant would not have mentioned it. The Appellant believed that he was being open and honest and straightforward with the TC and helping her assess whether he was of good repute. The TC had taken what was volunteered information and turned this against the Appellant. Mr Kelly submitted that there was no contradictor to the Appellant's evidence at the Public Inquiry. There was no-one, from the DVSA or another operator, saying that the Appellant's evidence was wrong.

26. Mr Kelly noted the TC's conclusions in paragraphs 28 and 29 of her decision. He asserted that it was difficult to draw the conclusion therein that the Appellant associated with Mr Hendry from the evidence. Association infers a business or professional relationship. Mr Kelly submitted that if the TC had concerns about the relationship between the Appellant and Mr Hendry then she had a choice which was either to disregard the relationship or to grant the Appellant an opportunity to have representation. If the TC was concerned about such a relationship then she may have thought to conjoin the regulatory proceedings against them both.
27. Mr Kelly submitted that the outcome of the regulatory proceedings against Ian Hendry were unknown. He asserted that if it had been determined that Mr Hendry was of good repute then the Appellant would have been penalised for speaking to someone who is of good repute. Given that the TC had concluded, in paragraph 29 of her decision, that she had '... cause to be suspicious' then she was obliged to give the Appellant an adjournment to seek representation or to have time to address the matters which the TC was raising. Because that opportunity was not given the decision was plainly wrong and ought not to stand.
28. Mr Kelly also made reference to further exchanges during the PI between the Appellant and the TC concerning the Appellant's relationship with Mr Hendry. Mr Kelly noted that during that exchange the Appellant had stated that he did not know anything about Mr Hendry's business, as he had had his '... fingers burnt there before', that he was not 'pals' with Mr Hendry and did not socialise with him. The Appellant had also stated that he had not set up his current company to become involved with Mr Hendry. Mr Kelly made reference to paragraph 29 of the TC's decision in which the TC noted that Mr Hendry was the subject of regulatory proceedings before the office of the TC and had his licence suspended, facts which were unknown to the Appellant.

The reasoning of the Traffic Commissioner

29. The decision of the TC runs to 31 paragraphs arranged in 7 sections. The first section sets out a background to the application and the Public Inquiry. The second section is a narrative on the Appellant's 'history in operator licensing'. The third section is concerned with finance. The fourth section contains a summary of the evidence given at the Public Inquiry by Mr Esson, the nominated transport manager. The fifth section contains a summary of the evidence given at the Public Inquiry by the Appellant. The sixth section (paragraphs 20 to 30) is headed 'Consideration of evidence and my decision'. The seventh and final section is the single paragraph decision noted at paragraph 3 above.
30. In paragraph 20 the TC has recorded the following:
 - 'If there was not context to this application it could look as if all the criteria for new licence have been met:-
 - establishment in Scotland;
 - applicant company not disqualified;
 - applicant sole director no longer disqualified;
 - application form contains declarations of previous involvements;
 - suitable industrial estate operating centre;
 - suitable maintenance provider;
 - a qualified transport manager, with no warnings against his repute;

- deposited funds for financial standing.’

31. In paragraph 21 the TC has recorded:

‘I recognise and record all of the foregoing. However there is context to this application and the onus is on (the Appellant), as sole director, to satisfy me on the question of repute. There is also an issue about likelihood of ongoing financial standing given how he said he would fund vehicle(s) purchase. I am very mindful that I have a gatekeeper role when considering applications (the *Asprey Trucks Ltd 2010/367* decision refers).’

32. In paragraphs 22 to 25 the TC makes reference to previous regulatory proceedings involving the Appellant and Mr Hendry, summarising in paragraph 25 that there was a ‘damning context’ leading to his eventual disqualification in 2008.

33. In paragraph 26 the TC said the following about Mr Esson, the nominated transport manager:

‘I want to record my impressions of Mr Esson. He is affable. He has the transport manager CPC and he has experience of driving. He is aware of the Hendrys – especially David, the son, for whom he worked. He protests that he will have nothing to do with Ian Hendry. His website was unconvincing and like many such puffs up his enterprise and connections. He says he will control the operation when (the Appellant) is offshore. I have my doubts. I think he will prefer affability to any assertiveness.’

34. In paragraphs 27 to 30 the TC set out her conclusions about the Appellant, as follows:

‘I am not persuaded that (the Appellant) has the resources to buy two lorries and to be a haulage contractor. He is a long term offshore worker who has engaged in and with haulage or operator licences in a serial non compliant manner. He likes an association with haulage but I doubt he is cut out to be a compliant operator or indeed if that is his intention.

