Appeal No.: UA-2024-001087-T
[2025] UKUT 071 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS

IN AN APPEAL FROM THE DECISION OF:
JOHN BAKER, DEPUTY TRAFFIC COMMISSIONER FOR THE SOUTH EASTERN AND METROPOLITAN TRAFFIC AREA
DATED 4th JULY 2024

Before:

Elizabeth Ovey, Judge of the Upper Tribunal
Martin Smith, Specialist Member of the Upper Tribunal
Gary Roantree, Specialist Member of the Upper Tribunal

Appellants: (1) Hard Concrete Limited
(2) Jatinder Singh Dhillon

Attendance: Mr. Darren Finnegan appeared on behalf of the Appellants, instructed by Rothera Bray LLP

Heard at: Field House, 15-25 Breams Buildings, London EC4A 1DZ
Date of hearing: 21st January 2025
Date of decision: 24th February 2025

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED and the case be REMITTED for a further hearing by a traffic commissioner selected by the Senior Traffic Commissioner.

SUBJECT MATTER: Refusal of adjournment; revocation of licence for maintenance failings; proportionality; disqualification

CASES REFERRED TO: *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489; *R.* v. *Hereford Magistrates' Court (ex parte Rowlands)* [1998] Q.B. 110; *Bryan Haulage Limited (No.*

2) 217/2002; *Priority Freight Limited and Williams* 2009/225; *Bradley Fold Travel Limited and Peter Wright* v. *Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13; *David Finch Haulage* [2010] UKUT 284 (AAC); *Fergal Hughes and Perry McKee Homes Limited* v. *Department of the Environment in Northern Ireland* [2013] UKUT 0618 (AAC); *Redsky Wholesalers Ltd.* T-2013-07; *VST Building & Maintenance Limited* [2014] UKUT 0101 (AAC); *LA and Z Leonida t/a ETS* [2014] UKUT 0423 (AAC); *Randolph Transport Limited and Catherine Tottenham* [2014] UKUT 460 (AAC)

REASONS FOR DECISION

Preliminary

1. This is an appeal by the First Appellant, Hard Concrete Limited ("the Company") and the Second Appellant, Jatinder Singh Dhillon ("Mr. Dhillon"), its sole director, against the decision of the Deputy Traffic Commissioner for the South Eastern and Metropolitan Area ("the TC") given on 4th July 2024, following a public inquiry held on 24th June 2024. By his decision the TC:

    1.1. Revoked the Company's operating licences OK2012880 and OH2017026;

    1.2. Refused the Company's application for licence OF2067675;

    1.3. Disqualified Mr. Dhillon from holding or obtaining an operator's licence in any capacity for a period of six months.

2. The revocation and disqualification were expressed to take effect from 5th August 2024. The Company and Mr. Dhillon applied for a stay, which was refused by the TC on 7th August 2024.

3. In the meantime, on 2nd August 2024, Mr. Dhillon had filed a notice of appeal against the TC's decision by which he sought to challenge the whole of the decision. A renewed application for a stay was made to the Upper Tribunal and was granted by Judge Rupert Jones on 8th August 2024. Case management directions were given by Judge Mitchell on 18th September 2024.

4. The Company and Mr. Dhillon were represented at the hearing before us by Mr. Finnegan of counsel. We are grateful to him for his clear and helpful submissions.

The facts

5. The Company is the holder of licence OK2012880, which was granted on 26th June 2018 as a standard national licence. A transport manager was therefore required and the application named Mrs. Depinder Gill as the transport manager. An application to downgrade the licence to a restricted licence was granted on 27th October 2022. The

specified operating centre at the time of the public inquiry was in Hayes and the authorisation was for one vehicle.

6. The Company is also the holder of licence OH2017026, which was granted on 13th August 2019 as a standard national licence. Again a transport manager was therefore required and the application named Mr. Gurdain Singh Brar as the transport manager. An application to downgrade the licence to a restricted licence was granted on 13th April 2023. The specified operating centre at the time of the public inquiry was in Slough. The authorisation was originally for one vehicle, but by the time of the public inquiry it had been increased to two.

7. The application for licence OH2017026 stated that licence OK2012880 was already held and that that licence would be surrendered if the new licence was granted. Clearly that did not happen. The application also stated that someone named in the application had had a goods or passenger service vehicle licence revoked, suspended or curtailed and that someone named in the application had attended a public inquiry before a traffic commissioner. In both cases the relevant licence was OK1143004 and the licence holder was Japji 7676 Ltd. It was not clear to us at the time of the hearing what the connection was with the Company or Mr. Dhillon and so we did not know whether or not any conduct which might have led to the regulatory action taken or to the attendance at a public inquiry might shed any light on the fitness of the Company to hold a licence or of Mr. Dhillon to act as a director. We noted, however, that the papers before us do not refer further to these matters and it seems clear that they did not weigh with the TC. For completeness, we record that we have been informed by the Appellants' solicitors since the hearing that the relevant inquiry related to the then transport manager.

8. The grant of licence OH2017026 did not proceed without difficulty, as is explained in the case summary for the public inquiry which is at p.24 of the appeal bundle. We take the following history largely from the case summary, since we have not seen all the underlying documentation. The transport manager specified on licence OK2012880 raised concerns which led to a letter dated 25th July 2019 stating that the application would be considered at a public inquiry. In the event, having reviewed the application, the traffic commissioner decided to grant it with a warning upon the acceptance of an undertaking to have an audit by 30th November 2019 and the Company was informed accordingly by a letter dated 7th August 2019 (p.205). It is to be noted that the letter made clear that the warning was a formal one which could be taken into account if further reports of non-compliance were received and the traffic commissioner had to consider whether action should be taken against the licence.

9. A request was received for an extension of the undertaking and the date was extended to 31st May 2020. No audit was received by that date and a letter warning of the proposed revocation of the licence was sent on 8th June 2020. What is described as an "audit and improvement plan" was received on 28th June 2020 (the audit having been carried out on 23rd May 2020). A letter from the Office of the Traffic Commissioner ("the OTC") dated 2nd July 2020 states that the traffic commissioner found the audit and improvement plan satisfactory and had decided simply to issue a further formal warning.

10. There appears to have been no further relevant history until 2022. On 19th August 2022 the Company applied to increase the authorisation under licence OH2017026 to three vehicles. The application led the Driver & Vehicle Standards Agency ("the DVSA") to carry out a maintenance investigation on 1st December 2022. The report of the investigation identified six satisfactory areas of assessment, one mostly satisfactory area, five unsatisfactory areas and one matter for report to the OTC. The unsatisfactory areas related to a number of defects including very limited recording of brake tests, problems with driver defect reports and a lack of wheel and tyre management systems. The matter for report was that the transport manager, whom we understand to have been Mr. Dhillon himself by that stage, had attained his certificate of professional competence four years previously and had not attended a refresher course. Further, it seemed from his answers to the questions asked that his knowledge was not sufficient to meet current changes and standards in legislation and he lacked full control. The investigation report added that the transport manager had booked a refresher course to be held on 16th January 2023.

11. The traffic commissioner granted the variation with a third formal warning upon the acceptance of an undertaking to have an audit by 30th August 2023. The terms of the undertaking were set out in a letter dated 13th February 2023. The undertaking was given by a letter dated 26th March 2023 after a reminder letter was sent dated 3rd March 2023 and, in the absence of a response, a further letter dated 22nd March 2023 stating that the traffic commissioner was minded to revoke the licence. The Company explained the delay by reference to the absence of certain individuals in India, an incorrect email address, submission of documentation by email which on investigation was blocked and the absence of a telephone number to contact the OTC.

12. No audit had been received by the time of the application for licence OF2067675, which is dated 1st August 2023 and was from the outset an application for a restricted licence. It disclosed the existence of licence OK2012880, although the licence holder was said to be Mr. Dhillon, and stated that that licence would not be surrendered. No reference was made to any other licence. The proposed operating centre was in Iver and authorisation was sought for three vehicles. The application elicited a number of requests for further information, including a request for confirmation whether licence OH2017026 would be surrendered. This led to email correspondence between the Company and the OTC in which by an email sent on 5th September 2023 the Company inquired whether, if they surrendered licence OH2017026, they would need to submit the audit, or whether they could wait until they got an interim licence on the new application. The response from the OTC, sent on 13th September 2023, was that the undertaking required the audit by 30th August 2023, so they would still need to submit it.

