NCN: [2025] UKUT 170 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. UA-2024-000502-T**
(ADMINISTRATIVE APPEALS CHAMBER)
TRAFFIC COMMISSIONER APPEALS

Between:

Mr Ryan Johnston

Appellant

- v -

Driver and Vehicle Agency

Respondent

Before:	Ms L. Joanne Smith: Judge of the Upper Tribunal Mr D. Rawsthorn: Member of the Upper Tribunal Mr R. Fry: Member of the Upper Tribunal
Hearing date:	28 October 2024
Heard at:	Tribunals Hearing Centre, Royal Courts of Justice, Belfast
Representation:	
Appellant:	Mr D McNamee, Solicitor
Respondent:	Ms A Jones, BL
On appeal from:	The decisions of the Presiding Officer on behalf of the Department for Infrastructure
Reference No:	23DET011
Decision under appeal:	28 March 2024 (interim decision: 21 December 2023)
Date of Decision:	29 May 2025

KEYWORDS: Impounding. Grounds for detention and return. Exemptions from requirement to hold an operator's licence. Cabotage. EU legislation

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)*. Societe Generale Ltd* [2013] UKUT 0423 (AAC).

SUMMARY OF DECISION

Two Bulgarian registered large goods vehicles and coupled trailers were detained following a stop by DVA (Driver and Vehicle Agency) Enforcement Officers in Belfast, Northern Ireland on 21 September 2023. Neither vehicle was listed on an operator's licence issued under s.1 of the Goods Vehicle (Licencing of Operators) (Northern Ireland) Act 2010. The Appellant, who was driving one of the two vehicles, claimed that both vehicles were undertaking cabotage under an EU Community Licence. Following a detention hearing on 5 December 2023 (continued on 12 March 2024), the Presiding Officer, on behalf of the Department for Infrastructure for Northern Ireland, determined that the vehicles and trailer were lawfully detained, with no grounds for return to the owner (the Appellant). He found that vehicle and trailer 1 were not operating in Northern Ireland on a temporary basis, and vehicle 2 had not produced the correct documentation, therefore the cabotage exemption requirements were not met. The DVA was directed to dispose of the vehicles and one trailer once the period for appeal had expired (the other trailer was returned to its owner). The Upper Tribunal found the Presiding Officer's conclusions were not "plainly wrong". The appeal is dismissed.

Please note the Summary of Decision and table of contents is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the Upper Tribunal follow.

DECISION

The decision of the Upper Tribunal is to DISMISS the appeal.

The Presiding Officer's direction to the DVA on 28 March 2024, to dispose of the vehicles, registrations B876 9TP and B900 8BT, and trailer, registration NI-070340-10, takes immediate effect.

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Mr Ryan Johnston ("the Appellant"), against a decision of the Presiding Officer ("PO") for the Department for Infrastructure for Northern Ireland ("the Dfl"). The decisions, dated 21 December 2023 ("interim decision") and 28 March 2024 ("final decision"), were to refuse an application for the return of two vehicles (registrations B876 9TP and B900 8BT) and one trailer (registration NI-070340-10). The PO directed that the Driver and Vehicle Agency ("DVA" and the Respondent) must dispose of the vehicles and trailer after the period for an appeal had expired.

2. By email dated 8 April 2024, a Senior Enforcement Manager at the DVA Headquarters confirmed that the two vehicles and trailer would not be disposed of pending a decision of the Upper Tribunal on appeal. In light of the Upper Tribunal's decision, the PO's direction to dispose of the vehicles and trailer now takes effect and they must be disposed of accordingly.

3. The Upper Tribunal granted an application by the DVA to be made respondent to the appeal, which was considered at an oral hearing, at the Tribunal Hearing Centre within the Royal Courts of Justice, Belfast, on 28 October 2024. The Appellant was in attendance and represented by his solicitor, Mr D. McNamee. The Respondent was represented by Ms A. Jones, BL.

Factual background

4. The facts set out below were not disputed by the Appellant either at the detention hearing, or at the appeal hearing. Except where expressly stated, these are also the findings of fact as found by the PO in his decisions dated 21 December 2023 and 28 March 2024.

Vehicle 1 (B876 9TP) and Trailer 1

5. On 21 September 2023, at approximately 7.42am, a left-hand drive Scania 3+2 large goods vehicle, with Bulgarian registration B876 9TP ("vehicle 1"), together with a loaded refrigerated trailer (ID number NI-070340-10) ("trailer 1") was stopped by a DVA Enforcement Officer on Dargan Road, Belfast. The driver, with a Northern Ireland accent, identified himself as Ryan Patrick Johnston (the Appellant) and produced an Irish driver's licence with an address in Co. Monaghan, Ireland. He stated he was the owner of the vehicle and director of the company using the vehicle, Rycon Logistics Ltd. He stated that the trailer was laden with fresh salad produce being transported from England to Northern Ireland (Killinchy, Co. Down). He produced consignment (CMR) delivery notes to confirm this. He held an Irish digital tachograph card and produced evidence on his phone (a UK based mobile number) of his driver CPC qualifications which were issued by a training provider in Northern Ireland.

6. The Enforcement Officer believed that the criteria under the Goods Vehicle (Licencing of Operators) (Northern Ireland) Act 2010 (the "2010 Act") applied so he requested a certified copy of a valid operator's licence, together with related documents, to establish lawful compliance with the legislation. The driver, who claimed to be undertaking cabotage, produced a folder of documents containing a certified copy (no. 1257950002) of an EU Community Licence Certificate (perforation 338757) which was valid from 1 December 2022 to 30 November 2032. A roadside translation using "Google" demonstrated that the certificate was in the name of "Raycon Logistics EOOD" (subsequently confirmed to be "Rycon Logistics Eood") with an address of Varna District, Varna Community, Varna City, PO Box 9000, 18 HRISTO BOTEV BUL., Entr 7. The Appellant, as driver, produced a delivery note relating to a previous load being transported from Germany to England on 19 September 2023. No other journeys were evidenced. There was no evidence of a journey originating in Bulgaria, where the community licence was issued and where Rycon Logistics Ltd has an address.

7. The tachograph records for the vehicle showed the journeys made on 19 September 2023 and 21 September 2023. It also showed that the vehicle was present in Bulgaria from 15 August 2023 to 2 September 2023. The company (operator) name locked on the tachograph was "Martin Canavan/Canavan Transport" of Stewartstown, Northern Ireland. The previous company (operator) name locked was "RS Spedition Limited", another Northern Ireland based company. The director of RS Spedition Limited is the Appellant's father, who has an address in Northern Ireland. The company card of Rycon Logistics Ltd, the Appellant's company and user of vehicle 1 and trailer 1 when they were stopped, had never been locked into the tachograph of vehicle 1. A total of five drivers' cards had been inserted over the previous year; two from Ireland and

three from the UK. Two other vehicles driven by these drivers were used by Northern Ireland based companies. The most recent tachograph calibration had taken place on 23 August 2023 in Bulgaria. Three previous calibrations had been carried out in Northern Ireland and another in GB.

8. Vehicle 1 had UK style number plates but with the Bulgarian registration number on them. The speed limiter plaque affixed to the door had an Irish registration mark on it. The manufacturer's plate referred to Ireland. The vehicle previously had a Northern Ireland registration number and was registered to "Martin Canavan" from Stewartstown, Northern Ireland. Vehicle 1 had an annual roadworthiness test ("MOT") undertaken at Cookstown DVA site on 18 August 2022. It appeared to have been last serviced on 30 September 2022 by a business based in Ballymena, Northern Ireland according to a "reminder" sticker inside the cab. The headlamp pattern was set correctly for use on UK roads and not for mainland Europe.

9. Trailer 1, coupled to vehicle 1 when stopped, was laden with salad produce. It displayed the fleet mark "RJ 01" (RJ being the initials of the Appellant). The registered keeper of trailer 1 was "Martin Canavan" of Stewartstown, Northern Ireland, who was also the previous keeper of vehicle 1. The trailer had its most recent annual roadworthiness test carried out in Northern Ireland on 13 June 2022. It was not covered by a valid MOT test certificate at the date of being stopped.

10. The Enforcement Officer formed the view, at the roadside, that the vehicle was being used by an operator based in Northern Ireland who was "flagging out" to Bulgaria, and therefore operating without the operator's licence required under s.1 of the 2010 Act. Vehicle 1 and trailer 1 were detained under Regulation 3 of the Goods Vehicle (Enforcement of Powers) Regulations (Northern Ireland) 2012 (the "2012 Regulations") as the driver had failed to satisfy the Enforcement Officer that the user held a valid operator's licence.

11. Subsequent enquiries demonstrated that Vehicle 1 is authorised on the Community Licence produced by the Appellant and had its annual road worthiness certificate issued on 22 August 2023 in Bulgaria, the same day as the most recent tachograph calibration. The Appellant did not hold a Northern Ireland Operator's Licence issued under s.1 of the 2010 Act.

Vehicle 2 (B900 8BT)

12. On the same day, at approximately 7.37am, another Enforcement Officer stopped a right-hand drive, 2-axle Scania articulated large goods vehicle ("vehicle 2") with Bulgarian registration B9008BT, together with a loaded 3-axle refrigerated trailer, ID number C523560 ("trailer 2"), on Dargan Road, Belfast.

The driver, with a Northern Ireland accent, identified himself and gave an address in Northern Ireland. He produced a driver's qualification card issued in Northern Ireland. He said he was employed by "RS Spedition Limited", a road freight transport company registered in Northern Ireland, and owned by the Appellant's father. Immediate enquiries with Companies House indicated that this company was in liquidation and had been ordered to be wound up, by the High Court, on 7 September 2023. The driver stated that the vehicle was owned by Mr Ryan Johnston, the Appellant, who was in another vehicle nearby (vehicle 1).