I asked him about Ian Hendry and he said he didn’t see him any more, just passing in the car. A different picture emerged when I pressed him. He most certainly still sees and associates with Ian Hendry. They discuss operator licensing. Judith Paterson, at the very heart of Ian Hendry’s engagement with operator licensing, helped (the Appellant) with his application.

Given that Mr Hendry is in the background and is subject to an ongoing inquiry which has led to the suspension of a licence which only has ever had interim status, I have cause to be suspicious over these recent attempts by (the Appellant) at entryism into having an operator’s licence and the discs that go with such.

Mr Cran was not straightforward or of repute in the past. He was not straightforward or of repute in the context of the Oil City application. He was not straightforward in his answers to me at this inquiry. He is not credible. I am not satisfied that he is of repute. I do not believe that any operation under any licence held by him will be compliant. He is

the sole director and owner of this eponymous applicant company and accordingly the company's application fails.'

35. There then followed the single paragraph decision which, as noted above, sets out a refusal of the application on the basis of the applicant company and the Appellant lacking repute under section 13A(2)(b) of the 1995 Act.

Our analysis

36. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

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

37. The Upper Tribunal In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI was considering an appeal to the Upper Tribunal against a decision of the Head of the Traffic Regulation Unit under the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. There is no doubt, however, that the principles set out by the Upper Tribunal in paragraph 8, are derived from parallel appeals, such as the one in the instant case, where the appeal is against a decision of a Traffic Commissioner under the Goods vehicles (Licensing of Operators) Act 1995 and Regulations made under that Act – see paragraph 4 of NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI.
38. We are satisfied that on the basis of the submissions which have been made on behalf of the Appellant that the decision of the TC in the instant case was 'plainly wrong'.
39. We have observed that there is an element of incongruity about aspects of the reasoning of the TC. As was noted above, in paragraphs 20 and 21 of her decision the TC has acknowledged that there was much to support the application in that it appeared that many of the legislative criteria had been met. These included 'deposited funds for financial standing'. Despite that the TC went on to observe, at paragraph 21, that there was 'an issue about likelihood of ongoing financial standing ...' and, at paragraph 27, that she was not persuaded that the Appellant had '... the resources to be a haulage contractor.'

In a similar way, in paragraph 20, the TC acknowledged that the application was supported by a 'qualified transport manager, with no warnings against his repute.' Despite that, the TC, in paragraph 26, went on to make several unfavourable and critical remarks about the nominated transport manager including 'He says he'll control the operation when (the Appellant) is offshore. I have my doubts. I think he will prefer affability to any assertiveness.'

40. None of that matters, however, because the TC has unequivocally based her decision to refuse the application on the basis that the single criterion in section 13A(2)(b) of the 1995 Act (the requirement to be of 'good repute') was not met.
41. Thereafter the TC's reasoning as to why she is not satisfied that the appellant is of good repute is tightly drawn. There is, firstly, the Appellant's background, or what the TC refers to as the 'context' to the application. We return to that aspect below.
42. Secondly, the TC has found that the Appellant was not 'straightforward in his answers to me at this Inquiry' and that he was not credible. Looking at the transcript of the Public Inquiry proceedings, there is a discrete passage which records the evidence of the Appellant and his exchanges with the TC. That passage begins with a reference by the TC to the Appellant's past involvement in regulatory proceedings and the background to the establishment of the company. That led to the Appellant admitting to incompetency in the past with his efforts to assist other people which had 'backfired' on him. In our view there was nothing untoward in the Appellant's evidence thus far. Indeed, it could readily be described as being straightforward.
43. The TC then brought up the Appellant's involvement with Mr Hendry. The Appellant states that he did not see him anymore, and when asked for clarification stated that he might see him passing, when Mr Hendry was driving but that he didn't '... really associate with him anymore.' There then followed an interjection by the nominated transport manager which could be regarded as unhelpful.
44. The Appellant then stated that he had spoken to Mr Hendry and the TC, once again sought clarification. The Appellant stated that he had seen Mr Hendry and spoken to him but was not '... involved with him in any transport things.' Asked by the TC as to the context in which he had spoken to Mr Hendry the Appellant replied that that he had seen him in the past, which meant four to five months previously, and that he had met him whilst Mr Hendry was walking his dog. There then followed this exchange:
 - 'Q. And you would talk away to him?
 - A. Well within reason, yes.
 - Q. Hmm?
 - A. Just, just conversation.
 - Q. Conversation, mmm-hmm, and could that conversation extend to lorries?
 - A. Well he did ask me if I've got my Operator Licence back, yeah that was all.
 - Q. Mmm-hmm
 - A. But I don't know what he is operating.
 - Q. Hold on. So he asked you had you got your Operator Licence back. So he knew you were seeking to get back in?

