



NCN: [2022] UKUT 00160 (AAC)

Appeal No. UA-2021-000326-NT

**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 26 October 2021

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr David Rawsthorn	Member of the Upper Tribunal
Mr Richard Fry	Member of the Upper Tribunal

Appellant:

RJ Rutledge Ltd

Attendances:

For the Appellant: John McManus (Solicitor); Mr Richard Rutledge & Mr Robert Rutledge

For the Respondent: None

Type of hearing: Face-to-face oral hearing

Date of hearing: 26 April 2022

Date of decisions: 21 June 2022

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED.

SUBJECT MATTER:-

Application for a restricted licence; refusal on foot of adverse compliance audit report; the duty to give reasons; the balancing exercise

CASES REFERRED TO:-

NT/2013/82 Arnold Transport & Sons Ltd v DOENI;
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; *Nico 2014 Limited* ([2022] UKUT
00096 (AAC); *ALPS Scaffolding Ltd* ([2022] UKUT
00094 (AAC))

REASONS FOR DECISION

1. This is an appeal from the decision of the Head of the Transport Regulation Unit ('TRU') to refuse the Appellant's application for a restricted goods vehicle operator's licence.
2. The TRU is part of the Department for Infrastructure ('the Department')

Background

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

- (i) On 2 July 2021 the Appellant made an application for a restricted goods vehicle operator's licence. The application sought authorisation for three vehicles and three trailers and was made as a result of a change of legal entity.
- (ii) As the application was not yet out of its objection period the operator requested interim authority. On 30 July 2021 the Deputy Head of TRU granted that application for interim authority, noting that, as a consequence of a very low first time pass rate (being 25%), further consideration would need to be given to the application for the full licence. A request was made for the Driver Vehicle Agency (DVA) to conduct a Compliance Audit and provide a report to the TRU for its consideration. The request was made on 13 August 2021 but DVA advised that the audit would unlikely take place before the interim authority was due to expire. The interim licence was therefore extended until 15 December 2021.
- (iii) The DVA audit was received by TRU on 22 October 2021. The Head of the TRU has stated that 'this audit was detailed and concluded with an "Unsatisfactory" rating with respect to maintenance; daily walk-round checks; safety inspections; and drivers' hours. It showed satisfactory ratings in respect of vehicle weights and establishment. The first time pass rate was reported as 29%.'
- (iv) The audit included a letter from the operator, which is referred to within the appeal papers, and an email from the DVA Traffic Examiner in response to the issues raised by the operator. The Head of the TRU has stated that 'both pieces of correspondence were considered as part of the decision making process'.
- (v) By way of correspondence dated 26 October 2021, the Appellant was informed that the application was refused.
- (vi) An appeal against the decision of 26 October 2021 was subsequently received in the office of the Administrative Appeals Chamber ('AAC') of the Upper Tribunal.
- (vii) In the notice of appeal, the Appellant's representative ticked a box to indicate that no application had been made to the Department for a stay of the decision of 26 October 2021 and wished to apply to the Upper Tribunal for a stay. In the papers which are before us, is a copy of a determination on a stay, made by the Head of the TRU on 12 November 2021. In that determination, the Head of the TRU noted an anomaly in the notice of appeal in that while a box had been ticked to indicate that

no stay application had been made to the Department when, in fact, such an application had been submitted to the TRU on 12 November 2021. In any event, the application for a stay was refused by the Head of the TRU on 12 November 2021.

- (viii) The renewed application for a stay before the Upper Tribunal was refused by Upper Tribunal Judge Hemingway on 17 January 2022.

Grounds of appeal

4. In the notice of appeal, the Appellant's representative set out the following grounds of appeal:

'Our adherence to drivers' hours and operation of our small fleet is to a high standard. We have never been stopped or prosecuted for any infringement of hours' offences and we are prepared to submit ourselves to an audit in this regard. Our tachograph analysis is conducted by a third party provider who provides advice and assistance if, and when necessary. Relevant training and updated CPC training occurs.

