Appeal No. T/2018/10
NCN: [2018] UKUT 353 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)

ON APPEAL from the DECISION of THE TRAFFIC COMMISISONER FOR THE NORTH WEST OF ENGLAND (Mr Simon Evans)
Dated: 6 February 2018

Before:

Mr E. Mitchell	**Judge of the Upper Tribunal**
Mr M. Farmer	**Member of the Upper Tribunal**
Mr A Guest	**Member of the Upper Tribunal**

Appellant:

Mr C Ingram (t/a T.I.P. Skips)

Attendances:

Mr J Backhouse, solicitor, of Backhouse Jones Solicitors for Mr Ingram

Heard at:	Breams Buildings, Field House, Central London
Date of hearing:	9 May 2018
Date of decision:	14 October 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal is **DISMISSED**. The Upper Tribunal decides that the decision of Mr Commissioner Evans, taken on 6 February 2018, contained neither error of fact nor law.

The Upper Tribunal **DIRECTS** that this decision takes effect at 23.59 hours on the 28th day after this decision is issued (not counting the day of issue). At that time and date, Mr Ingram's application for a restricted licence under the Goods Vehicles (Licensing of Operators) Act 1995 will be finally disposed within the meaning of section 24(9) of that Act. Concurrently, the interim restricted licence granted to Mr Ingram by Mr Commissioner Evans with effect from 16 February 2017 will terminate by operation of section 24(6) of the 1995 Act. This direction is made in order to enable Mr Ingram to close down his transport operation in an orderly manner.

SUBJECT MATTER:-

Application for restricted operator's licence

CASES REFERRED TO:-

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695, [2011] RTR 13;

Subesh & ors v. Secretary of State for the Home Department [2004] EWCA Civ 56, [2004] INLR 417;

Assicurzioni Generali SpA v. Arab Insurance Group [2002] EWCA Civ 1642, [2003] 1 WLR 577.

REASONS FOR DECISION

Background

1 Mr Ingram once held a restricted operator's licence granted to him under the Goods Vehicles (Licensing of Operators) Act 1995 ("1995 Act"). The licence related to Mr Ingram's operation of a skip hire business. According to the Traffic Commissioner's

reasons for his decision in the present case, that licence expired on 31 October 2016 because Mr Ingram failed to renew it.

2. On 16 December 2016, Mr Ingram applied to the Traffic Commissioner for a new restricted operator's licence. The application sought authority to operate six vehicles. With effect from 16 February 2017, the Traffic Commissioner for the North West of England, Mr Simon Evans (hereafter "the Commissioner"), granted an interim licence pending determination of the application for a restricted licence. The interim licence authorised the use of only four vehicles. Upon granting the interim licence, the Commissioner required Mr Ingram to give an undertaking to arrange, within four months, an independent audit of his operation.

3. Mr Ingram subsequently amended his application so that it sought authority to operate four, rather than six, vehicles.

4. Following a public inquiry (PI) held on 23 January 2018, the Commissioner decided on 6 February 2018 to refuse Mr Ingram's licence. At the PI, Mr Ingram was represented by Backhouse Jones Solicitors. Rather than set out the Commissioner's extensive reasons for his decision, they are dealt with below insofar as they are challenged on this appeal.

5. Mr Ingram now appeals to the Upper Tribunal against the Traffic Commissioner's decision.

The Commissioner's decision

The relevant evidence

6. The Commissioner summarised Mr Ingram's operation's regulatory history, which he described as "lengthy":

- 31 October 2003: curtailment of restricted licence to authorise use of three, rather than six vehicles, following PI findings of breach of regulatory prohibitions and licence undertakings;

- 22 October 2004: formal warning recorded by a traffic commissioner, following PI findings of breach of regulatory prohibitions and maintenance shortcomings;

- 28 March 2011: PI called due to apparently unsatisfactory maintenance inspection but vacated following Mr Ingram's agreement to a curtailment of his restricted licence to authorise use of four vehicles;

- 28 June 2013: curtailment of restricted licence to authorise use of three vehicles following PI findings of breach of regulatory prohibitions and an unsatisfactory maintenance inspection.

