

Appeal No. NT/2017/26

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

**ON APPEAL from the DECISION of the DEPUTY HEAD of the TRANSPORT
REGULATION UNIT
Dated 5 April 2017**

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr Stuart James	Member of the Upper Tribunal
Mr John Robinson	Member of the Upper Tribunal

Appellant:

Mr Derek Lyons

Attendances:

For the Appellant: The Appellant was in attendance and was represented by his solicitor Mr Strawbridge

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 10 August 2017
Date of decision: 6 November 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

SUBJECT MATTER:- Impounding; application to adduce fresh evidence

CASES REFERRED TO:- (T/2012/58) Alan Knight Transport B.V. & Alan Michael Knight; T/2015/36 Martin Oliver Partnership; T/2011/60 Nolan Transport v VOSA & Secretary of State for Transport; NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695;

REASONS FOR DECISION

Background

1. This is an appeal from the decision of the Head of the Transport Regulation Unit, (“Head of the TRU”) to refuse the Appellant’s application for the return of trailer ID NI/062461/98.
2. The factual background to this appeal appears from the documents and the Head of the TRU’s decision and is as follows:-
 - a) On 12 September 2016 a vehicle in combination with a semi-trailer was detained by a DVA enforcement officer on the grounds that there was no goods vehicle operator’s licence in connection with the vehicle, no goods vehicle certificate, no road tax and was fraudulently displaying an operator disc. The DVA enforcement officer ordered that the vehicle be taken to DVA premises.
 - b) The vehicle was formally detained by the DVA on 23 September 2016. Notice of the detention was published in the Belfast Gazette on 3 October 2016 with a requirement that any person who had a claim on the vehicle was to send that claim in writing to the DVA on or before 26 October 2016.
 - c) By way of correspondence dated 17 October 2016 and received on 20 October 2016 the Appellant notified the DVA that he had read the notice in the Belfast Gazette and stated that he was the registered owner of the trailer.
 - d) On 24 October 2016 a DVA officer responded to the Appellant indicating that he (the Appellant) was required to set out his interest and good title to the vehicle in writing and provide any supporting documentation together with any rental agreements that may have been in place with a third party. The DVA officer also enclosed a fact sheet and an application form which was to be completed and forwarded to the Transport Regulation Unit for the return of the detained vehicle.
 - e) In correspondence dated 31 October 2016 and received in the DVA on 14 November 2016, the Appellant stated that he wished to clarify his possession of the trailer. In her formal determination, the Head of the TRU noted that the Appellant had not provided any supporting documentation and had not returned the formal application form which had been forwarded to him to either the DVA or the TRU.
 - f) On 29 November 2016 the DVA officer wrote to the Appellant stating that, thus far, insufficient information had been provided to make a formal determination for the return of the detained trailer. The DVA officer enclosed with this correspondence a further copy of the relevant application form. On 1 December 2016 an application form signed by the Appellant, and dated 30 November 2016, was received by DVA and was forward forwarded by them to TRU.

The decision-making process in the TRU

3. On 21 February 2017 correspondence was forwarded to the Appellant in which it was noted that while he had stated in his application form that he did not wish the application to be considered at a hearing, it had been decided by the Department that it would be appropriate to hold a hearing. The stated reason for the decision to hold a hearing was that the Appellant had appeared to base

his application on 'contradictory grounds.' The Appellant was told that the holding of a hearing would give him the opportunity to clarify his grounds and to present further evidence and/or arguments in support of his application.

4. The Appellant was also informed that the hearing would take place on 21 March 2017. The Appellant was invited to attend and he was informed of his right to be legally represented, to give evidence, to call witnesses, to cross examine witnesses and to address the Department both on the evidence and on the subject-matter of the proceedings. Under a heading '**ACTION YOU MUST TAKE NOW**', The Appellant was advised of the following:

'As the Department can only return property to the lawful owner of the trailer the matter of determining ownership **will** be considered as part of the hearing. **You are therefore required to submit documentary proof and/or other physical evidence to demonstrate that you are the true owner of the trailer to the Department no later than 15 March 2017.**

You should consider immediately whether to seek informed advice and/or representation from a solicitor or other representative. If you do, you should pass this letter and associated documents to them as soon as possible to allow sufficient time for the proper preparation of your case.

You should collect any further documentary evidence you would wish to have considered at the Hearing.

You should arrive at the Hearing at least 30 minutes before the Hearing is due to start. If you have any further documentary evidence you wish to be considered at the Hearing you should pass it to the clerk on arrival.

...

Please note that the Department is unlikely to grant an adjournment unless there are exceptional circumstances. Any request for an adjournment should be submitted in writing to this office ... stating why you feel that an adjournment should be granted.

If after reading this letter you have any questions regarding the impounding Hearing please contact me ...'