Walk round checks; walk round checks are conducted and when identified defects are noted. We conduct weekly walk round checks which is sufficient and adequate for fulfilment of legal obligations.

Regular safety inspection/testing; all vehicles are maintained to a high standard. We appreciate the necessity of this for any vehicle and would again stipulate that we have a high pass rate in regard to testing.

Finally please note our correspondence dated 21/10/21 which we are unsure was considered at the time of the decision dated 26/10/21.'

5. The correspondence dated 21 October 2021 was included in the bundle of papers which were before us. It is addressed to the DVA and is a lengthy refutation of aspects of the audit report.

Relevant legislative provisions

6. Sections 2(1)-(4), 12(2)-5) 12B, 12C, 12D and 12E of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 ('the 2010 Act') provide:

2. "Standard" and "restricted" licences

(1) An operator's licence may be either a standard licence or a restricted licence.

(2) A standard licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods—

(a) for hire or reward, or

(b) for or in connection with any trade or business carried on by the holder of the licence.

(3) A restricted licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods for or in connection with any trade or business carried on by the holder of the licence, other than that of carrying goods for hire or reward.

(4) Notwithstanding subsections (2) and (3), a company may use a goods vehicle on a road for the carriage of goods for hire or reward under a restricted licence instead of a standard licence if (but only if) the goods concerned are the property of a company which is—

(a) a subsidiary of the first company,

- (b) a holding company for the first company, or
- (c) a subsidiary of a company which is a holding company both for that subsidiary and for the first company.

(d) if the Department thinks fit, whether the requirement of section 12D is satisfied.

12. Determination of applications for operators' licences

- (1) On an application for a restricted licence the Department must consider—
- whether the requirements of sections 12B and 12C are satisfied; and
 - if the Department thinks fit, whether the requirement of section 12D is satisfied.
- (2) Subsections (1) and (2) are subject to sections 10 (publication of application) and 47(2) (payment of application fee).
- (3) In considering whether any of the requirements of sections 12A to 12D are satisfied, the Department must have regard to any objection duly made under section 11(1)(a) in respect of the application.
- (4) If the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) or (2) are not satisfied, it must refuse the application.

12B Requirements for restricted licences

The requirement of this section is that the applicant is not unfit to hold an operator's licence by reason of—

- (a) any matter of which particulars are required to be given under section 7; or
- (b) any event required to be notified in accordance with section 8(1).

12C Requirements for standard and restricted licences

- (1) The requirements of this section are that it must be possible (taking into account the Department's powers under section 14(3) to issue a licence in terms that differ from those applied for) to issue a licence in relation to which subsections (2) to (6) will apply.
- (2) There must be satisfactory arrangements for securing that the following are complied with in the case of vehicles used under the licence—
- (a) Article 56 of the Road Traffic (Northern Ireland) Order 1981 (drivers' hours); and
 - (b) the applicable Community rules, within the meaning of Article 2 of that Order.
- (3) There must be satisfactory arrangements for securing that vehicles used under the licence are not overloaded.
- (4) There must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition.
- (5) The licence must specify at least one place in Northern Ireland as an operating centre of the licence-holder, and each place so specified must be

available and suitable for use as an operating centre of the licence-holder (disregarding any respect in which it may be unsuitable on environmental grounds).

- (6) The capacity of the place specified as an operating centre (if there is only one) or both or all of the places so specified taken together (if there is more than one) must be sufficient to provide an operating centre for all the vehicles used under the licence.
- (7) In considering whether the requirements of subsections (2) to (6) are satisfied, the Department may take into account any undertakings given by the applicant (or procured by the applicant to be given) for the purposes of the application, and may assume that those undertakings will be fulfilled.
- (8) In considering whether subsection (5) will apply in relation to a licence, the Department may take into account any conditions that could be attached to the licence under section 20(1)(a) (conditions of licences) and may assume that any conditions so attached will not be contravened.
- (9) In considering whether subsection (5) or (6) will apply in relation to a licence, the Department may take into account whether any proposed operating centre of the applicant would be used—
 - (a) as an operating centre of the holders of other operators' licences as well as an operating centre of the applicant; or
 - (b) by the applicant or by other persons for purposes other than keeping vehicles used under the licence.