7. As described in the Commissioner's reasons, the evidence given at the PI connected with Mr Ingram's failure to renew his previous restricted licence included:

- Mr Ingram accepted that he failed to renew in time. He did not believe he received a reminder but "did not offer this as an excuse". Mr Ingram said a Mr Holgate, who had been "managing the licence", failed to note its expiry. Mr Ingram also said that the operation was a "joint enterprise" between himself and Mr Holgate; people assumed Mr Holgate part-owned the business;

- Mr Ingram said he "never let go" of supervising Mr Holgate but also gave evidence that "I got to the point where I never needed to check up on him";

- According to Mr Ingram, Mr Holgate was dismissed in December 2017 although the Commissioner noted the absence of documentary confirmation;

- Mr Ingram said Mr Holgate failed to discharge his duties to ensure that: vehicles were "up to scratch"; preventative checks were carried out; and paperwork kept up to date. Mr Holgate was once given a written warning; the Commissioner again noted the absence of documentary confirmation;

- Mr Ingram said he first learnt that his licence had expired when informed by the Office of the Traffic Commissioner, by letter "in December 2016";

- Mr Ingram accepted that, between expiry of his former licence on 31 October 2016 and "December 2016", he operated without a licence. But he only used one vehicle because trade was quiet;

- Mr Ingram conceded that he still operated a large goods vehicle after receiving the December 2016 notification that his licence had expired. However, he only

collected skips that were already hired out. He did not take on any new business. The only explanation Mr Ingram could give for this admitted unlawful use was "business need".

8. The evidence given at the PI, or referred to in the Commissioner's reasons, in relation to Mr Ingram's interim licence, and the independent audits he undertook to arrange, included:

- Mr Ingram did not, found the Commissioner, comply in a timely fashion with his undertaking to arrange an independent audit. The audit report was submitted late. It was also "wholly inadequate" extending to only a single page, which covered few of the relevant areas, and was produced by a maintenance contractor unqualified to carry out audits;

- A subsequent independent audit was carried out by a properly-qualified individual, Mr Graham Robinson of RTC, but not until 9 September 2017. Mr Robinson concluded that "the systems were in place but require more time spending on the management systems";

- Mr Robinson provided another report dated 19 January 2018, following a further audit, which stated that inspection frequencies had been met since the last audit and the systems were satisfactory. This was despite no roller brake testing having been carried out, between 9 September 2017 and the date of the PI, and continued use of outdated inspection records;

- Mr Ingram said that, at some point in 2017, maintenance was brought in-house, to be done by himself and Mr Holgate. He could not explain why he failed to notify this change to the Office of the Traffic Commissioner; he said he did not know this was required. Mr Ingram accepted that neither he nor Mr Holgate were qualified mechanics;

- Mr Ingram undertook to carry out quarterly roller brake testing in the future. He accepted testing deficiencies were not addressed promptly enough after the September 2017 audit but "expressed readiness to obtain further audits and to share the outcomes with the Traffic Commissioner".

9. The evidence given at the PI, or referred to in the Commissioner's reasons, about use of a vehicle when Mr Ingram's operation was unlicensed included:

- Mr Robinson's September 2017 audit report noted that the odometer for one of Mr Ingram's vehicles ("the vehicle") indicated that, between 6 June 2016 and 8 March 2017, it travelled 8,268 km. For part of this period (31 October 2016 to 16 February 2017), Mr Ingram held no licence. The report said Mr Robinson was told that the vehicle was used for non-commercial purposes and was on loan to another company. At the PI a Mr Giles, described as the operation's current transport administrator, gave evidence that the loan explanation was given by Mr Holgate. Mr Robinson said the same at the PI;

- Mr Ingram gave evidence that the vehicle was "the spare wagon" used around his farm, and was typically used by Mr Holgate. However, he later conceded that this would not account for the mileage recorded between June 2016 and March 2017. Subsequently, Mr Ingram further conceded that the vehicle was not the 'spare wagon';

- The Commissioner's reasons note that Mr Ingram's explanation differed from that recorded in Mr Robinson's report. Mr Ingram later conceded: "to be honest, I was trying to squeeze out of the trouble, as I didn't know the answer to the 8,000 km" and "sort of" made something up. Mr Ingram accepted, in the words of the Commissioner, that "the unaccounted for mileage could only have been the result of vehicle movements through the T.I.P. Skips business but with a very small amount of mileage at the farm". Mr Ingram also gave evidence that he did not tell lies and "claimed that someone else had suggested to him that the vehicle had been loaned". It seems that Mr Ingram's final position was that he simply could not explain the mileage;

- Mr Ingram went on to give evidence that Mr Holgate must have used the vehicle and destroyed the records. According to the Commissioner's reasons, Mr Ingram could not explain why Mr Holgate should have done this nor why his own checks failed to spot such unauthorised use;

- "he further admitted that as part of his backtracking, he had created the VOR [vehicle off-road] documentation [for the vehicle] but only at the point at which it had been pointed out to him that there was unaccounted mileage".