5. The correspondence also stated that representatives of the Department would be in attendance and that the Department reserved the right to call any other person relevant to the proceedings to give evidence.
6. Correspondence in connection with the hearing was forwarded to the Director of Compliance and Enforcement at the DVA on 22 February 2017.
7. On 27 February 2017 e-mail correspondence was received in the TRU from the Appellant. In this correspondence the Appellant stated 'Please add this copy to my evidence file'. Attached to the e-mail was a copy of an invoice.'
8. On 14 March 2017 correspondence was forwarded to the Appellant in the following terms:

'I refer to the Impounding Hearing scheduled to be held ... on 21 March 2017.

Enclosed with this letter are the documents provided by the Driver & Vehicle Agency (DVA) as part of the disclosure process ahead of the Hearing; these documents comprise the evidence that DVA will seek to rely on during the Hearing. You should add these to any documents already received.

It will only be these enclosed documents, as well as the invoice submitted previously by you to the Transport Regulation Unit which will be considered

as part of the Hearing; these papers should now be passed to your solicitor as a matter of urgency.'

9. Attached to the correspondence of 14 March 2017 was a copy of a report prepared by a 'GVA Compliance Manager' and associated documents.
10. The hearing took place on 21 March 2017. The Appellant was not present nor was he represented. The hearing was conducted by the Head of the TRU. A member of the TRU Compliance Team was present as were four officers from the DVA. We have a copy of the transcript of the hearing in the papers which are before us. At the outset of the hearing the following was recorded:

'Ms Knowles began by explaining the background to the case resulting in the hearing. Ms Knowles reported that Mr Derek Lyons made a request to make an audio/visual recording of the Hearing which had been refused. Ms Knowles informed that this refusal applied to the attendees from the Driver & Vehicle Agency (DVA) also.

Ms Knowles informed the Hearing that Mr Lyons had previously indicated that he would be in attendance at the Hearing but had forwarded an e-mail that morning stating:

Apologies of absence. Michael please ask for the following details to be read out at the hearing, as myself or any other person I had named to attend now won't be attending for the following reasons: No 1, myself and my family's safety in accordance with the 1998 Human Rights Act, Article 8, the Human Rights Act 1988 Article 6. I have been refused several requests connected to this case. I do understand this hearing is to satisfy the TRU of ownership of the trailer. F D Lyons

Ms Knowles read the e-mail verbatim, as requested by Mr Derek Lyons. In light of the non-attendance of the applicant, Ms Knowles stated that she had considered an adjournment, despite there not having been an application for one; she said she had considered that Mr Derek Lyons had produced no tangible evidence of the risk to his or his family's safety; she also said she had considered the indication from Mr Derek Lyons that he would be legally represented, as well as the potential impact of an adjournment on the other attendees, and had decided that an adjournment was not appropriate.'

11. On 22 March 2017 correspondence was forwarded from the TRU to the Appellant. The correspondence was in the following terms:

'I am writing to inform you that the hearing to consider your application for the return of trailer ID ... took place yesterday in your absence.

Immediately prior to the hearing the DVA presented three additional pages of evidence which I have included with this letter. I have labelled them A, B and C respectively.

Ms Knowles admitted this evidence in your absence. However she has determined that it is appropriate that you are given an opportunity to consider and provide written comment on this additional evidence.

Page A is a printout from the vehicle test centre of the trailer's testing schedule. It was presented by DVA as evidence that your trailer was not owned by you as it is registered to Lyons Bros. You are invited to make comment on your ownership of the trailer.

Page B is a copy of the invoice which you submitted as your evidence. You will note that Lyons Haulage Ltd has been written on the page by DVA. During the inquiry DVA alleged that the invoice in the name of FD Lyons was fraudulent. DVA had recently contacted the accounts manager at A&M Commercials Ltd, the seller to ascertain the validity of the invoice. DVA submit that the accounts manager stated that when their records were cross-referenced with the invoice number the original invoice had been made out to Lyons Haulage Ltd. You are invited to make comment on the allegations. Ms Knowles notes that a copy of the invoice was provided electronically and she invites you to submit the original, in hard copy, for her consideration.

Page C is an indicative VAT record that DVA submitted may assist you in establishing ownership. DVA explained the nuances of VAT on exported goods and drew Ms Knowles' attention to the fact that VAT on such goods must be declared on business VAT returns. You are invited to make comment on the DVA evidence and to submit any VAT documentation you may have in support of your application for return of the trailer.

You have previously been requested to provide proof of ownership and Ms Knowles has indicated that in addition to the above you may submit any further evidence in relation to ownership which you may have.'

12. On 23 March 2017 e-mail correspondence was received in the TRU from the Appellant. It was to the following effect:

'Thank you ... for your email and attachments dated 22/03/2017. Please note my objection under article 8 of the Human Rights Act (myself and my family life privacy) I have noted the verbal comments put forward by the DVA department officers. It is obvious that they are intruding on myself and wider family, please advise your decision on you conclusion.'
13. On 23 March 2017 receipt of the Appellant's e-mail of the same date was acknowledged.
14. On 5 April 2017 the Appellant was notified that the Head of the TRU had refused his application for the return of trailer NI/062461/98 and, in summary, the Appellant was informed that the basis for the refusal was that he had not satisfied the Department, to the required standard of proof, that he was the owner of the trailer. A copy of the decision of the Head of the TRU, itself dated 5 April 2017, was attached to the correspondence of the same date.