13. The driver stated that he had started his journey in the Republic of Ireland, collecting beef from Duleek, Co. Meath and then delivering the beef to Denmark. He stated that he drove from Denmark to Coventry, England (unladen). He then collected a load of fresh salad from Coventry and was travelling to deliver the load in Killinchy, Co. Down, Northern Ireland. This was the same destination as vehicle 1 and trailer 1. He produced consignment (CMR) delivery notes for the two laden journeys (Co. Meath to Denmark and Coventry to Co. Down) but had no evidence of a laden journey from Denmark to Coventry. As the Enforcement Officer then believed that s.1 of the 2010 Act applied to vehicle 2, he requested the production of a certified copy of a valid operator's licence.

14. The driver produced a folder, within which was an EU Community Licence with serial number 116994003. A roadside translation using "Google" indicated the licence was in the name of "RS Spedition Eood". The folder also contained Bulgarian insurance documents in the name of "RS Spedishan Eood" of Varna 9000, Hristo Botiev, No18 blk.18, G which were valid from 10 November 2022 to 9 November 2023. Subsequent enquiries demonstrated that while the Community Licence had been granted in 2017, its authority had been terminated on 4 September 2019 due to lack of financial standing.

15. Tachograph records from vehicle 2, covering a twelve-month period from 29 August 2022 to 21 September 2023, revealed a calibration test certificate dated 21 April 2022 from a tachograph centre based in Co. Antrim, Northern Ireland. A download of the tachograph from 29 August 2022 to 21 September 2023 revealed journeys originating and finishing in the UK, Ireland, France, Italy, Germany, Netherlands, Sweden and Denmark. There were no journeys to, from or within Bulgaria recorded. The last company (operator) name locked into the tachograph was Eddie Stobart Ltd, a UK based company, on 8 August 2017. RS Spedition Limited's company card had not been locked into the tachograph. The tachograph data had not been downloaded in 1334 days. All the previous drivers of vehicle 2, as noted on the tachograph, had held digital driver's cards issued in either the UK or Ireland. There were no Bulgarian drivers' cards noted on the tachograph records.

16. Vehicle 2 had its Bulgarian registration number printed on a UK style number plate, and not of the type used in Bulgaria. There were two Irish harp designs displayed on the front of vehicle 2, together with an Irish flag. The driver had a UK driver's licence and a UK driver's card. His address was in Northern Ireland. The driver stated that he was the main driver of the vehicle, and he had never travelled to Bulgaria in it. The headlamp pattern was set correctly for use in the UK, and not for mainland Europe. The Enforcement Officer formed the view that vehicle 2 was being used in contravention of s.1 of the 2010 Act by a Northern Ireland based operator who had "flagged out" to Bulgaria. RS Spedition Limited did not hold a valid Northern Ireland operator's licence issued under s.1 of the 2010 Act.

17. Subsequent enquiries with the Bulgarian authorities confirmed that Vehicle 2 had no valid annual roadworthiness certificate ("MOT") in place at the date of the stop, and it was not authorised on any Bulgarian Community Licence.

18. The receiver of the goods from both vehicles in Killinchy, Northern Ireland advised that they had contracted NG Bell & Sons to carry out their haulage work. NG Bell & Sons had sub-contacted the work to MS Express Transport, a freight forwarder, to allocate the work of transporting the fresh produce from Coventry to Northern Ireland. MS Express Transport had allocated the two loads of salad to the Appellant. They would be paying the Appellant within 45 days of the journey, upon receipt of an invoice from Rycon Logistics Ltd, which had a Bulgarian address (VAT number BG2073526). There was no further information available regarding this VAT number.

19. Trailer 2 was registered in the UK and displayed fleet number "DHR 20". The number plate attached to the rear of trailer 2 was also a UK style plate. Following the detention of trailer 2, an application for return was received, along with proof of ownership. The DVA accepted that the applicant for return was the owner of trailer 2, and it was returned on 24 October 2023. Trailer 2 is not therefore a matter for determination in this case.

The detention hearing

20. The Appellant applied for the return of vehicles 1 and 2, and trailer 1, on applications dated 6 October 2023. His address was stated to be in Co. Monaghan, Ireland with a correspondence address in Magherafelt, Northern Ireland. Each application stated the same grounds:

"(a) at the time of detention, the user of the vehicle held a valid licence;
(b) at the time of detention, the vehicle was not being, and had not been, used in contravention of s.1 of the 2010 Act; and

(c) if at the time of detention the vehicle was being, or had been, used in contravention of s.1 of the 2010 Act, the owner did not know that it was being, or had been, so used."

Each application also stated, *"The vehicle was being operated under a valid operator's licence. There were no grounds to detain this vehicle."*

21. A detention hearing was arranged to take place on 5 December 2023. The Appellant was present and was represented by Mr McNamee. The Respondent was represented by Ms Jones. The two Enforcement Officers were in attendance and gave oral evidence. The Appellant provided clarification, at the outset of the hearing, that he relied upon a Bulgarian operator's licence in the name of Rycon Logistics Eood, reference number 340236 (a different reference number to the Community Licence produced when vehicle 1 was stopped). He produced a copy of the licence, claiming that both vehicles were authorised under it. There was insufficient time to complete the full detention hearing on this date, therefore the PO issued an interim decision, dated 21 December 2023, dealing with the issue of detention of the vehicles and trailer.

22. The detention hearing was resumed on 12 March 2024 to deal with the remaining issues, and the same representatives were present. The Appellant gave evidence at the second detention hearing. He also produced evidence which purported to demonstrate a laden incoming load from Germany to England on 19 September 2023 in respect of vehicle 2. The final decision of the PO was issued on 28 March 2024.

The Presiding Officer's decisions

23. The only issue that had been considered at the detention hearing on 5 December 2023 was the question of whether the DVA had the right to detain the two vehicles and trailer. In his interim decision, dated 21 December 2023, the PO, on behalf of the DfI, determined overall:

> *"I am satisfied, on the balance of probabilities, the DVA had reason to believe that each vehicle (Vehicle 1 and Vehicle 2) and Trailer 1, was being or had been, used on the road in contravention of Section 1 of the 2010 Act."*

24. Having determined that there were grounds to detain the two vehicles and trailer, the hearing was resumed, and concluded, on 12 March 2024, in order to consider ownership and whether there were grounds for return. On 28 March 2024, the PO prepared a final decision which stated:

*"The claimant **not** having satisfied me that any Ground is made out in respect of either vehicle, or the trailer, the DVA is directed to dispose of the said vehicles and trailer, once the period for appeal has expired."*

The appeal

25. The Appellant lodged an appeal against the decision of the PO, which was received by the Upper Tribunal on 15 April 2024. The Appellant's grounds of appeal, as submitted by his solicitor, were set out in his application. Prior to the date of the appeal hearing before the Upper Tribunal, the Appellant submitted a skeleton argument which cited the same grounds of appeal and which were expanded upon during the oral hearing.

26. The grounds of appeal are summarised, in the written order presented on his appeal form, as follows:

    (i) The decision of the PO is in error as the authorities should not detain a vehicle "out of the blue". An operator should be given notice of the Department's intention to detain a vehicle and an opportunity to address any concerns that the Department may have in relation to any purported breach of the Regulations: *Nolan Transport* [2012] UKUT 221 (AAC).

    (ii) The PO erred in law in his determination that the Appellant had to prove he was the "legal" owner of the vehicle. This is not in accordance with the Regulations and contrary to the cases of *Nugent & Nugent*, and *NI Truck Ltd.*

    (iii) The PO erred in his reliance of the DVA's wrongful interpretation of the cabotage rules.

    (iv) The PO has fallen into error in his decision making and fact-finding in the following ways:

        a. The PO has imported a requirement that the vehicle has to come from and/or return to a particular member state of the EU, which runs contrary to his interim view, that the vehicle had to return to the territory of the EU as a whole. This is not the correct interpretation of the Trade and Cooperation Agreement.

        b. The PO erred in his finding that no valid EU operator's licence was in place despite evidence from DVA witnesses that there was a valid EU licence in the name of Rycon Logistics Eood. The PO has no jurisdiction to determine the authenticity of an EU licence.

        c. The finding that the vehicles were not in NI on a temporary basis runs contrary to the weight of evidence which shows that vehicles entered the UK from Holland, then drove from mainland Britain to Northern Ireland, according to the tachograph evidence and the fact that vehicle 1 is left-hand drive.

d. The PO placed undue weight on the fact that the headlights of the vehicles were dipped in the manner normally found within the UK/NI. In addition, the use of the phrase "UK/Republic of Ireland" suggests they are one territorial location when the Republic of Ireland is in the EU and the UK is not.
e. The PO's finding that the Appellant "did not know" that the company was breaching the 2010 Act is inconceivable. The Appellant cannot prove his lack of knowledge.
f. The PO has erred by ignoring the written documentary proofs presented by the DVA in preference of the evidence of a 20-year-old driver in his finding, at paragraph 42(h) of the final decision, that RS Spedition was the user of vehicle 2, rather than Rycon Logistics Ltd (para 42(g)). It therefore follows that this finding is "perverse and unlawful".
g. The PO has acted outside his lawful authority in determining the validity and proper usage of an EU Community licence.
h. The PO erred in his finding (paragraph 64 of his interim decision) that vehicle 2 had entered the UK unladen from Denmark, without giving the appellant the opportunity to give evidence on this matter. This finding denied the appellant a fair hearing.