The Commissioner's findings and conclusions

10. The Commissioner made adverse findings about Mr Ingram's capability and character:

- Mr Ingram's evidence was "unimpressive, confused and contradictory" and "he appeared to be creating new explanations as he went along, to seek to explain away questions he was unable to answer". There was "a clear attempt to mislead me as to the true extent of his role in the skip hire business";

- Despite Mr Ingram's lengthy industry experience, he lacked knowledge and understanding of the basic requirements of a licence holder. His failure to renew his previous licence was due to basic administrative failures, inadequate commitment to compliance and a failure to supervise and manage the staff member (Mr Holgate) now blamed for the operator's shortcomings.

11. In relation to certain other individuals who featured in the case, the Commissioner found:

- The allegations about Mr Holgate were not substantiated. They were pure speculation and carried no evidential weight;

- Mr Giles' evidence was credible and accepted by the Commissioner.

12. In relation to the significant issue concerning use of the vehicle, the Commissioner found:

- Mr Ingram's operation used a vehicle unlawfully between 31 October 2016 and 16 February 2017. From December 2016, Mr Ingram knowingly operated unlawfully and "thereby placed the needs of his business before the requirement for compliance with the law";

- Mr Ingram prepared the vehicle's VOR record for June 2016 to March 2017 after the event without exercising care as to its accuracy. This was done to "[obscure] the absence of preventative maintenance records" for a period during which the vehicle undertook significant mileage. During this period, it was more likely than not that the vehicle was not formally maintained in accordance with licence undertakings given by Mr Ingram;

- Mr Ingram "lied when supporting the submission that the vehicle had been loaned". His dissembling at the PI forfeited any credit he might have been given for initially "admitting the falsehood";

- Mr Ingram either supplied the untrue loan explanation or acquiesced in it by allowing it to be included within an audit report to be put before a PI when he did not know or believe it to be true;

- Mr Ingram's contention that he could not in fact explain the vehicle's unaccounted mileage was "deeply concerning" and supported the Commissioner's view that Mr Ingram had abrogated his responsibilities as licence holder.

13. Other adverse findings made by the Commissioner included:

- When the business was operating under an interim licence, Mr Ingram failed to notify a material change to maintenance arrangements, which involved substituting a qualified external contractor for in-house staff without any formal qualifications;

- Mr Ingram's application for a restricted licence was materially false, concerning arrangements for management of drivers' hours and tachograph compliance. This was likely to be due to Mr Ingram's administrative shortcomings and inadequate commitment to compliance;

- Mr Ingram failed effectively to act on the recommendations of the September 2017 audit, which to some degree negated the credit that might otherwise have been given for obtaining advice and guidance;

14. The Commissioner accepted that certain positive factors went to Mr Ingram's credit:

- The operation had the necessary financial standing;

- The appointment of Mr Giles as 'transport administrator' was encouraging and he had the potential to become a competent administrator. But this was not a wholly positive factor. Mr Giles was still developing his expertise and, in so doing, could not rely on Mr Ingram for informed advice and guidance.

Furthermore, errors in the application for a restricted licence would have been made by Mr Giles;

- Mr Ingram openly accepted that, for a time, the operation was carried on unlawfully;

- Mr Ingram obtained professional legal and transport advice and demonstrated intent to arrange further independent audits. Both he and Mr Giles had also completed an RHA operator's licence awareness course;

- Compliance had improved between the first and second Robinson audits;

- There were no adverse regulatory findings for the period when Mr Ingram was operating under an interim licence.

15. Before drawing the strings of his reasoning together, the Commissioner directed himself:

(a) in *Asprey Trucks Ltd* [2010] UKUT 367 (AAC), the Upper Tribunal held, in the Commissioner's words: "those who are allowed entry [to the haulage] industry must satisfy the Traffic Commissioner of their good repute or fitness". In addressing those matters, a commissioner should "be awake to what the public, other operators, and customers and competitors alike would expect of those permitted to join the industry that they will not blemish or undermine its good name, or abuse the privileges it bestows"; and

(b) the question for determination in Mr Ingram's case was whether he met the test of fitness.

16. The Commissioner decided that Mr Ingram was unfit to hold a restricted licence. He could not be trusted to run a compliant operation in the light of: his poor regulatory history; his deliberate operation of vehicles without a licence ("a most serious matter"); his failure to be straightforward at the PI, which included an admission that he was prepared to lie or mislead to 'get out of a squeeze'; and his creation of records after the event.

17. The Commissioner asked himself whether the appointment of Mr Giles meant "compliance could be materially different" but answered in the negative given "his

considerable inexperience in what would remain [Mr Ingram's] sole trader business". The Commissioner refused Mr Ingram's application for a restricted licence.

