



Neutral Citation No: [2023] UKUT 6 (AAC)
Appeal No. UA-2022-000030-T

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

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR
THE SCOTTISH TRAFFIC AREA (Ms C Gilmore)**

Dated: 22 December 2021

Before:

Marion Caldwell KC	Judge of the Upper Tribunal
Mr Gary Roantree	Member of the Upper Tribunal
Dr Phebe Mann	Member of the Upper Tribunal

Appellant: Mr James Kilpatrick

Attendance: Mr James Kilpatrick

Heard at: George House, 126 George Street, Edinburgh.

Date of Hearing: 21 November 2022

Date of Decision: 29 December 2022

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject Matter

Standard international public service vehicle operator's licence; section 14ZA(2)(b) of the Public Passenger Vehicles Act 1981; good repute.

Cases referred to:

NT/2013/82 Arnold Transport & Sons Ltd v DOENI

Aspey Trucks Ltd 2010/49

Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010]

EWCA Civ. 695

NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI

Priority Freight T/2009/225

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the Scottish Traffic Area ("TC") given on 22 December 2021. The appeal was considered at an oral hearing at which Mr Kilpatrick (hereinafter "the appellant") was in attendance.
2. The appellant applied for a standard international public service vehicle operator's licence authorising the use of one vehicle. He had one vehicle in possession. The appellant was the proposed transport manager. Details of the proposed operating centre and maintenance arrangements were given. Bank statements were submitted in support of financial standing.
3. The appellant was called to Public Inquiry ("PI") which was held on 31 August 2021. Following the PI the TC decided that the appellant does not meet the requirement to be of good repute as required by section 14ZA(2)(b) of the Public Passenger Vehicles Act 1981. Accordingly, his application for a standard international public service vehicle licence was refused.
4. The appellant now appeals to the Upper Tribunal.

The proper approach of the Upper Tribunal to an appeal

5. The following principles (extracted from the Digest of Traffic Commissioner Appeals) as to the proper approach to an appeal in the Upper Tribunal can be found

in the decision of the Court of Appeal in the case of *Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ. 695*:

- (1) *The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.*
- (2) *The Appellant ‘assumes the burden’ of showing that the decision appealed from is wrong.*
- (3) *In order to succeed the Appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might prefer a different view; 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 phrase “plainly wrong” as a shorthand description of this test. (*NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*, paragraph 8).

The Relevant Legislative Provisions

6. The 1981 Act provides that on an application for a standard licence, the traffic commissioner must consider and be satisfied that the applicant is, among other things, of good repute (ss 14 and 14ZA). The traffic commissioner must also be satisfied that the designated transport manager is of good repute. In this case the applicant and the designated transport manager were one and the same.
7. Paragraph 1(1)(b) of schedule 3 provides, *inter alia*, that in determining whether an individual is of good repute, a traffic commissioner shall have regard to all the relevant evidence and in particular to --
 - (a) *relevant convictions of his and of his employees and agents;*
... ; and
 - (b) *such other information as the commissioner may have as to his previous conduct, in whatever capacity, in relation to the operation of vehicles of any description in the course of business.*