12D. Further requirement for standard and restricted licences

The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose.

12E. Professional competence for restricted licence holders

As from such date as may be prescribed, section 12B shall have effect as if for the words "is not unfit" there were substituted "is professionally competent as determined in accordance with section 12A(2)(d) and not otherwise unfit".

General principles on the operation of the Act and Regulations

7. 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

8. 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 oral hearing of the appeal

9. At the oral hearing of the appeal the Appellant limited company was represented by one of its directors, Mr Richard Rutledge. He was accompanied by his father Mr Robert Rutledge who assists in the running of the limited company. Both witnesses gave oral evidence which we found to be honest and credible
10. We were informed that Mr Richard Rutledge was formerly a sole trader who held an operator’s licence for his business. Mr Richard Rutledge emphasised that there had been no compliance issues with his former licence. The application which is the subject of this appeal was mandated by a change in

legal entity to a limited company. Further, Mr Richard Rutledge wished to expand the business. The refusal of the licence application and the expiry of the former sole trader operator's licence meant that the business was reliant on third party hauliers at a considerable cost to the company.

11. The business was concerned with the import and processing of animal feed. It was local to an area in the west of Northern Ireland. Regular (and sometimes daily) trips were made by drivers from the business base to the port in Londonderry to collect animal feed in bulk and return it to the base, involving a 60-mile round trip. At the base the animal feed would be processed into individual orders which would then be distributed to customers, mainly farmers living in the local area. A single journey from the base might involve a single load to a single customer or several smaller loads for up to 4-5 customers. The catchment area for customers was a 100 mile radius. The business was reputable and was committed to the provision of personal service to the customers. The company had an employee on whom Mr Richard Rutledge relied to carry out the administrative paperwork and ensure compliance with regulatory requirements. She held a transport manager diploma.
12. Both Mr Richard and Mr Robert Rutledge described themselves as 'feed men' rather than 'transport men.' They were candid in admitting that while they had thought they were aware of the regulatory requirements for an operator's licence, there had been certain deficiencies as identified in the compliance audit report. They gave an explanation for the minor drivers' hours infringements set out on page 7 of the compliance audit report explaining that the majority of driving undertaken in the business was on rural roads where it might not be possible to find a place for the driver to stop. In connection with maintenance, Mr Richard Rutledge stated that they relied on a third party to carry this out. Since the refusal of the application, the requirement to ensure adequate maintenance had been reinforced with the provision of quarterly reports following inspections. Mr Richard Rutledge accepted the obligation to carry out daily walk round checks and that this was emphasised to drivers. He noted that there had been an element of confusion about the date and time of the audit examination and accepted that it would have been better if the member of staff who dealt with administrative and transport matters had been present when the examination took place. This was the first occasion on which the business had been the subject of an audit examination.
13. The Appellant was represented by Mr McManus (Solicitor) who made oral submissions which were parallel to the grounds of appeal as set out above.

Analysis

14. We start with the issue of the decision-making process within the Department which gave rise to the appeal. As was noted above, the Appellant was informed about the decision through correspondence dated 26 October 2021. The relevant content is as follows:

'I refer to the company's application for an operator's licence and to the recent compliance audit carried out by the DVA, which has been assessed as unsatisfactory.

As a result of the findings of the audit, the Head of the Transport Regulation Unit has refused the company's application under the provisions of Section

12(5) of the 2010 Act as he could not be satisfied that the requirements of Sections 12C(2)(a), 12C(2)(b), and 12C(4) had been met. These provisions relate to the arrangements for securing that the following are complied with in the case of vehicles used under the licence:

12C(2)(a) Article 56 of the Road Traffic (Northern Ireland) Order 1981 (drivers' hours)

12C(2)(b) the applicable Community rules within the meaning of that Order

and that

12C(4) there must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition

The interim licence is now no longer valid and you must either destroy or return the interim licence documents to the Department.'

