NCN: [2023] UKUT 37 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2022-000001-NT**
ADMINORTHERN IRELANDSTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from the DECISION of the DEPARTMENT FOR INFRASTRUCTURE (Transport Regulation Unit), for Northern Ireland

Before:	Ms. L.J Clough: Deputy Judge of the Upper Tribunal Mr R. Fry: Member of the Upper Tribunal Mr M. Smith, JP: Member of the Upper Tribunal
Appellant:	Derrymorgan Transport Ltd
Respondent:	Driver and Vehicle Agency
Reference No:	21DET009
Heard at:	Tribunal Hearing Centre, Royal Courts of Justice, Belfast
On:	15 November 2022
Date of Decision under Appeal:	28 November 2021

DECISION OF THE UPPER TRIBUNAL

THE APPEAL IS DISMISSED

Subject matter:

Cases referred to

Fergal Hughes v DOENI & *Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC NT/2013/52 & 53*; Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695. *Clarke v Edinburgh & District Tramways Co Ltd* [1919] UKHL 303; (1919) SC (HL) 35; 56 SLR 303. *Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/60). *Shawe-Lincoln v Dr Arul Chezhayan Neelakandan* [2012] EWHC 1150. *Petrodel Resources Limited v Prest* [2013] UKSC 34; [2013] 2 AC 415

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by Derrymorgan Transport Ltd ("the Appellant"), against a decision of the Department for Infrastructure for Northern Ireland ("the DfI"), dated 28 November 2021.

2. The appeal was considered at an oral hearing, at the Tribunal Hearing Centre within the Royal Courts of Justice, Belfast, on 25 October 2022. The Appellant was represented at the hearing by Mr N Manly, solicitor. The Respondent was represented by Ms A Jones, BL.

Background facts

3. On 24 June 2021, a right-hand drive 2-axle Scania vehicle with Bulgarian licence plate number B 7698 BC, together with a loaded 3-axle semi-trailer bearing the ID number C517427, was observed and thereafter stopped by Police Officer Stevenson while travelling on the Seagoe Road, Portadown. Vehicle Examiner Todd attended to carry out an investigation on the vehicle, arriving at the scene around 4.50pm in the afternoon.

4. The driver of the vehicle identified himself as Conall McKeever with an address in Craigavon, Northern Ireland. This was verified from his driver's licence. He was wearing a jacket bearing the logo "Yellowford Transport" and confirmed that he was transporting a load from Portlaoise and Kildare in the Republic of Ireland for delivery in Warrenpoint and Craigavon, Northern Ireland. He stated that his employer was Marcus Morgan, who was contactable through his son, Michael Morgan on a UK mobile number and who was found on the Northern Ireland Driver database as residing at an address in County Armagh, Northern Ireland. The driver stated that he had never travelled to Europe with the vehicle.

5. The driver produced a community licence issued in Bulgaria with a perforated serial number 195133. This was noted to be a valid community licence in the name of "Derrymorgan Transport Ltd" with the right to carry out international carriage of goods. The licence was valid from 29 December 2015 until 28 December 2025. The Bulgarian authorities later confirmed that the director of Derrymorgan Transport Ltd is Marcus Morgan, the purported employer of the driver of the vehicle.

6. On examination of the vehicle, Vehicle Examiner Todd noted that the trailer was displaying a UK number plate which did not match the drawing vehicle registration plate. The trailer registration plate was found to match another drawing vehicle whose registered keeper was Marcus Morgan. The trailer's plate was listed on the Northern Ireland Operator's Licence of a Northern Ireland registered company, Yellowford Transport Ltd (ON1138467) from 28 May 2019 to 7 September 2020. The digital tachograph on the vehicle had been calibrated by a company based in Armagh on 1 July 2019 with two previous calibration tests also being carried out in Northern Ireland on 31 March 2017 and 4 July 2018. A receipt was located in the vehicle cab for a puncture repair on 18 June 2021 which had been carried out in Armagh, Northern Ireland with the customer name noted as Marcus Morgan. Tachograph analysis of the previous four weeks showed the company card inserted in the tachograph was that of Yellowford Transport Ltd (Northern Ireland based company), with vehicle start and finish locations within Ireland or the UK only (not Bulgaria). Invoices in the cab showed a service and safety inspection had been carried out by a Northern Ireland company on 2 December 2020. Two fuel cards were located, one of which was in the name of Yellowford Transport Ltd and another in the name of Marcus Morgan personally. The vehicle headlights were dipped in the direction consistent with the requirements for driving in the UK and Ireland rather than in Europe (Bulgaria). The vehicle, while bearing a Bulgarian registration plate, was consistent with the nature and style of vehicles used in the UK and Ireland – right hand drive and the rear registration plate was yellow which is UK practice. Fuel receipts in the vehicle were from Dundalk in the Republic of Ireland. A receipt book was found in the vehicle in the name of "Derrymorgan European Logistics Storage and Distribution" with an address in Mallusk, Northern Ireland.