The findings and reasoning of the Head of the TRU

15. In the decision of 5 April 2017, the Head of the TRU made the following findings and conclusions:

'Findings

Lawful detaining

On the evidence above the trailer and vehicle combination appeared to have been used in contravention of Section 1 of the Goods Vehicles (Licensing of

Operators) Act (Northern Ireland) Act 2010.

Under powers provided in the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012 the Driver and Vehicle Agency have appropriately and lawfully detained the vehicle and trailer combination.

The requirement to publish the detention in the Belfast Gazette has been fulfilled.

Ownership

An application for the return of the trailer has been accepted. I am not satisfied on the balance of probability that (the Appellant) is the owner of the trailer. The reasons are as follows:

While (the Appellant) has made written representations that he owns the vehicle without prima facie evidence of ownership that is not sufficient.

(The Appellant) is not the registered keeper of the trailer. The registered keeper is Lyons Bros.

Notwithstanding that there is an allegation that the invoice admitted may have been tampered with, even if it was for (the Appellant), the invoice is not in itself evidence of ownership. Rather it is a request/requirement from the seller to the purchaser to pay the agreed price of purchase. (The Appellant) had the opportunity to submit additional evidence which may have better informed the issue of establishing good title to the trailer. As it stands in isolation the invoice presented by (the Appellant) is insufficient evidence to satisfy the Department that he is the owner of the trailer.

Grounds for return

The grounds for return are as cited in Para 12 above. I have been unable to explore these further with (the Appellant) at oral hearing and he has not submitted any further written representations.

Conclusion

Given that the Department is not satisfied on the balance of probability that (the Appellant) is the owner of the trailer, his application for its return accordingly fails at this point.

However, for the avoidance of doubt, even if it had been concluded that (the Appellant) was the owner of the trailer the grounds on which he was relying for the return of the vehicle are not made out as insufficient written detail has been provided.

DETERMINATION

(The Appellant's) application for the return of trailer ... is REFUSED on the grounds that he has not demonstrated to the required standard of proof that he is the owner of the trailer. Even if he had been able to demonstrate ownership his application would still have been refused because the grounds on which he sought to rely could not be made out.'

The appeal to the Upper Tribunal

16. On 25 April 2017 a notice of appeal was received in the office of the Administrative Appeals Chamber of the Upper Tribunal. The following grounds of appeal were set out:

‘I am not an operator as my trailer was attached to a Renault Premium lorry and I have provided evidence that I own the trailer. Why should I not get it back.’”

The oral hearing of the appeal

17. The oral hearing of the appeal was listed for 10 August 2017. Correspondence was received in the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal on 9 August 2017. In this correspondence, the Appellant’s representative, Mr Strawbridge, indicated that he had been instructed in the matter on 27 July 2017 and received the relevant paperwork on 31 July 2017.
18. The representative stated that in advance of the oral hearing of the appeal he wished to advise the Upper Tribunal of the Appellant’s intention to adduce fresh evidence. The representative noted that the Upper Tribunal should already have been aware that the Appellant did not attend the ‘original hearing’ and did not ‘tender his own evidence’. The representative noted that the additional evidence which the Appellant wish to adduce included the Appellant’s own oral evidence, oral evidence of the Appellant’s son, bank statements and two further witness statements. In relation to the additional evidence in the form of bank statements the representative noted that original bank statements would not be available in time for the oral hearing. He stated that the Appellant had endeavoured to obtain the original documentation but that it would not be available for a further period of one week.
19. On 9 August 2017 the clerk office to the AAC was directed to forward to the Appellant’s representative the determination of the Upper Tribunal in *T/2015/36 Martin Oliver Partnership*. It was also directed that the Appellant’s representative should be advised that his statement in his correspondence of 9 August 2017 that ‘in advance of the hearing we wish to advise the Upper Tribunal of our client’s intention to adduce fresh evidence’ would be treated as an application to adduce fresh evidence which matter would be dealt with as a preliminary issue at the outset of the oral hearing. It was also directed that the Appellant’s representative should be provided with an extract from the ‘Digest of Decisions on Appeal from Traffic Commissioners’. The relevant extract made reference to an application in the case of *T/2015/36 Martin Oliver Partnership* whereby permission to appeal against the Upper Tribunal’s decision was made to the Court of Appeal for England and Wales. The determination of the Court of Appeal in refusing that application for permission to appeal was set out in full in the direction.
20. As was noted above, the Appellant attended the oral hearing of the appeal and was represented by his solicitor, Mr Strawbridge. During the course of the oral hearing the Appellant indicated to us that he was having difficulty hearing the proceedings. There followed an adjournment to establish whether the facilities to assist with impaired hearing were operational. Following the adjournment, the Appellant informed us that he could now hear the proceedings. Mr Strawbridge stated that he had consulted with his client and outlined to him

what had transpired up to the adjournment and indicated that the Appellant was happy to proceed with the remainder of the hearing.