Background

8. The following is a summary of the background to this appeal taken from the decision of the Traffic Commissioner dated 22 December 2021 and other documentation within the bundle for the Traffic Commissioner and PI in this case.
9. In 1998, the appellant held an operator's licence which was called to PI. That licence was allowed to lapse before the inquiry was held. The appellant applied for, and was granted, a standard national licence in December 2003. A public inquiry was held in 2004, following which the appellant was issued with a warning in relation to his repute. A condition was attached to the licence preventing any increase in vehicle authorisation.
10. A further public inquiry was convened in April 2008 following more concerns having been raised in relation to maintenance of vehicles and the management of drivers' hours in the appellant's transport operation. The appellant was found to have repeatedly breached his licence undertakings, failed to cooperate with DVSA officers and to have lied to them and the Commissioner. He was found to have lost his repute. His licence was revoked and he was disqualified for a period of five years from holding an operator licence.
11. In 2011, following another public inquiry, the former Traffic Commissioner for Scotland found that an operator, Jacqueline Mason and James Thomson t/a Access Coach Hire (PM1084146), was a front for the appellant enabling him to continue operating whilst disqualified. She also considered the appellant's conduct as a vocational driver at that time and found him unfit to hold his vocational PCV driving entitlement on account of drivers' hours infringements which he had committed. His vocational driving entitlement was suspended for four months.
12. In December 2014, the Deputy Traffic Commissioner considered an application made by the appellant for a restricted public service vehicle operator's licence. The Deputy Traffic Commissioner refused the application having concluded that the appellant did not have the required repute to be granted an operator's licence. He also found that the appellant was not of appropriate financial standing and that the 'main occupation' criteria for a restricted licence in terms of section 13(3)(b)(ii) of the Act was not met.
13. Given the appellant's history, the TC directed that his current application for a licence be considered at public inquiry.
14. The appellant lodged documents in relation to maintenance and financial standing in advance of the inquiry. He also submitted an email from a transport consultant who advised that he would assist him should the licence be granted.

The Public Inquiry

15. The appellant attended the PI in person. He was unrepresented. The appellant gave evidence at the PI. After the conclusion of the public inquiry the appellant advised that he wished more time to submit information and documentation in relation to a bounce back loan which he had applied for and been given by the Royal Bank of Scotland. The TC allowed an additional 14 days for that information to be lodged. The appellant lodged copies of correspondence between him and the bank, together with copies of his bounce back loan application and contract.
16. The TC summarised the evidence at the PI as follows :-
 10. ... *I explained to the applicant at the outset of the hearing that the onus was on him to satisfy me that he met all of the criteria for the licence.*
 11. *The applicant told me that he desperately wanted to get back in the coach business as an operator. He had been excluded from the industry for many years now and had been operating an Ebay business, but that was not as lucrative as it once was.*
 12. *He told me that he also had a business called Phoenix Travel. He described that business as an independent travel tour company and advised that it had been in existence for around 15 years. He advised that the business used to do work abroad but that had ceased many years ago. The Scottish side of the operation was mainly focussed on small tours and golf trips etc. The operator licence would allow him to supply transport for the Phoenix Travel business.*
 13. *The Phoenix Travel website states that the business has at its disposal 'every class of vehicle you can imagine from chauffeur driven cars to luxury mini vans to executive coaches'. The applicant was asked to explain how vehicles were provided to service Phoenix Travel's requirements. He advised that he hired vehicles in from other operators. When asked when he had last done so, he said it had been around five years ago. His answer, when asked what Phoenix Travel had actually been doing since then, was 'not very much'. He told me he had been stabbed in the back by a former colleague and things had been difficult since then.*
 14. *The applicant produced bank statements in the name of James Kilpatrick t/a Kilpatrick Coach Hire covering the period 10 February 2021 to August 2021 in support of his application. He also produced a mini statement showing the account balance at 24 August 2021. Several large deposits from Phoenix Travel were shown thereon: £1000 on 31 March 2021; £10,000 on 23 April 2021; and £3000 on 4 June 2021. There were also number of payments to a fuel card company, payments to another entity called TJS Travel, and direct debit payments referred to as 'BBLs loan'.*