15. In the case of *Nico 2014 Limited* ([2022] UKUT 00096 (AAC)), the Upper Tribunal was considering an appeal from a decision of the Traffic Commissioner for the East of England Traffic Area, embodied in a letter of 18 August 2021 sent by the Office of the Traffic Commissioner refusing to grant his application for a standard national goods vehicle operator's licence. The Upper Tribunal said the following, at paragraph 7:

'The letter of 18 August 2021, which communicated the decision to the appellant relevantly indicated that the application had been refused on the basis that "The financial information provided was not acceptable because you failed to establish financial standing. Therefore, you failed to demonstrate that you meet the requirements of Section 13A(2)(c) of the above Act". The letter offered no further explanation as to why it had been decided that the financial standing requirement had not been met (no reference to the 28 day period nor the perceived to be excessive reliance on credit) nor was anything said about professional competence and the doubted ability to manage compliance with the regulatory regime. But the letter did alert the appellant to the right of appeal. Even though it might well have been the intention of the TC that refusal was to have been based upon all of the concerns identified in his note, we have felt constrained to proceed on the basis that the refusal was on financial grounds only since no other basis for the refusal found its way into the letter communicating the decision.'

16. The Upper Tribunal added the following at paragraphs 13 to 15:

'13. Having said the above and having reached our decision on the appeal, there are some matters with respect to the way the decision of the TC was communicated to the appellant which we think we ought to comment upon.

14. In our view the letter of 18 August 2021 was deficient because, whilst it communicated to the appellant in clear enough terms the result of his application for a licence, it did not set out any of the reasoning which underpinned that outcome. We make a general observation, and such observations have been made by the Upper Tribunal on previous occasions including in *Wajid Bashir t/a MB Travel* [2018] UKUT 0401 (AAC), in particular at paragraph 12 and *Sheraz Asghar* [2018] UKUT 0442 (AAC) in particular at paragraph 16, that such is not acceptable. We say that because

if a prospective appellant is not provided with the reasoning underpinning a decision then he/she is in difficulty in making an informed decision as to whether there might be merit in appealing or not. That might lead to a prospective appellant appealing in circumstances where he/she might otherwise not have done (thus leading to unnecessary administrative functions having to be performed) or to a prospective appellant not appealing in circumstances in which he/she might have done had he realised (if it be the case in any given instance) that the reasoning was at least arguably defective (thus raising the possibility in some cases of a denial of justice). It might lead to a prospective appellant being unable to prepare grounds of appeal which are focused and properly directed towards the TC's reasoning, thus leading to the necessity for later amendment or to arguments being raised at a late stage before the Upper Tribunal. None of that is satisfactory. Accordingly, we would express the hope that, in relation to decisions only expressed by letter (usually the case where there has been no public inquiry) the reasoning underpinning a negative decision will be communicated in that letter. We would also make the point that where, as here, the reasoning is evident from internal memoranda, it should be a relatively easy task to transpose and incorporate that reasoning into a decision letter.

15. If the above seems like harsh criticism of the OTC we do not mean it to be. We understand the difficulties of working in a busy office under pressure. We understand that the OTC might well still be having to cope with the fall-out from the coronavirus pandemic and the huge adverse impact that has had upon administrative processes in many organisations and departments. But the matter is, in our view, of such importance that not pointing it out would represent a failing on our part. In this case there was no injustice or unfairness because the appellant did understand why his application had been refused and was able to put all of his points to the Upper Tribunal on appeal. But that does not detract from the importance of the concern we have identified.'