21. At the oral hearing, Mr Strawbridge renewed the application to adduce fresh evidence. He confirmed to us that the fresh evidence which he wished to adduce went to the issue of the ownership of the detained trailer.
22. Mr Strawbridge conceded that the proper approach on this issue was as set out by the Upper Tribunal in *T/2015/36 Martin Oliver Partnership*. Turning to paragraph 45 of that decision he confirmed that the test to be applied was whether the following conditions were met:
 - (i) The fresh evidence must be admissible evidence.
 - (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.
 - (iii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
 - (iv) It must be evidence which is apparently credible though not necessarily incontrovertible.'
23. Mr Strawbridge submitted that limbs (i), (iii) and (iv) of the test were satisfied. Attention turned, therefore, to limb (ii). He submitted that it was for the Upper Tribunal to ascertain the Appellant's knowledge of the proceedings at the hearing stage and that we should address the limb (iii) test at that stage. Mr Strawbridge agreed that a pivotal question would be why the Appellant did not attend the hearing in person. He submitted that having taken instructions the Appellant's case was that he had attended a Public Inquiry in connection with regulatory proceedings involving his son. He asserted that at that Public Inquiry matters had 'become heated' and that the Appellant had been asked by the Head of the TRU, who was conducting the Inquiry, to leave. Security had become involved.
24. Turning to the Appellant's own case, Mr Strawbridge agreed that the Appellant had been notified of the date, time and venue of the hearing. He asserted that the Appellant did not wish to attend the hearing on his own and wished to have his son in attendance with him. His son was not available to attend on the scheduled hearing date. The Appellant did not wish to attend the hearing 'for fear of what might happen'.
25. Mr Strawbridge referred us to a copy of an e-mail which had been sent by the Appellant to the TRU on 23 March 2017. Although this post-dated the date of the hearing, its contents were reflective of the reasons why the Appellant felt unable to attend. It was parallel in content and tone to the e-mail which had been sent to the TRU on the morning of the hearing and the contents of which are recorded in the transcript of the hearing. In short, the Appellant did not wish to attend the hearing on his own and opted not to attend.
26. Mr Strawbridge submitted that it was a matter for the Upper Tribunal to determine whether there was any reasonableness in the Appellant's omission to attend the oral hearing and deprive himself of the option of being present to provide evidence to satisfy the issue of ownership. He submitted that there was a distinction between the circumstances which arose in *T/2015/36 Martin Oliver*

Partnership and the circumstances of the present case. The distinction was that in *Martin Oliver*, the Appellant had attended and been involved in the proceedings and had been legally represented. In the present case, the Appellant had not been involved in the proceedings.

27. Mr Strawbridge was asked by us whether the Appellant, given that he wished to be accompanied by his son at the hearing, his son not being available and, accordingly, not wishing to attend on his own, sought a postponement/adjournment of the hearing. It was observed by us that the hearing notification letter had made the reference to the possibility of an adjournment, albeit in terms that such would be unlikely to be granted save in exceptional circumstances. Mr Strawbridge replied that the Appellant did not think of that and that this was the Appellant's position.
28. Mr Strawbridge was asked to comment on the Appellant's response, or, more accurately, his lack of response to the correspondence which had been forwarded to the Appellant from the TRU both prior and subsequent to the hearing, seeking additional information from him in order to establish true ownership. Mr Strawbridge's response was the Appellant 'does not grasp the issue.' Mr Strawbridge stated that he had been instructed in the matter on 27 July 2017 and had immediately noticed 'glaring deficiencies' in the case. When asked whether the Appellant was aware that the burden of proof of establishing ownership was on him, he responded that he did not think that the Appellant had appreciated the point. His approach was to question why he had to obtain the requested materials.
29. Mr Strawbridge was asked why, if the Appellant was having difficulties in comprehending the issues relevant to the detention of the trailer and the steps required to have it returned, had not sought assistance from other members of his family, particularly his son who had knowledge of the transport industry and regulatory proceedings. Mr Strawbridge asserted that the Appellant's son had taken the same approach, had the same view of the issues as his father and had taken the lead adopted by his father. The Appellant's son had a parallel lack of appreciation of the issue of the burden of proof.
30. The Appellant was asked to comment on copy correspondence found at page 28 of the appeal bundle. The correspondence was from the Appellant to an officer in the DVA and was dated 31 October 2016. In the correspondence, the Appellant intimated that he was responding to correspondence dated 24 October 2016 from the DVA. That latter correspondence is summarised at paragraph 2(e) above. The Appellant stated that he '... would like to clarify my possession with the trailer.' He also wished to ensure that there was sufficient insurance cover for the detained trailer. Finally, the Appellant stated:

'I have taken legal advice from my solicitor, and have been informed that unless you release this trailer in the next 5 days I have no option but to take the DVA to court over the illegal detention of my trailer. Also I will seek rent of £200 weekly from 12/09/16 until the trailer is released.'
31. In response, the Appellant confirmed that he had taken legal advice but was informed that he had to '... fill in the form.' He submitted that he was unsure as the information which was needed by the DVA or TRU. He added that he thought that his only option was to appeal.