13. An audit carried out on 29th September 2023 was then submitted which was expressed to be for licence OH2017026 but noted that the operator had two licences. By this time both licences were restricted licences and the requirement of professional competence which had previously applied under section 13B of the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act") no longer had to be satisfied. Mr. Dhillon was identified as the responsible person and it was noted (p.237 of the appeal

bundle) that he had passed the certificate of professional competence on 22nd January 2019 and had done a refresher course on 16th January 2023. The certificate of the original course had been seen (and is at p.377 of the bundle), but there is no reference to sight of the certificate for the refresher course (and it is not in the bundle). The auditor commented (p.250) that "*there appears to be some disconnect between attending the course and applying the knowledge that should have been learnt*". There is reference to the roadside stop of vehicle LJ67HGP on 10th May 2023, the subsequent findings and the action taken against the driver, to which we refer further in paragraph 15 below. The summary of the audit shows that 12 areas were satisfactory, three mostly satisfactory, five satisfactory in part and seven unsatisfactory. The overview included the following:

> "*… the company has changed maintenance providers, and the paperwork has no issue number on it, and I am concerned that it does not adequately cover all of the inspection requirements. There is then evidence of some good systems such as the wheel nut torque register is in place and being used and a planner up to December 2024.*
>
> *My recommendation is the operation steps up its efforts, uses the compliance folder it was supplied with fully and holds more evidence of the work it is carrying out.*"

14. The traffic commissioner's review of this material led to a letter dated 18th October 2023 by which the Company was informed that the traffic commissioner remained to be satisfied and required a full independent audit to be completed. The existing undertaking would be removed if the Company accepted a further undertaking that a further audit should be carried out by 18th April 2024. An undertaking was given accordingly and the undertaking appeared on licence OH2017026 at the time of the public inquiry.

15. By the time of the public inquiry it had transpired that a maintenance investigation had been carried out by the DVSA in relation to licence OH2017026 on 31st May 2023 which identified a number of shortcomings, including lack of regular roller brake testing, an ineffective driver defects system, no evidence of a vehicle emissions maintenance and monitoring system and an inadequate wheel and tyre maintenance system. The report stated that the responsible person, who we understand to be Mr. Dhillon, appeared to lack any experience or knowledge and he was ignoring obvious problems. Three of the areas for assessment were satisfactory, five were unsatisfactory and four required report to the OTC. The report included links to a number of helpful websites offering guidance of various kinds. This investigation arose out of the roadside stop mentioned in the September 2023 audit. It appears from pp.289-292 that on that occasion three "S" marked prohibitions were issued, relating to nearside and offside indicators which were inoperative and to a defective tyre, all of which were significant against the driver, a Mr. Balour Singh. Fixed penalty notices were also issued. Further, the vehicle was not specified on the operator's licence and the one month grace period had expired, and Mr. Singh had not used the tachograph record sheet or driver card. In addition, the examiner, Mr. Peter Forshaw, had had problems in accessing the operating centre and had been informed by the site owner's

solicitor that the Company had been given 28 days' notice to quit, the notice being dated 1st May 2023. Mr. Dhillon had not at that point found an alternative site and the maintenance provider had also been held up at the entrance. In the light of that information and having regard to the audit, the traffic commissioner decided to hold a public inquiry to consider the application for licence OF2067675, a decision of which the Company was informed by a letter dated 28th November 2023.

16. The next event of which we are aware is that a desk-based assessment was carried out in relation to licence OK2012880 on 1st February 2024. That assessment identified two areas as satisfactory, one as "*issues found*", one as mostly satisfactory, 11 as unsatisfactory and one as "*action required*". It raised many of the same issues as had been raised in relation to licence OH2017026. As respects maintenance, it stated at p. 106 that during the three year period assessed, the Company had "*100% initial fail rate and 75% final fail rate*", which we understand to refer to MOT tests. It also raised issues as to the observation of the drivers' hours requirements, including 15 incidents of driving without a driver card for small movements and 12 examples of Mr. Dhillon, who is a driver as well as a director of the Company, having exceeded the 4.5 hours limit without taking his required break. (This led to the rather farcical situation whereby, as appears from p. 147, Mr. Dhillon discussed these infringements with himself and confirmed his understanding of the implications.) It also identified that vehicle DX64BDO was driven for 165 kilometres on 19th August 2023 without a driver card inserted.

17. No audit in relation to licence OH2017026 was provided by 18th April 2024. A reminder letter was sent on 2nd May 2024, without immediate result. The traffic commissioner considered the case and decided to call the Company and Mr. Dhillon to a public inquiry, to be held on 24th June 2024, which would relate to the existing licences and the outstanding application for licence OF2067675. The call-up letter, which is dated 14th May 2024, gives details of the various matters which were of concern to the commissioner and identifies the relevant provisions of the Goods Vehicles (Licensing of Operators) Act 1995 as section 26(1)(b), (c)(ii), (ca), (e), (f) and (h). In summary, reliance was placed on the maintenance, driver defect reporting and drivers' hours issues already mentioned, the failure to notify changes to the traffic commissioner and the issue of prohibition and fixed penalty notices. Mr. Dhillon's vocational driving entitlement was to be considered at a parallel hearing on the same day. The Company was also informed that the traffic commissioner would consider the report dated 26th June 2023 of Mr. Peter Forshaw, a DVSA vehicle examiner, which dealt with the issues in more detail.

18. We note that the letter drew attention to the seriousness of the matters being raised and stated "*… you should identify competent legal or professional representation quickly unless you are confident that you do not need it.*" It also enclosed a form of authority for a legal or other representative and an attendance form covering the possibilities that the Appellants would be legally represented, professionally represented or unrepresented.

19. The call-up letter appears effectively to have crossed with an email from the Company sent on 14th May 2024, which stated that an audit report was being sent, offered an explanation for a parking issue and stated that the Company would try to work on the matters raised and to become a member of the Road Haulage Association so that they could learn better ways.

20. The audit report duly arrived and shows that the audit was carried out on 11th April 2024. The first paragraph of the summary (p.299) reads:

> "*The operator's compliance performance is severely lacking, with multiple critical deficiencies observed across many audit areas. The operator's current processes and procedures are almost non-existent and pose significant risks to safety and regulatory compliance. Their disregard for fundamental regulatory requirements not only jeopardises their own operations but also undermines public trust in the transport industry as a whole. Urgent intervention and remediation efforts are imperative to address these systemic deficiencies and prevent further regulatory violations and potential enforcement actions. Failure to take decisive action may result in severe consequences, including suspension or revocation of their operator licence.*"

That must be read in the light of the fact that the "*major priorities*" identified in the next paragraph and repeated elsewhere in the report are to update the operating centre (apparently by pursuing the application for licence OF2067675), update the maintenance provider, bring the preventative maintenance inspections (which were being completed regularly) into line with the regulatory requirements as to frequency, check that the paperwork is being completed in full and to ensure that driver reportable defects are dated on completion.

21. On 21st May 2024, having received the call-up letter, Mr. Dhillon wrote to the OTC by email as follows:

> "*We are going to request you that can you forward PI date. Reason for it, We spend around £17000 money to repair our trucks. We were unable to do work for nearly 3-4 months following months nov 23 dec23, jan 24 and Feb 24 Which cost we paid yard rent 3 months £8100, Truck finance £12600 and insurance £3000. We run a small company so you can understand how difficult it is to manage it. For PI we need legal advice which costs very hard and affordable this time period. We request you please understand our circumstances and give us more time. We shall be really grateful to you."*

22. The following day the OTC responded by email:

> "*The Deputy Traffic Commissioner has considered the contents of your email and had decided to refuse the request for an adjournment. You do not have to be legally represented and many operators attend without a solicitor or other representative. As the adjournment has been refused you must attend and provide all the information requested …*"

23. Mr. Dhillon then inquired about the provision of a Punjabi interpreter on the ground that English was his second language and was informed that a Punjabi interpreter would attend.

24. On 11th June 2024 the Company sent a letter by email to the OTC (p.328) which included the following in relation to missing mileage:

> "*Its show driver has missing mileage but not any driver drives a vehicle without techo cards. It happens when ANY driver drives a vehicle.*
>
> *For example: Jatinder driver vehicle 22may 23may and 25 may another driver drive and 26may Jatinder drive again. MAY 25may driver drive 60 miles and it's showing Jatinder has missing mileage. (We attached copy)*
>
> *Even nobody knows about this. All TM and auditors tell us this happens only because of card missing, but that's not true.*"

We understand that the copy referred to is a reference to pp. 358 to 364, which appear to show that Mr. Dhillon drove the vehicle LJ67HGP on 24th May 2024 ending with a closing mileage of 196528 kilometres and drove it again on 27th May 2024 with a starting mileage of 196729 kilometres, leading to a missing vehicle mileage record of 201 kilometres. These figures can be reconciled by observing that Mr. Mohammed Adil Ajaz drove that vehicle on 25th May 2024 for 201 kilometres. Similarly, missing mileage of 75 kilometres between 17th and 23rd May 2024 on that vehicle and of 69 kilometres between 17th and 29th May 2024 on vehicle SN16NXF can be reconciled by observing that Mr. Ajaz drove those vehicles for the relevant distance on 20th May 2024.

