



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

Appeal No. UA-2022-001310-NT

**ON APPEAL from the DECISION of the HEAD OF THE TRANSPORT REGULATION
UNIT on behalf of the DEPARTMENT FOR INFRASTRUCTURE, for Northern Ireland**

Before: Ms. L.J Clough: Deputy Judge of the Upper Tribunal
Mr D. Rawsthorn: Member of the Upper Tribunal
Ms K. Pepperell: Member of the Upper Tribunal

Appellant: Toland Plant Ltd

Respondent: Driver and Vehicle Agency

Reference No: 22DET002

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast

On: 28 February 2023

Date of Decision under Appeal: 23 August 2022

Date of Decision: 31 May 2023

DECISION OF THE UPPER TRIBUNAL

**THE APPEAL IS DISMISSED
The stay is concluded with immediate effect.**

Subject matter:

Impounding. Grounds for return. Ownership. Exemption from licence on grounds of journey to/from annual roadworthiness testing. Admission of fresh evidence.

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); *Ladd v Marshall* (1954) 1 WLP 1489

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by Toland Plant Ltd, of Mindoran, Clonmany, County Donegal (“the Appellant”), against a decision of the Head of the Transport Infrastructure for Northern Ireland (“the DfI”). The decision was to refuse an application for return of a detained vehicle (Regulation Unit (“the TRU”) dated 23 August 2022, on behalf of the Department for registration SV56 EFB) and trailer (ID number NI/058318/10), and for them to be disposed of accordingly. The Appellant now appeals this decision to the Upper Tribunal.

2. The appeal was considered at an oral hearing, at the Tribunal Hearing Centre within the Royal Courts of Justice, Belfast, on 28 February 2023. Mr J. Toland was in attendance on behalf of the Appellant company, who was represented by Mr McKeever, BL and Mr J Crilly, solicitor. Mr Toland’s partner, Ms McGonigle, was also in attendance. The Respondent was represented by Ms A. Jones, BL. Mr M. Wills and Mr Shaw from the DfI, were also in attendance.

Background facts

3. On 13 June 2022, two Driver and Vehicle Agency (“DVA”) vehicle examiners were on duty on the A6, Glenshane Road area. At approximately 4pm, they observed a blue and white Scania goods vehicle (registration SV56 EFB) (“the vehicle”) in combination with a 3-axle Nootboom flatbed trailer (ID NI/058318/10) (“the trailer”) travelling on A6 Glenshane Road. The vehicle and trailer were transporting a second trailer, a Schmitz Tipper Trailer (ID number NI/064581/08). Of note, the Schmitz trailer is not subject to this appeal as it was agreed that this constituted “goods being carried” and was therefore returned to its owner under Regulations 15 and 16 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012 (hereafter “the 2012 Regulations”).

4. The vehicle (with trailer) was stopped for a compliance check. The driver identified himself as Liam Kieran McEleney with an address in Clonmany, Co. Donegal. He produced

his driver's licence and a driver qualification (CPC) card which had expired on 27 May 2022. He stated he was employed by Jimmy Toland of "Toland Plant" and stated he was transporting the vehicle and its load from Thomas McCrea & Sons to his employer's yard in Clonmany. The vehicle displayed a Goods Vehicle Operator Licence identity disc in the name of "James Toland t/a Toland Bros". Further investigations noted that this licence had been revoked on 7 August 2019. The vehicle was not specified on this, or any NI Operator's Licence and the driver's employer did not hold a valid Operator's Licence.

5. As the roadside investigation continued, a person purporting to be James Toland contacted the Vehicle Examiner by telephone, explaining that the vehicle and trailer were returning from their annual roadworthiness test (MOT). He later attended the roadside to reiterate this, further explaining that Thomas McCrea & Sons had undertaken the MOT preparation work on the vehicle and trailer. Investigations identified that the vehicle and trailer had been tested on 4 June 2022, some nine days prior to them being stopped by the DVA Vehicle Examiners.