7. Further checks did not reveal any start or finish points within Bulgaria and there was no evidence of the vehicle having returned to Derrymorgan Transport Ltd's operating centre in Bulgaria. All driver cards inserted during the use of the vehicle were connected to drivers based within the UK or Ireland. The vehicle was noted to have been stopped on 1 June 2021 by the police and on that occasion, a different driver from Yellowford Transport was using the vehicle.

8. As a result of the investigation, Vehicle Examiner Todd detained the vehicle and trailer under s.1 of the Goods Vehicles (Licencing of Operators) Act (Northern Ireland) 2010

(hereinafter referred to as "the 2010 Act") and Regulation 3 of the Goods Vehicle (Enforcement Powers) Regulations (Northern Ireland) 2012 (hereafter called the "2012 Regulations"). He reasoned that the driver had failed to satisfy him that the "user" held a valid licence in Northern Ireland and there was no evidence that the vehicle was being used in compliance with the Northern Ireland legislation. In particular, Vehicle Examiner Todd was not satisfied that the "user" was Derrymorgan Transport Ltd of Varna, Bulgaria. Nor was he satisfied that the vehicle was lawfully operating under a Bulgarian Community Licence, but rather an operator established and operating in Northern Ireland was attempting to "flag out" to a Bulgarian operator thus evading the NI regulations.

9. Following publication of details of the detention of the vehicle in the usual manner, the Appellant, Derrymorgan Transport Ltd of Varna, Bulgaria, applied for the return of the vehicle. On 22 November 2021, a virtual hearing took place to determine this application. In attendance virtually were: Marcus Morgan, Director of Derrymorgan Transport Ltd of Varna, Bulgaria; Neil Manley, solicitor, representing the applicant; Ashleigh Jones, BL on behalf of the DVA; Vehicle Examiner Alan Todd, witness for DVA; and the clerk on behalf of the Transport Regulation Unit within the DfI, to ensure the smooth running of proceedings.

The DfI's decision under appeal

10. The Presiding Officer of the Transport Regulation Unit ("the TRU"), on behalf of the Department for Infrastructure ("the DfI"), prepared a written decision in this matter, which was signed for issue on 28 November 2021. He refused the application for return of the vehicle B7698BC, under Regulation 3 of the 2012 Regulations, on the basis that it was not being used in accordance with s.1 of the 2010 Act. He ordered that the vehicle be disposed of accordingly.

The appeal

11. The appellant lodged an appeal with the Upper Tribunal against the decision of the DfI. This was supplemented by a Skelton Argument prepared by Mr N Manley, solicitor on behalf of the Appellant (unsigned and undated). In short, the Appellant, through its solicitor, submitted that there were two matters in issue on appeal: firstly whether Derrymorgan Transport Ltd used the vehicle in question in contravention of section 1 of the 2010 Act; and

secondly whether the DVA were correct in impounding the vehicle under Regulation 3 of the 2012 Regulations.

12. It was an agreed fact that the Appellant company, Derrymorgan Transport Ltd, is a limited company registered in the Bulgarian Companies Registry from 29 December 2015, and has a registered office in Varna, Bulgaria. It was agreed that the company holds an Operator's Licence with a Community Authorisation Certificate in Bulgaria and that the vehicle in question, Scania tractor unit, registration B7698BC, was authorised on the Bulgarian licence held by Derrymorgan Transport Ltd. The Appellant did not dispute the facts of the case as set out in paragraphs 3 to 7 above.