25. The tachograph analysis reports in the bundle at pp. 347 to 362 show no driver infringements for November and December 2023, two infringements in January 2024, during which vehicles were driven for 953 kilometres in total over 12 days, and none in February 2024. This is the period during which the Company says it was not operating. There were five infringements in March 2024, two in April 2024 and one in May 2024. The infringements were all committed by Mr. Harpreet Singh Brar with the exception of one of the January infringements, which was committed by Mr. Dhillon himself. The infringement consisted of driving for 4 hours 32 minutes without a break.

26. In addition to the missing mileage records referred to in paragraph 24 above, the bundle contains further missing mileage records which have been annotated to offer an explanation for the missing mileage.

27. The OTC asked Mr. Forshaw to produce an updated report on the maintenance records for the Company's vehicles and the forward planner. That report, dated 12th June 2024, is to be found at pp.386 to 390. It included the following:

> 27.1. Vehicle DX64BDO was found at the preventative maintenance inspection on 15th April 2024 as having tyres at the limit and at the inspection on 30th May 2024 to have both front tyres below the legal limit. That did not appear on the driver defect report. There had been

decelerometer brake testing on 15th April and 30th May 2024 but on both occasions, the wheel station temperatures were not noted. The vehicle failed an exhaust emissions test in June 2024;

27.2. Vehicle DH10NOW (SN16NXF) had been subject to decelerometer brake testing on 5th March and 30th May 2024 but no wheel station temperatures were noted. Roller brake testing on 2nd April 2024 with the vehicle partly laden had been satisfactory. At the preventative maintenance inspection on 16th April 2023 the ABS lamp had been noted as "*intermittent*" and the advice given was to monitor it;

27.3. Vehicle LJ67HGP had been subject to decelerometer brake testing on 21st March, 1st May and 10th June 2024 but the wheel station temperatures had not been noted;

27.4. Many of the driver defect reports showed nil defects. Driver detectable defects were noted on inspection including tyres below the legal limit and warning lamp activation but were not recorded on the reports;

27.5. There were insufficient details in relation wheel nuts and retorque although it did seem to take place as a routine fleet check.

28. The public inquiry was duly held on 24th June 2024 in front of the TC and was attended by Mr. Dhillon, the interpreter and (by Teams) Mr. Forshaw.

The public inquiry

29. As a general point we note from the transcript of the hearing that although Mr. Dhillon very understandably asked for an interpreter, he does speak and understand English to a considerable extent and at times responded in English without waiting for the interpreter. In what follows we identify the times when that occurred in relation to relevant material.

30. We draw attention to the following matters which emerge from the transcript.

31. The TC began by going through what he understood to be the reason for his having to consider three licences. At an early stage Mr. Dhillon said that he had ten vehicles, but agreed that the first licence, which had its operating centre in Hayes, authorised one vehicle and the second licence, which had its operating centre in Slough, authorised two vehicles and had been granted with a warning on issue. The TC made clear his understanding that three warnings had been issued in relation to the second licence (OH2017026). Mr. Dhillon asserted that the warnings were not mentioned and were not written in any letter. He was taken by the TC to the relevant letters and then said he was told to make improvements but not told what the improvements should be and the transport managers in the area did not know either.

32. The TC then turned to the maintenance investigation reports. He drew attention to the problems found on the December 2022 investigation. He then asked Mr. Forshaw

about his report of the May 2023 investigation. Mr. Forshaw drew attention to the helpful links contained in his report. He outlined his concerns about the operating centre, the brake testing and maintenance standards, the driver defect reporting system and the retorque and wheels and tyres. He agreed with the TC that the shortcomings were the same as had been identified in December 2022. The TC then asked Mr. Dhillon what he had to say about the fact that it appeared that during the time between December 2022 and May 2023 he had not made the improvements he had promised. At this point Mr. Dhillon expanded on occasion on what the interpreter was saying, but the gist of his answer was that that they started making the improvements but things get missed. He agreed that a prohibition had been issued but said that the operating centre was on muddy ground which often had a foot of water standing on it and defects could not be seen. The TC put to him that the matters observed on 10th May 2023 would not have been affected by the water in the operating centre and his response was to the effect that the tyres were dirty and the driver missed the indicator defects because the water was muddy. Mr. Forshaw was asked if he wished to comment and said if there were issues with the condition of the operating centre his advice would be to move the vehicle somewhere else where a thorough and robust first use check could be carried out. He also said that unless the vehicle was submerged the indicator should be clearly visible and there would be a warning on the dashboard to alert the driver.

33. The next topic was the desk-based assessment carried out on 1st February 2024. The TC briefly identified the concerns and asked Mr. Dhillon what he had to say. Mr. Dhillon said, speaking partly in English, that the preventative maintenance inspections had improved a lot. As we understand it he said that there were some matters, such as braking and temperature checks, that they had asked the maintenance people to carry out and they had missed it. He also said that they had now moved the office to the operating centre and when they had the new operating licence all three vehicles would be in one place and they would surrender the other licences. The maintenance providers would be in the same yard. He recognised that "*small things, minor things*" were missing at the moment but said that they had made contact with a transport consultant company which would visit every three or four months and advise them. He also referred to difficulties as a result of English being a second language. The TC asked when the improvements had been done and the answer was after the December 2022 and May 2023 investigations.

34. The TC then took Mr. Dhillon to Mr. Forshaw's report of 12th June 2024 and drew attention to what was stated about the tyres on vehicle DX64BDO. He expressed concern that Mr. Dhillon had been warned about the tyres on 15th April 2024 but it was not picked up in the driver defect report of 25th May 2024 and four or five days later the maintenance inspector said the tyres were illegal. Mr. Dhillon explained that the vehicle had been parked up for 10-15 days and was only used on one day. The tyres were fine on the outside but worn on the inside. The interpreter originally got this the other way round, saying that the tyres were fine on the inside, but was corrected in English by Mr. Dhillon, who went on to say that that was what he missed. The vehicle was only used for one or two days and they were waiting for the MOT, when the tyres would have been changed.

35. The question of the intermittent ABS lamp was also pursued. Mr. Forshaw

explained that intermittent operation could potentially indicate that a wheel bearing was starting to fail. It therefore needed to be investigated, although an aggressive wheel wash might cause the light to come on for a period. The TC commented that there were driver detectable faults coming out at inspections but some daily defect reports included noting of repairs. Mr. Dhillon agreed that if water went in it could cause the light to go on and said that if the light did not go off the mechanic "*right there*" would check the vehicle. He had checked it and said there was no problem.

36. The TC then turned to missing mileage, raising the question of the 165 kilometres on 19th August 2023. Mr. Dhillon in effect gave (in English) the explanation which is set out in the letter of 11th June 2024 quoted in paragraph 24 above. The TC seems to have accepted such an explanation for a missing 177 kilometres between 20th and 25th October 2023 on the basis that the card had not been read and there seemed to be some problem with the card.

37. The TC also put to Mr. Dhillon the working hours infringements, pointing out that Mr. Dhillon seemed to be taking his breaks in the wrong order and for not enough time. Mr. Dhillon's answer was that sometimes they had to move the vehicle because of congestion, which split up the break.

38. The TC then began the task of balancing the negative aspects of the case with the positive aspects. He identified the positives as having a new maintenance provider in Iver, having changed the system for walk round checks and having improved in other areas. Mr. Dhillon agreed that that was correct. The move to Iver took place when the new application was made, in August 2023. The TC asked whether Mr. Dhillon had anything to say which would convince him that Mr. Dhillon would be fully compliant if the licence was allowed to continue. Mr. Dhillon said that they had worked very hard to compile the paperwork in January and February and if there was anything still that they needed to improve, they would improve further. The vehicles did not do more than 10,000 kilometres a year and each was driven only three days a week, but they needed three vehicles, one to collect the material and two to go out to deliver the concrete. We note that this passage in the evidence involved some intervention in English by Mr. Dhillon to correct what the interpreter was saying and some response from the interpreter, also in English, to the effect that he had said the opposite before.

39. At the bottom of page 18 of the transcript (p.409 of the bundle), the TC referred to his power to disqualify the Company or Mr. Dhillon and said:

> "*I want to emphasise I haven't made my decision yet, but if I don't ask him now, I'd be criticised because you have to give people the chance to comment. Does he want to say anything about that?*"

We think the intention of the TC was to give Mr. Dhillon the opportunity to comment on the possibility of disqualification. Mr. Dhillon's response was in English, in terms of now having everything in the record, training drivers on reporting defects, keeping AdBlue records and doing walk around checks. He also referred again to the transport consultant and promised that the preventative maintenance inspections (we think) would be made "*more standard according to the requirement*". He mentioned the sum

of £17,000 or £18,000 spent in the quiet time of January and February. This answer seems more obviously applicable to the issue of future compliance and does not address the possible consequences of disqualification.