6. On the basis that the vehicle was a goods vehicle over 3500KG, being used for hire or reward or in connection with the user's trade or business, and in the absence of a valid operator's licence, the DVA examiners considered they were being used on a road contrary to s.1 of the Goods Vehicles (Licencing of Operator's) Act (Northern Ireland) 2010 (hereafter "the 2010 Act"). Both vehicle and trailer were detained under the powers contained within Schedule 2 of the 2010 Act and under Regulation 3 of the 2012 Regulations. The DVA published a notice in the Belfast Gazette to advise of the detention and to invite the owner to apply for return of the vehicle and trailer.

7. On 22 July 2022, "Toland Plant Ltd, Springtown Road" with a business address of Mindoran, Clonmany, Co Donegal, applied for return of the vehicle and trailer. The grounds for return as cited on the application, were that at the time of detention, the vehicle and trailer were not being and had not been used in contravention of s. 1 of the 2010 Act, for the following reasons:

"The vehicle and trailer had been delivered to McCrea's Garage, Ballyrobert for preparation of MOT test. The vehicle and trailer tested on 4/6/2022. Both vehicles

passed test and were taken back to McCrea's garage. The vehicle was collected from McCrea's on 13/6/2022. The vehicle was insured. The driver had valid licence. The vehicle was not being operated for hire and reward. There was a trade plate in the vehicle. The appellant is the registered keeper of the vehicle and I attach V5 registration document to verify ownership."

8. The Applicant did not request a hearing to determine the application. The Head of the TRU proceeded to decide the application on the basis of the papers.

The decision under appeal

9. The Head of the TRU, on behalf of the Department for Infrastructure, prepared a written decision in this matter, which was signed on 23 August 2022. He determined that the application for return of vehicle (SV56 EFB) and trailer (NI/058318/10) was refused, and the vehicle and trailer were to be disposed of accordingly.

10. In making this decision, the Head of the TRU considered a number of matters. In relation to ownership, he determined that the Applicant (now Appellant), Toland Plant Ltd, of Mindoran, Clonmany, Co. Donegal was the owner of the vehicle. He made this decision on the basis that he had sight of the vehicle's V5C document which showed Toland Plant Ltd (Springtown Road, NI) as the registered keeper, as well as an invoice for the purchase of the vehicle, dated 12 February 2016 (marked as paid on 7 March 2019), from ND MacAskill & Son to Toland Plant Ltd, Mindoran, Co Donegal. A vehicle examination test report showed that Toland Plant Ltd had presented the vehicle for its roadworthiness test. The Head of the TRU was therefore satisfied, on the balance of probabilities, that the owner of the vehicle was Toland Plant Ltd, the applicant in this case.

11. In relation to the trailer, the Head of TRU determined that the Applicant, Toland Plant Ltd, was not proven to be the owner. He had been provided with a screenshot of a purchase invoice, dated 29 October 2010, held online from Euro Auctions (UK) Ltd to "Jimmy Toland" (page 96 of the appeal bundle). The Head of the TRU was aware that Jimmy Toland and Toland Plant Ltd were two separate entities. The invoice also noted a "total unpaid" of £10,061.02 and stated at the top "Copy for information purposes only. This does not verify proof of purchase."

DVA records indicated that the vehicle had been presented for testing regularly by “SN Trucks and Plants” and this was the case at the time of detention. The numerous different legal entities potentially owning the trailer, combined with an indication on a dated invoice that the trailer was not fully paid for, resulted in the Head of the TRU determining that ownership of the trailer was not made out.

12. The Head of the TRU then went on to consider whether there were grounds to detain both the vehicle and the trailer. The vehicle was a UK registered vehicle and should therefore be specified on a Goods Vehicle Operators Licence in the UK if being used on a road to carry goods for hire or reward, or in connection with such a trade or business in accordance with s.1 of the 2010 Act. It was an agreed fact that neither the vehicle nor trailer were listed on any valid Operator’s Licence at the time of detention. The Applicant had advanced two potential grounds to suggest that the vehicle was not being used in contravention of s.1 of the 2010 Act. The Head of the TRU considered each in turn.