15. *The applicant was asked to explain the reason for the deposits from Phoenix Travel and how such large sums had come to be at its disposal given the fact that it had not been trading for some considerable time. He told me that there were grants going around for businesses because of COVID. He advised that Phoenix Travel had been awarded a COVID related grant from Fife Council because he had business premises in that Council area. He had received £26,000 in grant funding for that business to keep it afloat.*
16. *When asked if there were conditions attached to the local authority grant funding he had received, the applicant replied that he had been 'operating and actively seeking work'. He was asked if he had actually managed to obtain any tour or tourist work in the last five years, given his earlier evidence. He did not answer that question, stating instead that he had 'done nothing wrong'. The applicant had transferred the sums from the Phoenix Travel account to the James Kilpatrick t/a J Kilpatrick Coach Hire account to ensure that he continued to meet the required financial standing for the operator's licence application he had made.*
17. *The applicant's evidence at inquiry was that he had opened the James Kilpatrick t/a Kilpatrick Coach Hire business account around June 2020 when the country was still in lockdown. Within a few months of so doing, he had applied for a bounce back loan under that business name. He advised in his correspondence following the inquiry that he had, in fact, only opened the account 'a matter of days' before applying for the bounce back loan. No evidence that 'J Kilpatrick Coach Hire' existed prior to that date was produced.*
18. *The applicant advised that he had been given a bounce back loan for the maximum amount of £50,000. With the money, he had bought the one coach he was applying for a licence to operate. When asked how he had managed to show that he met the turnover criteria, he advised that he had estimated his turnover at £260,000. That was based on the turnover he expected to generate with his operator's licence authorising one vehicle notwithstanding the fact that he had not, at that time he applied for the loan, applied for an operator's licence.*
19. *The applicant told me that the sums paid to TJS Travel, in excess of £2000, were for maintenance of the coach he had purchase. That was despite the that fact that it was not in use. There was also an element of rental in the payments, as the coach was sitting at their yard until he could operate. He told me he had completed a transport manager CPC refresher course, and that he intended to use a consultant to assist him with compliance in the business. There was, however, no evidence produced in relation to how he intended to manage drivers' hours.*

20. *When asked about his adverse history in operator licensing, he advised that he could accept some of it. He could never understand why the previous Traffic Commissioner had found him to be involved in fronting, but he had to accept that he had been guilty of misdemeanours in the past. He accepted that he had been found to have been dishonest in his behaviour but that was also in the past. He became emotional when he told me that he had lost his mother to dementia six years ago and explained that things had been difficult at that time. He had lost his partner, suffered from depression, lost his house and been sequestered for a second time.*

21. *He now had money behind him. He repeatedly asserted that what he had done in obtaining the grants and loans was above board. He had done it to keep himself afloat. He was also due a refund from Action Fraud¹. He had a new high quality coach and was willing to engage a transport consultant. Despite the fact that he had been guilty of tachograph and drivers' hours offences in the past, vehicles now had digital tachographs so there could be no misunderstandings. He assured me that I would be able to trust him to operate compliantly in the future.*

The TC's consideration of the evidence and findings

17. The TC had asked for a transcript of the evidence to be prepared. However, she was informed that the recording equipment had malfunctioned during the hearing and a transcript could not be obtained. She therefore relied on her notes and the notes of her clerk in writing her decision². She also took account of all of the documentation submitted by the appellant in reaching her decision³.
18. The TC noted that the appellant had an adverse history in operator licensing. In 2008, the former TC had found him to have behaved dishonestly and to have been involved in deliberate obfuscation during a DVSA investigation. She referred to previous comments by the former TC in her 2008 decision :-

“...On the negative side there is the breach of the licence undertakings in relation to drivers' hours and tachograph charts and I regard these as extremely serious. There is the lying to both myself and to the Traffic Examiners. There are the deliberate 'misunderstandings' and failing to co-operate with the Examiners.

¹ This should be HMRC for VAT, as the appellant accepted at the hearing in the Upper Tribunal. See also the TC's and clerk's notes, page 257, 263.

² Pages 245-263.

³ Page 9, paragraph 8. The documents are at 196-242 and 267-295.

*I am in no doubt that the failure to supply the tachograph records was to obscure drivers' hours offences...*⁴

*"...He has shown himself to be an unreformed character who cannot be trusted by me to operate compliantly within my jurisdiction...I have put into the balance the whole experience of his since I granted him the licence in 2003 and gave him the chance to operate compliantly which he did not. He simply cannot be trusted to be a straightforward compliant operator."*⁵

19. The TC referred to the findings of the Deputy Traffic Commissioner ("DTC") in his decision in 2014, in which he found that the applicant did not have the requisite repute to be granted a licence. He based his findings on an absence of evidence of complaint business operation since the applicant's disqualification, his involvement in fronting whilst disqualified, and his claims that he had never previously been advised by a traffic Commissioner that he had lost his repute, despite that being clearly stated in the written decision which had been issued⁶.