40. The TC then asked Mr. Forshaw if there was anything else he had in mind to say. Mr. Forshaw said that if the licence were to continue, he would like a commitment to laden roller brake testing at every inspection. As he put it:

> "*Decelerometer testing has its place, but Mr. Dhillon has got two vehicles that are volumetrics, and they operate at the designed limit. So, any degradation in brake performance is magnified …*"

There had been intermittent roller brake testing, but some of it was partially laden. Mr. Dhillon stated that roller brake testing was done three times a year and was always laden and decelerometer testing was at every inspection. The TC explained that Mr. Forshaw had said he wanted roller brake testing each time. The hearing concluded with a further assurance from Mr. Dhillon that they would implement the full rules and do everything according to the requirements.

The TC's decision

41. As we have said, by his decision the TC revoked licences OK2012880 and OH2017026,[1] refused the application for licence OF2067675 and disqualified Mr. Dhillon from holding or obtaining an operator's licence for a period of six months in any capacity. The decision was based on breaches of section 26(1)(a), (c), (ca), (e) and (f) of the 1995 Act, as a consequence of which the TC found that the Company no longer met the requirement of fitness to hold a licence.

42. The decision set out the basic facts of the case and then addressed the application for an adjournment to obtain legal representation as follows:

> "*8. On the 21 May 2024 the operator applied for an adjournment saying that legal advice was required and that more time was needed to raise the money to pay for this. There was no indication of the time period that was being requested and the background of the case led me to believe that delay should be minimised. I refused the application saying that representation was optional and that many operators choose to attend inquiries without representation.*"

[1] The letter dated 4th July 2024 notifying the decision and the decision itself both refer to licence OH2067675, but the body of the decision refers to licence OH2017026 and we think the numbers from the proposed licence OF2067675 have erroneously been used. We do not think there has been any misunderstanding as a result. The correct number is given in the TC's decision refusing the application for a stay.

43. The TC then summarised events at the public inquiry along the lines set out above. Having done so, he continued:

> "*16. There is no doubt in this case that there have been breaches of Sections 26(1)(a) (c) (ca) (e) and (f) of the Goods Vehicles Act 1995. The proposed operating centre on the new application has been in use since August 2023, prohibitions and fixed penalties have been issued, statements made when the licences were granted have not been fulfilled and undertakings have not been met. It is apparent from the record that the operator has been afforded several chances to make improvements. Three warnings have been issued and time given to improve which should have been evidenced from the audits or DVSA investigations which followed.*
>
> *17. In deciding what action to take in response to these findings and the past history I have to balance the negative aspects with any positives I can find. The negatives are set out in the last paragraph and show a pattern of repeated regulatory failings over the time that the licences have been in force. On the positive side I can see that the operator has made changes in response to some adverse findings made in audits and DVSA investigations but on the other hand there are still areas where significant and worrying failings are evident. In particular I note the analysis prepared by Vehicle Examiner Forshaw of the most recent documentation submitted where he found driver detectable faults as serious as two defective tyres only being identified at a maintenance inspection. I take into account what Mr Dhillon said in relation to making improvements and that English is not his first language, but this cannot be an excuse for operating vehicles that could be a road safety risk. Having balanced all the relevant factors including the history I conclude that this is a case of serious to severe seriousness as defined in Statutory Document 10 issued by the Senior Traffic Commissioner.*
>
> *18. Having determined the level of seriousness I ask myself the question set out in the case of Priority Freight Limited & Paul Williams i.e. how likely is it that this operator will operate in compliance with the operator's licensing regime? In other words, can the operator be trusted going forward? The problem for this operator is that he has been trusted and given the chance to improve on at least three occasions previously and yet he has failed to show satisfactory levels of compliance up to the date of this inquiry. Mr Dhillon said it had not been clear to him when warnings were issued what he needed to do to improve but the onus is on him as an operator to find out what is required and implement improvement accordingly. My conclusion therefore is that I cannot trust the operator to maintain sufficient compliance if the licence is allowed to continue. For these reasons I find that fitness to hold a restricted licence is no longer shown and believe there is need to put the operator out of business as a consequence. I therefore revoke the existing licences with effect from the 5 August 2024 allowing a period before revocation to give the operator time to complete any outstanding work commitments. The application for a new licence in the Eastern Traffic Area is refused.*

19. I have considered whether the director should be disqualified from holding a licence for a period and have decided that such an order is proportionate and necessary because I believe Mr Dhillon needs some time away from holding a licence so he can reflect on what has happened. However, taking into account the positive aspects of the case as detailed and the efforts Mr Dhillon has made, I limit the period of disqualification to six months which will also commence on the 5 August 2024 and applies to Mr Dhillon as an individual, partner or director. If he decides after that time to reapply for a licence, he will need to show that he has learned from this experience and that he has a network of professional support available to him to ensure compliance is guaranteed."

44. In his decision of 7th August 2024 refusing the application for a stay, the TC said:

"*4. … A pattern of some temporary improvements by the operator but few long term changes was evident to me. It followed from that conclusion that ongoing compliance was unlikely if the operator was allowed to continue in business and the Priority Freight question was answered in the negative.*

5. My primary consideration when considering this stay application however, is the potential risk to road safety. I summarised in the "Background" section of my decision the occasions when road safety critical faults had been found on authorised vehicles and drivers' walk round checks had not been taken effectively. I also emphasised the finding that even in the very recent documentation produced for the inquiry two illegal tyres were found at a maintenance inspection when five days before a nil defect walk round check had been recorded.

6. I remind myself that [Mr. Dhillon] was aware of the pending public inquiry when this serious error was made and it still happened …"

The initial grounds of appeal and the application for a stay

45. In the notice of appeal dated 2nd August 2024 the grounds of appeal were set out as follows:

"*I feel that Mr. Baker was unduly harsh in revoking the operator licences.*

We have made huge improvements since the DVSA enquiry and we have a Transport Consultant looking after us. We will also offer to add a Transport Manager with a CPC to the licence to ensure compliance.

English is not my first language, so it's been a learning process that we have been going through. We are now in a good position to stay compliant with the law.

Putting my company out of business is unfair as it can be operated safely and in a compliant way.

Since our Transport Consultant started to work with us, things have improved, but the Traffic Commissioner hasn't given us enough time to prove this. If we were given a 6 month period of grace to prove that we are now compliant, this would be very fair. But [to revoke] the licence with 28 days notice is excessive."

46. When the Appellants' application for a stay was received by the Upper Tribunal, they were given a brief period within which to provide reasons for a stay. Those reasons were given in a letter dated 8th August 2024, which included the following:

"*We submitted our vehicle to our garage for MOT preparation a few days before it was due.*

The garage (Commercial Care) wrote on the PMI sheet that the tyre depth was 0 mm because the tyre needed changing. When questioned, they confirmed it was actually at 1mm but they wanted to make sure that we arranged for it to be changed straight away.

I called the tyre company (Szol Tyres) as we have a contract with them. They said they would come that evening to change the tyre. However, they did not arrive but said they would come the following morning. I said I would take the vehicle to them as it was on the way to a small job I needed to do. When I arrived at Szol tyres they informed me that they were out on another job and would come to my yard on their way back.

So I took the vehicle to the job I needed to do because the tread depth was actually 1 mm and the tyre was legal. As an experienced operator I believed that the tyres were legal."

The letter also gave details of expenditure incurred and the consequences of the loss of the licences. This material was relied upon by Judge Rupert Jones when he granted a stay of the revocation of the licences. In particular, he concluded that there was a genuine dispute as to whether there would be any public safety issue in the operator continuing to operate in the interim.