Ground 1: MOT testing exemption

13. The Head of the TRU firstly considered the possibility that the vehicle was exempt from requiring an Operator’s Licence by virtue of its return from MOT testing at the time of detention. Vehicle Examiner Shaw’s witness statement confirmed that he spoke to Jimmy Toland (the applicant) at approximately 6pm on the date of detention who indicated that the vehicle was on the road as it was returning from its MOT test. Mr Toland later attended the roadside investigation, and reiterated the same assertion, implying that the vehicle did not require an Operator’s Licence for such a journey. In the subsequent application for return of the vehicle, reference was made to the vehicle being stopped while on the return journey from Thomas McCrea & Co Ltd who had undertaken work on the vehicle in preparation for the roadworthiness test. Thomas McCrea & Co Ltd provided a letter dated 5 August 2022 stating that the vehicle and two trailers had been delivered to them during the week of 30 May 2022 and that the vehicles stayed at the premises, apart from being presented for test, until they were collected on behalf of the applicant around mid-afternoon on Monday 13 June 2022 (page 98 of the appeal bundle). The DVA obtained evidence that the vehicle had passed its MOT test in Belfast on 4 June 2022 at 9.35am and the trailer had passed its test at 10.45am on the same date. The driver told the Vehicle Examiner on the date of detention, 13 June 2022, that he was taking

the vehicle from Thomas McCrea & Sons in Newtownabbey, to his employer's yard, in Clonmany, Co Donegal. This was repeated in the application for return of the vehicle and trailer.

14. The Head of the TRU considered Paragraph 11 to the Schedule to The Goods Vehicles (Licensing of Operators) (Exemption) Regulations (Northern Ireland) 2012 (hereafter "the Exemption Regulations"), which states that an operator's licence shall not be required for:

"11. A vehicle proceeding to or from a vehicle testing centre for the purposes of an examination of that vehicle and/or its trailer, provided that the only load being carried is a load required for the purposes of the examination under the Goods Vehicles (Testing) Regulations (NI) 2003."

Article 73 of the Road Traffic (Northern Ireland) Order 1995 provides further details on what constitutes a vehicle testing centre:

Vehicle Testing Centres

"73. The Department may provide and maintain centres (in this Part referred to as "vehicle testing centres") where the examination of vehicles may be carried out for the purposes of the Road Traffic Order and may provide and maintain apparatus for carrying out such examinations."

15. These provisions provide an exemption permitting the transport of vehicles to and from DVA test centres for the purpose of annual roadworthiness testing (MOT testing) without the need for an Operator's Licence. However, the Head of the TRU determined that the journey of the vehicle and trailer in this instance did not start or end at a DVA testing centre, and it took place nine days after the testing date. Consequently, the Head of the TRU determined that the MOT testing exemption did not apply, hence the vehicle was being used in contravention of s.1 of the 2010 Act.

Ground 2: Vehicle and trailer not being used for hire or reward

16. The Head of the TRU then considered the possibility that the vehicle was not being used for hire or reward as also cited in the application for return. He noted that the DVA paperwork referred, on occasion, to the vehicle and trailer as “carrying goods for hire or reward” but they were not detained specifically for this reason. They were detained due to the absence of a valid operator’s licence for the vehicle, as required by s.1 of the 2010 Act, as it was transporting a load, thus appearing to be operating for hire or reward. The legislative framework requires the vehicle to be licenced for the carriage of goods on a road for hire or reward or for or in connection with any trade or business carried on by the licensed person (s.1 2010 Act). He noted that the applicant company has an online presence to promote their active import and export business offering low loader transportation work in Ireland and in the UK. The detained trailer was a low loader which would be typically used in this type of business. The applicant company has never held or applied for a goods vehicle operator’s licence in Northern Ireland. The Operator’s Licence identification disc inside the vehicle when stopped was revoked in August 2019. The Head of the TRU concluded that the vehicle and trailer, when stopped, were at the very least, being used for or in connection with such a trade or business but in the absence of a licence. Consequently, it was determined that this ground was not made out either.