32. The Appellant was asked to comment on correspondence dated 22 March 2017 forwarded from the TRU to him. The detail of that correspondence is set out at paragraph 11 above. As was noted therein, this was correspondence which post-dated the hearing, summarised certain issues which arose during the hearing, enclosed additional evidence which was adduced at the hearing and which invited the Appellant to comment on those issues and, more generally, to forward any additional evidence which he considered relevant to the issue of ownership. At the oral hearing before us, the Appellant stated that he did not do anything in response to that correspondence and that the reason for that may have been because he did not read the letter properly.
33. At this stage of the oral hearing, we adjourned to consider the application to adduce fresh evidence. Our determination was that the application should be refused and we outlined that determination to the Appellant and Mr Strawbridge. On the basis of our determination we permitted a further adjournment in order to allow Mr Strawbridge to take instructions from the Appellant.
34. On return, Mr Strawbridge stated that in light of our determination, which 'changed the landscape considerably, he had no representations to make on the substantive issue arising in the appeal. He informed us that the Appellant had submissions which he wished to make.
35. The Appellant submitted that he was the loser in this case. He stated that he thought that he was doing the right thing in showing the invoice. He submitted that all that he had been asked to do was to submit the invoice. He had filled in the forms. He thought that it was very unfair for him to lose his trailer for something which his son had done. He did not know that his son had taken the trailer. He added that he lived in Portrush most of the time and that, accordingly, some of the correspondence which may have been sent to him by DVA/TRU to 'his house' may have been left unattended for some time.
36. Mr Strawbridge added that he wished to raise one final issue which was that the Head of the TRU had taken into account evidence arising from an interview under caution. He submitted that the Appellant had been denied the opportunity to see the contents of the interview which were 'hotly disputed' by the Appellant and his son.

The proper approach on appeal to the Upper Tribunal

37. 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. (*Bradley Fold*) 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.’

38. At paragraph 4, the Upper Tribunal had stated:

‘It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, (“the 1995 Act”), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.’

The legislative provisions relating to detention and return of vehicles

39. Under the provisions of section 1(1) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010, (the 2010 Act) it is unlawful, in Great Britain to use a goods vehicle on a road, for the carriage of goods, either for hire or reward or for or in connection with any trade or business carried on by the user of the vehicle, without holding a licence, (known as ‘an operator’s licence), issued under the Act. By section 1(6) a person who uses a vehicle in contravention of this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.
40. Section 44 of the 2010 Act provides that Schedule 2 to the 2010 Act ‘shall have effect’. Schedule 2 contains detailed powers to make Regulations concerning the detention etc of goods vehicles used in contravention of section 1 of the 2010 Act and, in paragraph 8(4) of Schedule 2, it sets out grounds for return which may be included in the Regulations.
41. The right to impound goods vehicles is set out in regulation 3 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012, (the 2012 Regulations), which came into force on 1 July 2012. Regulation 3 of the 2012 Regulations is in these terms:-
- “Where an authorised person has reason to believe that a vehicle is being, or has been, used on a road in contravention of section 1 of the 2010 Act, he may detain the vehicle and its contents”.
42. Authorised person is defined in paragraph 1(1) of section 58 of the 2010 Act and means ‘(a) an examiner appointed by the Department under Article 74 of the 1995 Order; or (b) any person authorised in writing by the Department for the purposes of the 2010 Act’. The ‘1995 Order’ is the Road Traffic (Northern Ireland) Order 1995.
43. By virtue of regulation 9(1) of the 2012 Regulations, the **owner** of a vehicle detained in accordance with regulation 3 may, within the period specified in

regulation 8(2), apply to the Department for the return of the vehicle. There is a definition of 'owner' in regulation 2 of the 2012 Regulations:

'owner" means, in relation to a vehicle or trailer which has been detained in accordance with regulation 3--

- (a) in the case of a vehicle which at the time of its detention was not hired from a vehicle-hire firm under a hiring agreement but was registered under the Vehicle Excise and Registration Act 1994, the person who can show to the satisfaction of an authorised person that he was at the time of its detention the lawful owner (whether or not he was the person in whose name it was so registered);
- (b) in the case of a vehicle or trailer which at the time of its detention was hired from a vehicle-hire firm under a hiring agreement, the vehicle-hire firm; or
- (c) in the case of any other vehicle or trailer, the person who can show to the satisfaction of an authorised person that he was at the time of its detention the lawful owner.'

44. The regulation 8(2) time period is the period of twenty-one days from the publication of notice of detention in the Belfast Gazette.