27. The DVA, represented by Ms Jones, submitted a skeleton argument in response, which was served in time but was not forwarded to the panel in time for the hearing. Consequently, the panel did not have a chance to read the skeleton argument prior to the oral hearing but it has been read prior to this decision being made. As the skeleton argument reflected the oral arguments made by the DVA's representative at the hearing, we are satisfied that the Appellant had the opportunity to address the points raised by the DVA during the oral hearing. For the avoidance of doubt, the full bundle of papers as well as supplementary skeleton arguments and the authorities bundle (prepared by Ms Jones and received prior to the hearing) have been considered in relation to this case, as well as the oral submissions made by the parties' representatives on the day of the appeal hearing. Although given the opportunity, neither party made further written closing submissions after the conclusion of the appeal hearing on 28 October 2024.

The Approach of the Upper Tribunal

28. 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.'

29. 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."

30. The task of the Upper Tribunal, therefore, when considering an appeal from a decision of the DfI in Northern Ireland, is to review the information which was before the Department, along with its decision based on that information. The Upper Tribunal will only allow an appeal if the appellant has shown that "the process of reasoning and the application of the relevant law require the tribunal to take a different view" (*Bradley Fold Travel Limited and Peter Wright* v. *Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, at paragraphs 30-40). 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 PO on behalf of the DfI) was "plainly wrong".

The Domestic Legislation

31. With regards to the legislation relating to this appeal, the starting point is s.1 of the Goods Vehicles (Licencing of Operators) Act (Northern Ireland) 2010 ("the 2010 Act") which states (as far as is relevant to this appeal – our underlining):

> ***"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.*
> *(3)…*
> *(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.*
> *(5)…*

Exemptions from holding an operator's licence

32. The Goods Vehicle (Licencing of Operators) (Exemption) Regulations (Northern Ireland) 2012 ("the Exemption Regulations") were made in exercise of the powers within s.1(2)(d) of the 2010 Act. Regulation 4 provides that the use of vehicles of any class as set out in the Schedule to the Exemption Regulations provides an exemption from the requirement to hold an operator's licence. Paragraph 23 of the Schedule creates an exemption for a goods vehicle being used to carry out a cabotage operation in accordance with the provisions of Regulation (EC) No.1072/2009:

> ***"23.*** *A vehicle which is being used to carry out a cabotage operation consisting of national carriage for hire or reward on a temporary basis in*

the United Kingdom in accordance with the provisions of Regulation (EC) No.1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market."

(as amended by the Licensing of Operators and International Road Haulage (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/708))

Detention

33. The detention of a vehicle being used in contravention of s.1 of the 2010 Act is provided for by Schedule 2 of the 2010 Act, and the corresponding Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012 (the "2012 Regulations"). Regulation 3 of the 2012 Regulations provides as follows:

"Detention of Property

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

Return to the "owner"

34. 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 notice of detention in the Belfast Gazette. An "owner" is defined in Regulation 2 of the 2012 Regulations. The grounds on which an "owner" may make an application for the return of a detained vehicle, 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.

35. In *Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/60) ("*Nolan*") 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:

> *"90. Three points need to be stressed at this stage. First it is for VOSA [the DVA in NI] to show that they had reason to believe that the detained vehicle was being or had been used, on a road, in contravention of s.2 of the 1995 Act [s.1 of the 2010 Act in NI]. The standard of proof required is the balance of probability… Second, once VOSA [DVA] have established they had the right to detain a vehicle it is for the owner to prove ownership of the vehicle of vehicles to which the claim relates. Again, the standard of proof required is the balance of probability…. Third, it is for the owner to show, on the balance of probability, that one of the grounds set out in regulation 10(4) of the 2001 Regulations [Regulation 4 of the 2012 Regulations in NI], as amended, has been established.*

The European Legislation

36. The UK, including Northern Ireland, left the EU at 11pm on 31 January 2020. Thereafter, an 11-month transition period commenced, during which, the UK remained bound by existing EU legislation (until 31 December 2020). From 1 January 2021, EU legislation was no longer binding on the UK, unless it was retained EU law ("REUL"), a form of UK domestic law which was created by the EU (Withdrawal) Act 2018 ("EUWA") which came into effect at the end of the transition period.

37. From this point, the UK Parliament and the devolved legislatures were responsible for deciding whether, how, and to what extent, domestic law and policy should then diverge from that of the EU, if at all. Future domestic legislation would either adopt EU policy frameworks for domestic needs or replace them entirely. The Retained EU Law (Revocation and Reform) Act 2023

was enacted to achieve this aim, and received Royal Assent on 29 June 2023. The Act removed the interpretive effects of EU law through the abolition of general EU law principles including the principle of supremacy. It also renamed REUL as "assimilated law" (from the end of 2023) to reflect the fact that the interpretive effects of EU law no longer apply to UK assimilated law.

38. The Trade and Cooperation Agreement (Treaty Series No 8 (2021)) (CP 426) ("TCA") was entered into on 30 December 2020, just as the transition period came to an end, and applied provisionally from 1 January 2021. It is a Treaty which forms a binding agreement between the signatories in order to set the terms of the future relationship between them. The signatories to the TCA are the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community of the other part. It sets out the agreed arrangements between EU member states (as a whole) and the UK for matters including trade in goods and services, intellectual property, aviation, energy, and of relevance to this appeal, the arrangements for road transport between and within the territories of the EU and the UK. In relation to road transport, it includes provisions to ensure that competition between EU and UK operators takes place on a level playing field, while making sure that safety is not compromised.

39. The substance of the TCA has not changed since it was agreed. It officially entered into force on 1 May 2021. The TCA was implemented into UK law by virtue of the European Union (Future Relationship) Act 2020, which also created powers to make secondary legislation, where appropriate, to enable the TCA to be implemented domestically or for domestic law to be interpreted in light of the Agreement (Part 3 of the European Union (Future Relationship) Act 2020). These measures provide for the implementation of the TCA as agreed between the UK and the EU. Article 5 of the TCA explicitly excludes direct effect of the provisions within the treaty thus individuals cannot directly invoke its provisions to rely upon them in national courts either against a state or against another individual.

40. The content of secondary EU law (e.g. regulations, directives, decisions, recommendations and opinions) must align with the principles and objectives set out in a Treaty (the principle of conferral). Two key EU Regulations which were in force prior to exit day, relating to the transport of goods by road, are Regulation (EC) No.1071/2009 and Regulation (EC) No.1072/2009. These Regulations were specifically retained by the Retained EU Law (Revocation and Reform) Act 2023 and now form part of UK assimilated law. They have been amended by various UK legislative Acts in order to align with the agreements reached by the signatories to the TCA. They remain in force in this amended form.

41. Of relevance to this appeal is Regulation (EC) No.1072/2009 of 21 October 2009, which is entitled "Common rules for access to the international road haulage market" and applies to "the international carriage of goods by road for hire or reward for journeys partly carried out within the United Kingdom" (Article 1(1)). Where the carriage of goods involves movement from the UK to an EU member state or a third country and vice versa, the Regulations apply to any part of the journey within the territory of the UK (Article 1(2)). It also applies to the "national carriage of goods by road undertaken on a temporary basis by a non-resident haulier as provided for in Chapter III" (Article 1(4)). These Regulations have been amended by virtue of ss.23-25 of the European Union (Future Relationship) Act 2020, to align with the agreements reached with in the TCA.

Cabotage

42. Cabotage, loosely defined, is the transport of goods within one country, by an operator based in a different country. Article 462 of the TCA sets out the agreement between the signatory states in relation to the operation of cabotage as follows:

"ARTICLE 462

Transport of Goods between, through and within the territories of the Parties

1. *Provided that the conditions in paragraph 2 are fulfilled, road haulage operators of a Party may undertake:*
   1(a) laden journeys with a vehicle, from the territory of the Party of establishment to the territory of the other party, and vice versa, with or without transit through the territory of a third country;
   2(b) laden journeys with a vehicle from the territory of the Party of establishment to the territory of the same Party with transit through the territory of the other Party;
   3(c) laden journeys with a vehicle to or from the territory of the Party of establishment with transit through the territory of the other Party;
   4(d) unladen journeys with a vehicle in conjunction with the journeys referred to in points (a), (b) and (c).
2. *Road haulage operators of a Party may only undertake a journey referred to in paragraph 1 if:*
   a. *They hold a valid licence issued in accordance with Article 463, except in the cases referred to in Article 464; and*
   b. *The journey is carried out by drivers who hold a Certificate of Professional Competence in accordance with Article 465(1).*

43. This provision was incorporated into Regulation (EC) No.1072/2009 (as amended), the requirements within which must be complied with in order to satisfy the cabotage exemption set out in paragraph 23 of the Schedule to the Exemption Regulations. Article 2(6) of Regulation (EC) No.1072/2009 defines "cabotage operations" as the "*national carriage for hire or reward carried out on a temporary basis in a host State, in conformity with this Regulation*". The cabotage provisions, are set out in Articles 8-10. They permit a vehicle undertaking an incoming international laden journey to the UK, to transport goods for hire or reward within the UK, no more than twice within seven days from entry to the UK. Such activity makes an international journey more financially viable for an international haulier, but the cabotage rules must be complied with for it to fall under the exemption within paragraph 23 of the Exemption Regulations. The rules are as follows:

> ***Article 8 General principle***
> *1. Any haulier for hire or reward who is a holder of a Community licence and whose driver, if he is a national of a third country, holds an EU driver attestation, shall be entitled, under the conditions laid down in this Chapter, to carry out cabotage operations within the United Kingdom.*
>
> *2. Once the goods carried in the course of an incoming international carriage have been delivered, hauliers referred to in paragraph 1 shall be permitted to carry out, with the same vehicle, or, in the case of a coupled combination, the motor vehicle of that same vehicle, up to two cabotage operations following the international carriage from another Member State or from a third country to the United Kingdom. The last unloading in the course of a cabotage operation before leaving the United Kingdom shall take place within 7 days from the last unloading in the United Kingdom in the course of the incoming international carriage.*
>
> *3. National road haulage services carried out in the United Kingdom by a non-resident haulier shall only be deemed to conform with this Regulation if the haulier can produce clear evidence of the incoming international carriage and of each consecutive cabotage operation carried out.*
>
> *Evidence referred to in the first subparagraph shall comprise the following details for each operation:*
> *(a) the name, address and signature of the sender;*
> *(b) the name, address and signature of the haulier;*
> *(c) the name and address of the consignee as well as his signature and the date of delivery once the goods have been delivered;*
> *(d) the place and the date of taking over of the goods and the place*

designated for delivery;
(e) the description in common use of the nature of the goods and the method of packing, and, in the case of dangerous goods, their generally recognised description, as well as the number of packages and their special marks and numbers;
(f) the gross mass of the goods or their quantity otherwise expressed;
(g) the number plates of the motor vehicle and trailer.