17. As a result, the Head of the TRU determined that the vehicle and trailer were lawfully detained, as they were being used on a road in the absence of an Operator’s Licence in contravention of s.1 of the 2010 Act. Irrespective of ownership having been made out in respect of the vehicle, given their use in contravention of s.1 of the 2010 Act, they were not to be returned to the owner, but rather to be disposed of.

The appeal

18. The appellant lodged an appeal against the decision of the Head of the TRU with the Upper Tribunal on an official appeal form which was signed and dated on 20 September 2022. The Appellant cited the following grounds of appeal:

- 1) The Department was wrong to rule that ownership of the trailer (NI/058318/10) was not made out. The appellant is the lawful owner of this property. The appellant will provide proof of ownership and give oral evidence in respect of this issue.*

- 2) *The Department was wrong to rule that the vehicle (and trailer) was not exempt as it was returning from testing. This is a matter of interpretation for the Tribunal (as indicated in Part A).*
- 3) *The Department was wrong to rule that the vehicle was being used for hire or reward or in connection with a trade or business. There is no evidence that the vehicle was being used for that purpose when it was seized. The appellant will give oral evidence in respect of that issue.*
- 4) *The vehicle (SV56 EFB) and trailer (NI/058318/10) should be returned to the appellant as they have been seized unlawfully. The appellant relies in particular on schedule 2, article 8(1), Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010...*

19. The Applicant applied for a stay of the Head of the TRU's decision pending appeal before the Upper Tribunal. This was allowed by the Head of the TRU as set out in a written decision dated 15 September 2022. Consequently, the vehicle and trailer, while they remain subject to detention, were not to be disposed of until the Upper Tribunal decide this matter.

The Approach of the Upper Tribunal

20. 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.’

21. 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.”

22. The task of the Upper Tribunal, therefore, when considering an appeal from a decision of the TRU 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 Head of the TRU on behalf of the DfI] was “plainly wrong”.

Legislation relevant to this appeal

23. With regards to the legislation relating to this specific appeal, the starting point is s.1 of 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 of 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 haulier 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.

24. 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 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.”

25. 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.

26. Regulation 2 defines an “owner”:

“2. “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.”

27. 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 Northern 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 or vehicles to which the claim relates. Again, the standard of proof required is the balance of probability.... Third, it is for the owner to show, on the balance of probability, that one of the grounds set out in regulation 10(4) of the 2001

Regulations [Regulation 4 of the 2012 Regulations in NI], as amended, has been established.

Discussion

Ownership of the trailer

28. The first ground of appeal raised by the Appellant was that the Head of the TRU was wrong to rule that ownership of the detained trailer was not made out, stating that the appellant would provide proof of ownership and give evidence to this effect. We remind ourselves that the Head of the TRU determined that the Appellant company was the owner of the detained vehicle on the basis of a V5C certificate recording the Appellant company (in its NI company name) as registered keeper of the vehicle, an original purchase invoice for the vehicle which was marked as paid, as well as evidence from the DVA that the Appellant company had presented the vehicle for its annual roadworthiness test. The combination of evidence was sufficient to satisfy the Head of the TRU on the balance of probabilities that ownership was made out in favour of the Appellant.

29. In respect of the trailer, the Head of the TRU had a screenshot of a purchase invoice dated 29 October 2010 (page 96 of the appeal bundle) which indicated that a sum of £10,061.02 remained outstanding for the trailer. The invoice was made out to the purchaser “Jimmy Toland”, a different name to the Appellant company. While there were similarities in the names in that “Jimmy Toland” is a director of the Appellant company, these are two separate legal entities. In addition, and adding further confusion, the DVA records indicated that a completely different company was the recorded owner of the trailer, namely “SN Trucks and Plants”. Given that three different legal entities were the potential owner of the trailer, the Head of the TRU could not be satisfied on the balance of probabilities that ownership was made out.