45. In paragraph 90 of its decision in *Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/60), the Upper Tribunal summarised the scheme for the right to impound and claim for return, under the parallel legislative scheme applicable in Great Britain, as follows:

'Three points need to be stressed at this stage. First, it is for VOSA to show that they had reason to believe that the detained vehicle was being or had been used, on a road, in contravention of s.2 of the 1995 Act. The standard of proof required is the balance of probability ... Second, once VOSA have established they had the right to detain a vehicle it is for the owner to prove ownership of the vehicle or vehicles to which the claim relates. Again the standard of proof required is the balance of probability ... Third, it is for the owner to show, on the balance of probability, that one of the grounds set out in regulation 10(4) of the 2001 Regulations, as amended, has been established.'

46. The reference to regulation 10(4) should be 4(3) but nothing turns on that.

47. The **grounds** on which an application for the return of an impounded vehicle may be made are set out in regulation 4(3) of the 2012 Regulations, as follows:

'(3) The grounds are--

- (a) that, at the time the vehicle was detained, the person using the vehicle held a valid licence (whether or not authorising the use of the vehicle);
- (b) that, at the time the vehicle was detained, the vehicle was not being, and had not been, used in contravention of section 1 of the 2010 Act;
- (c) that, although at the time the vehicle was detained it was being, or had been, used in contravention of section 1 of the 2010 Act, the owner did not know that it was being, or had been, so used;

- (d) that, although knowing at the time the vehicle was detained that it was being, or had been, used in contravention of section 1 of the 2010 Act, the owner--
 - (i) had taken steps with a view to preventing that use; and
 - (ii) has taken steps with a view to preventing any further such use.'

Analysis

48. We begin by setting out the reasons for our determination that the application to adduce fresh evidence should be refused. As was noted above, in his oral submissions to us, Mr Strawbridge submitted that limbs (i), (iii) and (iv) of the test (as set out in paragraph 45 of the decision of the Upper Tribunal in *T/2015/36 Martin Oliver Partnership*) were satisfied. We do not have to consider that submission because we are positive that limb (ii) of the test is certainly not satisfied. As a reminder, limb (ii) is in the following terms:

'It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.'

49. In this instance we substitute for 'public inquiry', the 'detention' hearing which took place on 21 March 2017. We have noted that the fresh evidence which was sought to be adduced went to the core issue in the proceedings, namely the ownership of the detained trailer. The fresh evidence is in two forms – the oral evidence of the Appellant and his son and written or documentary evidence in the form of bank statements and statements of two other individual statements.

50. We have noted that well in advance of the decision to hold a 'detention' hearing the Appellant was given a number of opportunities to adduce evidence in connection with the issue which was central to the decision subject to appeal. As was noted above, when he first contacted the DVA to claim ownership of the trailer, noted in the Belfast Gazette, as detained, an officer of the DVA responded to him by way of correspondence dated 24 October 2016. The correspondence is in the plainest and unambiguous of terms. It informs the Appellant of what he is required to do in order that his application for the return of the trailer might be considered. Attached to the correspondence was a fact sheet on the 'Detention of vehicles used without an operator's licence.' Once again this document is straightforward and comprehensible, even to the layperson. Finally the Appellant was provided with an application form which he was asked to complete.

51. The Appellant's response was by way of correspondence dated 31 October 2016. He did not complete the application form which had been sent to him. He did not provide any documentation in support of his claim to ownership of the trailer. As was noted above, he sought reassurance that there was adequate insurance in place for the trailer. As was noted above, he added the following:

'I have taken legal advice from my solicitor and have been informed that unless you release this trailer in the next 5 days I have no option but to take the DVA to court over the illegal detention of my trailer. Also I will seek rent of £200 weekly from 12/09/16 until the trailer is released.'