18. The Commissioner's decision was given on 6 February 2018 but he directed that his refusal would take effect in 28 days to allow for an orderly closedown of the business. Ordinarily, a commissioner's refusal to grant a licence causes a linked interim licence to terminate. However, Mr Ingram's appeal to the Upper Tribunal maintained the interim licence pending determination of the appeal (see sections 24(6) and 24(9) of the 1995 Act). This explains the direction given above, after our decision, Mr Backhouse having submitted at the hearing that, if Mr Ingram lost his appeal, he should have 28 days to wind down his business.

Grounds of appeal

19. Mr Ingram's written notice of appeal, drafted by Backhouse Jones Solicitors, advances the following arguments.

Ground 1 – failure to give appropriate weight to / credit for positive features of Mr Ingram's case

20. Mr Ingram accepts he has an adverse regulatory history. However, the Commissioner failed to consider positive steps taken after a PI in 2013 such as a "marked improvement in the driver defect reporting system". These improvements went directly to the question whether future compliance could be expected but did not feature in the Commissioner's decision-making.

21. Mr Robinson carried out two compliance audits. The Commissioner failed to give "appropriate weight and credit" to improvements made between the two audit reports, in particular the view expressed in the second report that "the operator does have systems in place to comply with the requirements of the operator's licence and they are operating satisfactorily".

22. The Commissioner failed to "consider the wider picture of compliance" and did not give "appropriate weight" to Mr Ingram's compliance with undertakings carried forward from his former licence. These factors played a part in the Commissioner wrongly concluding that Mr Ingram's operation would not be regulatory-compliant in the future.

23. The Commissioner paid no regard to the difficulties caused by Mr Holgate whose role, until his dismissal in December 2017, was to ensure the operation's regulatory compliance.

Ground 2 – unreasonable interpretation of evidence

24. Mr Ingram concedes that he could not explain the absence of records for the vehicle during the period when his operation was unlicensed. Two witnesses, one of whom the Commissioner expressly found to be credible, gave evidence that Mr Holgate came up with the explanation that the vehicle was 'off road'. Despite that, the Commissioner found that Mr Ingram was the source of the 'off road' explanation and gave no reason for refusing to accept the evidence of a credible witness;

25. The Commissioner's finding that Mr Ingram attempted to mislead him about his role in the operation was unsupported by the evidence. The Commissioner misunderstood the evidence about Mr Holgate's role in the operation.

26. The Commissioner's treatment of the evidence was inconsistent. Mr Ingram's tachograph evidence was described as false but the same evidence given by a Mr Giles was considered simply an error.

27. The Commissioner's negative view of in-house maintenance by unqualified fitters failed to take into account that, in 2013, in-house fitters were used when "there is no adverse history".

28. The Commissioner's reasons often refer to the absence of corroboration for Mr Ingram's evidence. In the absence of contrary evidence, Mr Ingram's evidence should have been treated as the "best evidence". Further, the Commissioner failed to request supporting evidence during the public inquiry. To cast doubt on Mr Ingram's oral evidence was therefore "wholly unfair".

29. Mr Ingram's written notice of appeal further argued that the Commissioner's approach was legally flawed because he treated Mr Ingram as an applicant rather than an interim licence holder. At the hearing, however, Mr Backhouse formally withdrew this ground. A sensible decision.

Mr Ingram's case as developed at the hearing

30. At the hearing before the Upper Tribunal, Mr Backhouse, for Mr Ingram, argued:

(a) In 2016, Mr Ingram did not receive the usual letter warning him that his restricted licence was due to expire. In response to our questions, Mr Backhouse conceded that the Commissioner made no finding of fact to this effect but he argued it should be inferred from the absence of any notification letter in the Commissioner's bundle;

(b) When informed that his licence had expired, Mr Ingram promptly applied for an extension and, when refused, applied immediately for a new restricted licence. The Commissioner ought to have given him credit for this;

(c) Mr Backhouse reiterated that Mr Ingram accepted his operation was unlicensed between October 2016 and February 2017 but his evidence to the public inquiry was that, during this period, he took on new business and only recovered skips that had previously been hired out;

(d) The 'heart of the case' was the Commissioner's finding that Mr Ingram could not be trusted to comply with regulatory requirements. However, the evidence principally relied on by the Commissioner – apparent extensive use of a vehicle during the unlicensed period – was supplied by Mr Ingram. In other words, he supplied the evidence that harmed his case. At the PI, Mr Ingram gave honest evidence that he could not explain the vehicle's apparent use, which was not weighed in the balance as a positive feature. Mr Ingram did not try to make up an explanation at the public inquiry. This undermined the commissioner's finding of dishonesty;

(e) Mr Ingram accepts that records indicate the vehicle travelled some 8,000 km during a period for much of which his operation was unlicensed. However, it had proven impossible at the PI to establish relevant facts about the vehicle's use. Mr Backhouse argued the most plausible explanation was an incorrectly completed VOR notice. However, he confirmed, in response to our questions that this was not relied on before the Commissioner. We can reject this argument at this stage in our reasons. Clearly, an explanation that was not relied on before the Commissioner, and appears to be Mr Backhouse's own take on the evidence, cannot show any error of fact or law in the Commissioner's decision;

