



NCN: [2021] UKUT 217 (AAC)

Appeal No. NT/2021/26

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated 22 February 2021

Before:

Kenneth Mullan Judge of the Upper Tribunal

Appellant:

Alana Creations Ltd

Attendances:

For the Appellant: The appeal was determined on consideration of the papers

For the Respondent: The appeal was determined on consideration of the papers

Type of hearing: The appeal was determined on consideration of the papers

Date of decision: 24 August 2021

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

SUBJECT MATTER:- Impounding

CASES REFERRED TO:- 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; Nolan Transport v VOSA & Secretary
of State for Transport (T/2011/60)

REASONS FOR DECISION

1. This is an appeal from the decision of the Head of the Transport Regulation Unit ('TRU') to refuse an application for the return of a detained vehicle. The TRU is part of the Department for Infrastructure ('the Department').

Background

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

- (i) On 27 November 2020 a HGV registration VEZ3874 was encountered by the Driver Vehicle Agency ("DVA"). It was carrying goods without a vehicle operator's licence. The vehicle was detained. The operator of the vehicle was identified as being Alana Creations Ltd. The operator had previously been issued with a pre-detention notice on 25 October 2017 after the vehicle was encountered being operated without an operator's licence on 13 April 2017 and 19 May 2017.
- (ii) The operator had previously submitted an application for a restricted goods vehicle operator's licence on 24 October 2017, but this application was refused on 07 December 2017 as being incomplete due to non-response to first and final letters requesting additional supporting documentation. A later application was submitted on 25 November 2020 for a restricted licence. This application remains under consideration as the Department continues to engage with the operator.
- (iii) After notice was issued in the Belfast Gazette in accordance with the Enforcement Regulations, an application was made for the return of the vehicle in a form of an undated letter (received at the office of the TRU on 15 January 2021), followed by a completed "Application to TRU" (Form GVA(D)B) which did not specify ground for return and did not request a hearing. Within Section 8, 'Details of Application', the applicant submitted;

"at the time the vehicle was detained an operator's licence application was being attended to. A newspaper advertisement part of the application had been published several days prior to the vehicle being detained ... the operator licence is applied for and still pending"

- (iv) As the application did not specify a ground for return the Head of the TRU directed the case worker to write to the applicant to advise that he intended to determine the application on the papers, that he requested evidence of ownership, and sought clarification on the grounds for return. The request asked for a response not later than Friday 12th February 2021 and asked:

"on your application I understand the grounds put forward for return of vehicle is that you had made an application to the Department for a Goods Vehicle Operator's licence, and published your advertisement for an operating centre prior to"

the detention taking place. I would be grateful if you could clarify my understanding as being correct, or elaborate as required."

- (v) On 17 February 2021 the Department received a letter from the applicant's solicitors providing evidence of ownership of the vehicle and confirming the Head of the TRU's understanding of the grounds for return of vehicle:

"We confirm your understanding that our client had made an application to the Department for a Goods Vehicle Operator's licence, and published an Advertisement on the 25th November 2020 (a copy of which was attached to our clients application for return of their vehicle) for an operating centre prior to the detention taking place is correct."

- (vi) In his decision the Head of the TRU noted that no further grounds for return or elaboration, was provided, nor was any request made for the application to be determined at a hearing.
- (vii) On 22 February 2021 the Head of the TRU made the following decision:

'The application for return of vehicle VEZ3874 is refused and it may be disposed of accordingly.'

- (viii) An appeal against the decision dated 22 February 2021 was subsequently received in the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal.
- (ix) By way of email correspondence dated 23 March 2021 the Appellant's solicitors made an application for a stay of the decision dated 22 February 2021.
- (x) On 23 March 2021 the application for a stay of the decision dated 22 February 2021 was granted by the Head of the TRU.

The grounds of appeal

3. In the notice of appeal, the Appellant's solicitors set out the following grounds of appeal:

'This is an appeal against the written decision of the Department for Infrastructure dated the 22nd February 2021 by David Mullan Head of Transport Regulation Unit. This appeal is based on that decision. The appellant says that there was an incorrect application of the law and in particular regulation 4(3) of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012.