4. No additional document shall be required in order to prove that the conditions laid down in this Article have been met.

44. As the requirements of lawful cabotage requires compliance with the assimilated EU Regulations relating to road transport of goods, this is the legislation applicable and to be directly addressed in an impounding case such as this. The TCA does not have direct effect within the UK legal system therefore its provisions need not be directly addressed. However, the principles conferred by the TCA must be borne in mind so as not to interpret any of the assimilated EU Regulations in a manner that contradicts the agreements made, unless and until a subsequent agreement is reached to amend the position (see s.29 of the European Union (Future Relationship) Act 2020).

ANALYSIS

Detention

45. In accordance with *Nolan*, the first issue to be determined by the PO was whether an authorised person had reason to believe that the vehicles and trailer were being, or had been, used on a road in contravention of s.1 of the 2010 Act, thus authorising its detention under Regulation 3 of the 2012 Regulations. An applicable exemption under the Exemption Regulations would mean that s.1 was not contravened. The burden of proof rests on the DVA to establish grounds for detention on the balance of probabilities (*Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/60)).

46. The PO made findings that both vehicles were large goods vehicles engaged in the carriage of goods for hire or reward on the date of detention. It was an agreed fact that the use of the two detained vehicles and trailer was not authorised under an operator's licence issued in Northern Ireland or in the UK. It was also agreed that the cabotage exemption was being relied upon at the date of detention to explain the lack of operator's licence covering the journeys.

Vehicle 1 and trailer 1

47. Dealing firstly with vehicle 1 and the coupled trailer 1, the PO was satisfied that a valid Community Licence Certificate held by Rycon Logistics Eood was produced by its driver (the Appellant) for the use of vehicle 1 and trailer 1. He also found that the driver produced valid CMR documentation for a journey that constituted laden international haulage from Germany to England two days before the stop in Belfast. He found that vehicle 1 had been present in Bulgaria between 15 August 2023 and 2 September 2023, a total of 18 days, within a three-month (90 day) period, during which it had undertaken its tachograph calibration and its annual road worthiness test ("MOT"). Vehicle 1's insurance was arranged in Bulgaria.

48. However, in the view of the PO, a number of other factual circumstances, none of which were disputed by the Appellant at the detention hearing, outweighed the vehicle's limited connections to Bulgaria and suggested a closer connection to Northern Ireland where the vehicle was stopped (paragraph 57(g) of the PO's interim decision). In summary these were that the driver, also purporting to be the owner, had both a Northern Ireland and Republic of Ireland address, along with Irish driver's licence and an Irish digital driver's card. His CPC modules had been completed in Northern Ireland. He claimed to be the Director of the Bulgarian company who used the Bulgarian registered vehicle, but which was drawing a Northern Ireland registered trailer. He had a UK telephone number. Vehicle 1 was on a journey within Northern Ireland, displaying UK style number plates and had its headlights dipped in a manner consistent with UK and Ireland based driving, despite it being a left-hand drive vehicle which would be expected to drive normally on the continent. The tachograph had been locked in by a transport operator with a Northern Ireland address. The previous drivers of the vehicle held either UK or Irish Digital drivers' cards and according to the tachograph evidence from the past three months, the vehicle had only been to Bulgaria for a short period of 18 days. The vehicle had previously been tested in Northern Ireland; it displayed a service reminder sticker from a service provider in Northern Ireland. He found no evidence of any carriage of goods to, from or within Bulgaria, where Rycon Logistics Ltd was said to be based.

49. The PO determined that this was not a valid cabotage operation under paragraph 23 of the Schedule to the Exemption Regulations to excuse or exempt the Appellant's vehicle and trailer from the requirement to hold an NI operator's licence under s.1 of the 2010 Act, for this journey. He determined that as the factors connecting the vehicle to Northern Ireland outweighed the factors linking the vehicle to Bulgaria, he determined that the operator was "not established in Bulgaria" (paragraph 58 of the PO's interim decision) which invalidated the cabotage rules.

50. For the paragraph 23 cabotage exemption to apply, several elements must be satisfied: the vehicle is being used for national carriage for hire or reward; its use is on a temporary basis in the UK (which includes Northern Ireland); and its use is in accordance with the provisions of Regulation (EC) No.1072/2009. It is fair to say that, at the point of being stopped, this appeared to be a Bulgarian goods vehicle (left-hand drive, Bulgarian registration plate), being operated by a haulage company set up in Bulgaria, Rycon Logistics Ltd, who held a valid EU Community Licence for the carriage of goods. The Community licence entitled Rycon Logistics Ltd to carry out cabotage operations within the UK (including Northern Ireland) by virtue of Article 8(1) of Regulation (EC) No.1072/2009. It is not in contention that the haulier produced "clear evidence of the incoming international carriage" as required by Article 8(3) of Regulation (EC) No.1072/2009. Having completed a laden incoming journey to the UK, the operator was theoretically entitled to carry out up to two cabotage operations within the UK (pick up to delivery point) within seven days from the time and date of the initial delivery in the UK (Crewe) (Article 8(2) of Regulation (EC) No.1072/2009). Evidence was produced of a journey from Cambridgeshire to Killinchy (Northern Ireland) to collect and then deliver salad produce, which was, on the face of it, the first of the two cabotage operations permitted to take place. The PO found, as he was entitled to do, that the requirements within the provisions of Regulation (EC) No.1072/2009 were met.

51. Mr McNamee, on behalf of the Appellant, suggested at the oral hearing of this appeal, that the matter stops there. He argued that as all the requirements of Regulation (EC) No.1072/2009 were met, the vehicle should not have been detained. However, one must return to the exemption outlined in paragraph 23 of the Schedule to the Exemption Regulations, as compliance with Regulation (EC) No.1072/2009, is only one of the three conditions to be met for the exemption to apply.

52. The vehicle was found to be carrying out national carriage for hire or reward (condition 1) and it was found to be in compliance with Regulation (EC) No.1072/2009 (condition 3). However, the vehicle was not found to be in the UK (including Northern Ireland) "on a temporary basis" (condition 2). While the PO did not make express reference to this condition in his interim decision, it is clearly on this basis that he found the cabotage exemption did not apply. The facts and circumstances outlined in paragraph 48 (above) illustrated to the PO that the vehicle, trailer, driver and owner of the haulage company had considerable connections to Northern Ireland (within the UK), which called into question the credibility of the claim that it was a true Bulgarian operation using the vehicle and trailer.

53. If a "foreign operator" was not in fact a foreign operator, but simply presenting itself as such, for example by obtaining a foreign operator's licence, a foreign

address and a business name, while in fact operating from within the UK (Northern Ireland), then this would invalidate any suggestion that the vehicle was in the UK (Northern Ireland) on a temporary basis as required by the paragraph 23 exemption. Considering the many connections with Northern Ireland, which far outweighed the number of connections with the country in which the operator was apparently based (Bulgaria), the PO agreed with the conclusion of the DVA Enforcement Officer, that this appeared to be a NI based haulage company "flagging out" to Bulgaria. We find that, while there were some connections to Bulgaria, the PO was entitled to reach this conclusion in light of the balance of evidence presented to him. We cannot therefore say that his decision is "plainly wrong".

Ground (i) – detention should not occur "out of the blue"

54. Ground (i) of the Appellant's grounds of appeal asserts that the authorities should not detain a vehicle "out of the blue". Mr McNamee adopted this same argument during oral submissions in the appeal hearing, relying upon the case of *Nolan* in support. There was no specific paragraph referred to from *Nolan* either in the written grounds or in oral submissions. Ms Jones on behalf of the DVA, argued that the relevant time for determining detention is the time of stopping the vehicle, stating that the Enforcement Officer in this case, having been presented with contradictory information at the roadside, including documents that required translation, was entitled to detain the vehicle to make further enquiries. She suggested that information arising after the event bears no relevance to the question of whether vehicle 1 and trailer 1 (and vehicle 2, dealt with later) should have been detained when stopped.