20. The TC noted that both the former TC and DTC had made it clear to the appellant that, given his history, he would not be pushing at an open door should he choose to apply for a licence again in the future. However, the last of the previous findings in relation to the appellant's conduct had been made over seven years ago and the events that had given rise to those findings took place before that. She stated that she had not met the appellant before and she made it clear to him that she was approaching his case with fresh eyes but, given the previous findings, he had a high threshold to meet in establishing repute.

21. Having considered the evidence, the TC made the following findings:-

26. I found the applicant to be an unconvincing and unreliable witness. He deliberately avoided answering questions where it was clear he considered honest answers may harm his case. He vacillated in his evidence and, as he had clearly done during previous inquiries, sought to rely on historic family and personal difficulties as an excuse for his behaviour.

27. The applicant told me that had been running an Ebay business for many years but it was now less profitable. He claimed that Phoenix Travel was still a live business but that was contradicted by his evidence that it had done 'not very much' over the last five years. Despite that, he had applied for, and been given, thousands of pounds of government grant funding to keep it afloat.

28. There was no financial evidence relating to Phoenix Travel before me, nor any information regarding the applications for, or the terms of, the grants that Mr Kilpatrick had applied for trading under that name. I am unable, therefore,

⁴ Page 138, paragraph 60.

⁵ Page 138, paragraph 61.

⁶ Pages 168-172.

to reach a conclusion as to the propriety of the applicant's actions in applying for those grants. Nevertheless, on the basis of evidence before me, I am able to find that it is more probable than not that Phoenix Travel had not been operating meaningfully, far less profitably, as a business for some time.

29. Mr Kilpatrick applied for the grants under the trading name of Phoenix Travel, but then created a new trading name under which he proceeded to apply for the bounce back loan. His evidence was that he opened the Royal Bank of Scotland account in the new trading name in June 2020. A few days later he applied for the loan. He was advanced the maximum permitted sum based on his projected turnover for his business.

30. The application form submitted for the bounce back loan runs in the name of 'J Kilpatrick Coach Hire'. The applicant fully admitted that he had created this new business in the midst of a pandemic when there was virtually no work for coach operators. He could see nothing wrong in so doing.

31. The applicant submitted a number of documents in relation to his application for a bounce back loan following the inquiry. I decided, therefore, to remind myself of the conditions for obtaining a bounce back loan during 2020.

32. At the time of writing, the government guidance in relation to bounce back loans was no longer available on the GOV.uk website. However, I had regard to information in relation to the scheme published by the British Business Bank, the state owned organisation which accredited lenders taking part in it. They describe the bounce back loan scheme (BBLs) thus:

"BBLs provided financial support to businesses across the UK that:

- *were losing revenue, and seeing their cashflow disrupted, as a result of the COVID-19 outbreak*
- *could benefit from £50,000 or less in finance."*

The FAQ section of the British Business Bank's website relating to bounce back states:

"Am I eligible? (updated 09 November 2020)

The Scheme is open to most businesses, regardless of turnover, who meet the eligibility criteria and who were established on or before 1 March 2020. Borrowers are required to declare, amongst other things, that:

The business is engaged in trading or commercial activity in the UK at the date of the application, was carrying on business on 1 March 2020 and has been adversely affected by coronavirus (COVID-19)."

The scheme was designed therefore, purely to help businesses which were already in existence at 1 March 2020 who had lost revenue as a result of the pandemic.

33. The applicant was at pains to persuade me that he had done nothing wrong in applying for the bounce back loan. He asked the bank to investigate his case and provided my office with documentation purporting to show that they had found nothing untoward in relation to his application. However, what was very obviously missing from that documentation is any evidence that the applicant told the bank that 'J Kilpatrick Coach Hire' had only been established a few days before applying for the loan, or that he was already trading as a sole trader in another business.