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(f) The Commissioner wrongly refused to accept the 'Holgate explanation' for the operation's regulatory shortcomings because it was not corroborated. There is no requirement in law for corroboration in PI proceedings before a traffic commissioner;

(g) at the hearing Mr Backhouse also developed a legal argument which featured little in Mr Ingram's notice of appeal. If it is necessary to do so, we amend the grounds of appeal to include this and any other new arguments advanced at the hearing. Mr Backhouse argues as follows:

- the licence criteria for restricted, as opposed to standard, licences are significantly different. The restricted licence criteria, in section 13B of the 1995 Act, require an individual to be "fit" to hold a licence. The criteria for restricted licences include no general requirement for good repute nor any general test of good conduct. These are features of the standard licence regime only;

- Under section 13B of the 1995 Act, an applicant for a restricted licence may only be found unfit on one of two grounds, namely certain convictions and activities. The Commissioner approached Mr Ingram's application as if it were an application for a standard licence requiring satisfaction of good repute and conduct requirements. In asking whether Mr Ingram could be trusted in the future to comply with regulatory requirements, the commissioner was applying, in substance, a test of good repute. The commissioner misdirected himself in law by assimilating fitness with to good repute.

Legal Framework

31. Section 2(1) of the 1995 Act generally prohibits any person from using a goods vehicle on a road for the carriage of goods for hire or reward, or for or in connection with any business carried on by the person, other than under an operator's licence. Contravention of section 2(1) is an offence (section 2(5)). Licences may be either standard or restricted (section 3).

32. An operator's licence may provide that no motor vehicle, other than one specified in the licence, is authorised to be used under the licence (section 5(2)(c) of the 1995 Act). Operator's licences are also required to specify a maximum number of motor vehicles (section 6(1)(a)).

33. On an application for a restricted licence, a traffic commissioner must consider whether the requirements of sections 13B and 13C of the 1995 Act are satisfied

(section 13(2)). If any requirements are determined not to be satisfied, the commissioner must refuse the application (section 13(5)).

34. Section 13B of the 1995 Act provides that an applicant is unfit to hold a restricted operator's licence by reason of "any activities or convictions of which particulars may be required to be given under section 8(4) by virtue of paragraph 1(e) or (f) of Schedule 2" to the 1995 Act. To explain further:

- Section 8(4) requires an applicant, if required, to give to the commissioner any information specified in paragraph 1 of Schedule 2 to the Act;

- Paragraph 1(e) refers to "particulars of any relevant activities carried on, at any time before the making of the application, by any relevant person". Paragraph 2 defines "relevant person" to include the applicant and paragraph 3 defines "relevant activities" as:

  > "(a) activities in carrying on any trade or business in the course of which vehicles of any description are operated;
  >
  > (b) activities as a person employed for the purposes of any such trade or business; or
  >
  > (c) activities as a director of a company carrying on any such trade or business";

- Paragraph 1(f) refers to notifiable convictions which have occurred during the five years preceding the licence application.

35. Section 13C of the 1995 Act requires satisfactory arrangements to have been made for a range of matters such as maintenance of vehicles.

36. Criteria for granting standard and restricted licences differ. Unique requirements for standard licences include:

- The applicant must be of "good repute" (section 13A(2)(b) of the 1995 Act). In determining whether an individual is of 'good repute', a commissioner may have regard to any matter but must always have regard to any relevant convictions and any other information which appears to the commissioner to relate to an individual's fitness to hold a licence (Schedule 3(1) to the 1995 Act);

- The applicant must be "professionally competent", which means either holding a specified qualification or having a transport manager who does (section 13A(2)(d) and Schedule 3(8));

- The applicant must have designated a transport manager who is of good repute and professionally competent (section 13A(3)).

37. It may be seen that, while 'unfitness' requires an application for a restricted licence to be refused, for applicants for standard licences, 'fitness' is an aspect of good repute.

38. Section 46(1) of the 1995 Act authorises regulations to prescribe fees to be payable for the continuation in force of operators' licences. The relevant regulations are the Goods Vehicles (Licensing of Operators) (Fees) Regulations 1995. Section 46(4) provides:

> "If any fee or instalment of a fee in respect of the continuation in force of an operator's licence is not duly paid by the prescribed time, the licence terminates at that time."

Why this appeal does not succeed

39. In Mr Backhouse's opening oral submission this was essentially a simple case. If so, that did not prevent him from identifying multiple grounds of appeal. His client cannot complain that his legal representative failed creatively to explore every possible avenue of challenge.