55. We agree with Ms Jones on this point. The DVA Enforcement Officer was conducting valid checks on what appeared to be a foreign goods vehicle having arrived at the port of Belfast and therefore a regulatory check was perfectly reasonable. According to the Upper Tribunal in *Nolan* (at paragraph 48):

> *"… Article 8.3 [of Regulation (EC) No. 1072/2009] effectively says that a vehicle is performing national road haulage services unless and until clear evidence is produced by the haulier, that the vehicle is and has been conducting cabotage operations… if the documents are to be made available at a later stage one consequence is that VOSA [DVA in NI] may be entitled to impound the vehicle and its contents. If they decided to impound, they would then have the right to immobilise the vehicle or to remove it. In our view one only has to set out the potential consequences, which would flow from permitting the haulier to produce the clear evidence at a later date, to see that this interpretation would not achieve an efficient and effective enforcement regime, nor would it contribute to the smooth operation of the internal transport market.*

56. The impounding regime was designed to monitor the haulage industry, to ensure that operators were complying with the Regulations, and to safeguard safety and fair competition. Where an authorised person has reason to believe that a goods vehicle is on a road in contravention of the 2010 Act, and would continue to operate in contravention of the 2010 Act if it was to continue on its journey, we consider it reasonable for the vehicle to be detained until such time as the authorised person is persuaded otherwise. A compliant operator should have little difficulty in presenting itself as such, including the presentation of the correct documentation in a readable form, to demonstrate conformity with the Regulations. Of course, it is not possible to have everything in order all of the time and the "occasional omission, which does not prevent a picture of lawful compliance from emerging, is unlikely to result in a vehicle being impounded" (*Nolan*, paragraph 108). The Enforcement Officer in this case, notwithstanding the documentation provided, was not presented, in our view, with a clear picture of a legitimate Bulgarian operation demonstrating lawful compliance with the cabotage rules while on the road in Northern Ireland. It would have been remiss of him to allow the vehicle to continue on its journey until a later date in these confused circumstances. It is virtually impossible to give prior warning of a stop where the DVA are unaware of each and every journey a vehicle is going to be undertaking and therefore unaware of when a vehicle is making a journey to be checked for compliance. An operator should act in compliance with the legislation at all times, so arguably only a non-compliant operation will place a stopped vehicle at risk of detention. We dismiss ground (i) for these reasons.

"Flagging out"

57. Mr McNamee submitted, during the oral hearing of the appeal, that there was nothing unlawful about "flagging out", stating that it was a term that cannot be found in legislation and therefore the decision of the PO was in error because of his references to this. It is agreed that "flagging out" is not a term which features in legislation. However, it is a commonly used term within the haulage industry to describe the action of registering a goods vehicle in a country other than the one in which it operates, usually to take commercial advantage. The PO and the DVA Enforcement Officer described the actions of the Appellant in this manner, and while the Appellant may disagree that he was in fact "flagging out", there is nothing erroneous in the PO using this term.

58. The term "flagging out" as used by the PO, equates to his conclusion that the operator was not legitimately based in Bulgaria, but rather was claiming to be so, in order to gain commercial advantage, for example, by not having to obtain and comply with a Northern Ireland operator's licence. The PO found the facts on the evidence presented to him and gave adequate reasons as to why he considered this to be the case. He based his decision on the legislative provisions. The PO's conclusion was open to him on the evidence presented

and cannot be criticised for the use of this term. There is no merit in this argument.

Ground (iv) b and g: No valid Community Licence

59. Ground (iv)(b) asserts that the PO was wrong in law to find that there was no valid Community Licence in place. Ground (iv)(g) goes on to suggest that the PO had no jurisdiction to determine the authenticity of an EU Community Licence. Mr McNamee raised this point in the oral hearing during the submissions relating to vehicle 1 and therefore it is taken that he relates this ground to vehicle 1 only. Quite simply, these assertions are incorrect. The PO, at para 57(a) of his interim decision, states, *"[A] valid Community Licence Certificate held by Rycon Logistics Eood was produced by its driver for the use Vehicle 1* (sic)*."* There can be no dispute that he determined there was a valid EU community licence in place for vehicle 1 and trailer 1. The PO did not go on to question its authenticity. He positively accepted its existence and took the matter no further. We find that Grounds (iv)(b) and (iv)(g) have no merit in respect of vehicle 1. The position in respect of vehicle 2 is discussed later.

Ground (iv)(c) and (d) – "temporarily" in the UK (lights and other circumstances)

60. Mr McNamee submitted that the details of the Northern Ireland and Republic of Ireland addresses, Irish flags and the direction that the headlights were dipped in vehicle 1 were insignificant factors to be taken into account as the requirements for lawful cabotage were all in place. He further submitted that the tachograph evidence demonstrated continental driving which should have been sufficient to demonstrate that this vehicle was in Northern Ireland on a temporary basis.

61. As already stated, vehicle 1 and trailer 1 were found not to be temporarily in the UK therefore the full requirements of lawful cabotage, as set out in paragraph 23 of the Schedule to the Exemption Regulations, were not in place. While the documentation needed to comply with Regulation (EC) No.1072/2009 was in existence, the operation did not present itself in alignment with the claim to be a Bulgarian operation, given the lengthy list of connections to Northern Ireland, which included the Irish flags (commonly flown in Northern Ireland), Northern Ireland accents of the driver (the Appellant), UK mobile phone numbers, NI driving licences, location of test venues, location of driver CPC training, addresses and the direction of the headlights. When taken as a whole, these misaligned circumstances were sufficient to cause the DVA Enforcement Officer to believe that vehicle 1 was more likely to be based in Northern Ireland than in Bulgaria and should therefore be operating in compliance with s.1 of the 2010 Act. The PO, after hearing this evidence at the detention hearing, agreed.

62. It is fair to say that the PO made references to Northern Ireland and to the Republic of Ireland in his decision, but he did so when discussing the direction of the vehicle's lights. For this purpose, Northern Ireland and the Republic of Ireland are essentially one and the same. Both states require the headlights to be dipped in the same direction as all vehicles on the whole island of Ireland drive on the left-hand side of the road. The PO was making a geographical point rather than a jurisdictional one. It is a matter of fact that Northern Ireland is part of the UK (outside the EU) while the Republic of Ireland is a member of the EU. There is a soft border between them thus people and traffic move around the whole island of Ireland without impediment. We do not consider, from reading both decisions, that the PO considers both states to be within the UK.

63. Mr McNamee went on to submit that the PO's finding, that the vehicles were not in Northern Ireland on a temporary basis, runs contrary to the weight of evidence. In our view there were more connections with Northern Ireland than there were with Bulgaria, the state in which the vehicle was purportedly based. It is agreed that the tachograph evidence demonstrated some continental journeys however, that simply shows where the vehicle has been. Utilising the extensive experience of the two specialist panel members, the tachograph evidence did not demonstrate the "diary" of a busy haulier from Bulgaria carrying out long distance international journeys and making full use of vehicles and drivers. One would expect to see local journeys within Bulgaria if that is where the vehicle was based, or journeys starting or finishing in Bulgaria, to and from its base. However, there was limited evidence of any journeys to, from or within Bulgaria. The majority of connections, beyond the journeys made by the vehicle, was with Northern Ireland therefore, that is where the PO concluded that the vehicle was most likely to be based (i.e. not in Northern Ireland on a temporary basis). For these reasons, we find that the PO was not "plainly wrong" to uphold the detention decision of the Enforcement Officer.

Ground (iii) and (iv)a: Incorrect interpretation of cabotage rules (movement to and/or from Bulgaria)

64. It was submitted on behalf of the Appellant in written grounds of appeal that the PO had erred in his interpretation of the cabotage rules, thus nullifying the Trade and Cooperation Agreement (the "TCA"). In particular, Mr McNamee submitted that the PO had erred in law by importing a requirement into the cabotage rules that the vehicle should have come from Bulgaria to bring its journey in line with the legislation.

65. At the appeal hearing, Mr McNamee expanded upon this written argument, stating that the TCA was an agreement reached between two parties: the EU and the UK. Article 462 of the TCA outlines the principles of cabotage which,

he highlighted, made reference to the territory of the "Party" of establishment. This, he stated, was different from the original reference to the "member state" of establishment and should be interpreted to mean any part of the territory of the EU, that being one of the "parties" to the Treaty. He submitted, therefore, that the DVA Enforcement Officer's interpretation of the TCA which suggested that vehicle 1 had to come from Bulgaria, a specific member state of the EU, was too restrictive. Further, as the PO had found Mr McNamee's interpretation of the Trade and Cooperation Agreement to be correct, he suggested that the PO had erred by importing a requirement that the vehicle's journey had to start in Bulgaria (the member state of establishment). Indeed, he asserted, this contradicted the PO's own determination on the interpretation of the TCA as set out in his interim decision. Ms Jones, for the Respondent, submitted that there had not been any change to the TCA as asserted by Mr McNamee, and there was nothing within the PO's decision that nullified its provisions.

66. Ms Jones is correct in that the terms of the TCA have not changed. Equally, Mr McNamee is correct in that the PO "preferred" his interpretation of the Trade and Cooperation Agreement – "provisionally" so. The PO did not find it was necessary to interpret the meaning of the phrase "party of establishment" as he determined that the circumstances suggested this was not a foreign operation conducting cabotage, but rather a local operation which appeared to require an operator's licence in compliance with s.1 of the 2010 Act. The PO's findings in this regard are set out at paragraphs 58 – 61 of his interim decision (our underlining):

> *58. I find that the DVA Officer had reason to believe that the detained vehicle and trailer were being, or had been, used on a road in contravention of the Act on the basis that the paragraph 23 exemption appeared inapplicable, since the operator was not established in Bulgaria.*
>
> *59. In these circumstances, I conclude that it is unnecessary specifically to go on to consider whether the appropriate interpretation of the meaning of "the Party of establishment" and "the territory of the party of establishment" in Article 462 is correct.*
>
> *60. For my part, provisionally at least, I prefer the interpretation that Mr McNamee places on Articles 461 and 462 [of the Trade and Cooperation Agreement] than that of Ms Jones. The Agreement is indeed between two parties only, the EU and the UK including Northern Ireland.*
>
> *61. Article 461 d) states "party of establishment" means the Party in which a road haulage operator is established". By extension, 'the territory of the Party of establishment' would appear to refer (where the EU Party*

is concerned) to hauliers established in any of those countries, not specifically to any individual country. I find it significant that Party is capitalised (thus) in emphasising this to be the case.