A. Yes.

Q. Mmm-hmm, and why was that?

A. Don't know. He probably seen it in the paper, local paper. You know it's a small world.'

45. We pause here to observe that we agree with the submission from Mr Kelly that the Appellant has been open with his responses to the TC. The appellant was candid in his responses, qualifying them at several points, e.g. that he would speak to Mr Hendry 'within reason.' He was also open that their conversation had extended to the Appellant seeking to obtain an operator's licence and his explanation as to why Mr Hendry would know about that i.e. that it was a 'small world', was wholly plausible. Mr Kelly's submission that it was not in the interests of the Appellant, as part of the application process for his own operator's licence, to advance information about his involvement with Mr Hendry if his relationship with Mr Hendry was problematic and likely to affect that application.

46. We also note that at this stage of the proceedings of the Public Inquiry, the Appellant was unaware that Mr Hendry was involved in regulatory proceedings and had been called to a Public Inquiry. At a later state in the proceedings there is the following exchange:

'Q. And you set up a company, that this is exactly the same time as Ian Hendry's company was getting called to an Inquiry before the Deputy Traffic Commissioner and on some very serious matters, such that Hendry's licence is in jeopardy which he would know because -

A. Well I never knew he was getting pulled up for a Public Inquiry.

Q. Well I -

A. And, like you said, I'm not being involved with Mr Hendry with transport again. I never set up George R Cran Transport being involved with Mr Hendry at all.

Q. Sorry?

A. I haven't set up George R Cran Transport limited to associate with Mr Hendry at all.'

47. Once again it is wholly arguable that the Appellant is being straightforward in his responses to the TC, expressing his surprise at learning that Mr Hendry had been called to a Public Inquiry and stressing in strong terms that he has no intention of associating with Mr Hendry.

48. The Appellant was asked again about his involvement with Mr Hendry during a further exchange. The Appellant volunteered to the TC that he had spoken to Judith Paterson having asked her to assist in the completion of his operator's licence application form. He had gone to Mr Hendry's office to get this assistance. He had sought help from Ms Paterson because he had, in the past paid for assistance from the RHA and that he had not received the correct help. There followed this exchange:

'Q. So this time you went down to Judith's?

- A. Yeah, just to double-check it, just get somebody to double-check it, if it was right.
- Q. Ah-ha. Did she suggest some changes to you or give you some advice or how did it go?
- A. No, she just ... I just wrote, well just double-check I've filled in the application form right. That was it. She never advised me nothing.
- Q. Presumably, she would have told you if it was right or not.
- A. Yeah, yeah.
- Q. And was Mr Hendry about at that point?
- A. I don't think he was there at that time.
- Q. Want [*sic*] do you know about how their business is going?
- A. To be honest, I don't know and I am not interested. I've had my fingers burnt there before.
- Q. But you are still pals with them?
- A. No, I wouldn't say pals, no, I mean, like I say, if I see him I speak to him, but I'm not a pal. I don't go socialising with him.'
49. Once again we observe that it is wholly arguable that the Appellant has been straightforward in his responses, volunteering information where necessary. His explanation as to why he had sought assistance from Ms Paterson is plausible. When asked the direct question as to whether he was friendly ('pals') with 'them', he was unambiguous in his response.
50. To repeat, from these reasonably brief exchanges, the TC has concluded that the Appellant:
- '... most certainly sees and associates with Ian Hendry. They discuss operator licensing. Judith Paterson, at the very heart of Ian Hendry's engagement with operator licensing, helped (the Appellant) with his application.
- Given that Mr Hendry is in the background and is subject to an ongoing Inquiry which has led to the suspension of a licence which only ever had interim status, I have cause to be suspicious over these recent attempts by (the appellant) at entryism into having an operator's licence and the discs that go with such.
- (The Appellant) was not straightforward or of repute in the past. He was not straightforward or of repute in the context of the Oil city application. He was not straightforward in his answers to me at this Inquiry. He is not credible. I am not satisfied that he is of repute. I do not believe that any operation under any licence held by him will be compliant.'