30. At the appeal hearing, Counsel for the Appellant outlined the background to the Appellant company, stating that it was involved in the trade of buying, selling, renting and leasing plant equipment in both the UK and Ireland. There were two companies involved in the business, namely Toland Plant NI Ltd (the Northern Ireland company) and Toland Plant Ltd (the Ireland company). It was stated that the vehicles from the Ireland company typically

undertake the drawing and haulage. Due to the proximity of the Appellant company's operating centre within County Donegal (Ireland) being so close to the Northern Ireland border, there was much trade and business undertaken within Northern Ireland.

Fresh evidence

31. In support of their first ground of appeal, the Appellant sought to admit fresh evidence in order to satisfy the Upper Tribunal that the Head of the TRU was wrong to conclude that the Appellant was not the owner of the detained trailer. In particular, the Appellant produced a copy invoice from Euro Auctions UK Ltd (reproduced from their system on the 17 February 2023) indicating that the trailer had been paid for in full in 2010. It was submitted that this copy invoice was better evidence than the online purchasing screen shot seen by the Head of the TRU (dated 29 October 2010). It was noted that the purchaser on the copy invoice reproduced on the 17 February 2023 was "Jimmy Toland" and not "Toland Plant Ltd", the Appellant company. Counsel explained that this difference was due to the fact that the Appellant company, Toland Plant Ltd, had only been established in January 2015, when the original purchase of the trailer was made in October 2010. The trailer was then transferred to Toland Plant Ltd when it was incorporated. It was submitted that there was significant evidential value in the copy February 2023 invoice as that was proof that the trailer was owned by the Appellant company, having been paid for in full.

32. The Appellant sought permission of the Upper Tribunal to admit the copy invoice as fresh evidence, quoting the words of paragraph 17 of Schedule 4 to the Transport Act 1985 (as amended) which provides that the Upper Tribunal "are to have full jurisdiction to hear and determine all matters whether of law or of fact for the purpose of the exercise of their functions under an enactment relating to transport". Counsel for the Appellant also referred the Upper Tribunal to paragraph 35 of *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, which states, "Although there is a power to permit further evidence (see para 8(2)), subject to para 9(2) which does not permit any appeal to take into consideration any circumstances which did not exist at the time of the determination subject of the appeal), whether or not to permit such evidence is clearly a matter for the tribunal...". Counsel for the Appellant submitted that on the basis of these provisions, the Upper Tribunal has the power to

admit the fresh evidence on the individual merits of the case, and in this case the copy invoice should be admitted.

33. In response, Counsel for the Respondent submitted that the fresh evidence should not be admitted, on the basis that an appeal before the Upper Tribunal is not a hearing *de novo*, but is instead, a review of the decision of the Head of the TRU. Counsel cited *Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC; NT/2013/52 & 53, in which it is stated (at paragraph 8) that “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 enquiry which has taken place.” It was submitted that the question for the Tribunal is whether the appellant tribunal concludes “on objective grounds that a different view from that taken by the Adjudicator was the right one, or (and we mean it to be the same thing) whether reason and the law impelled them to take a different view” (*Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* (2010) EWCA Civ 695, para 39-40). Counsel for the Respondent submitted, that the Upper Tribunal should not admit the fresh evidence, but instead focus on its usual role which is to review the decision of the Head of the TRU as matters stood at the date of decision.

34. Dealing firstly with the admission of fresh evidence in this matter, we acknowledge that the Upper Tribunal has a discretion to admit fresh evidence, but it is not the usual course of proceedings. The correct approach of the Upper Tribunal is to review the decision of the Head of the TRU rather than to hear the case afresh. When considering whether to admit fresh evidence, the Upper Tribunal has typically followed the Court of Appeal process in *Ladd v Marshall* (1954) 1 WLP 1489, which outlines the matters to consider, as follows: (i) the fresh evidence must be admissible; (ii) it must be evidence which could not have been obtained, with reasonable diligence, for use at the public enquiry; (iii) it must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would be decisive; and (iv) it must be evidence which is apparently credible though not necessarily incontrovertible.