67. The PO found, at paragraph 57(d) of his interim decision, that "[N]o evidence of any carriage of goods from or to Bulgaria had been provided to DVA when requested". He continued at paragraphs 57(e) and (f) to outline the evidence of the Enforcement Officer who concluded that the absence of such evidence was a breach of Article 462 of the TCA. The PO did not follow the Enforcement Officer's line of thought in respect of the TCA. He found that vehicle 1 and trailer 1 had to be detained as "the operator was not established in Bulgaria" (paragraph 58). He did not make a finding, at any point in his interim decision, that the journey of vehicle 1 and trailer 1 had to commence in Bulgaria. He did not import such a journey as a requirement of the cabotage rules. Indeed, there is no requirement set out in the TCA that a journey must commence from the "member state" of establishment. While the DVA Enforcement Officer incorrectly determined that the lack of incoming journey from Bulgaria was a breach of the TCA, this did not negate the need to detain vehicle 1 and trailer 1 due to the circumstances already outlined which suggested that the vehicle and trailer were not in Northern Ireland on a temporary basis. The lack of journey from Bulgaria was not the sole determining reason for detention to be upheld – it was one circumstance that added to the collective.

68. We find that the PO was correct in considering that the interpretation of the TCA was unnecessary in the circumstances of this case. It was the PO's determination that the vehicle was not temporarily based in Northern Ireland which authorised its detention. The agreements reached within the TCA have been incorporated into the amended Regulation (EC) No.1072/2009, which is the direct and applicable legislation to be considered in this case, and the PO found that the requirements of Regulation (EC) No.1072/2009 had been complied with. It makes no difference to the outcome of the detention decision, or to the outcome of this appeal, as to who the parties to the TCA are. Consequently, this ground has no merit.

Vehicle 2

69. The PO found that a Community Licence in the name of "RS Spedition Eood" and an insurance document in the name of "RS Spedishan Eood" was produced by the driver of vehicle 2 when stopped by the Enforcement Officer. The driver said he was working for "RS Spedition Ltd". The driver did not provide any Community Licence in the name of "Rycon Logistics Eood", despite this being produced by the Appellant on the morning of the detention hearing.

70. The Enforcement Officer became aware, at the roadside, that RS Spedition Ltd was a company based in Northern Ireland which had gone into liquidation. This cast doubt on whether the Community Licence produced at the roadside was still valid. The Enforcement Officer also became aware that the Appellant, who was driving vehicle 1 nearby, was claiming to be the user of vehicle 2. This created a conflict as to which entity was the user of the vehicle - RS Spedition Ltd, Ryan Johnson or Rycon Logistics Ltd. The PO found that the requirement to produce documents to demonstrate that vehicle 2 was engaged in a lawful cabotage arrangement was not met which in turn gave the Enforcement Officer grounds to detain vehicle 2, as he had reason to believe that the vehicle was not compliant with s.1 of the 2010 Act.

71. In addition, based upon the reports of the driver of vehicle 2 at the scene of the stop, the PO found that the previous loaded journey for vehicle 2 had been between two member states of the EU, namely Ireland (County Meath) and Denmark. The next journey, from Denmark (EU) to Coventry, England (UK), which preceded the cabotage journey within the UK (Coventry to Northern Ireland), had been unladen. The PO concluded that as vehicle 2 had entered the UK unladen before collecting a load in Coventry, England, it was in breach of Article 462(7)(a) of the TCA. He determined that, *"notwithstanding that the Officer did not include this amongst his reasons for detention, it would represent a reasonable ground for believing that its operation was in breach of Section 1 of the Act"* (paragraph 67 of the PO's interim decision) thus providing further grounds to detain vehicle 2 at the roadside.

Ground (iv)(h): Procedural irregularity

72. At the hearing of the appeal, Mr McNamee conceded that the circumstances surrounding vehicle 2 were weaker but he argued, in line with ground of appeal (iv)(h), that it was a procedural irregularity for the PO to determine that the incoming load to the UK was unladen without hearing from the Appellant at the detention hearing. It is clear from the PO's interim decision that he found the detention of vehicle 2 was justified for two key reasons. Firstly, there was some confusion over the user of vehicle 2. One of the three potential "users" did not appear to be a company in operational existence and therefore the EU Community Licence presented in that company name may not have been operative to authorise the use of vehicle 2. Secondly, he had found the incoming journey to the UK was unladen which specifically contravened the legislation.

73. The paragraph 23 cabotage exemption requires a haulier to act in compliance with Regulation (EC) No.1072/2009. In particular, Article 8(2) states that *"once the goods carried in the course of an incoming international carriage have been delivered*", the hauler is entitled to make two cabotage journeys within the 7-day

time limit specified. This wording implies that the incoming journey must be laden, and it aligns with the agreements reached in the TCA, in particular Article 462, as referred to by the PO in his interim decision. As Regulation (EC) No.1072/2009 is referred to in the domestic legislation, this ought to have been the primary consideration for the PO in his determination. Nevertheless, the legal position remains the same – the incoming journey to the UK must be laden.

74. Article 8(3) of Regulation (EC) No.1072/2009 provides that a non-resident haulier "*shall only be deemed to conform with this Regulation if [he/she] can produce clear evidence of the incoming international carriage and of each consecutive cabotage operation carried out"*. The Enforcement Officer gave oral evidence at the detention hearing that there was no such evidence forthcoming from the driver of vehicle 2 in respect of the incoming international carriage. He was clear that the driver had produced evidence in respect of the journeys before and after, but not of the incoming journey. The Appellant was aware that this was the Enforcement Officer's evidence as his statement had been provided in advance of the detention hearing. Mr McNamee cross-examined the Enforcement Officer and during that cross examination he did not take issue with the matter. He did not ask for his client, who was present at the first detention hearing, to give evidence to contradict the point. Equally, the Appellant did not present (or attempt to present) documentary evidence of the incoming load at that initial detention hearing. In the event, he did so at the second detention hearing. As there was no indication made to the PO at the initial hearing that this was an issue in the proceedings, the PO was not bound to challenge it himself, nor was he bound to take evidence from the Appellant in respect of this unchallenged point. We find there to have been no procedural irregularity by failing to take evidence from the Appellant.

75. Overall, in relation to vehicle 2, we find that the PO's determination that detention was justified, was not "plainly wrong". He was presented with inconsistent evidence as to the user of the vehicle, and the status of one of the companies pertaining to use the vehicle, which raised doubt as to which of the two EU Community Licences, one presented on the date of the stop and the other presented at the detention hearing, authorised the use of vehicle 2. He found there was no evidence of a laden incoming journey to the UK, which breached the requirements of Regulation (EC) No.1072/2009 and these must be complied with to satisfy the paragraph 23 cabotage exemption. The PO's findings are rational in light of the evidence presented to the PO, and when taken together, entitled the PO to reach the conclusion that he did.

Ownership of the vehicles and trailer

76. The detention hearing continued on 5 December 2023, and this is when the PO considered the second and third elements of the inquiry in accordance with

Nolan. In relation to ownership, the PO was presented with two purchase invoices and a bank statement which the Appellant submitted demonstrated that he was the owner of the two vehicles and the trailer. The Respondent took a neutral view. The PO concluded, at paragraph 5 of his final decision, that vehicle 1 had been purchased by the Appellant on 17 July 2023 and vehicle 2, on 9 January 2023. The question of ownership, having been determined in favour of the Appellant, was not challenged at the appeal hearing. We need not take this matter any further.

77. Ground of appeal (ii) asserted that the PO had erred in law by finding that the Appellant had to prove he was the "legal" owner of the vehicle. In fact, the Appellant did provide the requisite documentation to prove ownership. The leading case of *Nolan* sets out the three-stage test regarding detention proceedings, the second stage of which requires the party seeking return of a detained vehicle to prove ownership (paragraph 90). As only the owner would have the documentation and/or information to be able to prove ownership of a vehicle, it is logical that the burden of proof should be on that party. The law is settled on this point therefore we dismiss ground (ii). While Mr McNamee did not pursue this point at the appeal hearing, it is prudent to deal with all the listed grounds of appeal for completeness.

Grounds for return

78. The Appellant bears the burden of proving, on the balance of probabilities, that one or more of the grounds for return, set out in Regulation 4 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012, is made out in order to justify the return of the vehicles and trailer (*Nolan*, paragraph 90).

79. The Appellant stated in oral evidence at the second detention hearing that both vehicles had entered England from Holland on the same ferry, on 20 September 2023. He produced fresh evidence which purported to demonstrate that vehicle 2 had been carrying a load on the journey from Holland to England (originating in Germany), therefore the driver of vehicle 2 had been wrong when he told the DVA Enforcement Officer at the roadside, that the incoming international journey had been unladen. In particular, this evidence consisted of annotated screenshots of WhatsApp messages between the Appellant and MS Express (the freight forwarder) that showed a Stena Line ferry journey from the Hook of Holland to Harwich (no date or annotation), and a Stena Line ferry journey from Birkenhead to Belfast on 20 September 2023 (no annotation). He also produced a photocopy of an untranslated German consignment note (CMR) dated 19 September 2023, which referred to vehicle 2 in handwritten entry at the bottom of the note. It referred to a delivery of goods to "Costco" in Northamptonshire, England from an address in Germany, the journey having commenced on 19 September 2023. The Appellant accepted that he had been

at fault for failing to brief the driver of vehicle 2 properly and for failing to provide him with the relevant paperwork which could be produced if he was stopped by the authorities.