The appellant applicant [*sic*] submits that on grounds 4(3)(d) that "although knowing at the time the vehicle was detained it was being, or had been used in contravention of section 1 of the 2010 Act Goods Vehicles Licensing of Operators) Act (Northern Ireland) 2010 (as amended) [*sic*], the owner had

taken steps with a view to preventing that use and has taken steps with a view to preventing any further such use – the appellant had applied for an operator’s licence and submitted an operating centre advertisement dated 25th November 2020 and as such it is submitted that the appellant should succeed on ground (D) within regulation 4 (paragraph 3). It is further submitted the appellant, having made the application, submitted the operating centre advertisement 25th November 2020 as vouched and had taken steps in accordance with regulation 4 paragraph 3 with a view to preventing that use and had taken further steps with a view to preventing any further such use. It is submitted the appellant’s case falls within the said ground for the return of the detained vehicle under regulation 4(3)(d).

The said vehicle registration VEZ3874 was the subject of a licence application and as indicated while the newspaper advertisement dated 25 November 2020 was duly vouched as part of this application and was published several days prior to the vehicle being detained. We enclose a further copy of the advertisement dated 25 November 2020.’

The Head of the TRU’s evidential assessment and reasoning

4. In the decision of 22 February 2021 the Head of the TRU set out the following evidential assessment and reasoning:

‘Evidence

7. In advance of preparing this written decision I have reviewed the following:-
- Bundle Prepared by OVA, which includes a Briefing note, statement and photographs from the detecting officer, a copy of the pre-detention notice issued to the applicant, and material relating to the company and the vehicle.
 - The applicants request for return and supporting letter from their legal representative; and
 - The Department's practice guidance document number 6 on detention which is in the public domain.

DVA Bundle

8. A report from the DVA on its decision to detain vehicle VEZ3874 was part of their bundle along with a statement from the detecting officer His statement, supported by photographic evidence, identifies three main points:
- Vehicle VEZ3874 was carrying goods (bathroom furniture and fittings)
 - the vehicle had no identity disk displayed
 - checks on the vehicle, and specified user of the vehicle, revealed that the vehicle was not specified on a goods vehicle operator's licence, and that the specified user of the vehicle, Alana Creations Ltd, did not hold a goods vehicle operator's licence

- the user of the vehicle had previously been issued with a pre-detention notice
9. DVA material also provides evidence that the vehicle in question is, most likely owned by the applicant.
10. The applicant has not provided any material that contradicts or challenges the material provided by D

Application for return of the detained vehicle by Alana Creations Ltd.

11. The applicant has provided four documents to the Department:
- a letter received at the Department on 15 January 2021 which stated that they wish to apply for the return of the vehicle, that they have already applied for a licence and await clarification of the same, and that they wish to apologise for any offence committed an application, OVA form (GVA(D)8), containing the details recorded at Paragraph 4 above
 - a further letter from the applicants legal representative as recorded at paragraph 6 above
 - correspondence from Capitalflow, a finance company in the Republic of Ireland, confirming that the vehicle is owned by Alana Creations Ltd on finance with Capitalflow.

Consideration and assessment

12. The first step is for the applicant to prove ownership of the relevant vehicle. On this, I accept the material provided by the applicant - being the correspondence from Capitalflow - along with the material from DVA which identifies the applicant as the registered keeper. Whilst being the registered keeper of the vehicle is, in itself, not evidence of ownership I am content that the evidence allows me conclude that, on the balance of probabilities, Alana Creations Ltd is the owner and this is not challenged by DVA.
13. I then turn to the case for detaining the vehicle. The material provided is, I believe sufficient, to conclude that the vehicle was being used in contravention of the Legislation, that a pre-detention notice was issued, and the vehicle was lawfully detained. The applicant has not provided an argument to this point
14. Finally I consider the grounds for return. Regulation 4(3) of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012 sets out the grounds for the return of a detained vehicle. Those 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 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.
15. The applicant has not explicitly confirmed on which of these grounds the application was being made, instead the applicant submits that they had applied for an operator's licence, and submitted an Operating Centre Advertisement in advance of the detention.
16. On this basis I would be led to conclude that the application fails as sufficient grounds have not been put forward. For the purposes of finality, however, I consider what case might be made under each ground.
- Grounds (a) & (b) as outlined above I am satisfied that the vehicle was being used in contravention of section 1 of the 2010 Act, and the user did not have a valid licence. An application on either of these grounds would therefore fail.
 - Grounds (c) & (d) as the applicant had received a pre-detention notice and had made two applications - making reference in their submission that the application was not yet granted - I conclude that the applicant had actual knowledge that the licence was being used in contravention of the Legislation.'