52. We find this to be of significance for two reasons. The first is that the case advanced on behalf of the Appellant for his failure to obtain and submit the evidence, now sought to be adduced, was that he had difficulties in comprehending the issues relevant to the detention of the trailer and the steps required to have it returned. That claim runs counter to the coherent arguments advanced in the correspondence dated 31 October 2016 which are, in our view, reflective of our own impression of the Appellant as an intelligent and articulate individual. We note below further evidence of his clear comprehension of the issues arising in the proceedings. Secondly, the asserted failure to 'grasp the issues' is undermined by the evidence that the Appellant sought legal advice from a professional representative.
53. The officer of the DVA returned to the matter in correspondence dated 29 November 2016. In summary this was a repeat of the correspondence dated 24 October 2016, pointing out that the Appellant's response to date had not provided sufficient information for a determination to be made on the return of the trailer. The Appellant was provided with a further copy of the fact sheet and the application form. Once again, the covering correspondence was straightforward and comprehensible. The Appellant's response was to complete and return the application form. That fact is, once again, contrary to the claim that the Appellant had difficulty in understanding the issues arising in the case.
54. In paragraphs 3 to 5 above, we have set out the detail of the correspondence which was forwarded to the Appellant informing him of the date, time and venue of the 'detention' hearing. In that correspondence it was made clear to the Appellant that a central issue to be considered at the hearing was the ownership of the detained trailer. He was advised in clear and straightforward terms of the requirement to provide evidence to substantiate his claim to ownership, was advised of his right to representation and of the circumstances in which an adjournment of the hearing would be granted.
55. As was noted above, the Appellant, by way of e-mail correspondence dated 27 February 2017 forwarded a copy of an invoice to the TRU and asked that this be added to his 'evidence file'. It is clear that the invoice was submitted by the Appellant in support of his submission that he was the owner of the detained trailer. Once again, the adducing and submission of this evidence runs counter to any suggestion that the Appellant was unable to 'grasp the issues.'
56. In paragraph 8 above we set out, in full, correspondence which was forwarded to the Appellant on 14 March 2017. This was the notification to him of the date, time and venue of the 'detention' hearing. It was not restricted to that, however. Attached to the correspondence was an important bundle of documents amounting to the evidence on which the DVA was going to rely at the hearing itself. There was an acknowledgement of receipt of the invoice which had been forwarded by the Appellant. Included within the DVA evidence was a report prepared by a DVA officer and submissions about the DVA concerns as to the true ownership of the detained trailer. It ought, in our view, have been evident to the Appellant, on receipt of the DVA evidence, that he had an obstacle to face in terms of proving his ownership of trailer.
57. We turn now to the Appellant's omission to attend the 'detention' hearing. This goes to that aspect of the application to adduce fresh evidence in the

form of his own oral evidence and the oral evidence of his son. As was noted above, the argument advanced on behalf of the Appellant was that prior to the present proceedings, he had attended a Public Inquiry in connection with regulatory proceedings involving his son. He asserted that at that Public Inquiry matters had 'become heated' and that the Appellant had been asked by the Head of the TRU, who was conducting the Inquiry, to leave. Security had become involved. Accordingly, the Appellant did not wish to attend the hearing on his own and wished to have his son in attendance with him. His son was not available to attend on the scheduled hearing date. The Appellant did not wish to attend the hearing 'for fear of what might happen'.

58. The argument advanced in oral submissions before us is mirrored in the e-mail which the Appellant had sent to the TRU on the morning of the 'detention' hearing and which, as the transcript of proceedings shows, was read out by the Head of the TRU at the start of the hearing – see paragraph 10 above. We observe, at this stage, that the submissions which were made in that e-mail, and in a parallel e-mail received in the TRU two days after the hearing, that the arguments which were being advanced – a breach of specific human rights including the European Convention on Human Rights Article 8 right to respect for private and family life – were sophisticated and were not reflective of someone who was not aware of the issues arising in the relevant proceedings.
59. As was noted above, at the oral hearing we asked Mr Strawbridge why the Appellant, given that he wished to be accompanied by his son at the hearing, his son not being available and, accordingly, not wishing to attend on his own, had not sought a postponement/adjournment of the hearing. We also observed that the Appellant's son was aware of the nature and form of regulatory proceedings.
60. In light of the information which was made available to the Appellant in advance of the detention hearing and the clear and definitive explanation to him of the issues which were going to arise and the steps necessary for him to address those issues, the decision for him and his son not to attend the 'detention' hearing to give direct oral evidence was one of deliberate choice by them. We have noted that the Head of the TRU having reviewed the reasons given by the Appellant for his choice not to attend i.e. risks to his and his family's safety, concluded that they were unfounded and unsupported by any tangible evidence. We agree with that. In our view, there was nothing to prevent the Appellant from attending the 'detention' hearing or, in order that concerns about safety and potential risk might be addressed, seeking an adjournment of the hearing to another date. A request for an adjournment would have addressed the parallel problem of the unavailability of the Appellant's son. We have not forgotten that the Appellant had already consulted with a professional representative in relation to the detention proceedings. There is no reason, in our view, why a further consultation could not have taken place and an adjournment sought with, at least, the professional representative attending the hearing to make the application.
61. Accordingly, we have determined that with reasonable diligence the Appellant could have made arrangements for the attendance of him and his son at a hearing. To the extent, therefore, that the application to adduce fresh evidence included an application for us to hear the oral evidence of the Appellant and his son, the application was refused.