80. The Appellant also stated that he was the transport manager for RS Spedition Eood when it held a Bulgarian licence. He claimed that the work carried out between Ireland and Europe was the biggest contributor to Rycon Logistics Ltd's earnings, which had an estimated turnover of £200k in the previous financial year. He said he employed an administrator in Bulgaria and visited "once or twice per month". The Appellant sought return of both vehicles and trailer on the basis that they were performing legitimate cabotage movements for Rycon Logistics Ltd when they were stopped, and Rycon held a valid EU Community licence authorising this to take place. He had produced a Bulgarian operator's licence number 340236 in the name of Rycon Logistics Eood, at the outset of the first detention hearing which he referred to in support of his grounds for return. The Appellant, as stated in his application for return, as well as his grounds of appeal, relied on three of the four grounds contained within Regulation 4 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012 (the "2012 Regulations") to justify the return of the vehicles and trailer.

Grounds for return under Regulation 4(3)(a)

Vehicle 1 and trailer 1

81. Regulation 4(3)(a) of the 2012 Regulations provides grounds for return if "*at the time the vehicle was detained, the user of the vehicle held a valid licence (whether or not authorising the use of the vehicle)*." The PO determined that "on the day of detention, Ryan Johnston produced a valid Bulgarian community licence in the name of Rycon" (paragraph 20(b) of the final decision) and found that Rycon was "probably" the user of vehicle 1 and trailer 1 on the day of the stop (paragraph 20(c) of the final decision).

82. The PO went on to determine that the DVA's first consideration following a detention, is to determine whether the user holds an operator's licence under s.1 of the 2010 Act, and whether the licence authorises the use of the detained vehicle on it. Given that there was no Northern Ireland operator's licence in place, the PO determined that return under ground (a) was not available as it was a matter of fact that there was no valid operator's licence in force. He rejected the Appellant's argument that the EU Community licence authorised the return of vehicle 1 and trailer 1.

83. We find that this is the correct interpretation of the 2012 Regulations. Regulation 4(3)(a) requires the user of the detained vehicle to hold "a valid

licence" to benefit from this ground for return. Regulation 2 of the 2012 Regulations states that a "licence" means "an operator's licence (whether standard or restricted) as defined in section 1(1) of the 2010 Act". Section 1(1) of the 2010 Act refers to a "licence issued under this Act: and in this Act such a licence is referred to as an "operator's licence". Although the PO did not reach his conclusion in this manner, his conclusion is correct. As there was no operator's licence issued under the 2010 Act in place for vehicle 1 and trailer 1, this ground was bound to fail.

84. Mr McNamee suggested that the EU Community licence was sufficient to warrant the return of vehicle 1 and trailer 1. This may well have been the case if it had been found that vehicle 1 and trailer 1 were undertaking a lawful cabotage operation as provided for under paragraph 23 of the Schedule to the Exemption Regulations; this would exempt the vehicle from the need to hold an operator's licence issued under the 2010 Act. However, as has already been discussed above (see paragraphs 47-53 of this decision), the PO found, as he was entitled to do, that vehicle 1 and trailer 1 were not conducting cabotage under the legislation, as they were not undertaking national carriage for hire or reward "on a temporary basis" in the UK (including Northern Ireland). From that finding, vehicle 1 and trailer 1 should only be operating under a 2010 Act operator's licence, and the EU Community Licence held by the "probable" user of the vehicle, Rycon Logistics Ltd, is insufficient to secure the return of vehicle 1 and trailer 1. The PO's conclusion in respect of this ground for return was not "plainly wrong".

Vehicle 2

85. The PO found that the driver of vehicle 2, at the point of stop, produced an EU Community Licence and an insurance document in the name of "RS Spedition Eood", and he told the DVA Enforcement Officer that he was working for that company. After the detention, the DVA Enforcement Officer found out that the community authorisation for RS Spedition Eood had terminated before the date of the stop and was therefore of no effect. It was an agreed fact that RS Spedition did not hold an operator's licence issued under the 2010 Act.

86. The Appellant stated in evidence that the driver misinterpreted who he was working for, as it was in fact Rycon Logistics Ltd that had employed him. Despite the Appellant's production of an email from MS Express to support the contention that Rycon was the user of vehicle 2 (Rycon was to invoice MS Express for delivering the load contained within vehicle 2), the PO preferred the contemporaneous evidence of the driver of vehicle 2 at the point of stop. He found the driver's response to be "instructive in determining the identity of the user of the vehicle" (paragraph 42(g) of the final decision) therefore he found that the Appellant had not satisfied him on the balance of probabilities that

Rycon Logistics Ltd was the user of vehicle 2. Instead, he found that the user of vehicle 2, at the point of stop, was more likely to be RS Spedition.

87. Mr McNamee, at the oral hearing of the appeal, advanced ground of appeal (iv)(f), arguing that the finding that RS Spedition was the user of vehicle 2 (paragraph 42(h) of the final decision) was "perverse and unlawful" because the PO ignored written documentary evidence provided at the detention hearing in preference of the comments of a 20-year-old driver. He asserted that the PO should not have made this finding without hearing from the Appellant, and his failure to do so amounted to a procedural irregularity in the decision-making process.

88. We dismiss this ground of appeal. The Appellant gave evidence at the second detention hearing and produced the documents which he said showed that Rycon Logistics Ltd was the user of vehicle 2. The Appellant gave an explanation why the driver's comments did not support his argument. The PO determined, at paragraph 48 of his final decision, that the documentary evidence which had been produced six months after the detention, appeared to be "pasted", copied and annotated by hand. There was no date for vehicle 2's ferry crossing and there was an unexplained spelling error, which he found to undermine the credibility of the documentation. On the basis of the evidence presented to him, including the Appellant's explanations, the PO was not satisfied on the balance of probabilities that the user of vehicle 2 at the point of the DVA stop was Rycon Logistics Ltd as claimed by the Appellant.

89. Unfortunately, the Appellant disagrees with these findings but there is no error of law identifiable in the way that the PO dealt with this point. The PO's role at the detention hearing was to weigh up the evidence before him and make a determination. That is what he did. He was perfectly entitled not to accept the credibility of the documentation produced by the Appellant at the detention hearing provided he gave adequate reasons for this finding. Again, that is what he did. It cannot be said that there was a procedural irregularity in the manner that this finding was made.

90. Having made a finding as to the user of vehicle 2, the PO went on to consider whether that user held a valid licence. As already discussed at paragraph 83 of this decision, the licence required is one issued under the 2010 Act. However, if vehicle 2 was found to be undertaking a lawful cabotage journey in accordance with paragraph 23 of the Schedule to the Exemption Regulations (including compliance with Regulation (EU) No.1072/2009), then the user's EU Community Licence may have sufficed to secure its return as it would therefore be exempt from the need to hold an operator's licence issued under the 2010 Act.

91. It was agreed that RS Spedition Ltd, who had been found to be the user of vehicle 2, did not hold a licence under the 2010 Act. With consideration of the cabotage exemption, the PO found that the documentation required to be produced to satisfy the cabotage requirements in Regulation (EU) No.1072/2009, was not made immediately available to the DVA Enforcement Officer when requested. In particular, there was no evidence of an incoming laden journey to satisfy Article 8(2) of Regulation (EU) No.1072/2009. As the requirements of lawful cabotage were not found to be met, vehicle 2 was required to operate under a 2010 Act operator's licence, and there was none in place. This was not contested. The PO determined that in the absence of a Northern Ireland operator's licence for vehicle 2, ground (a) could not be satisfied (paragraph 42(j) of the final decision). We find that the PO was not "plainly wrong" to refuse the return of vehicle 2 as ground 4(3)(a) was not made out.

Grounds for return under Regulation 4(3)(b)

92. The Appellant also relied upon Regulation 4(3)(b) of the 2012 Regulations, which provides grounds for return if "*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*." One obvious way to avoid operating in contravention of s.1 of the 2010 Act, in the absence of a 2010 Act issued operator's licence, is where an exemption applies, and this is precisely what the PO went on to contemplate in his final decision.

93. In respect of vehicle 1 and trailer 1, the PO asked himself whether the Appellant had satisfied him, on the balance of probabilities, that the cabotage activity which was claimed to be in progress at the point of detention, was being carried out in accordance with the legislation. The PO reminded himself of paragraph 23 of the Exemption Regulations which makes provision for lawful cabotage, the provisions within Regulation (EC) No.1072/2009, and of the Trade and Cooperation Agreement relating to road haulage and cabotage operations. He concluded, that he was "*not satisfied on the balance of probabilities that there is compelling evidence that this was a haulage company operating legitimately from within Bulgaria*" (paragraph 32 of his final decision) stating that "*it is not established there*", and consequently, it was a breach of s.1 of the 2010 Act to drive a goods vehicle on Northern Ireland roads for hire or reward without an operator's licence issued under that provision. He continued at paragraph 34, "…*to satisfy the exemption detailed in paragraph 23, the cabotage must be carried out on a 'temporary basis'. I conclude the lack of legitimate and on-going associations with Bulgaria, beyond obtaining the licence there, and a single visit but operations much more closely linked with Northern Ireland is such that I am unable to conclude that the use in Northern Ireland was temporary."* He determined that that operation carried out by Rycon Logistics

on the day of detention was not lawful cabotage thus the claim for return of vehicle 1 and trailer 1 under Regulation 4(3)(b) could not succeed.