34. I noted that the maximum amount of bounce back loan which could be awarded was 25% of an applicant's turnover, up to a maximum of £50,000. The applicant t/a J Kilpatrick Coach Hire was awarded the maximum loan available. The turnover figure he provided was a projected one, justified no doubt on the basis that his 'new business' had been established after 1 January 2019. He ticked the box on the form confirming that the amount he sought to borrow was equal to or less than 25% of his estimated turnover.

35. The applicant's evidence was that his new business was intended to supply transport service to Phoenix Travel. I did not consider it a coincidence that had the applicant applied for the bounce back loan under the trading name of Phoenix Tours,(sic, Travel) that being a business established prior to 1 January 2019, he would have had to provide details of his actual turnover.

36. Standing my findings in relation to the probable profitability of Phoenix Travel, it is unlikely that the applicant would have been able to establish any basis upon which he would have been entitled to a bounce back loan. I find, therefore, that the applicant purported to create a new business entity solely for the purpose of applying for the bounce back loan.

37. The applicant repeatedly asserted that he had done nothing wrong in applying for the funding that he had. He was adamant that he had stuck to the letter of the law. However, James Kilpatrick t/a J Kilpatrick Coach Hire was not an existing business as at 1 March 2020 which had lost revenue as a result of the pandemic. It was not, therefore, entitled to receive a bounce back loan. Had he disclosed that fact, the bank ought not have loaned him any money under the scheme.

38. Moreover, I find the applicant's claims that he believed he had done nothing wrong in applying for the loan to be wholly incredible. The terms and conditions upon which bounce back loans could be granted were well publicised. Rather, I suspect that the applicant, full in the knowledge that his exiting sole trader business did not have sufficient turnover to justify the grant of a bounce back loan, invented a new business and banked on no one properly checking he met the criteria in a system where estimates were accepted as vouching and little due diligence was being carried out.

39. *Even if I am wrong in that, I note that the applicant based his projected turnover figure on the operation of a (single vehicle) business which already had the benefit of an operator's licence. He did so well in advance of submitting any application for a licence, against a backdrop of significant adverse findings and warnings of the hurdles he would face in seeking to have any future application granted. His projected turnover figure was therefore, at best, recklessly overoptimistic and at worst deliberately and vastly overinflated. I find, in light of the applicant's track record of deceit, dishonesty and obfuscation, that it was the latter, and that he submitted such a figure to guarantee his access to the maximum amount available.*

40. *This applicant has sought to hide behind trading names and obscure from sight his opportunistic exploitation of state backed crisis funding arrangements for personal gain. He has obtained large sums of taxpayer backed low cost funding when he was not entitled to do so. He has done so whilst responsible operators in my jurisdiction have continued to strive to comply with the rules, operating in some of the most difficult circumstances our society has ever encountered. The applicant has, however, been caught out again.*

22. The TC found it was a positive feature that the appellant was paying back the bounce back loan and that he had undertaken transport refresher training. However, she could not attach much weight to these given the gravity of her negative findings.

23. She then went on to consider whether the appellant could be trusted to be a compliant operator in the future, and concluded:-

42. *Trust lies at the very heart of my jurisdiction. In NT/2013/82 Arnold Transport & Sons Ltd v DOENI the Upper Tribunal said:*

"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... 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."

Based on his behaviour in relation to the bounce back loan, I find that the former Traffic Commissioner's characterisation of this applicant still holds true: He has shown himself to be an unreformed character who cannot be trusted by me to operate compliantly within my jurisdiction. He simply

cannot be trusted to be a straightforward compliant operator. There is no way, given his behaviour, that other operators could trust him to comply. If I cannot trust him, I cannot find him to have repute.