35. In dealing with these matters, we find that the copy invoice of 17 February 2023 is relevant evidence as it addresses the question of ownership of the trailer, hence it is admissible as evidence in these proceedings. It is evidence that would probably have had an influence on

the result of the case and on the face of it, it appears to be credible evidence. However, if the trailer had been paid for in full before the Appellant company was established, and therefore well in advance of the decision of the Head of the TRU, we find that this is evidence that could have been presented to the Head of the TRU before making his decision. If the invoice was not actually available to be presented to the Head of the TRU in making his decision, then the production of the copy invoice at this late stage casts doubt upon its credibility as reliable evidence to take into consideration. No explanation was given as to why this invoice was not presented to the Head of the TRU earlier. Furthermore, there was no evidence presented to demonstrate the change of ownership from Jimmy Toland to the Appellant company after incorporation, which left an evidential gap outstanding.

36. The burden of proving ownership of the trailer rests upon the Appellant, originally as applicant, for return of the trailer. It was therefore a matter for the Appellant to produce sufficient evidence to demonstrate that the payments for the trailer had been satisfied in full and that ownership had been transferred, in order to do this. The Appellant chose not to request a public enquiry in order to present its case and should therefore have ensured that the paper evidence presented to support its case was the best evidence they had. They chose to present a screen shot from the Auction detailing outstanding balances which did not demonstrate full ownership of the trailer and chose not to explain matters further. An appeal before the Upper Tribunal is a review hearing unless there are exceptional circumstances to admit the fresh evidence. It does not automatically provide an Appellant with a second bite of the cherry. Given the fact that it was not presented to the Head of the TRU in advance of his decision and given the lack of explanation as to why, this calls into question the credibility of the evidence. We determine that the fresh evidence is not admitted. It should be noted that in order to maintain fairness to all parties in proceedings, no fresh evidence from any party to these proceedings was thereafter admitted or considered. This case was determined in the usual manner, namely a review of the decision of the Head of the TRU, based on the information before him at that time.

37. Turning then to the question of whether the Head of the TRU was wrong to conclude that ownership of the trailer was not made out, we find that the decision and reasoning of the Head of the TRU in his determination of ownership of the trailer was not “plainly wrong”. The evidence presented to him demonstrated that the trailer had been purchased by a different legal

entity and full payment had not been completed, thus ownership was potentially retained by the auction company. A different potential owner was listed on DVA records relating to the trailer and a different entity again was applying for return of the trailer as “owner” (the Appellant). It is only the owner who is permitted to secure the return of the trailer. Given the uncertainty about which of the numerous possibilities was the owner, it would have been remiss of the Head of the TRU to have concluded in favour of the Appellant and to have risked returning the trailer to the incorrect entity.

Return from testing

38. The second ground of appeal raised by the Appellant is the following:

“The Department was wrong to rule that the vehicle (and trailer) was not exempt as it was returning from testing. This is a matter of interpretation for the Tribunal (...).”

At the appeal hearing, Counsel for the Appellant withdrew this ground of appeal. It was accepted facts by all parties that the vehicle and trailer had been tested on 4 June 2022. They were stopped by the DVA officers on 13 June 2022 while on a journey from Thomas McCrea & Co Ltd, where work had been done in preparation for annual roadworthiness testing (on 4 June 2022), to the business address of the Appellant in Co Donegal. The vehicle and trailer were not stopped on the day of testing and neither the start nor end point of the journey involved the MOT testing centre location. Consequently, Counsel for the Appellant conceded that this journey did not fall within the exemption provided for within paragraph 11 of Schedule 2 to the Goods Vehicles (Licensing of Operators) (Exemptions) Regulations (Northern Ireland) 2012. This ground of appeal was therefore not considered but for the avoidance of doubt, we agree that the Head of the TRU was correct in his reasoning and in his decision in this matter.