The legal context

47. Under the 1995 Act as currently in force:

"26.(1) Subject to the following provisions of this section and the provisions of section 29, a traffic commissioner may direct that an operator's licence be revoked, suspended or curtailed … on any of the following grounds -

(a) in the case of a heavy goods vehicle licence, that a place in the traffic area to which the licence relates has, at a time when it was not specified in the licence as an operating centre of the

licence-holder, been used as an operating centre for heavy goods vehicles authorised to be used under the licence;

(b) *…*

(c) *that during the five years ending with the date on which the direction is given there has been –*

(i) *a conviction of the licence-holder of an offence such as is mentioned in any of sub-paragraphs (a) to (i) of paragraph 5 of Schedule 2*

(ii) *a conviction of a servant or agent of the licence-holder of any such offence, other than an offence such as is mentioned in sub-paragraph (c), (e) or (h) of that paragraph; or*

(iii) *a prohibition under section 69 or 70 of the Road Traffic Act 1988 (power to prohibit driving of unfit or overloaded vehicles) of the driving of a vehicle of which the licence-holder was the owner when the prohibition was imposed;*

(ca) *that during those five years a fixed penalty notice … has been issued … to a servant or agent of the licence-holder in respect of an offence within [paragraph (c)(ii) above]*

(d) *…*

(e) *that the licence-holder made, or procured to be made, for the purposes of –*

(i) *his application for the licence,*

(ii) *an application for the variation of the licence, or*

(iii) *…*

a statement of fact that, whether to his knowledge or not, was false, or a statement of expectation that has not been fulfilled;

(f) *that any undertaking recorded in the licence has not been fulfilled;*

…"

"28.(1) Where, under section 26(1) or 27(1), a traffic commissioner directs that an operator's licence be revoked, the commissioner may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the commissioner thinks fit) from holding or obtaining an operator's licence; …

…

(5) The powers conferred by subsections (1) and (4) in relation to the person who was the holder of a licence shall be exercisable also –

(a) where that person was a company, in relation to any director of that company …"

48. Section 37 of the 1995 Act gives a right of appeal to the Upper Tribunal against, inter alia, any direction under section 26(1) and any order under section 28(1) and (5). Paragraph 5 of Schedule 2 includes offences consisting in the contravention of any provision contained in or having effect under any enactment relating to the maintenance of vehicles in a fit and serviceable condition.

49. The powers of the Upper Tribunal on an appeal are set out in paragraph 17 of Schedule 4 to the Transport Act 1985, which reads as follows, so far as material:

"*17.(1) The First-tier Tribunal and 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 any of their functions under an enactment relating to transport. In the case of the Upper Tribunal, this is subject to sub-paragraph (3).*

(2) On an appeal from any determination of a traffic commissioner …, the Upper Tribunal is to have power –

(a) to make such order as it thinks fit; or

(b) to remit the matter to –

(i) the traffic commissioner who made the decision against which the appeal is brought; or

(ii) as the case may be, such other traffic commissioner as may be required by the senior traffic commissioner to deal with the appeal,

for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate;

and any such order is binding on the commissioner.

(3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal."

50. It is well established that the task of the Upper Tribunal when considering an appeal from a decision of a traffic commissioner is to review the material before the traffic commissioner, and 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*", as explained in *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. This is sometimes summarised as requiring the Upper Tribunal to conclude that the traffic commissioner was plainly wrong. Mr. Finnegan accepts in his submissions that that is the correct test and further that the burden of showing that the decision is wrong rests on the Appellants, citing *Fergal Hughes and Perry McKee Homes Limited* v. *Department of the Environment in Northern Ireland* [2013] UKUT 0618 (AAC).

51. It is also well established that when considering mandatory revocation of a standard operator's licence the questions a traffic commissioner will need to consider will include how likely the operator is to operate in compliance with the licensing regime in future and whether the conduct which has taken place is such that the operator should be put out of business. The first of those questions was identified in *Priority Freight Limited and Williams* 2009/225 and is commonly referred to as "the *Priority Freight* question" and the second was identified in *Bryan Haulage Limited (No. 2)* 217/2002 and is commonly referred to as "the *Bryan Haulage* question". It is clear from the decision in *Bryan Haulage* that the question was framed in the light of the need for a relationship of proportionality between the conduct found to have occurred and the sanction necessarily to be imposed. If a positive answer is to be given to the question, it is because revocation is a proportionate response to the relevant conduct. The *Priority Freight* question is regarded as a preliminary question, to be asked before the *Bryan Haulage* question is asked, because, as explained in *Priority Freight*, if the evidence demonstrates that the operator is very likely to be compliant in future, that may indicate that the case is not one in which the operator should be put out of business.

52. As already mentioned, both the *Bryan Haulage* and the *Priority Freight* questions were framed in the context of revocation of a standard licence, in relation to which one of the conditions to be satisfied on application is that the applicant is of good repute: see s.13A(2)(b) of the 1995 Act. That particular condition does not apply to applicants for a restricted licence, who have to satisfy the different "fitness" requirement set out in s.13B. It was decided, however, in *Redsky Wholesalers Ltd.* T-

2013-07 that the *Bryan Haulage* and *Priority Freight* questions might appropriately be asked in relation to the revocation of a restricted licence. The Tribunal put the position as follows:

> "*18. We disagree that, in this case, the "Priority Freight" and "Bryan Haulage" questions were inappropriate. In our view, they were helpful. Although the "Priority Freight" and "Bryan Haulage" cases relate to repute, the fundamental analysis arises from the fact that an operator's licence (whether restricted or standard) is a possession and, as a matter of compliance with [the European Convention on Human Rights], a proportionate approach is required, and consideration of the likelihood of future compliance should inform the approach taken.*
>
> *19. Although, in the absence of argument on the point, we draw back from holding that the "Priority Freight" approach is a requirement when considering the question of fitness to hold a restricted operator's licence, we consider that the [Deputy Traffic Commissioner's] approach was not inappropriate in the circumstances of this case. In particular, the "Priority Freight" question concerning future compliance (or otherwise) is very likely to be relevant to fitness in most cases. We do not think that fitness is a significantly lower hurdle than the requirement to be of good repute, it is simply a different requirement. An operator putting badly maintained vehicles on the road represents an equal menace to public safety, whether or not they hold a restricted licence or a standard licence. If an operator (even a restricted licence holder) cannot be trusted to comply in future, we do not see how any such operator can hope to be regarded as fit to hold an operator's licence.*
>
> *20. So far as the "Bryan Haulage" question is concerned, many holders of a restricted licence will not go out of business if their operator's licence is revoked … In our view, having asked the "Priority Freight" question relating to future compliance, a Traffic Commissioner cannot be criticised for asking himself, in the context of assessing fitness, whether an operator's conduct is such that they deserve to lose their restricted operator's licence, whatever the consequences.*"

53. As set out in paragraph 43 above, in this case the TC did ask himself the *Priority Freight* question and it has not been suggested that he was wrong to do so. He also referred to the Senior Traffic Commissioner's Statutory Document No. 10, which identifies a number of possible regulatory starting points and placed this case in the "*Severe to Serious*" category, which is suggested in cases involving "*Persistent operator licence failures with inadequate response or previous public inquiry history*". Mr. Finnegan accepts that the TC was right to adopt that starting point. In such a case the possible forms of regulatory action identified in the Statutory Document range from revocation with detailed consideration of disqualification to significant time limited curtailment that may materially affect the transport operation.

The Appellants' submissions

54. Against that background, Mr. Finnegan contends that:

54.1. The TC erred in not granting an adjournment to allow the Company to obtain legal representation;

54.2. The TC's decision to revoke both operator licences was disproportionate;

54.3. The TC erred in failing to consider or to give adequate weight to the positives in the case;

54.4. The TC's decision to disqualify Mr. Dhillon was disproportionate;

54.5. The TC was plainly wrong in refusing the application for licence OF2067675.

55. We consider those submissions noting that Mr. Finnegan does not contend that the TC was plainly wrong to find the breaches of section 26 which were referred to in his decision. We think that is a realistic approach having regard to the facts set out above. We note that the relief being sought is remission for a further hearing.

Failure to grant an adjournment

56. In support of this ground of appeal Mr. Finnegan relies on *VST Building & Maintenance Limited* [2014] UKUT 0101 (AAC). The facts of that case were that the appellant was notified by a letter dated 23rd July 2013 that the traffic commissioner intended to hold a public inquiry on 11th September 2013. On 29th August 2013 the appellant's representative wrote to the OTC stating that he had been instructed to apply for an adjournment and explaining that his client had had a serious motorcycle accident in Albania the previous year, had been told to return to the hospital in Albania where he had been treated and was due to leave the following day. The treatment was said to be vital to the appellant's recovery and the appellant was likely to be out of the country until mid-December 2013. It was suggested that a new date for the public inquiry should be set from February 2014 onwards and it was further stated that the appellant was the only person who could deal with the provision of requested documents and information. After various exchanges between the appellant's representative and the traffic commissioner, the adjournment was refused on the grounds, in summary, that (i) in the light of the serious instances of non-compliance, the traffic commissioner could not allow the operator to continue to operate seven vehicles for a further five or six months before a public inquiry was held; (ii) there was the question who was in control of the business while the appellant was away and whether any such person was sufficiently competent to run a safe and compliant operation; and (iii) the traffic commissioner had offered to suspend the licence until the inquiry could be held, but the representative did not have instructions to agree.