13. In relation to ownership of the vehicle, it was submitted that as only the owner is entitled to apply for return of the vehicle, it was "highly unlikely" that the vehicle would belong to anyone other than the Appellant company as to do so would nullify its entitlements under its Community Licence. It was submitted that for Mr Morgan to own the vehicle personally would be of no commercial benefit to him as he would not be in a position to operate that vehicle in either jurisdiction without the requisite licences. It was therefore suggested that applying logic, on the balance of probabilities, the Appellant company was the lawful owner of the vehicle and thus entitled to apply for its return.

14. In relation to whether the vehicle was used in contravention of s.1 of the 2010 Act, the legality of the detention of the vehicle was challenged on the basis that the use of the vehicle did not require an operator's licence under the 2010 Act and therefore there was no breach of the legislation. It was submitted that this is so as section 1 of the 2010 Act was amended on the day of exiting the EU by virtue of the Licencing of Operators and International Road Haulage (Amendments etc) (EU Exit) Regulations 2019 ("the 2019 Regulations") thus permitting a haulier established within a member state to carry goods for international carriage (for hire or reward) to be used without a UK/NI Operators Licence while moving within Northern Ireland (s.1(2)(d) and (2A) of the 2010 Act, as amended). On this basis, the Appellant submits that the DVA were incorrect in detaining the vehicle under Regulation 3 of the 2012 Regulations.

The Approach of the Upper Tribunal

15. As to the approach which the Upper Tribunal must take on an appeal such as this, it was said, in the case of *Fergal Hughes v DOENI* & *Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC, NT/2013/52 & 53, at paragraph 8:

> *"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 or 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.'*

16. At paragraph 4, the Upper Tribunal 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."

17. The task of the Upper Tribunal, therefore, when considering an appeal from a decision of the DfI in Northern Ireland, is to review the information which was before the Department along with its decision based on that information. The Upper Tribunal will only allow an appeal if the appellant has shown that "the process of reasoning and the application of the relevant law require the tribunal to take a different view" (*Bradley Fold Travel Limited and Peter Wright* v. *Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, at paragraphs 30-40). In essence therefore the approach of the Upper Tribunal is as stated by Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, that an appellate court should only intervene if it is satisfied that the judge (in this case, the decision of the Presiding Officer on behalf of the DfI) was "plainly wrong".

Legislation

18. With regards to the legislation relating to this appeal, the starting point is s.1 of the Goods Vehicles (Licencing of Operators) Act (Northern Ireland) 2010 Act ("the 2010 Act") which states as follows:

"Operators' licences

1(1) Subject to subsection (2) and sections 2A and 3, a person shall not use a goods vehicle 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 that person,

except under a licence issued under this Act; and in this Act such a licence is referred to as an "operator's licence".

(2) Subsection (1) does not apply to-

(a) the use of a small goods vehicle;

(b)…

(c) the use of a goods vehicle for international carriage by a haulier established in Great Britain and not established in Northern Ireland; or

(d) the use if a vehicle of any class specified in Regulations.

(2A) A class of vehicles that may be specified in regulations under subsection (2)(d) includes goods vehicles used for international carriage by a hailer established in a member State.

(4) In subsection (2)(c) and (2A), "established", "haulier" and "international carriage" have the same meaning as in Regulation (EC) No 1072/2009 on common rules for access to the international road haulage market.

19. Schedule 2 of the 2010 Act states that Regulations will provide for the detention of vehicles used without an operator's licence under s.1 of the 2010 Act. Regulation 3 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012 (the "2012 Regulations") provides for the penalty where a vehicle is used in contravention of s.1:

"Detention of Property

3. Where a 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, the authorised person may detain the vehicle and its contents."

20. Regulation 9 of the 2012 Regulations, states that the "owner" of a vehicle detained under Regulation 3 may apply for the return of the vehicle, within the period specified in Regulation 8(2), namely 21 days from the publication of the notice of detention in the Belfast Gazette. The grounds on which an application for the return of a detained vehicle may be made are set out in Regulation 4 of the 2012 Regulations as follows:

"Release of Detained Vehicles"

4(1) In the circumstances described in paragraph (2), a vehicle detained by virtue of regulation 3 shall be returned to the owner, without the need for an application under regulation 9.

(2) The circumstances are that the authorised person is satisfied that one or more of the grounds specified in paragraph (3) is made out.

(3) The grounds are that—

(a) 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) 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) 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; or

(d) 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.

21. Regulation 2 defines an "owner":

"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.