43. *It is for the applicant to satisfy me that he meets the statutory requirements for the licence he is applying for. He has failed to do so. In Aspey Trucks Ltd 2010/49 the Upper Tribunal set out the role of the Traffic Commissioner in considering an application. They said:*

“In a case such as this, the Deputy Traffic Commissioner was not looking at putting someone out of business. Rather, he was deciding whether or not to give his official seal of approval to a person seeking to join an industry where those licensed to operate on a Standard National or Standard International basis must, by virtue of S.13(3), prove upon entry to it that they are of good repute. In this respect, Traffic Commissioners are the gatekeepers to the industry – and the public, other operators, and customers and competitors alike, all expect that those permitted to join the industry will not blemish or undermine its good name, or abuse the privileges that it bestows. What does “Repute” mean if it does not refer to the reasonable opinions of other properly interested right-thinking people, be they members of the public or law-abiding participants in the industry”

Given my findings in this case, I cannot countenance giving this applicant my official seal of approval. He continues to be unfit to join this industry. A formal finding in terms of Section 14ZA(2)(b) of the 1981 Act that the applicant does not have repute is made out. Having found that he does not meet one of the mandatory criteria for the licence, I need not consider his application further. His application for a licence is refused.

The grounds of appeal

24. The grounds of appeal are at page 24. There are essentially four grounds which can be broadly stated as follows: (1) The TC could not have reliably remembered all the important facts based on her memory and her notes, given that the PI was on 31 August and the decision was dated 22 December 2021; (2) the TC misunderstood the bounce back loan scheme and believed he had obtained the loans wrongly; (3) she did not approach the case with a fresh pair of eyes and attached equal weight to his previous licence history; and (4) if the TC had been in any doubt about the BLS, she should have recalled the PI for further evidence.

25. In addition to the grounds of appeal, the appellant provided a "Background" document (pages 25-30) in which he elaborated on his grounds. However, at the hearing before the Upper Tribunal he withdrew point 3.

Upper Tribunal Hearing

26. The appellant submitted that given the TC's workload and the numerous cases she had to deal with she could not have accurately remembered the evidence at his PI between 31 August and the issue of her decision almost 4 months later. The TC's notes and those of her clerk were, he submitted, illegible.

27. The appellant submitted that his second ground of appeal was really the crux of the matter. The TC had misunderstood the Bounce Back Loan Scheme. He said that he had been called by the bank and informed about the scheme and that he could apply as he was an established business customer. He made an application for Phoenix Travel and based on his declared returns to HMRC of a turnover of £16,000 he obtained a loan of just over £4000. That business was in existence prior to the outbreak of Covid and the creation of the BBLs.

28. He then opened a bank account, with the same bank, in the name of J Kilpatrick Coach Hire, he said. A few days later, he applied for a BBLs in the name of that business. He stated that he had spoken to the relevant department of the bank who had confirmed that the loan was available for new starts (page 196). He told the Upper Tribunal that the bank had advised him that because he was a business customer he was an eligible customer for a BBLs loan, that he was entitled to start a subsidiary and apply for a BBLs loan and he would get a loan for 25% of the projected turnover. Following the PI, he contacted the bank for confirmation that his application for the BBLs for J Kilpatrick Coach Hire was not taken out mistakenly or fraudulently. He referred to an email from the bank which, he claimed, showed that his application was not untoward. The email at dated 13 September 2021, from a member of the Commercial Complaints Department of NatWest Bank⁷ (page 209). It states:

The care team are absolutely satisfied with your application and, although I can't send you an email from them as they are an internal team, they have said that showing your completed loan document should be evidence enough for the Traffic Commissioner for Scotland but you can also use this email as evidence also.

29. We pointed out to the appellant that he had produced no evidence to support his claim that the bank had invited him to set up a new account and apply for a loan for a new business, to which he had no reply other than his own evidence.

⁷ The NatWest Bank is part of the same banking group as the RBS.