17. In the case of *ALPS Scaffolding Ltd* ([2022] UKUT 00094 (AAC)), the Upper Tribunal was considering an appeal against the decision of the Traffic Commissioner (TC) dated 26 May 2021 to revoke its operator's licence. The TC's decision was contained in a letter dated 26 May 2021. The letter referred to a previous letter dated 26 April 2021 notifying the Appellant that the TC was considering revoking its goods vehicle operator's licence and to other correspondence received. The TC's letter stated that 'In the absence of a request for a public inquiry to be held, the Traffic Commissioner has revoked your operator's licence with effect from Wednesday 26 May 2021 in accordance with the grounds stated in our letter.'
18. The Upper Tribunal noted the following at paragraph 19:

'The TC's detailed reasons for revocation were set out in an internal memo (a VOL submission on 25 May 2021) that was not disclosed to the Appellant prior to revocation or its appeal. The detailed reasons were only provided to the Appellant as part of the appeal bundle. These reasons should have been provided to the Appellant at the time of revocation so that they could inform its decision as to whether to appeal and on what basis. All the Appellant received was the summary of reasons in the TC's letter of 26 April 2021. We return to this topic below.'
19. The Upper Tribunal returned to the issue in paragraph 47 as follows:

'We repeat our observations that the OTC should provide its full reasons for its decision in writing to the licensee at the time or before any revocation decision. The operator needs these reasons in order to decide whether to appeal and on what grounds. It is a fundamental requirement of natural justice and procedural fairness for full reasons to be given at the time.'

20. We accept and endorse the comments in both of these decisions. We direct the Head of the TRU to take note of them and alter the decision-making process within the TRU to ensure compliance with the relevant requirements. A failure to do so may mean that any subsequent appeal decision notification that fails to comply with the duty to give reasons will succeed on that ground alone and without more.
21. Returning to the instant case, the 'reasons' given in the letter of 26 October 2021 are no more than a recitation of legislative provisions which it was thought were relevant and nothing more. With respect to the Appellant and his father, whom we met at the oral hearing, it is unlikely that they could have determined from what is set out in the letter of 26 October 2021 what were the reasons which underpinned the decision.
22. Ironically, having decided to appeal against the decision and having requested a stay of its effect, the Appellant uncovered more about the decision-making process in the determination refusing the stay than from the decision itself. In paragraph 4 of the determination, the Head of the TRU set out the following:

On 26 October 2021 I considered the evidence available to me. Greatest weight was given to the DVA audit. Whilst I did consider the additional correspondence from the operator and DVA and gave little weight to those documents. The letter from the operator read more as a complaint of the approach taken by the DVA, and some concerns were in turn addressed by the Traffic Examiner. On balance I found that the issues / points commented upon had already been addressed in the Audit Report itself including the reasoning for the out-of-hours visit, and the "accusation" made by the DVA officer. At that time I concluded that:

"Section 12(2) requires that, on an application for a restricted licence the Department must consider whether the requirements of section 12C (amongst others) are satisfied.

In the simplest of terms the evidence provided by the DVA allows me to conclude that the operator does not meet the requirements of Section 12C(2)(a)&(b), and does not meet the requirements of section 12C(4)

*As such, and in consideration of Section 12(5) "if the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) and (2) are not satisfied it **must** refuse the application" – emphasis is my own.*

I therefore direct that the application is refused.

Before this business applies for an alternative licence I would ask that they consider the employment of a transport manager who is able to put appropriate systems and controls in place. I would recommend that the operator considers applying for a Standard National licence which the Department may consider supports the business by establishing a specific responsible and qualified person to effectively manage transport operations."

