



NCN: [2018] UKUT 39 (AAC)

Appeal No. NT/2017/42

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated 22 June 2017

Before:

**Kenneth Mullan
Mr George Inch
Mr Stuart James**

**Judge of the Upper Tribunal
Member of the Upper Tribunal
Member of the Upper Tribunal**

Appellant:

Mr Mark Lyons

First Named Respondent:

Driver & Vehicle Agency

Second Named Respondent:

Department for Infrastructure

Attendances:

For the Appellant:

The Appellant was in attendance and was represented by Mr Potter BL instructed by James Strawbridge Solicitors

For the First Named Respondent:

The First Named Respondent was represented by Mr Anderson BL instructed by Departmental Solicitors Office

For the Second Named Respondent:

The Second Named Respondent was represented by Ms Jones BL instructed by the Departmental Solicitors Office

Heard at:

Tribunal Hearing Centre, Royal Courts of Justice, Belfast.

Date of hearing:

30 November 2017

Date of decision:

2 February 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

SUBJECT MATTER:- Impounding; application to adduce fresh evidence

CASES REFERRED TO:- NT/2017/26 Derek Lyons; T/2015/36 Martin Oliver Partnership; T/2011/60 Nolan Transport v VOSA & Secretary of State for Transport; NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695;

REASONS FOR DECISION

Background

1. This is an appeal from the decision of the Head of the Transport Regulation Unit, ("Head of the TRU") to refuse the Appellant's application for the return of vehicle L70 NSH and trailer ID NI/064926/05.
2. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-
 - (i) On 18 February 2017 a Scania articulated vehicle VRM L70 NSH in combination with a Fruehauf trailer ID NI/064926/05 was being driven by Mr Dean Lyons and was carrying animal feed.
 - (ii) Enforcement Officers from the Driver and Vehicle Agency (DVA) followed the vehicle into the Apple Green Service station. Subsequently the vehicle was detained on the grounds that the DVA suspected that the vehicle was being used by Mr Mark Lyons t/a Lyons Haulage who does not hold a valid goods vehicle operator's licence. At the time of the detention the vehicle was specified on the licence held by Mr David Neal ON1113362.
 - (iii) Formal notice of the detention was published in the Belfast Gazette on 21 April 2017. This notice required any person who had a claim to the vehicle to forward that claim in writing to the TRU on or before 19 May 2017.
 - (iv) On 11 May 2017 an application for the return of the vehicle and trailer combination was received from Mr Mark Lyons t/a as Lyons. The grounds on which a return of the vehicle was sought were that:
 - (a) At the time the vehicle was detained, the person using the vehicle held a valid operator's licence (whether or not authorising the use of the vehicle). The stated licence number was ON1113362 which is the licence held by Mr David Neal.
 - (b) At the time the vehicle was detained it was not being, or had not been, used in contravention of section 1 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010, ('the 2010 Act').

- (v) The Appellant submitted a number of documents in support of the application for the return of the vehicle and trailer combination.
- (vi) In his application for the return of the vehicle and trailer combination, the Appellant had requested a hearing. The Head of the TRU determined that a hearing should be held.
- (vii) In advance of the hearing, the Appellant submitted a number of documents and materials. DVA provided an outline of the case and a bundle of tabulated papers. All evidence and materials provided pre-hearing were disclosed to all parties.
- (viii) The hearing took place on 8 June 2017. The appellant was present and was represented by Mr Strawbridge Solicitor. Three Officers from the DVA were present. The officers from the DVA gave evidence as did the Appellant. Mr Strawbridge made submissions on behalf of the Appellant.
- (ix) At the oral hearing the Head of the TRU afforded the DVA an opportunity to obtain and forward clarification in respect of an issue which had arisen. Subsequently the DVA supplied a statement from an Enforcement Officer of the Northern Ireland Environment Agency (NIEA) which was shared with Mr Strawbridge. In correspondence dated 15 June 2017 Mr Strawbridge made further submissions in connection with this statement.
- (x) Mr Strawbridge provided additional documents following the hearing.
- (xi) On 22 June 2017 the Head of the TRU made the decision to refuse the Appellant's application for the return of vehicle L70 NSH and trailer ID NI/064926/05. The decision was notified to the appellant on the same date.