62. We have noted that when the Appellant failed to attend the 'detention' hearing, the Head of TRU gave consideration to whether the hearing should be adjourned even though the Appellant had made no application to that effect. That is, in our view, reflective of judicious practice. Looking at the reasons given for the determination not to adjourn, we find no fault with them.
63. We also concluded that there was no reason why the Appellant could not, with reasonable diligence, have obtained the documentary evidence which he sought to adduce, on a 'fresh' basis, before the Upper Tribunal. The documentary evidence was in the form of bank statements and statements of two further witnesses. We were informed that both the bank statements and the witness statements were in support of the assertion that the Appellant was the owner of the detained trailer. As was noted above, the Appellant was given a number of opportunities to adduce this type of evidence. It was specified to him by the DVA that the very limited information which he had provided was insufficient for there to be a proper determination on ownership (and return). His response was to consult his professional representative and respond with a warning that action might be pursued through the courts to seek the return of the detained trailer but no more.
64. When pressed again by the DVA to provide information which was relevant to the issues arising, his response was to return an application form completed in the barest of detail but with no supporting documentation. That the Appellant did seek a copy of an invoice which he submitted was evidence of his ownership demonstrated that he was alert to that issue. We see no reason why he did not then, as he has later sought to do before the Upper Tribunal, seek additional evidence in support of his submissions as to his ownership. The trailer is clearly a valuable asset. In addition both of his somewhat conflicting assertions that either he could not grasp the issue at hand and that he had done everything which he had needed to do, are not sustainable. Further, the evidence was not difficult to obtain.
65. That is not the end of the matter, however. As was noted above, the TRU was extremely diligent in forwarding correspondence to the Appellant on the day after the 'detention' hearing, that is 22 March 2017. The correspondence is set out in full in paragraph 11 above. Attached to the correspondence were three items of documentary evidence which had been provided by DVA officers during the hearing. It was noted that the Head of the TRU had determined that it was appropriate that the evidence be shared with the Appellant and that he be given an opportunity to comment on it. Once again, that is reflective of a judicious approach.
66. The evidence included details of the detained trailer's testing schedule which, it was asserted was indicative that the trailer was not owned by the Appellant. The appellant was also informed that during the course of the 'detention' hearing, allegations were made that the invoice which had been supplied by the Appellant as evidence that he owned the trailer was fraudulent. Finally, the DVA officers supplied details of VAT arrangements which, it was asserted, assisted in the establishment of ownership. The Appellant was invited to comment on each additional piece of evidence and the assertions which had been made by the DVA officers. In addition, he was reminded that he had the opportunity to provide any additional evidence which he had in connection with the ownership of the trailer. In our view, if the Appellant was not aware in advance of the 'detention' hearing that the issue of ownership was central to the proceedings, then the correspondence of 22 March 2017 ought to have

reinforced that in his mind. We have noted that the Appellant's response was not to seek the additional evidence which he sought to adduce at the oral hearing before us, but, as he freely admitted to us, to ignore the correspondence and do nothing further. It is clear that had the Appellant been proactive in accepting the invitation to respond to the issues which arose during the hearing and adduce the evidence which he considered to be relevant then the TRU would have been willing to take that evidence into consideration.

67. For the sake of completeness on the issue of the application to adduce fresh evidence, at a very late stage of the oral hearing, the Appellant submitted that the correspondence which had been issued to him, particularly the letter of 22 March 2017, which post-dated the 'detention' hearing, may have been left unread and unanswered because it was sent to one address and relating to him and he had another property at which he sometimes resided. We reject that submission. The postal address to which the correspondence was sent was the address which the Appellant had indicated in his application form for the return of the detained trailer. Further the Appellant was proactive in responding to all other items of correspondence which were sent to him either in writing or by e-mail.
68. When the determination that the application to adduce fresh evidence was refused was given at the oral hearing, Mr Strawbridge was invited to make submissions on the substantive issues arising in the appeal. He indicated that he had no further submissions to make as the refusal of the application had 'changed the landscape' of the appeal. He did submit that the Head of the TRU had taken into account evidence which had been given during the course of an interview under caution with the Appellant's son, that the Appellant had been denied the opportunity to consider that evidence and the evidence was disputed by the Appellant. We have noted that the evidence to which Mr Strawbridge referred was addressed by the Head of the TRU in connection with the issue of lawful detention, namely whether the vehicle was being used in contravention of the section 1(1) of the 2010 Act. That is an evidential issue which the Appellant (or his son) could have challenged at any stage of the regulatory proceedings including at the 'detention' hearing but they chose not to. We are wholly satisfied that the Head of the TRU addressed the evidence in an appropriate manner.
69. At the oral hearing before us, the Appellant made general submissions on the issues arising in the appeal. In summary, he asserted, as he was entitled to do, that it was unfair for him to lose his trailer for something which his son had done. He did not know that his son had taken the trailer. He submitted that he had thought that he had done everything required of him.
70. The Head of the TRU approached the matter by addressing the issues of lawful detaining, ownership and grounds for return. The Upper Tribunal has emphasised that if there is any doubt as to whether the person applying for the return is the owner then that matter must be dealt with first by the Traffic Commissioner - see paragraph 7 of *Alan Knight Transport B.V. & Alan Michael Knight* (T/2012/58).
71. As was noted above, the test which we have to apply is whether the decision of the Head of the TRU was 'plainly wrong'. We are wholly satisfied that neither the law nor the facts impel us to interfere with the DTC's decision as per the decision in *Bradley Fold* and the appeal is dismissed.

A handwritten signature in black ink on a light grey rectangular background. The signature reads "Kenneth Mullan" in a cursive script.

**Kenneth Mullan, Judge of the Upper Tribunal,
6 November 2017**