23. It is not clear where the Head of the TRU recorded this aspect of the decision-making process but we suspect that it was in the internal Departmental memorandum records. To repeat, this reasoning was only provided to the Appellant because he appealed against the adverse decision and requested a stay. Had he chosen not to appeal he would be none the wiser about the reasons for the decision and would not have had the benefit of the guidance offered by the Head of the TRU.
24. We have had occasion in the past to comment on the adequacy of the decision-making process in TRU and have issued directions for improvement in this area. The Upper Tribunal will continue to monitor developments in this crucial area.
25. As noted above, it is possible to identify from the determination on the application for a stay, an element of the reasoning behind the decision by the Head of the TRU that the licence application should be refused. He accorded the greatest weight to the evidence in the compliance audit report. In paragraph 3(iii) above, we noted that the Head of the TRU had summarised the findings and conclusions of the examiner, as follows:

‘This audit was detailed and concluded with an "Unsatisfactory" rating with respect to maintenance; daily walk-round checks; safety inspections; and drivers' hours. It showed satisfactory ratings in respect of vehicle weights and establishment. The first time pass rate was reported as 29%.’
26. Seen in that ‘raw context’, it is, to an extent, understandable why the Head of the TRU had concerns about compliance with the statutory requirements. But the findings and conclusions were not, in our view, seen in the proper context and the Head of the TRU has not properly conducted the required balancing exercise. To repeat what we have already said, the absence of adequate reasons does not help.
27. We have already noted that Mr Richard Rutledge had previously held an operator’s licence during the period when he operated as a sole trader. In the ‘Licence history’ section of the application for the licence which is the subject of this appeal, reference is made to that licence and, more particularly to the fact that there was no compliance history. Further, the application also states that no-one named in the application had convictions or penalties. We do not have details of the duration of that licence but Mr Richard Rutledge informed us that he had been in business for 14 years. There was no issue, whatsoever, with financial standing or with the nominated transport manager.
28. As noted above, Mr Richard Rutledge has given evidence about the date and timing of the audit compliance examination and accepts that it would have been more beneficial for the member of staff who dealt with administrative and transport matters to have been present to answer questions. Both Mr Richard and Robert Rutledge accepted that while there may have been deficiencies with driver hours, these were minor and could be explained by the driving pattern and locality. Further, they also agreed that daily rather than weekly walk-around checks were more appropriate and that further attention in relation to the maintenance arrangements were appropriate. They had taken on board the recommendations which had been made as a result of the compliance audit and were committed to changes in practice to comply with them.
29. We are of the view that the Head of the TRU could have engaged with the Appellant following receipt of the audit report and explored adherence to the recommendations if the licence had been granted. We note that Mr Richard Rutledge had written to the DVA in correspondence dated 21 October 2021

and, in our view, the Head of the TRU could have been more proactive in connecting with him based on his response with resorting to an immediate decision to refuse the application.

30. Finally, we have noted that in the correspondence dated 26 October 2021 from the TRU notifying the Appellant of the 'decision' to refuse the application, Ms Featherstone gives guidance to Mr Richard Rutledge on actions which he could take if he had decided to re-apply for an operator's licence. Once again, we do not know why the Head of the TRU did not suggest further engagement with the Appellant on this basis before refusal.
31. In these circumstances, the appeal is allowed.
32. We make the following Direction:

'The decision of the Head of the TRU was that certain of the legislative provisions governing the requirements for the grant of a restricted goods vehicle operator's licence were not satisfied. For the reasons which we have set out above, we have determined that the decision was wrong and, inherent in that determination is an acceptance that the relevant legislative provisions were satisfied. We have not seen any evidence to suggest that the remaining legislative requirements for the grant of a licence are not satisfied. We remit this case to the Head of the TRU himself to re-decide the licence application. We do so in the expectation that it will be granted. We would add, however, that it is our view that in addition to the usual restricted licence undertakings it would be appropriate there should be an undertaking for (i) Mr Richard Rutledge to undertake a new operator's course within six months of grant of the licence, (ii) the relevant individual within the company to undertake a Transport Manager refresher course and (iii) that there should be a requirement for a further independent audit to be carried out within 6 months of the licence being granted. Finally, we have noted that the refusal of the licence application and the expiry of the former sole trader operator's licence has meant that the appellant's business has been reliant on third party hauliers at a considerable cost to the company. Given that, we expect the re-determination of the application for the licence will be given priority.'



**Kenneth Mullan, Judge of the Upper Tribunal,
21 June 2022**