22. In *Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/60) at paragraph 90, the Upper Tribunal summarised the process for the right to detain and apply for the return of a vehicle in Great Britain, and the same scheme applies in Norther Ireland:

"Three points need to be stressed at this stage. First it is for VOSA [the DVA in NI] 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 [s.1 of the 2010 Act in NI]. The standard of proof required is the balance of probability… Second, once VOSA [DVA] have established they had the right to detain a vehicle it is for the owner to prove ownership of the vehicle of 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 [Regulation 4 of the 2012 Regulations in NI], as amended, has been established.

Discussion

Was the vehicle lawfully detained?

23. The first issue to be determined by the Presiding Officer in this case was the question of whether the vehicle was lawfully detained in contravention of s.1 of the 2010 Act. He reached his decision by weighing the undisputed evidence before him. In summary the evidence was as follows. The vehicle in question was a right-hand drive lorry, with UK coloured registration plate and lights dipped in the direction of UK vehicles, suggestive of the fact that it was not used in Europe despite its Bulgarian registration. It was listed on DVA records as having been tested in Northern Ireland in 2018, with tachograph calibrations having taken place in Northern Ireland on 1 July 2019 (Toal Truck Services) and on 4 July 2017 (Granco Ltd), and a puncture repair having taken place in Northern Ireland on 18 June 2021. The tachograph data confirmed the vehicle had started and finished journeys in either the UK or Ireland from 26 May 2021, with this data having been locked in by Yellowford Transport, a Northern Ireland based company. The driver indicated that he was employed by Marcus Morgan, a resident of Northern Ireland with a UK contact number (his son) and who had instructed the driver to carry out the driving work on behalf of Lavery Transport, a Northern Ireland based company. The driver was wearing a Yellowford Transport jacket (Northern Ireland based) and confirmed he had never been to Bulgaria in the vehicle. The tachograph confirmed he had been the sole driver of the vehicle since 14 June 2021. He confirmed that the vehicle was either left at the premises of Lavery Transport (another NI based company) or at

his own home address overnight (in Northern Ireland). It was an agreed fact that the vehicle was specified on a Bulgarian Community Licence in the name of Derrymorgan Transport Ltd and although the vehicle had been insured in Bulgaria from 24 August 2021, tachograph records demonstrated that it had never driven in Bulgaria since 26 May 2021. The vehicle had never been tested in Bulgaria, nor had it been taxed in Bulgaria. The Bulgarian telephone number for Derrymorgan Transport Ltd was unobtainable. This, in the view of the Presiding Officer, demonstrated on the balance of probabilities, that this was not a vehicle used in Bulgaria, but rather a vehicle that was used regularly in Northern Ireland by a Northern Ireland based operator(s). In the absence of the vehicle being listed on any Northern Ireland Operator's Licence, the Presiding Officer determined that it was being used in contravention of s.1 of the 2010 Act.

24. It was submitted by the Appellant, that the Licensing of Operators and International Road Haulage (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/708) amended the 2010 Act so as to permit hauliers established in a European member state to carry goods for hire or reward overseas without a UK/NI operator's licence. This was considered in more detail during the hearing and it was agreed by all parties that this was correct. It was agreed that the purported haulier was conducting the carriage of goods for hire or reward and that it was a goods vehicle. With this in mind, the key question was whether the haulier purporting to be carrying goods, namely Derrymorgan Transport Ltd, was a haulier established in a member state, which would entitle it to drive the vehicle without a NI operator's licence while in Northern Ireland.

25. Looking again at the undisputed evidence set out at paragraph 23 of this decision and bearing in mind that there was no fresh evidence put before either the Presiding Officer or the Upper Tribunal to contradict these facts, the decision of the Presiding Officer cannot be challenged. All the evidence set out above indicates that the vehicle operator was established in Northern Ireland and not in another member state. The links to Bulgaria, namely the vehicle registration plate and its presence on a Bulgarian Community Licence, are facts which, in the absence of any supporting evidence, could be considered to be a cover to give the impression that this is a vehicle used by a haulier based in a member state. All the evidence suggests that this is a UK/NI vehicle which was being used across Ireland and the UK, in which case the 2010 Act applies. It was also agreed that this vehicle is not listed on a Northern Ireland Operator's Licence therefore it was being used in contravention of s.1 of the 2010 Act and

consequently the DVA were correct to detain it. We are therefore in agreement with the decision of the Presiding Officer and find no error of law in his approach to this aspect of his decision.