The findings and reasoning of the Head of the TRU

3. In the decision of 22 June 2017, the Head of the TRU made the following findings and conclusions:

‘I have had regard to these contexts as I consider, in turn, the two grounds on which (the Appellant) has based his application for the return of the vehicle.

Ground one – that at the time the vehicle was detained the person using the vehicle held a valid operator's licence (whether or not authorising the use of the vehicle) stating that the licence number was ON1113362 which is currently held by David Ernest Neal t/a David Neal International.

The vehicle and trailer in combination was over 3.5T, was laden and was being used on a road for hire and reward. Therefore its use requires the user of the vehicle at that time to hold a valid operator's licence. There is no doubt that L70NSH was specified on Mr Neal's licence at the time of the detention on 18 February 2017 however specification on a licence in itself is not indicative of who was using the vehicle. Neither (the Appellant) nor Lyons Haulage holds a good vehicle operator's licence.

The applicant has claimed that the vehicle was being used by Mr Neal. In support of this he has provided a copy of the licence which he must have obtained from Mr Neal, a copy of a leasing arrangement with Mr Neal and his verbal submissions. I note that he did not seek to have Mr Neal attend to give evidence or provide any other documentation in support of his application. The applicant claims the driver, his son Dean Lyons, also worked for Mr Neal, but similarly did not seek to ask his son to provide evidence of his employment with Mr Neal or to attend to give evidence.

I therefore remind myself of the definition of the user of the vehicle.

For the purposes of this Act, the driver of a vehicle, if it belongs to the driver or is in the driver's possession under an agreement for hire, hire purchase or loan, and in any other case the person whose servant or agent the driver is, shall be deemed to be the person using the vehicle.

The vehicle was not owned by nor was it leased or on hire to Mr Dean Lyons, the driver. In any event Mr Dean Lyons does not hold an operator's licence. Nor is it claimed Mr Dean Lyons was the user. Therefore in this case the user is defined as the person whose servant or agent the driver is. In other words who employs/contract/instructs/controls the driver.

There is no contention that vehicle L70 NSH did not pick up feed on the morning of 18 February 2017, nor that Mr Dean Lyons was not driving the vehicle when it was encountered by DVA. No evidence of his employment by Mr Neal has been provided. An email from TJ Booth claims to have instructed David Neal International to lift the load however no evidence of instruction on that date has been supplied nor has any evidence been provided in respect of instructions to Mr Dean Lyons by Mr David Neal. Evidence from West Twin Silos shows this vehicle lifted the load and the haulier was 'Lyons' on both the day in question and on other days when that vehicle was used. I do not accept Mr Lyons submission that the use of the livery 'Lyons' on the top of the cab is used by West Twin Silos to determine the haulier as if that were to be the case many hauliers would be called 'Globetrotter' [*a maker's mark regularly on cab headboards*]. I agree that West Twin Silos may not be privy to the hire arrangements however it remains that no evidence has been provided to indicate that David Neal International did lift the feed on any of these days or that the vehicle was being used in connection with Mr Neal's business and not 'Lyons'.