57. The main focus of the appeal in that case was the traffic commissioner's refusal of an adjournment. The Upper Tribunal accepted that a decision whether or not to adjourn involves a balancing exercise, bearing in mind that the material which justifies calling an operator to a public inquiry will almost always give rise to concern about the safety of the public generally, unfair competition with other operators and undermining enforcement of the regulatory regime by appearing to allow an operator to "*get away with it*" for a long period. Paragraph 9 continues:

> "*The weight to be given to [those concerns] will vary according to the circumstances of the individual case and the ease or difficulty which the operator is likely to face in challenging the material.*"

Operators are advised in paragraph 10 to apply immediately it becomes apparent that there is a problem with the date of the inquiry. The application in question was, as pointed out in paragraph 12, made late, unsupported by any independent evidence and without any explanation for the delay. It was "*a classic example of how not to apply for an adjournment*" (paragraph 13) and a request for a lengthy adjournment (paragraphs 14 and 15, in substance). The traffic commissioner was under no obligation to put forward a counter-offer of an adjournment for a short period. Ultimately, having looked at the position carefully, the Upper Tribunal was satisfied that the traffic commissioner conducted an appropriate balancing exercise.

58. In the light of that decision, Mr. Finnegan submits, first, that the TC ought to have inquired what steps Mr. Dhillon had taken, what steps he intended to take and how long an adjournment was likely. In his oral submissions he drew our attention to what he described as the unsophisticated nature of the application and the inquisitorial nature of the jurisdiction and argued that no balancing exercise had been carried out.

59. In his skeleton argument Mr. Finnegan also draws attention to article 6 of the European Convention on Human Rights, incorporated into domestic law by the Human Rights Act 1998. Article 6 provides, so far as material, that "*In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time*". We understand that Mr. Finnegan's concern is with the fairness of the hearing in the absence of legal representation, although the right to legal representation applies only to those charged with a criminal offence. We think ultimately this point comes back to the need for a balancing exercise before an adjournment is refused.

60. In this connection Mr. Finnegan draws our attention specifically to the brevity of the TC's reasoning on the adjournment point, which appears in paragraph 8 of the decision, and the complicated nature of the case the Company through Mr. Dhillon had to deal with. He submits that the email from the OTC notifying the Company of the TC's decision sent on 22nd May 2024 (p.323) suggests that a request for an adjournment to obtain legal representation was of a nature not accepted as a basis for adjournment, or that there was a policy against adjournment in such circumstances, and that the only factor the TC considered was his belief that the case was one of urgency.

61. Mr. Finnegan further submits that legal representation would not necessarily be futile and identifies in his submissions on other grounds of appeal respects in which representation might have been of assistance.

The revocation decisions were disproportionate

62. Mr. Finnegan points out that a question such as repute or fitness must be considered at the date of the traffic commissioner's decision, although that does not mean that the past is irrelevant: *Randolph Transport Limited and Catherine Tottenham* [2014] UKUT 460 (AAC), at paragraph 12. He submits that while the desk-based assessment of February 2024 admits of a poor compliance regime, the analysis of the maintenance documents at pp.386 to 389 shows a vastly improved situation, with the worst issue being the two tyres which were below the legal limit and the failure to record the matter in a driver defect book. He recognises that this was a serious matter, but argues that there was an upwards trajectory of compliance which the TC did not adequately consider.

63. More specifically, Mr. Finnegan says:

63.1. No criticism was made of the drivers' hours documentation submitted in preparation for the inquiry.

63.2. In paragraph 17 of the decision the TC dealt with the positive aspects of the case as follows:

> "*On the positive side I can see that the operator has made changes in response to some adverse findings made in audits and DVSA investigations but on the other hand there are still areas where significant and worrying failings are evident.*"

This is not a fair reflection of the substantial positives and advances made by Mr. Dhillon. Mr. Finnegan mentions specifically that the wheel nuts retorquing was satisfactory and driver's defect reports were being marked where matters had been rectified.

63.3. The Company has three vehicles, one of which is a tipper requiring roller brake testing four[2] times a year, which is carried out but perhaps not with the required frequency. The other two are volumetric mixers for which decelerometer brake testing is acceptable. Mr. Finnegan accepts that a temperature check then needs to be carried out and the maintenance provider did not do so, but points out that brake testing was happening, which was itself an improvement and the TC was wrong to identify as problems the facts that partially laden and decelerometer

[2] Rather than three times a year, as suggested by Mr. Dhillon in his evidence at the inquiry.

testing was carried out. In particular, the use of decelerometer testing was not a problem in itself.

63.4. The TC failed to conduct the balancing exercise adequately in that he made no inquiry as to the consequences of revocation, as opposed to the consequences of disqualification (as noted in paragraph 38 above). Mr. Finnegan refers to *LA and Z Leonida t/a ETS* [2014] UKUT 0423 (Admin). This was in particular an aspect where legal representation might have been helpful.

64. Mr. Finnegan submits overall that the vehicles had been consistently maintained and points out that the Company and Mr. Dhillon had had little opportunity to hide any problems given the number of audits and investigations. He also says that the Company's plans for further improvements following the April 2024 audit were not fully explored at the public inquiry. He submits that a proportionate decision would have been curtailment or a short suspension.

The TC failed to give adequate weight to the positives

65. As Mr. Finnegan recognises, there is a degree of overlap here with the points made in relation to the previous ground of appeal. He advances the following additional considerations:

65.1. Neither the Company nor Mr. Dhillon had been called to a public inquiry previously. Paragraph 2 of the decision shows that the TC wrongly believed that a public inquiry had been held before licence OH2017026 was granted.

65.2. No reference was made to the fact that Mr. Dhillon held a certificate of professional competence as a transport manager and had recently undertaken a refresher course.

The disqualification decision was disproportionate

66. As Mr. Finnegan points out, this ground of appeal becomes redundant if we are with him on revocation, since there will then be no basis in section 28(1) of the 1995 Act for making a disqualification order.

67. On the footing that the power to make such an order subsists, Mr. Finnegan cites *David Finch Haulage* [2010] UKUT 284 (AAC) for the proposition that the imposition of a period of disqualification following revocation is not a step to be taken routinely, although no additional feature is required. He points out that the TC's reason for ordering disqualification, as set out in paragraph 19 of the decision, was that the TC believed that Mr. Dhillon needed some time away from holding a licence so that he could reflect on what had happened. He submits that the TC could alternatively have given indications that Mr. Dhillon should undertake further courses before proceeding with the application in relation to licence OF2067675.

68. Mr. Finnegan also submits that it is relevant that the outcome of the driver conduct hearing was that Mr. Dhillon's vocational licence was suspended for a period of 28 days.

Refusal of the application for licence OF2067675

69. Mr. Finnegan acknowledges that it is for the applicant for a licence to persuade the traffic commissioner that the relevant conditions contained in the statutory provisions at sections 13 to 13D of the 1995 Act are satisfied and accordingly this ground of appeal faces some difficulty. He explains that this ground is advanced to protect the Appellants' position in asking us also to remit the application decision to another hearing. The matters on which he relies are the same as those he relies on as respects the disproportionality of the revocation decisions.

Points arising at the hearing

70. At the hearing we had a number of queries arising from the papers before us which were mentioned to Mr. Finnegan and which we now record. They were as follows:

70.1. At the start of his evidence at the inquiry Mr. Dhillon surprisingly referred to having 10 vehicles.

70.2. We noted that p.189 shows a maintenance agreement between Truckmend London Limited and the Company dated 5th January 2022 providing for maintenance of vehicles at the Iver depot. That is the proposed operating centre for licence OF2067675. The Company moved there in August 2023.

70.3. It is also the case that significant distances seem to have been driven by the vehicles LJ67HGP and DX64BDO in late January 2023 (p.360), at a time when it appears from p.386 that vehicle DX64BDO was declared off the road and when, according to the application for an adjournment, the Company was doing no business. Mr. Dhillon suggested that that was for road testing.

71. In response to Mr. Finnegan's submission that Mr. Dhillon had undertaken a refresher course as a transport manager, we asked him if the certificate was in the bundle. In fact, the bundle includes the original certificate of professional competence dated 22nd January 2019 at p.377, but the only refresher course certificate is at p.376 and is a driver certificate recording attendance at a seven hour course on 16th January 2023. After the hearing we were provided with a certificate of refresher training as a transport manager recording attendance, with the same training provider, on 16th and 17th January 2023. We find this curious, but do not need to take the point further.

72. Mr. Dhillon referred to having engaged a transport consultant. We asked at the hearing what the name of the consultant was. Mr. Finnegan was not able to give us an immediate answer, but his instructing solicitors have since informed the Upper Tribunal that the firm in question is The Road Transport Consultancy Limited.

73. We also inquired about the reference to Japji 7676 Ltd in the application for licence OH2017026. Again Mr. Finnegan was not able to give us an immediate answer, since Mr. Dhillon apparently did not know what that was about, but as already noted in paragraph 7 above we have also subsequently been given some information relating to that company.