30. The appellant confirmed to the Upper Tribunal that he had electronically signed and dated the electronic BLS application form on 9 June 2020 (page 282) and submitted it. He agreed that in doing so he had made certain declarations. In particular, he had confirmed that he had been carrying on business as J Kilpatrick Coach Hire on 1 March 2020 (page 280) and that that business had been adversely affected by Covid. He accepted that J Kilpatrick Coach Hire had not been in existence or carrying on business on 1 March 2020. He reverted to the advice he said he had been given in a telephone conversation with the bank; he said he had relied on that.
31. It was noted by the Tribunal that the email address provided on the BLS application form was not the one used by the bank to correspond in relation to the legitimacy of the application. Mr Kilpatrick said the form had been filled in by his granddaughter and she must have put in the wrong email address, but he had access to both.
32. Regarding ground 3, he stated that whilst he had been criticised by the previous TC, she had also said that it would be unfair to suggest that he could never re-enter the industry, albeit it would not be an “open door”. He submitted that the TC had placed too much emphasis on his past. He said that since his last licence had been revoked he had been of good character, had had no intervention with the law and fully complied with everything expected of him as a citizen. Therefore, that being the case, he submitted that he was of good character and the decision should be overturned or brought before another inquiry for consideration (page 30).
33. The appellant made further submissions by email after the Upper Tribunal hearing and after we had reached our decision. We therefore had no regard to these later submissions.

Discussion and Decision

34. Regarding ground 1, it is not uncommon for TCs and judges to write decisions from their memory, notes and documentation submitted for the hearing in question. In any event, the appellant, did not refer to any factual inaccuracies in the TC’s decision that might be due to a lapse of memory. His criticisms were mainly about findings with which he disagreed. We are therefore unable to find that the TC’s decision is plainly wrong because she did not have a transcript of the evidence given at the PI.
35. We are unable to uphold ground 2. The TC allowed the appellant additional time to produce the BLS loan application form for J Kilpatrick Coach Hire and related documentation. That documentation clearly shows that the scheme was intended for businesses that were in existence on 1 March 2020 and whose business had been adversely affected by the Covid restrictions. The appellant accepted that the business was not in existence at that date. He produced no evidence to show that the bank had advised him that there

was any other scheme or exceptions to what was stated on the BBLs application form for which a new business created after that date would be eligible to apply for such a loan and for which the bank would be empowered to approve and grant such a loan.

36. The BBLs documentation and the publicly available information about the scheme show that it was based on trust. An applicant had to self-declare that it met the criteria to be granted a loan. The bank took what was on the form at face value without requiring supporting vouching. It is for that reason that no weight can be attached to the emails from the appellant's bank. The bank is simply taking the form at face value and, on the basis that what is stated is true and accurate, grants the loan if the answers show that the applicant meets the eligibility criteria. The email referred to by the appellant stated no more than this. It did not prove that a business that was not in existence on 1 March 2020 was eligible for a BBLs loan, or that the application had been made honestly.
37. We are unable to find that the TC misunderstood either the BBLs or the emails from the appellant's bank. On the contrary, we find she was quite correct in her interpretation of the scheme and the documentation before her. She had ample evidence before her on which to base her findings in fact about this issue. We can find no fault with her reasoning or fact finding regarding the BBLs.
38. Regarding ground 3, as was noted by the TC in paragraph 42 of her decision, operator licensing is based on trust. In considering the question of good repute, the TC has to ask herself, "*How likely is it that this operator will, in future, operate in compliance with the operator's licensing regime?*"⁸ In other words, can he be trusted? The TC, in considering the grant of a licence and whether the applicant is of good repute must take into account "all the relevant evidence" see paragraph 6 and 7 above. The relevant evidence includes his history in this regulatory regime. We therefore can find no fault in the TC's approach in having regard to the appellant's history, this was relevant evidence she was bound to consider..
39. History might pale into insignificance if it were balanced against a recent substantial period demonstrating good repute and that the applicant for a licence can be trusted.
40. The appellant submitted that since the revocation of his last licence, which was in 2008, he had been of good repute, and that should have been weighed in the balance against his history. Contrary to the assertions of the appellant, since 2008 he has been found to be involved in fronting (2011) and of driver's hours infringements, resulting in his vocational driving entitlement being suspended for four months⁹. In 2014 the DTC refused to grant him an operator's licence on the grounds that he was not of good repute based partly on his adverse history and the fact that he had denied he had ever been found not to be of good repute, despite this having been imparted to him in

⁸ *Priority Freight T/2009/225*.