West Twin Silos does not record who the driver was. I turn then to look at other background evidence to determine if there was evidence which, by extension, would support that Mr Dean Lyons was likely to be employed by Mr David Neal. Documents relating to

Fermanagh and Omagh District Council and Lyons Haulage for which payment was made to Lyons Haulage were presented. These link Mr Dean Lyons to Lyons Haulage on 9 February 2017 and indeed while driving vehicle L70 NSH the driver has stated the carrier to be Lyons. The applicant submits that he subcontracted this work to another individual (not Mr David Neal). No evidence of those subcontracting arrangements have been provided nor that this individual did indeed carry out the work. If however I were to assume this to be true then Mr Dean Lyons would need to have been instructed by that individual, particularly in this scenario as ROC licences were involved. Therefore Mr Dean Lyons would be his servant/agent and not Mr Neal's. For all these reasons I therefore place more weight on the documentary evidence indicating links between Mr Dean Lyons and Lyons Haulage than on the applicant's verbal submissions to the contrary. Employment of Mr Dean Lyons by Mr Neal has not been satisfied.

(The Appellant) introduced and has sought to rely on a lease which purports to be for the use of the tractor unit. Given the discrepancies on dates set out above (the Appellant) was given the opportunity to provide further evidence as to the validity of the lease. Documentation in the form of a printout from a SAGE system allegedly used by (the Appellant) and an e-banking download purporting to relate to his bank account were submitted. I noted that bank statements had been produced for the purchase of the trailer and that a letter from the bank was produced for the purchase of the tractor unit. I asked (the Appellant) to provide the relevant and corresponding bank statement in respect of the lease but none was provided.

The documentation relating to the payment for the first month's lease of L70 NSH does not satisfy the Department that there has been a payment made and received for the hire of the tractor unit for the following reasons:

The SAGE documentation does provide any detail that relates to Lyons Haulage or that a payment transaction has taken place.

The e-download from (the Appellant's) account has not been authenticated by the bank as demonstrating that this is a valid transaction that has resulted in a credit of the required amount into (the Appellant's) account. Rather it refers to an 'entry date' with the status of 'completed'. It is not clear what 'completed' refers to.

(The Appellant) has applied for operators' licences in the past and has attended Public Inquiries in his own right and accompanying others and would therefore be well aware of the need to present clear and unambiguous evidence regarding financial transactions.

There is a pattern of events relating to the vehicle during the course

of the alleged lease arrangements the description of which along with the above do not support the contention that Mr David Neal had sole possession of the vehicle of the time it was specified on his licence and so was unlikely to be true.

For the reasons and explanations above the applicant and owner of the vehicle at the time has failed to satisfy to the civil standard of proof that the vehicle was lawfully used by Mr David Ernest Neal t/a David Neal International at the time when it was specified on his licence.

Ground 1 is not made out.

Ground 2 – that at the time the vehicle was detained it was not being, or had not been, used in contravention of section 1 of the 2010 Act:

In summary Section 1 states that a person shall not use a vehicle over 3.5T on a road for hire and reward or in connection with trade or business carried out by that person except under a licence issued under the 2010 Act. In clarifying the issue I have broken the legislation into two component parts. To make out this ground the burden of proof is on (the Appellant) to satisfy the Department that either, in the first part, the vehicle did not require a licence at the time of the detention or that, in the second part, the user of the vehicle held a valid licence when being so 'used'.

Despite his assertions that he knew nothing or could not comment on the use of the vehicle during the time it was allegedly leased to Mr Neal the applicant sought to rely on ground 2 for the return of the vehicle. Use of this ground inherently asserts that the applicant did have knowledge of the use of the vehicle (*that it was not being, or had not been used, in contravention of Section 1 of the 2010 Act*).

Given the circumstances set out above at the time of detention the applicant has not satisfied the Department in the first part that the vehicle did not require a licence at the time of detention and therefore was not being used in contravention of Section 1 of the Act.

It follows that as the vehicle was being used it required a licence to have been issued under the Act to the person using the vehicle at that time. I therefore asked myself the question, 'has the applicant satisfied the Department that the person who was using the vehicle held a valid licence?' This matter, that it is asserted that Mr Neal was using the vehicle in connection with his business has been addressed above under Ground 1 in that it is not been shown to the civil standard of proof that Mr Neil was the 'user'. There is no other evidence to indicate that anyone else holding a valid operator's

licence was the user of the vehicle at the time it follows that the applicant has failed to satisfy the Department, in the second part, that the vehicle was not being or had been used in contravention of the 2010 Act.