51. We accept, of course, that the assessment of evidence is for the Traffic Commissioner. Within that, the assessment of credibility is also a matter for the Traffic Commissioner. We were not present at the Public Inquiry. We are reminded that the former Transport Tribunal and the Upper Tribunal (AAC) have frequently stressed that Traffic Commissioners have the advantage of seeing and hearing the witnesses, with the result that it is only in the clearest cases that the Tribunal or the AAC will differ from the Traffic Commissioner when it comes to assessing the credibility of a witness. In addition providing that there is evidence to support a particular conclusion it is for the Traffic Commissioner to decide what weight, if any, to give to that evidence. Grounds of appeal, which state expressly or by implication that the Traffic Commissioner gave too much or too little weight to a particular piece of evidence, have no prospect of success.
52. We have noted Mr Kelly's comments about the endorsement of the decision in *David Pritchard*. That decision exhorts Traffic Commissioners, when dealing with the issue of credibility, to adopt a rigorous approach. That approach includes the consideration of possible innocent explanations and giving reasons for rejecting them.
53. While we were not at the Public Inquiry, we do, however, have a copy of a full transcript of the evidence which was given and the exchanges which took place. In our view, the TC, in the reasons for her decision, has not given reasons for rejecting the Appellant's evidence concerning his interaction with Mr Hendry and, indeed, his employee. As was noted above, the Appellant has advanced what are for him innocent explanations for his interactions with Mr Hendry and the exchanges which took place – 'It's a small world', 'I don't know and I am not interested', 'I'm not a pal. I don't go socialising with him', 'She never advised me nothing', 'I'm not being involved with Mr Hendry with transport again.' As was noted by Mr Kelly there was no contradictor to the Appellant. In our view the Appellant was entitled to know why his evidence had been rejected. The statement that he was 'not credible' is, in our view, not sufficient to amount to a rigorous assessment of the appellant's evidence.
54. We are also of the view that there is insufficient evidence to found certain of the TC's conclusions. It is a leap too far for the TC to conclude, from the Appellant's evidence alone, that the Appellant '... most certainly sees and associates with Ian Hendry.' We agree with Mr Kelly that the term 'associates' is redolent of a relationship beyond casual encounter and social communication and more akin to regular and less unintentional contact. The Appellant's evidence was he had encountered Mr Hendry on a casual basis and communicated with him. That communication had included discussion about the Appellant's application for an operator's licence. The Appellant had met Ms Paterson for what he advances as a plausible reason. To elevate all of that to association between the Appellant and Mr Hendry goes too far and is unsupported by the evidence. So too is the conclusion that the Appellant and Mr Hendry 'discuss operator licensing'.
55. We are also concerned that during the earlier part of the exchanges between the TC and the Appellant at the Public Inquiry about his relationship with Mr Hendry that the Appellant was unaware that Mr Hendry was the subject of regulatory proceedings and had been called to a Public Inquiry. In our view, that reinforces the Appellant's own evidence that his involvement with Mr Hendry was chance and that they did not have a relationship involving transport. It also, to an extent, weakens the conclusion of the TC that the

Appellant and Mr Hendry 'discuss operator licensing'. If they did then it would be very likely that the Appellant would have been aware of the Public Inquiry call-up. It is unclear to us why the TC, in the knowledge that reliance would be placed on the Appellant's relationship with Mr Hendry, did not alert the Appellant to this at the outset of the proceedings in order to give him the opportunity to address the issue.

56. We have noted above that the TC has placed great emphasis on the Appellant's background or what she submits to be the 'context' to the application. We hesitate to state that the TC was not entitled to take that context into consideration. We are of the view, however, that Mr Kelly's submission that the TC was dealing with wholly different circumstances in connection with the present application and that the fact that the Appellant had been found not to be of repute in the past did not mean that he was not of repute in the present, is well made.
57. The decision of the Traffic Commissioner dated 15 July 2016 was on the basis that the single criterion in section 13A(2)(b) of the 1995 Act (the requirement to be of 'good repute') was not met. In turn, the TC's conclusions on the issue of good repute were centred on credibility. We have concluded that the TC's assessment of credibility was not sufficiently rigorous and that there was insufficient evidence to found her conclusions. Accordingly her decision is set aside. The appeal is allowed and the matter is remitted to the Traffic Commissioner or Deputy Traffic Commissioner for rehearing and determination.



**Kenneth Mullan, Judge of the Upper Tribunal,
5 May 2017**