General principles on the operation of the Act and Regulations

5. At paragraphs 10 to 13 of the decision in NT/2013/82 Arnold Transport & Sons Ltd v DOENI, the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

'Some General Principles

10. An operator's licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of

the 2010 Act as amended, have been met. [The expression Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, (“the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.

11. The grant of an operator’s licence does not mean that an operator can then proceed on the basis that the requirements that must be met in order to obtain a licence can thereafter be disregarded. In our view it is clear both from the terms of the 2010 Act and from Regulation 1071/2009 that these are continuing obligations, which an operator is expected to meet throughout the life of the licence. It is implicit in the terms of s. 23, which gives the Department power to revoke, suspend or curtail an operator’s licence, that this can take place at any time and for any reasonable cause, including matters covered by the requirements of s. 12 as amended. It is explicit in s. 24, which provides that a standard licence shall be revoked if at any time it appears that the licence-holder is no longer (i) of good repute, (ii) of appropriate financial standing or, (iii) professionally competent. The underlining, in each case is ours. First, we wish to stress that once it appears that the licence-holder is no longer of good repute, or of appropriate financial standing or professionally competent the licence must be revoked because the Act makes it clear that there is no room for any exercise of discretion. Second, the use of the expression ‘at any time’ makes the continuing nature of the obligations crystal clear.
12. The Tribunal has stated on many occasions that operator’s licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator’s licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.
13. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator’s licence will be called into question. It will become clear, in due course, that fitness to hold an operator’s licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: “*actions speak louder than words*”, (see paragraph 2(xxix) above). We agree that this is a helpful and

appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'

The proper approach on appeal to the Upper Tribunal

6. 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.'

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 legal principles relevant to detention and return

7. 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 Northern Ireland 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.
8. 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.
9. 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".
10. 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.
11. 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.'
12. The regulation 8(2) time period is the period of twenty-one days from the publication of notice of detention in the Belfast Gazette.
13. In paragraph 90 of its decision in *Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/60) ('*Nolan*'), 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.’

14. The reference to regulation 10(4) should be 4(3) but nothing turns on that.
15. 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

16. I have no hesitation in upholding the decision of the Head of the TRU.
17. I begin by considering whether the Department had the right to detain the relevant vehicle. As noted in paragraph 7 above, the Upper Tribunal in *Nolan* decided that the first question to be answered is whether the authorised person had reason to believe that the detained vehicle was being or had been used, on a road, in contravention of section 2 of the 2010. I am wholly satisfied that there was sufficient evidence available to the authorised person to allow him to have reason to believe that there was a contravention of section 2. In this regard I accept in its entirety the statement of the detecting officer.
18. I am also wholly satisfied, on the evidence which is available to me, that the Appellant was the owner of the relevant vehicle. In any event, it would appear to be the case that the Appellant does not dispute this.

19. I turn to the question as to whether any of the grounds for the return of the detained vehicle, as set out in regulation 4(3) of the 2012 Regulations, have been established by the Appellant. As set out in the notice of appeal, the Appellant representative, rely on the ground set out in regulation 4(3)(d). In what can be said to be somewhat of an inventive assertion, the representative submits that by making an application for an operator's licence and, as part of that application, placing an advertisement in connection with the proposed operating centre, the Appellant, for the purposes of regulation 4(3)(d), while 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, had taken steps with a view to preventing that use and had taken steps with a view to preventing any further such use. This assertion is entirely misplaced. It is absurd and illogical for the representative to expect that I would accept that by applying for an operator's licence and placing an advertisement in connection with an operating centre, the Appellant had taken steps with a view to preventing use in contravention of section 1 of the 2010 Act and had taken steps with a view to preventing any further such use.
20. Further, and put quite simply, applying for an goods vehicle operator's licence does not permit the applicant to commence the use of the 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.
21. For the sake of completeness, I find that none of the other three grounds in regulation 4(3) of the 2012 Regulations have been established.
22. For these reasons, I have concluded that the decision of the Head of the TRU was not plainly wrong. The appeal is, accordingly, dismissed.



**Kenneth Mullan, Judge of the Upper Tribunal,
24 August 2021**