Ground 2 is not made out.'

The appeal to the Upper Tribunal

4. On 30 June 2017 a notice of appeal was received in the office of the Administrative Appeals Chamber of the Upper Tribunal. The following grounds of appeal were set out:

'Evidence and Burden of Proof'

1. It is accepted that the standard proof in this case is that of the balance of probabilities i.e. the civil standard. The burden of proof in these cases primarily resides with the Appellant.
2. The DVA's case is that the Appellant does not hold an Operator's Licence and the subject vehicle was being used by the Appellant on and/or before 18 February 2017 for the delivery of goods in contravention of the Operator's Regulations.
3. The Appellant prior to the hearing of 8 June 2017 produced prima facie evidence that he was not the user of the subject vehicle on or before 18 February 2017. The subject vehicle was hired by Mr David Neal who was the user/controller and also the holder of and Operator's Licence for the vehicle.
4. Essentially the DVA challenges the bone fides/truthfulness of the Appellant and his evidence. The DVA relied upon their own evidence to challenge the veracity of the Appellant's case.
5. The Appellant believes that on the basis of the case being made by the DVA, the burden of proof should have passed to them.
6. In light of the DVA case, the TC has not considered the standard burden of proof applicable to the evidence relied upon by the DVA.
7. The TC has relied upon specific evidence adduced by the DVA. Specifically, documentary material obtained by the DVA from an organisation called West Twin Silos. See Paragraphs 20, 24, 26 and in the 'Findings of Fact' section of the TC's decision.
8. The DVA submitted the material relating to West Twin Silos without supporting statements of evidence or oral evidence from this organisation.
9. A similar finding on the issue of P&O Ferries was reached by the TC. The TC appears to have accepted the case made on this issue by the DVA.
10. In contrast the TC reached her findings on issues pertaining to the Waste Carrier Licence which crucially included supporting statements from an Officer in Northern Ireland Environment Agency.

11. The Appellant asserts the TC did not apply a consistent evidential standard for the material adduced and relied upon by the DVA on three central issues.

DVA Interview of Mr David Neal prior to 8 June 2017

1. It is common case between the parties that Mr Neal holds a valid Operator's Licence for vehicle L70 NSH.
2. Mr Neal was interviewed at length under caution by the DVA on 28 March 2017 as part of their investigations.
3. It is the Appellant's case that the answers provided by Mr Neal as part of that interview will be supportive of the Appellant's case. Those answers will also address issues raised by the TC in her judgement. The transcript of this interview is under the control and knowledge of the DVA.
4. This interview is relevant to matters in dispute between the parties.
5. Prior to 8 June hearing the DVA opted to disclose only limited material from the interview of Mr Neal, material which was not on the face of it favourable to the Appellant. No other material was disclosed.
6. The DVA declined to provide the entire transcript, citing at the 8 June hearing Mr Neal may be the subject of a criminal investigation and prosecution. DVA did not specify the nature of any potential criminal investigation or charge that Mr Neal may be the subject of.
7. The Appellant asserts that the DVA has a duty to present all relevant evidence that it has acquired during the course of its investigations. Disclosure should be made of relevant evidence regardless if it is or is not supportive of their decision to detain. The DVA's role in these proceedings is akin to duties of Police/Public Prosecuting authorities in a criminal investigation.
8. The Appellant should be afforded an opportunity to have Mr Neal's evidence disclosed by way of full interview transcript.