Whether the Commissioner treated Mr Ingram's application as if it were an application for a standard licence

40. We shall deal first with the ground given most prominence at the hearing namely whether the Commissioner, directly or indirectly, mistakenly applied the statutory criteria for standard licences rather than restricted licences.

41. As we have observed, fitness-type questions arise under both the restricted and standard licence provisions. Sections 13(5) and 13B of the 1995 Act prohibit the grant of a restricted licence to a person who is unfit, within the meaning of the Act. In the

case of applicants for standard licences, "fitness" is an aspect of the "good repute" requirement.

42. We do not accept that this experienced Commissioner's reference to *Asprey Trucks Ltd* shows that he mistakenly applied the standard licence criteria. It is true that *Asprey Trucks Ltd* involved an applicant for a standard licence. However, the Commissioner's summary of the decision was to the effect that that entrants to the industry need to satisfy a traffic commissioner of their good repute or fitness. The Commissioner did not proceed on the basis that Mr Ingram needed to establish good repute. Immediately after the *Asprey Trucks Ltd* reference, the Commissioner said he needed to determine whether Mr Ingram met the test of fitness. Next, the reasons state that the Commissioner found Mr Ingram to be unfit. We do not consider that the Commissioner's sequential references to 'fitness' and being 'unfit' show that he required Mr Ingram to demonstrate his fitness, instead of asking whether Mr Ingram was unfit. The important aspect of this part of the Commissioner's reasons is the clear finding that Mr Ingram was unfit, which was the correct test.

43. We also reject the argument put at the hearing that some or all of the factors that weighed against Mr Ingram's application were, by their nature, matters going to good repute rather than fitness. The 1995 Act does not draw a watertight distinction between good repute and fitness-type considerations. As we have pointed out above, an integral part of the concept of good repute, as it applies to applicants for standard licences, is an individual's fitness to hold a licence. The Commissioner did not err in law or fact by relying on his finding that Mr Ingram could not be trusted to run a compliant operation in assessing whether he was unfit to hold a restricted operator's licence. How, we ask rhetorically, could any sensible regulatory system turn its back on regulatory trustworthiness when addressing whether an applicant is unfit?

44. If Mr Backhouse argues that "activities", as referred to in section 13B, is limited to activities that have been the subject of a traffic commissioner's request for information, we reject the argument. In our judgment, the purpose of section 13B is to limit the scope of the matters that may be relied on in determining whether an applicant is unfit. That follows from the statutory wording – "activities…of which particulars may be required to be given under section 8(4))". Had the statutory intention been to limit relevant activities to those in respect of which particulars had in fact been required, the phrase 'may be required' would not have been used.

45. We are not entirely certain whether Mr Backhouse argues that Schedule 2 to the 1995 Act's definition of "relevant activities" prevents post-application activities from being taken into account. But, even if we assume that argument is correct, in our judgment the most significant adverse findings made against Mr Ingram concerned either matters that occurred before, or straddled, his application for a restricted licence or Mr Ingram's attempts at the PI to explain those matters.

Whether the Commissioner failed to give appropriate weight to / credit for positive features of Mr Ingram's case

46. We do not accept that the Commissioner overlooked Mr Ingram's operation's full post-2013 regulatory history. The Commissioner is not required to refer to each and every item of evidence. We have before us a set of Commissioner's reasons that are, in our view, of a high standard. We are satisfied that the Commissioner evaluated Mr Ingram's application conscientiously and thoroughly. It is true that the Commissioner's reasons focus on the more recent regulatory past but there was nothing wrong with that. In fact, it was in our judgment almost inevitable since the significant concerns in this case arose from more recent events;

47. We do not see how the Upper Tribunal could allow an appeal on the ground that a traffic commissioner failed to give 'appropriate' weight and credit to a particular matter. The Court of Appeal in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, [2011] RTR 13 addressed the nature of the Transport Tribunal's (now Upper Tribunal's) appellate jurisdiction. The Court applied *Subesh & ors v. Secretary of State for the Home Department* [2004] EWCA Civ 56, [2004] INLR 417 where Woolf LJ held:

> "44…The first instance decision is taken to be correct until the contrary is shown…An appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might *prefer* a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category."