74. We return to some of these points in paragraph 101 below.

Discussion

75. It is clear from *VST Building & Maintenance* that the decision whether or not to grant an adjournment is a discretionary decision and the case itself is a helpful illustration of the factors that are likely to be relevant. The proper approach to adjournments is also discussed in Statutory Document No. 9 on Case Management at paragraphs 26 to 33. In paragraph 26 the following citation from the decision of the Divisional Court in *R.* v. *Hereford Magistrates' Court (ex parte Rowlands)* [1998] Q.B. 110 appears, with minor amendments to make what is said applicable to the present jurisdiction:

> "*30. The decision whether to grant an adjournment does not depend upon a mechanical exercise of comparing previous delays in [other] cases with the delay in the instant applications. It is not possible or desirable to identify hard and fast rules as to when adjournments should or should not be granted. The guiding principle must be that [traffic commissioners] should fully examine the circumstances leading to applications for delay, the reasons for those applications and the consequences [to the parties]. Ultimately, they must decide what is fair in the light of all those circumstances.*
>
> *31. [The] court will only interfere with the exercise of … discretion … in cases where it is plain that a refusal will cause substantial unfairness to one of the parties.*"

We find this a helpful summary of the test to be applied and clearly an approach which is consistent with Mr. Finnegan's reliance on article 6 of the European Convention on Human Rights.

76. In order to apply the test, it is of course essential to have in mind what circumstances were, and what circumstances were not, known at the time of the TC's decision on 22nd May 2024. The call-up letter offers a useful summary of what was known at 14th May 2024. In particular we note that Mr. Forshaw's report dated 26th June 2023 and the desk-based assessment dated 25th March 2024 were both available. The April 2024 assessment was not, but it appears to have been sent to the OTC by email on 14th May 2024 in response to the reminder letter of 2nd May 2024. The TC

did not have Mr. Forshaw's report of 12th June 2024 which revealed that two tyres had been below the legal limit at the inspection on 30th May 2024.

77. We also note that the standard wording in the call-up letter is not the same as the standard wording in the call-up letter in *VST Building & Maintenance*. In that case the letter warned of the consequences of failure to attend and then later, having warned the recipient that the traffic commissioner was unlikely to grant an adjournment unless there were exceptional circumstances, gave guidance on making an application for an adjournment. The letter in the present case said, immediately after directing Mr. Dhillon to turn up at least 15 minutes ahead of the start time for the inquiry:

> "*The traffic commissioner is unlikely to allow a postponement, unless the circumstances are exceptional.* ***If you do not attend, the case will be heard in your absence.*****"**

The statement as to representation which we have quoted in paragraph 18 above appears immediately below that passage. There was no guidance on applying for an adjournment.

78. In our view it is entirely understandable that Mr. Dhillon should have taken the view that he was not "*confident that [he] did not need*" competent legal or professional representation. He asked the OTC to "*forward PI date*" within a week of the call-up letter and more than four weeks before the inquiry was due to be held. He based his request on the cogent reason that he wanted legal advice and gave details of the financial demands which made it very hard to afford such advice in "*this time period*". What he did not do, and what any competent adviser would have advised him to do if he had one, was to explain when he hoped the Company would be able to pay for legal advice and for how long he was seeking an adjournment. (We were told at the hearing that he had in fact made inquiries about the cost before sending the email and had been given an estimate of £8,000.) It is clear from paragraph 8 of the decision that the open-ended nature of the request was one of the factors taken into account to his disadvantage.

79. *VST Building & Maintenance* identifies as potentially relevant factors the concerns the traffic commissioner may have about road safety, unfair competition and compliance with the regulatory regime which have led to the operator being called to the public inquiry. The email of 22nd May 2024 which notified the Company of the TC's decision did not identify any of those concerns or refer to the open-ended nature of the request. The Company was therefore unable to address those concerns or the objection based on the lack of a specified period for the adjournment.

80. To the extent that the letter did offer reasons, they seem to lie in the statements that the Company did not need to be legally represented and many operators attended without a representative. While those statements are true in the strict sense, the important question in considering fairness when an adjournment is requested for the purpose of obtaining representation is whether the particular individual or company called to an inquiry will be able adequately to present the case or whether representation is needed if that object is to be achieved. In the present case, that question has to be considered against the background that Mr. Dhillon had previously referred to his

difficulties with English as a second language and that communications from him in the bundle, including the request for an adjournment, suggested that he might not be well equipped to represent himself and the Company. The material before us does not show that this question was considered.

81. We should make clear that we do not doubt that the experienced TC would have intended to take Mr. Dhillon to the relevant parts of the inquiry bundle, to ascertain whether he agreed with or disputed the facts and to invite his comments, as indeed the transcript shows that he did. This approach, however, put Mr. Dhillon in the position of reacting to what the TC said. A representative is potentially able to marshal proactive arguments on behalf of the client, although the ability to do so may be limited by the facts of the particular case.

82. This point is also illustrated by *VST Building & Maintenance* in paragraph 9, where the point is made that the appellant in that case would have found it difficult, if not impossible, to challenge the prohibitions and the lack of an operating centre, but the production of maintenance records might have avoided a finding that a statement of expectation had not been fulfilled. In the present case, a competent representative could not have challenged the failures to notify matters to the OTC or the existence of prohibitions and fixed penalties, but could have addressed the TC on the importance of the maintenance improvements which had been made, particularly in the light of the major priorities identified in the April 2024 audit, on the plans for future improvements and, crucially, on the appropriate form of regulatory action.

83. The second reason given in paragraph 8 of the decision for the refusal of an adjournment was simply "*the background of the case*". This does not explain which of the three matters identified in *VST Building & Maintenance* the TC had in mind, or indeed whether he had them all in mind. It may be that the reference is to the matters in paragraphs 1 to 5 of the decision setting out the background against which the Company was called to the public inquiry. If so, while we can well see that the TC was of the opinion that it was time to bring this rather protracted matter to a head, we cannot see that there was a degree of urgency, in the light of the matters known to him on 22nd May 2024, sufficient to require delay to be "*minimised*" at the expense of giving Mr. Dhillon a reasonable opportunity to obtain legal advice. It does not appear that there was then any evidence of deterioration from the point of view of safety and indeed there was some, if limited, evidence of improvement. There is nothing to suggest a particular concern about unfair competition. We do not think Mr. Dhillon could fairly be said to be getting away with anything if the enforcement action continued, but at a slightly later date than had been intended.

84. We agree that, as stated in paragraph 16 of *VST Buildings & Maintenance*, the TC was under no obligation to put forward a counter-proposal suggesting an adjournment of a limited period, but clearly he could have done so. Alternatively he could have granted an adjournment for a short period. He did not take either of those courses but instead dealt speedily and very briefly with the request. We do not go as far as Mr. Finnegan in saying that the TC appeared to have a policy against adjournments, but, with some hesitation, we have concluded that it does not appear that the TC followed the guidance in the *Hereford Magistrates* case. In particular, it does

not appear that the TC fully examined the consequences for the Company and Mr. Dhillon, given Mr. Dhillon's particular disadvantages in representing the Company at an inquiry conducted in English.

85. In all the circumstances, we conclude that the material before the TC was sufficient to establish that the refusal of any adjournment would cause substantial unfairness to the Company and Mr. Dhillon.

86. Before we turn to the consequences of that conclusion, we consider the other grounds of appeal in so far as they relate to revocation. We are not persuaded that, on the material before him, the TC was plainly wrong in deciding to revoke the existing licences. The overall picture is of an operator which has been subject to a number of investigations and audits over a period of years without achieving the necessary standards in a number of areas. The February 2024 desk-based assessment suggests that in some respects matters had deteriorated. We recognise that the priorities in the April audit appear to have shifted somewhat from maintenance matters, but we find it difficult to detect the "*profound improvement*" to which Mr. Finnegan refers in his skeleton argument.

87. Specifically:

87.1. Although paragraph 17 of the decision dealt very briefly with the improvements which had been made, the transcript at p.408 shows specific identification of the new maintenance provider in Iver, the changed systems for walk round checks and improvements "*in other areas*". The TC was clearly trying to identify the positives. Paragraph 15 of the decision refers to those matters and to the engagement of the transport consultant. An obvious difficulty for the Company is that the new maintenance providers took over in August 2023, as the TC noted in paragraph 13, but that did not resolve all the difficulties.

87.2. We agree that there was no criticism of the drivers' hours documents submitted to the OTC, but as against that the documents revealed a number of infringements. Mr. Dhillon himself was attending a driver conduct hearing relating to infringements. It appears that he failed to understand the relevant regulations despite having obtained a certificate of professional competence and done a refresher course.