⁹ Page 9, paragraph 4 and page 161.

previous decisions¹⁰. In his written grounds of appeal to the Upper Tribunal he stated that he had no recollection of having lost his repute or having been disqualified for 5 years. However, he withdrew these assertions at the hearing before the Upper Tribunal.¹¹

41. The appellant's application for the BBLs loan is also highly relevant evidence that the TC was bound to consider. The BBLs is a useful indicator as to how the appellant might operate within the operator licensing regulatory regime because it, too, was based on trust and self-certification. The appellant had been found to have flouted the conditions of the BBLs.
42. The TC found the appellant to be an unconvincing and unreliable witness. She found that he had given inaccurate information to the bank to obtain the BBLs loan by stating that J Kilpatrick Coach Hire had been in existence on 1 March 2020, a fact that was irrefutable on the evidence available. She found his claims that he believed he had done nothing wrong in applying for the loan to be wholly incredible. The view of a judge at first instance as to where credibility lies, is entitled to great weight¹². The judge at first instance has had the benefit of seeing and hearing the witness. An appellate court should not disturb a judgment of fact unless satisfied that it is unsound. That applies equally to the TC's opinion in this case.

Courts have recognised the benefit of seeing and hearing a witness giving evidence. This is in the context of limiting the extent to which an appellate court will interfere, even in an appeal on the facts, with a conclusion reached by a judge who took the oral evidence. The significance of these factors reflects the fact that a bare transcript of the evidence and the judge's judgement setting out the findings of fact cannot convey every nuance of the evidence as given in court. (Jacobs, Tribunal Practice and Procedure, 5th ed, page 467.)

We have no reason to disturb or disagree with the TC's finding on the appellant's reliability and credibility. She has explained her impression of the appellant in giving his evidence (paragraph 26) and his motivation of personal gain in opening a new bank account in the name of a new business (paragraph 40). She has analysed the BBLs and made clear findings in fact that it was aimed at businesses already in existence on 1 March 2020 and that the appellant's application presented false information to the bank in order to obtain the BBLs loan. We can find no fault either with her reasoning or her fact finding on these issues.

43. Having made these findings, the TC balanced the positives in the appellant's case against the negatives and found that the positives were outweighed, largely based on his behaviour in relation to the BBLs loan.

¹⁰ Page 171.

¹¹ Page 25.

¹² Thomas v Thomas 1947 SC (HL) 45 at page 48.

44. We are therefore unable to accept the appellant's submission that the TC attached too much weight to his history. As the TC found, his more recent conduct regarding the loan was consistent with his past behaviour and that he had shown himself to be an unreformed character who could not be trusted to operate compliantly within the regulatory regime.
45. We find no merit in the appellant's fourth ground of appeal. The TC allowed the appellant a further 14 days to produce any additional information he wished to present to show that his application for the BLS loan had been made in good faith and that J Kilpatrick Coach Hire met the eligibility criteria. He presented his evidence and it was considered by the TC. It is obvious from her decision and findings that she was in no doubt about the purpose of the scheme and the eligibility criteria. She therefore had no reason to recall the PI and we can find no fault in her not doing so.
46. We see no reason to disturb the TC's findings in fact or her reasoning in reaching her conclusion that the appellant did not meet the requirement of good repute in terms of section 14ZA(2)(b) of the 1981 Act. There are no grounds for holding that the TC's decision on this issue was plainly wrong.

Decision

47. The decision of the TC dated 22 December 2021 is upheld. The appeal is dismissed.

**Authorised for issue
On 29 December 2022**

**Marion Caldwell KC
Judge of the Upper Tribunal**