Ownership of the vehicle

26. The second question to be determined by the Presiding Officer, was whether Derrymorgan Transport Ltd of Varna Bulgaria was the "owner" of the lawfully detained vehicle, as only the lawful owner is entitled to have the vehicle returned to them under Regulation 4 and 9 of the 2012 Regulations. The burden is on the applicant seeking return of the vehicle, in this case Derrymorgan Transport Ltd, to satisfy the DVA on the balance of probabilities, that it is the owner of the vehicle. Thereafter, the owner must satisfy the DVA that one of the conditions set out in Regulation 4 of the 2012 Regulations is satisfied so as to secure the return of the vehicle.

27. The Presiding Officer was guided by the undisputed facts in this case, as summarised in paragraph 23 above, to determine ownership. All the facts pointed to one of a number of Northern Ireland based operations using the vehicle, and all doing so within the Republic of Ireland or Northern Ireland. It was highlighted by the Appellant that the vehicle was specified on a Bulgarian Community Licence in the name of Derrymorgan Transport Ltd, a Bulgarian registered company and that this was evidence that Derrymorgan Transport Ltd was the owner of the vehicle. The Presiding Officer reasoned that this was not conclusive evidence of ownership, but rather evidence merely of possession. It was submitted by the Appellant that there was no commercial gain to be had in anyone other than Derrymorgan Transport Ltd, the listed user on the Bulgarian Community Licence, to be using the vehicle. This matter wasn't directly addressed in the Presiding Officer's decision however, it is in the interests of an operator who seeks to avoid the financial and administrative requirements of the Regulatory regime in UK/NI, to pretend that this was a Bulgarian vehicle carrying out international transport, so this argument carries little weight.

28. In light of the evidence listed above, all of which indicated a Northern Ireland based vehicle under the control of Northern Ireland based operators/companies, the Presiding Officer determined that the owner was more likely to be Marcus Morgan personally or an entity within

Marcus Morgan's control. He was not satisfied on the balance of probabilities that Derrymorgan Transport Ltd of Varna, Bulgaria was the owner of the vehicle. With this decision we cannot disagree. There is evidence indicative of a number of entities who may be the owner of the vehicle but there is insufficient evidence to demonstrate on the balance of probabilities, in other words, that it is more likely than not, that any one of the entities connected to this vehicle, including Derrymorgan Transport Ltd of Varna, Bulgaria, is the owner of the vehicle. The Presiding Officer reached his decision logically and lawfully hence there is no error in law in this aspect of the appeal. As only the owner can apply successfully for the return of a detained vehicle, and as it was lawfully determined that Derrymorgan Transport Ltd was not the owner of the vehicle, the application for return of the vehicle was bound to fail. We find that the decision of the Presiding Officer was not "plainly" wrong.

Unfairness

29. The Appellant also raised, on appeal, the issue of unfairness. It was submitted that the identity of the observers in the detention hearing caused the Appellant's solicitor to advise that should he give evidence, this may have consequences for his company and himself personally. It is further submitted that as a result of Marcus Morgan, as Director of Derrymorgan Transport Ltd, not giving evidence during the hearing, unfair inferences were drawn by the Presiding Officer when making his decision in this case. The Appellant cites as evidence of this, paragraph 23 of the Presiding Officer's written decision which states, "I place some weight on the fact that the Appellant's Director chose not to give evidence and answer questions before me".

30. As to this submission, it is noted that the observers in the hearing room were the usual observers who could be expected, and indeed entitled to attend. There was no independent member of the public or press observing the hearing, for example. Appellant did not object to observers in the hearing room, nor did he attempt to find out who they were. This was perfectly within his right. Equally, he was given the opportunity to give evidence at the hearing, and it was his choice as to whether he accepted that opportunity or not. Giving evidence would have provided him with the opportunity to explain the applicant company's side of the matter which in turn, would have provided more information for the Presiding Officer to work with in making his decision. Mr Morgan chose not to give evidence in support of the case and offered no