Lawful detention

39. The third ground of appeal raised by the Appellant is:

“The Department was wrong to rule that the vehicle was being used for hire or reward or in connection with a trade or business. There is no evidence that the vehicle was

being used for that purpose when it was seized. The appellant will give oral evidence in respect of that issue.”

It is on this basis that the Appellant submits that the Head of the TRU had no authority upon which to detain the vehicle and trailer.

40. As set out above, s.1(1) of the 2010 Act makes it unlawful in Northern Ireland, to use a goods vehicle on a road, for the carriage of goods either for hire or reward or for or in connection with any trade or business carried on by the user of the vehicle, without holding an operator’s licence. Section 44 of the 2010 Act provides that Schedule 2 of the Act “shall have effect”. Schedule 2 contains powers to make Regulations concerning the detention etc of goods vehicle used in contravention of s.1 of the Act. The right to detain and impound goods vehicles is set out in Regulation 3 of the 2012 Regulations, which states:

“3. Where an authorised person has reason to believe that a vehicle is being or has been, used on a road in contravention of section 1 of the 2010 Act, he may detain the vehicle and its contents.”

An “authorised person” is defined in paragraph 1(1) of s.58 of the 2010 Act as “(a) an examiner appointed by the Department under Article 74 of the [Road Traffic (Northern Ireland) Order 1995]; or (b) any person authorised in writing by the Department for the purposes of the 2010 Act.”

41. At the appeal hearing, the Appellant confirmed that its business involves the sale, purchase and lease of plant equipment as well as the transport of stone and quarry material. This requires the use of tractor units and trailers to transport the plant bought, sold and leased as well as to transport the stone and quarry material. On the date of detention, 13 June 2022, the vehicle and trailer were being used by an employee of the Appellant to transport another trailer from Thomas McCrea & Co Ltd to the business address of the Appellant in Co Donegal, where the work of the Appellant company operates from. All three units had been at Thomas McCrea & Sons Ltd to prepare for annual roadworthiness testing which had been successfully completed on 4 June 2022. They are all used by the Appellant company for the purpose of its business.

42. To operate, the tractor units and trailers which are used within the Appellant's business must be maintained to a roadworthy standard (see Article 65 of the Road Traffic (Northern Ireland) Order 1995, and the Goods Vehicle (Testing) Regulations (Northern Ireland) 2003). This involves the annual testing process which was carried out on the three units in question on 4 June 2022. When stopped by the DVA officers, they were being returned to the Appellant's business premises to either be bought, sold, leased or to be used by the business to transport goods. The movement of the units on 13 June 2022, from the preparation and completion of the MOT testing to their working base, can only be a journey which is "for or in connection with... the trade or business carried on by the user" of the units. Consequently, the vehicle and trailer in issue in this appeal, fall within the remit of s.1 of the 2010 Act, which requires an operator's licence to be in place for their use on a road. In the absence of an operator's licence, they fall foul of s.1 of the 2010 Act and their detention was and remains lawful in these circumstances. The Head of the TRU was not "plainly wrong" to conclude this in his decision of 23 August 2022.

43. The Appellant further submits that:

"[t]he vehicle (SV56 EFB) and trailer (NI/058318/10) should be returned to the appellant as they have been seized unlawfully. The appellant relies in particular on schedule 2, article 8(1), Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010..."

We find that the Head of the TRU was correct to determine that detention of the vehicle and trailer was lawful as they were being used on a public highway within Northern Ireland, for or in connection with the user's trade or business, in the absence of a valid operator's licence. On this basis, the Head of the TRU was correct to find that they were lawfully detained, and given that no ground for return has been established, he was also correct to refuse the application for return and to order them to be disposed of.

44. In conclusion, we find that the decision made by the Head of the TRU in this case, was reached lawfully and fairly and was not “plainly wrong”. This appeal is dismissed, and the vehicle and trailer are to be disposed of accordingly.

**L J Clough
Deputy Judge of the Upper Tribunal**

**Mr D. Rawsthorn
Member of the Upper Tribunal**

**Ms K. Pepperell
Member of the Upper Tribunal**

Authorised for issue on 31 May 2023