87.3. The fact that Mr. Dhillon held qualifications as a transport manager is a two-edged sword. He ought as a result to have been well aware of the regulatory requirements, both in relation to drivers' hours and much more widely, but adverse comments on his knowledge and understanding were made in December 2022, May 2023 and September 2023.

87.4. The TC was understandably concerned by the evidence of continuing safety risks arising from the failure to spot driver detectable faults, such as the two defective tyres.

88. We accept that there is more to be said on the question of brake testing than appears in paragraph 13 of the decision, but we note that Mr. Forshaw's report drew attention in particular the failure by the maintenance provider to carry out temperature checks when using decelerometer testing. The safety concerns which arise from problems with brake testing are not removed if the operator ensures testing is carried out but it is done in a manner which does not meet the requirements.

89. We agree that the TC seems to have been under a misapprehension about whether the Company had previously been called to a public inquiry. The weight of the fact that it had not is, however, much diminished by the fact that it had nevertheless received three formal warnings and undertakings had been required.

90. We also accept that the TC did not specifically inquire about the consequences of revocation. The *Leonida* case to which Mr. Finnegan refers is a case in which the traffic commissioner found that the operator's repute was severely tarnished and suspended the licence for 21 days. He also directed that a separate licence granted to a company should not come into effect until after the suspension. Mr. Leonida put in a witness statement giving limited evidence that the operator, a partnership, would fail if there was a loss of vehicles on its licence and the company's new licence was not granted at the same time. At the inquiry he said that if the licence was suspended the business would close. The traffic commissioner's decision ordering the suspension and the delay before the new licence took effect did not deal specifically with the evidence that the business would fail. The Upper Tribunal said at paragraph 13:

> "*When preparing for the Public Inquiry it should have been clear to the Leonida brothers and it must have been clear to Mr. Brown [(their legal adviser)] that this was a case which could very easily go either way. It appears to us that their main aim was to avoid a finding of loss of good repute, which would have led, of course, to mandatory revocation. Given the fact that the partnership was 'staring revocation in the face' it ought to have been clear to the Leonida brothers and it must have been clear to Mr. Brown that some form of regulatory action was inevitable. The sensible course, in that situation, would have been for the operator and its adviser to work out, in advance, the least damaging form of regulatory action and then to set out, in much greater detail than was done in this case, the consequences of each form of regulatory action and why the business might be able to survive in one case but could not in others. Unfortunately that does not appear to have been done in the present case. Instead it appears to us that a decision was taken to gamble on avoiding any form of regulatory action.*"

91. It is clearly the case that evidence of the consequences of various forms of regulatory action may be relevant to a commissioner's decision as to the action to be taken. It follows that where an operator is unrepresented it would often be good practice for the commissioner to ask questions with a view to obtaining such evidence. In the present case, however, it is clear from paragraph 18 that, having answered the *Priority Freight* question adversely to the Company, the TC found that fitness to hold a restricted licence was no longer shown and proceeded on the footing that it was

necessary to put the Company out of business as a consequence. That is to say that the TC took the view that putting the Company out of business was both an expected and an appropriate consequence because he could not trust the Company to maintain sufficient compliance in future. It is difficult to see how evidence of the consequences would have assisted the Company and Mr. Dhillon without effective submissions as to the *Priority Freight* question.

92. The above reasons, however, derive from a consideration of the TC's decision on the basis of the material before him. If the Company had been legally represented, it is at least possible that that material would have included:

92.1. A much clearer and more focused explanation of the improvements which had been made.

92.2. A much clearer explanation of why, after a period of more than four years, the Company had still not achieved full compliance with the regulatory requirements and had only just appointed a transport consultant. (We agree with the TC that the fact that English is not Mr. Dhillon's first language cannot be an excuse for operating vehicles which could be a road safety risk.)

92.3. A detailed explanation of the Company's plans for future changes which would ensure future compliance, particularly since the change in maintenance providers had not led to inspections which met the required standards.

92.4. On the basis of the above, submissions as to why the *Priority Freight* question should be answered in the Company's favour.

92.5. Submissions as to the alternative courses of regulatory action open to the TC and evidence as to the consequences such as was contemplated in the *Leonida* case.

92.6. Further evidence as to the best practice requirements for brake testing of vehicles of the nature of those operated by the Company.

92.7. Further evidence such as is quoted by Judge Rupert Jones when granting the stay.

93. In relation to the reference to further evidence in paragraphs 92.6 and 92.7, we should make clear that we have not looked at the additional material for the purpose of forming our view on whether the TC's decision was plainly wrong. Further evidence in the Upper Tribunal is subject to the constraints imposed by *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489, one of which is that the party seeking to adduce additional evidence on appeal must show that the evidence could not have been obtained with reasonable diligence for use at the hearing below. The further evidence we have mentioned clearly

could have been so obtained. We are making the different point that it is possible to identify additional evidence which a competent representative might well have identified and put before the traffic commissioner.

94. In the light of what we have said in paragraph 92, we conclude that it is at least reasonably possible that if the Company and Mr. Dhillon had been legally represented the TC might have been persuaded to take a different course of action. That is particularly the case given the weight which the TC, understandably, gave to the defective tyres point.

95. We should, however, make clear that the further evidence relating to the defective tyres is itself not without difficulty. The email containing the relevant material does not itself identify the dates on which the events mentioned occurred. This is in itself no doubt the result of the Company's lack of representation at the time and we have assumed in the Company's favour that the evidence is directed towards the recent events which were at the forefront of the TC's decision. Even so, the evidence appears to be inconsistent with Mr. Dhillon's evidence at the inquiry at pp.403-404 to the effect that he missed the defect because the tyres looked fine on the outside and were only worn on the inside.

96. We turn now to the question of disqualification. We accept that disqualification does not follow routinely from revocation, although no additional feature is required, and that where a period of disqualification is imposed the person disqualified is entitled to have some explanation of the reasons for the particular order, as was said in *Finch*. In our view paragraph 19 of the TC's decision meets that requirement. The TC did not impose disqualification as if it were a routine consequence. He took the view that Mr. Dhillon needed time to reflect on what had happened, but took into account the positive aspects and the efforts which Mr. Dhillon had made.

97. Although Mr. Finnegan suggests that an indication could have been given to Mr. Dhillon such as that he needed to complete a further course before proceeding with the licence OF2067675 application, the evidence is that he had been unable to apply what he learned from previous courses to the management of the Company's business. In addition to the various assessments to that effect, if he had done so he would not have been attending a driver's conduct hearing for infringements of the drivers' hours requirements. It was entirely realistic for the TC on the basis of the material before him to point out that if, after the six months, he decided to reapply for a licence he would need to show he had learned from the experience and had a suitable network of professional support available. Again we are not persuaded that the TC's decision was plainly wrong.

98. Nevertheless, the TC's decision on the application for an adjournment also has consequences here. If it is reasonably possible that the TC might have been persuaded to take a different course of action, it follows that the necessary pre-condition for making a disqualification order might not have existed. It is also possible that, even if the licences had been revoked, the TC might have been persuaded not to make a disqualification order.

99. As to the application for licence OF2067675, the TC's decision was not only not plainly wrong but was plainly right in the light of his other decisions. We note, however, that the substance of the application in practical terms is that the Company should carry on its existing business at its existing operating centre but under the provisions of a new licence appropriate to the location of the operating centre which would replace both the existing licences. Correspondingly the substance of Mr. Finnegan's submissions is that if the decisions in relation to the existing licences are remitted for a further hearing it would make sense for the application to be remitted also. We agree that that is the case.

Conclusion

100. For the reasons we have given, we have come to the view that the TC was wrong to deal with the application for an adjournment as he did. We are satisfied that if the Company and Mr. Dhillon had been able to obtain legal representation the outcome of the public inquiry could have been different. We recognise that it is not a foregone conclusion that if the TC had granted an adjournment of a few weeks legal representation would in fact have been obtained. Nevertheless we decide that in the interests of justice the appeal should be allowed and the decisions in relation to all three licences should be remitted for a further hearing. As a result the direction for disqualification falls.

101. The Company and Mr. Dhillon should understand, however, that it does not follow that the outcome of the further hearing will in fact be different. It remains unclear to us why Mr. Dhillon was not able to achieve a higher degree of regulatory compliance between June 2018 and June 2024. We make allowances for the fact that the need for an interpreter, no matter how competent the interpreter might be, can complicate proceedings such as a public inquiry, but some of his evidence was unsatisfactory: for example, his assertion that the formal warnings were not included in any letter and his explanation for the defects leading to the prohibitions. We have also referred in paragraphs 70 and 71 above to other points arising from the documents which appear to us to require explanation.

E. Ovey
Judge of the Upper Tribunal
Authorised for issue on 24th February 2025