48. The Court of Appeal also addressed 'primary facts' and findings built on primary facts. The Court referred to Clarke LJ's judgment in *Assicurzioni Generali SpA v. Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577:

> "16. Some conclusions of fact are…not conclusions of primary fact…They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

49. Mr Backhouse does not argue that the Commissioner overlooked improvements made between the two audit reports nor could he since this factor was included within the Commissioner's list of 'positives'. It seems to us that Mr Backhouse, in effect, asks the Upper Tribunal to re-determine the weight to be given to the improvements. In the light of the case law just referred to, we decline to do so. For the same reason, the argument that the Commissioner failed to give "appropriate weight" to the operation's compliance with licence undertakings does not succeed;

50. We do not accept that the Commissioner's trustworthiness finding was flawed because he failed to consider 'the wider picture of compliance'. The Commissioner did consider the extent to which Mr Ingram's operation was, and had been, compliant with regulatory requirements. In any event, the Commissioner's adverse trustworthiness finding was informed, to a significant degree, by matters that were not technical regulatory matters, albeit they sprang from Mr Ingram's haulage activities, including knowing unlawful use of the vehicle, evasiveness and a willingness to lie or mislead.

Whether the Commissioner unreasonably interpreted the evidence

51. It is argued that the Commissioner had no regard to the difficulties caused by Mr Holgate, an individual who has hovered over this case almost like Banquo's ghost. This argument assumes that which Mr Ingram sought to prove before the Commissioner. In other words, this argument posits a finding of fact that was not made by the Commissioner. In our judgment, the Commissioner was entitled to be sceptical about Mr Ingram's attempts to implicate Mr Holgate in the operation's regulatory failings. But, in any event, the Commissioner's reasons, on our reading, show he considered that, if Mr Ingram claims about Mr Holgate were correct, Mr

Ingram, as the licence holder, was in any event at fault for failing effectively to supervise him.

52. Mr Backhouse argues that the Commissioner erred in finding that Mr Ingram was the source of the 'off road' explanation for the vehicle's use while, at the same time, finding that other witnesses who gave similar evidence were credible. There was, says Mr Backhouse, a necessary inconsistency. We struggled to follow this argument since the Commissioner's reasons state, quite clearly, that Mr Ingram conceded that he prepared the VOR notice after the event. This was not, therefore, a finding of fact based on inferences from other findings of fact. The Commissioner simply accepted Mr Ingram's evidence. This argument does not succeed;

53. In our judgment, the Commissioner's finding that Mr Ingram sought to mislead him about his role in the operation was properly supported by evidence. Paragraph 32 of the Commissioner's reasons describes evidence given by Mr Ingram about his and Mr Holgate's respective roles, which the Commissioner found inconsistent. For example, Mr Ingram's asserted that he both "never let go" of supervising Mr Holgate but also "got to the point where I never needed to check up on him". The Commissioner erred in neither fact nor law in finding that Mr Ingram attempted to mislead him about his role in the operation;

54. It is argued that the Commissioner's evaluation of the evidence was inconsistent. Mr Ingram's tachograph evidence was described as false yet the same evidence given by Mr Giles was considered simply an error. Even if we accept that the Commissioner used pejorative language to describe Mr Ingram's evidence, but not Mr Giles', so as to impute dishonesty, we reject this argument.

55. It is quite possible, in relation to a joint activity, for different people to be driven by different motivations. In our judgment, this is what the Commissioner decided. The Commissioner evaluated Mr Ingram's evidence in the round. His assessment of any one piece of the evidence was inevitably informed by findings that other evidence given by Mr Ingram was false or misleading. By contrast, Mr Giles made a generally favourable impression but what he lacked was experience. In our determination, there was no necessary inconsistency between, on the one hand, a finding that in submitting his application for a restricted licence Mr Ingram provided "false" evidence and, on the other hand, a finding that Mr Giles made a mistake. Reading the reasons as a whole, it is in our view clear that the Commissioner found that Mr Ingram, with his many years of haulage experience, provided 'false' tachograph-related evidence but

the inexperienced Mr Giles made a mistake. This finding was tainted by neither error of law nor fact;

The remaining arguments

56. Mr Backhouse argues that the Commissioner found, or assumed, that in-house maintenance would not meet regulatory requirements. A careful reading of the Commissioner's reasons shows that he made no such finding/s. At this stage in his reasoning, the Commissioner was concerned with a failure to *notify* a change of maintenance contractor. The Commissioner made no finding that maintenance had to be carried out by external contractors or qualified in-house staff. The Commissioner was, in our view, simply noting that switching from qualified to unqualified maintenance personnel was a matter that might, not would, cast doubt on the effectiveness of maintenance arrangements. In effect, the Commissioner said this was a type of change that it was particularly important to notify. That approach cannot be faulted. It stands to reason that, in general, use of unqualified maintenance personnel, rather than qualified, carries a greater risk of unsatisfactory maintenance of vehicles. It is for this reason that the Commissioner stressed the importance of complying with the requirement to notify a change of maintenance contractor. This argument does not succeed.