explanation as to why he chose not to give evidence. Only the Appellant and his solicitor know the reasons why he considered there a risk of consequences against his company or himself personally if he chose to speak. He was of course entitled to choose not to speak. In the absence of any objection to the apparent block in his ability to give evidence, there can be no criticism made of this procedurally. Equally, there can be no criticism made of any inference drawn by the Presiding Officer in making his decision, as he is entitled to draw such inferences as appear proper from the applicant company Director's silence. It has long been a common law principle of evidence within civil proceedings that an inference may be drawn from a party's failure to respond to an allegation or from a party's failure to give evidence. Whether it is appropriate to draw an inference and if so, the nature of the inference that can be drawn, will depend upon the facts of the case at hand (*Shawe-Lincoln v Dr Arul Chezhayan Neelakandan* [2012] EWHC 1150). A court may draw inferences from a party's failure to rebut the other party's evidence in relation to matters likely to be within the knowledge of the silent party, provided there is a reasonable basis to draw such a conclusion (*Petrodel Resources Limited v Prest* [2013] UKSC 34; [2013] 2 AC 415). In this case, it was within the remit of the applicant company director's knowledge to be in a position rebut the evidence of the DVA, and to provide proof that not only was this the applicant's vehicle, but that it was being used by a legitimate Bulgarian haulage business. The Presiding Officer was therefore entitled to draw inferences from Mr Morgan's silence, and for such inferences to be added to the evidence to be assessed in determining this matter.

31. Irrespective of whether an inference was drawn or not, there was such a weight of uncontradicted factual evidence before the Presiding Officer, that any inferences drawn from the Mr Morgan's decision not to give evidence is inconsequential to the outcome of this case. Without any inferences, we take the view that the Presiding Officer would have been entitled to reach the same conclusion.

32. Finally, it was submitted that the Presiding Officer strayed into matters of poor operating practice which indicated a deliberate or pre-conceived bias on the part of the Presiding Officer in reaching his decision. It is noted that the Presiding Officer questioned whether the Appellant company paid excise duty in a country other than NI/UK given that it had an operator's licence there and had insured the vehicle in Bulgaria. The Appellant's solicitor objected to this question during the virtual hearing, arguing that this was an issue regarding

fitness to hold a licence and thus irrelevant to the issues in that particular hearing. The Presiding Officer did not pursue this line of questioning and comments in his written decision (at paragraph 31) that he did not therefore go on to ask about why an operator would allow a vehicle to be parked at a home address rather than at an official operating centre. The Presiding Officer therefore stopped short of straying into irrelevant issues such as fitness to hold a licence. He did however comment (at paragraph 32) that the evidence "overwhelmingly pointed to the detained vehicle being based in and operated in Northern Ireland and not Bulgaria. The issues relating to bad operating practice reflect the fact that Marcus Morgan has chosen to attempt to circumvent the need for an operator's licence in Northern Ireland". It is this latter point with which we agree. The matters regarding holding a licence in Bulgaria, insuring a vehicle in Bulgaria and whether excise duty is paid in that country, would all provide some evidence that this was a legitimate operation in Bulgaria. However, in the absence of that business related evidence, the Presiding Officer was left again in the position that there were few links to Bulgaria thus supporting the evidence that this was a Northern Ireland operator "flagging out". Once again, the extent of the evidence before the Presiding Officer was sufficient on its own merits, to entitle him to reach the decision he did, and these comments, irrespective of whether he strayed into other areas, were also pertinent towards the issue of whether this was a legitimate Bulgarian operation. The Presiding Officer correctly adapted his approach and reached his decision in a procedurally fair manner. We do not find any error of law in this approach.

Conclusion

33. The Presiding Officer refused the application for return of the vehicle and ordered that it be disposed of in accordance with the Regulations. We agree with this decision and find no error of law in the manner in which it was reached. Ultimately, the detention of the vehicle was lawful as the facts indicate that this was a Northern Ireland based vehicle being operated by a Northern Ireland based entity and therefore required an NI operator's licence. There was no such licence. There was insufficient evidence to satisfy the Presiding Officer, on the balance of probabilities, that Derrymorgan Transport Ltd of Varna, Bulgaria was the owner of the detained vehicle and therefore the Appellant was not entitled to have the vehicle returned to it.

The decisions in this case, as reached by the Presiding Officer, were reached lawfully and fairly and were not "plainly wrong". This appeal is therefore dismissed.

L J Clough
Deputy Judge of the Upper Tribunal

R. Fry
Member of the Upper Tribunal

M. Smith, JP
Member of the Upper Tribunal

Authorised for issue on 3 February 2023