94. In respect of vehicle 2, the PO considered the cabotage exemption rules once again. Having determined that RS Spedition Ltd was the user of vehicle 2, and this operator was no longer a holder of an EU Community Licence, any purported cabotage arrangement would have been in breach of s.1 of the 2010 Act, according to the decision of the PO (paragraph 47 of the final decision). In addition, the driver had failed to produce CMR (consignment) documentation in relation to the incoming international haulage journey immediately prior to the cabotage commencing within the UK/NI. The documentary evidence of a laden journey which was produced at the second detention hearing, was found by the PO to lack credibility. The documentation should have been produced on the day of the stop – not six months afterwards – to comply with the legislation. Bearing in mind the totality of the evidence before him, the PO determined that this was not a valid Bulgarian operation, which was not established there. He was unable to conclude that the use of vehicle 2 in Northern Ireland was temporary, and therefore the cabotage exemption did not apply. That in turn meant that the use of vehicle 2 at the point of detention was in breach of the 2010 Act and could not authorise the return vehicle 2 under Regulation 4(3)(b).

95. We have already determined that the PO's finding that the cabotage exemption did not apply to vehicle 1 and trailer 1 by virtue of the fact that they were not in the UK on "a temporary basis" was not "plainly wrong" (paragraphs 47-53 of this decision). Equally, we determined that the PO was not "plainly wrong" to find that vehicle 2 was not undertaking lawful cabotage at the point of detention due to the lack of proof of an incoming laden journey as required by Article 8(2) of Regulation (EC) No.1072/2009 (paragraph 75 of this decision). Very simply, in the absence of a lawful cabotage exemption, both vehicles and trailer were being used to transport goods for hire or reward on Northern Ireland roads in contravention of s.1 of the 2010 Act. As a result, the PO was not at liberty to return them under the Regulation 4(3)(b) ground.

Grounds for return under Regulation 4(3)(c)

Vehicle 1 and trailer 1

96. Regulation 4(3)(c) provides grounds for return if "*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*." This ground assists a vehicle owner who is not the operator and is therefore remote from the actual day to day use of the vehicle, for example a leasing company who owns the vehicle but is not aware of what the lessee does with it. In evidence at the detention hearing, the Appellant maintained that there had

been no breach of the rules as vehicle 1 and trailer 1 were conducting lawful cabotage when stopped on Dargan Road, Belfast, by the DVA Enforcement Officer. The PO found that at the point of detention, vehicle 1 and trailer 1 were being driven by the Appellant for the user, Rycon Logistics Ltd, the company for which the Appellant is the sole director. The PO concluded that the evidence before him did not satisfy him that the Appellant did not know that the company "for which he is the guiding mind" was breaching the 2010 Act (paragraphs 39(e) and (f) of the final decision). Consequently, ground (c) was not made out for the return of vehicle 1 and trailer 1

97. Mr McNamee, reiterating grounds of appeal (iv)(e) at the appeal hearing, asserted that this finding was "inconceivable" as the Appellant cannot prove his lack of knowledge. We have some sympathy with this submission as it is difficult to prove a negative. Indeed, the Upper Tribunal, at Paragraph 110 of *Nolan* agreed:

> "[A] claim for the return of a vehicle under regulation 10(4)(c) of the 2001 Regulations, as amended, requires the owner to prove: "*that, 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".* The underlining is ours to stress that the owner has the difficult task of proving a negative. Judging by previous appeals on this point Traffic Commissioners also find it difficult to explain why an owner has failed to prove that they did not know. For these, or other reasons, the approach most commonly adopted when this issue arises is to consider whether the evidence demonstrates that the owner must have known of the use in contravention of [s.1 of the 2010 Act], because, of course, in that situation the claim must fail. This seems to be a sensible and practical approach, provided it does not lead to confusion over the burden of proof or to the suggestion that it means that someone has to prove that the owner did in fact know of the use in contravention of [s.1]."

98. As stated at paragraph 7 of *Societe Generale Ltd* [2013] UKUT 0423 (AAC), *"[E]very claim for the return of a vehicle in which reliance in placed on Regulation 4(3)(c) of the [2001 Regulations as amended] raises a deceptively simple question, which the Traffic Commissioner must answer. The question is this: "Has the claimant satisfied me that he, she or it probably did not know that the vehicle was being or had been used in contravention of [s.1 of the 2010 Act]?"* At paragraph 9 the Upper Tribunal provided a starting point:

> *"[T]raffic Commissioners should start the process of answering the question posed at paragraph 7 by asking: "Is there any evidence before me on the basis of which I could be satisfied that the claimant probably*

did not know that the vehicle was being or had been used in contravention of s. 2 of the 1995 Act?"

If there is no such evidence to support the conclusion that the claimant did not know, there is no need for the Traffic Commissioner to go further and consider whether the claimant had actual, imputed or constructive knowledge, the latter requiring additional findings of dishonesty (paragraph 10 of *Societe Generale Ltd*).

99. The Appellant gave oral evidence that he did not know there was a breach of the legislation but went no further than this. The PO found, at paragraph 39(f) of his final decision, that "*there is no evidence before me on the basis of which I could be satisfied that [the Appellant] probably did not know that the vehicle was being or had been used in contravention of s.1 of the 2010 Act*." In our view, the answer provided by the claimant as to the extent of his, her or its knowledge, boils down to a matter of credibility. Evidence to support the reasons given by the claimant as to why he, she or it did not know that the Act was being breached, may assist the question of credibility although it is not determinative. A decision maker, in considering whether the evidence demonstrates that the owner must have known of the use in contravention, may be assisted by the external circumstances as they are found to be and consider if this persuades him or her that what the Appellant says about the extent of their knowledge, internally, is correct.

100. The facts found by the PO, in relation to the external circumstances in this case, were that the Appellant was driving vehicle 1 and trailer 1, he was aware of the journeys he was making in vehicle 1 as he was driving the planned routes and managing the loads, and he was the sole Director of the company using the vehicle. The PO also found that vehicle 1 and trailer 1 were not in the UK (including Northern Ireland) on a temporary basis, thus failing to fully satisfy the cabotage requirements under paragraph 23 of the Schedule to the Exemption Regulations. The Appellant disagrees that the circumstances found by the PO were the circumstances in existence at the time, but as discussed earlier, these were findings the PO was entitled to make on the evidence before him. It naturally follows the PO's findings, that the Appellant, as the "guiding mind" of the company using the vehicle, must have known that the vehicle and trailer were not in the UK on a temporary basis. It also follows, that in such circumstances, he must have known that the 2010 Act was being contravened in conducting a journey which could not have been found to be legitimate cabotage under the legislation, because the vehicle was not in Northern Ireland on a temporary basis. Lack of knowledge of the law, if that were to be suggested, is no defence. The PO's determination that Regulation 4(3)(c) was not satisfied in respect of vehicle 1 and trailer 1, cannot be said to be "plainly wrong".

Vehicle 2

101. In respect of vehicle 2, the PO had determined that the owner was Rycon Logistics Ltd, of which the Appellant was the sole director. He also determined that *"… [v]ehicle 2 was being driven by [the driver] although it is evident that [the Appellant] was fully aware of the journey being carried out by him, and that the vehicles were encountered in Belfast within 5 minutes of each other. [The Appellant] had purchased the vehicle for the use of his transport company and the responsibility lay with him to ensure that the regulations covering operations were complied with*" (paragraph 53a of the final decision). The Appellant simply maintained in oral evidence that he was not aware there had been a breach of the legislation. He accepted that the required documentation had not been provided to the driver, could not therefore be produced by the driver upon the stop, and that he had not correctly briefed the driver.

102. The PO found, at paragraph 53(e) of the final decision, that there was no evidence before him *"… on the basis of which [he] could be satisfied that the [Appellant] probably did not know that the vehicle was being or had been used in contravention of s. 2 of the 1995 Act?"* He went no further than this, in line with the guidance in *Societe Generale Ltd*. He found that Regulation 4(3)(c) was not made out and vehicle 2 could not be returned to the Appellant.

103. The facts found by the PO, in relation to the external circumstances in this case, were that the Appellant was aware of the journey being made by vehicle 2 and was aware that the required documentation was not in the vehicle for production if requested. The PO also found that vehicle 2 was not conducting lawful cabotage. The PO was entitled to make these findings on the basis of the evidence before him throughout the two detention hearings. The PO's determination that Regulation 4(3)(c) was not satisfied in respect of vehicle 2 is not "plainly wrong".

Conclusion

104. Overall, we find that the Presiding Officer was entitled to determine, on the evidence before him, that the detention of the two vehicles and trailer was lawful as they were goods vehicles being used on a road within Northern Ireland, for the carriage of goods for hire or reward in the absence of a valid operator's licence issued under the 2010 Act. He found that the cabotage journeys claimed by the Appellant were not being conducted lawfully and therefore there was no exemption from the requirement to hold a 2010 Act operator's licence available to him. On this basis, given that no ground for return was established for both vehicles and trailer, the PO was entitled to refuse the application for return and to order them to be disposed of.

105. We find that the decision made by the Presiding Officer in this case, was reached lawfully and fairly and was not “plainly wrong”. This appeal is dismissed. The vehicles and trailer must be disposed of accordingly.

106. We apologise for the delay in giving this decision, partly due to the parties having been given the opportunity to provide post hearing written submissions, but also due to the complexity of this case. We thank the parties for their patience while witing for this decision.

Ms L. Joanne Smith
Judge of the Upper Tribunal

Mr D Rawsthorn
Member of the Upper Tribunal

Mr R Fry
Member of the Upper Tribunal

(Authorised for issue on)
29 May 2025