57. The Commissioner did not misdirect himself in law in that he required Mr Ingram's evidence to be corroborated. The Commissioner simply assessed his evidence in the round. The fact that some evidence was not supported by other evidence, whether oral or documentary, was simply one factor weighed in the balance. In our judgment, it is quite clear that the Commissioner did not apply some kind of corroboration rule;

58. We agree with the Commissioner that the question whether Mr Ingram received a notice of impending termination of his previous restricted licence was really beside the point. If the Office of the Traffic Commissioner does tend to issue such notices, it is perfectly entitled to do so. But, if such a practice went wrong in any particular case, it would not detract from a licence holder's obligation to keep track of licence expiry dates. It is the operator's business after all.

59. We do not agree that the Commissioner erred by failing to give credit for Mr Ingram's prompt application for an extension of his (expired) restricted licence and, when that was refused, his prompt application for an interim licence. These were

simply obvious actions that any operator who wanted to stay in business would take. On any reasonable view, this was a neutral consideration;

60. Mr Backhouse's points about the limited nature of Mr Ingram's business during the period of unlicensed operation (i.e. he broke the law but only a little bit) are an attempt to argue the facts afresh, rather than an argument that the Commissioner made an error of fact or law.

61. In arguing that Mr Ingram supplied the key piece of evidence that harmed his case, we have to assume that Mr Backhouse refers to the means by which the transport consultant Mr Robinson became aware that the vehicle had covered some 8,000 km. Mr Backhouse cannot sensibly argue that Mr Ingram should be given credit for supplying the Commissioner with Mr Robinson's audit report. The undertaking to secure an independent audit was not imposed for the sake of it. The Commissioner wanted to see the contents of the subsequent audit report.

62. Mr Backhouse has not identified evidence that shows, or might show, that Mr Ingram made an unprompted disclosure to Mr Robinson about the vehicle's use and recorded mileage. But we do ourselves note that the Commissioner's reasons are admittedly obscure on this point. They state that "a discrepancy had…been drawn to the reader's attention". Who is the 'reader'? Is it Mr Robinson? We must therefore see what Mr Robinson's September 2017 audit report said.

63. The September 2017 report says "examination of the records for the three vehicles specified in the licence revealed that…the third vehicle…had a VOR notice in the file showing the vehicle off the road between 6.6.16 and 8.3.17 however there was 8268 km travelled between the odometer readings entered on the VOR notice. I was informed the vehicle was used for non-commercial purposes and on loan to another company" (p.53 of the bundle). Taking an objective view, the report in our opinion strongly suggests that Mr Robinson discovered the mileage and then someone tried to explain it to him. Mr Robinson's January 2018 report adds nothing of relevance.

64. Turning now to the transcript of the PI, we see that Mr Ingram told the Commissioner "Graham [Robinson] pointed out to me the 8,000 kilometres, I've thought "I've not done that"". Where, then, is the evidence to show that Mr Ingram volunteered that the vehicle had travelled some 8,000 km during the relevant period? There is none. We do not see how the Commissioner could have found that Mr Ingram volunteered the information that the vehicle had travelled some 8,000

mysterious kilometres. There was no possible credit available on the basis that Mr Ingram volunteered information about the vehicle's mileage;

65. Now, the argument that that the Commissioner erred by failing to recognise the honesty of Mr Ingram's evidence that he could not explain the vehicle's mileage.

66. To answer a question by saying 'I don't know' is not necessarily an indication of truth. If a person does know the answer, saying 'I don't know' is an untruth. Mr Backhouse argues that the Commissioner erred by failing to give Mr Ingram credit for honestly admitting that he could not explain how the vehicle had covered 8,000 km. But it is Mr Backhouse who asserts that 'I don't know' / 'I have no explanation' was an honest answer. The Commissioner found that Mr Ingram either (a) did know the answer so that 'I don't know' was untrue, or (b) did not know the answer, in which case he had failed properly to supervise use of the vehicles specified on the licence.

67. In our judgment, the Commissioner's approach was entirely sound. He did not err in law or fact by limiting the options to two – untruthful evidence or failure of supervision – and deciding that, wherever lay the truth, an adverse finding would be made. We reject the argument that Mr Ingram's inability to supply an explanation for the vehicle's use (which seems to have been his final stance) was a matter that the Commissioner had to put in the credit side of the regulatory balance.

In conclusion

68. This appeal is dismissed but, as explained above, we allow Mr Ingram one month in which to wind down his business.

69. Finally, we must apologise for the delay in determining this appeal. After the hearing, the judge suffered a fracture and was away from duty for a period of time. We do hope the delay in giving this decision has not exacerbated the worries that Mr Ingram must have been experiencing about the future of his business.

Mr E Mitchell, Judge of the Upper Tribunal,
14 October 2018