Admission of Fresh Evidence

1. If Mr Neal's interview transcript is not to be disclosed to the Appellant should be permitted to introduce fresh evidence from Mr Neal.
2. TC in her judgement notes that the Appellant failed to provide evidence from Mr Neal dealing with invoices and other documentary material. It is the Appellant's case that this information can be provided by Mr Neal (either through interview disclosure or) as evidence before this court.
3. The TC did not accept the banking information pertaining to the transaction between Mr Neal and Mr Lyons under their hire agreement as satisfactory. Notwithstanding the Appellant feels this information was sufficient, the Appellant is prepared to provide additional supplementary banking material.
4. On the issue of the Waste Carrier Licence the Appellant should be afforded an opportunity to provide further rebuttal evidence on Waste Transport Delivery Note and his contractual relationship

with the subcontractor. The Appellant made clear this additional witness was prepared to give evidence in court.

5. The Appellant wishes to adduce fresh evidence from his son Mr Dean Lyons.
6. The Appellant asserts that in light of the foregoing the proposed fresh evidence meets the test for admission before this court.'

The oral hearing of the appeal

5. The oral hearing of the appeal was listed for 30 November 2017. The appellant was present and was represented by Mr Potter. In advance of the oral hearing, Mr Potter had provided a Skeleton Argument. In the Skeleton Argument, Mr Potter made the following submissions in connection with the burden and standard of proof:

'4. The appellant accepts that he assumes the burden of showing that the decision of the TRU is wrong. Secondly, the appellant accepts that he must show that, "the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view."

5. In accepting those burdens the appellant invites the Upper Tribunal to carefully consider the process of reasoning of the TRU, the admissibility of evidence by the TRU, the weight given to certain pieces of evidence, and the relevant law, in particular, on the admissibility of evidence.

6.

- (a) The appellant admits that the burden of proof lay upon him, and admits that the standard of proof is on the balance of probabilities, the civil standard, not beyond a reasonable doubt, the criminal standard.

- (b) At pages 3 and 4 of the transcript the TRU stated,
"It's an adversarial hearing. Normally, our inquiries are inquisitorial, but it's adversarial today in that I am presiding on behalf of the Department over a dispute between DVA and Mr. Lyons. Both sides will have every opportunity to put their case in the best way they feel. As I say, it's not inquisitorial, however, Mr. Strawbridge, there will be an opportunity to ask questions of DVA and DVA will have the opportunity to ask questions of yourself here and your client. I also reserve the right to ask questions and seek clarification. However, my role here is to remain neutral and ensure the fairness of the proceedings. I would advise that the hearing is only to deal with matters and circumstances relating to the detention of the vehicle and for the application for the return of it. It's not a forum to deal with other unrelated matters."

- (c) Reference to the content of the transcript demonstrates that at times the proceedings are dealt with on an adversarial basis, and at others inquisitorial. What is clear is that the TRU controlled the manner in which the

hearing took place, and was responsible for the admissibility of evidence, and made decisions on the weight to be given to the evidence.

(d) It is submitted that the TRU had ample evidence to find in the appellant's favour on the balance of probabilities if the TRU had properly considered, and given appropriate weight to, the documentation submitted by the appellant, and the appellant's evidence, in particular;

(i) The DVA did not challenge the appellant's ownership of the vehicle. The appellant provided an invoice and evidence of funds transfer in respect of the purchase of the vehicle. The appellant also provided documentary evidence to link the invoice for the trailer to the ID number recorded by the Department and a bank statement showing a debit from the account in the appropriate amount at the relevant time. At paragraph 53 of the TRU decision it is recorded that the appellant had satisfied the Department that if the application for return succeeds the vehicle and trailer in combination can be returned to Mr. Lyons as the owner.

(ii) The TRU received documentation establishing beyond doubt that David Neal held a valid operator licence for the vehicle.

(iii) The TRU received a signed and dated hire agreement between the appellant and David Neal bearing the date of the 24th January 2017.

(iv) The TRU received documentary evidence in the form of an invoice demonstrating payments made by David Neal to the appellant in respect of his use of the vehicle under the signed hire agreement.

(e) In coming to its decision the TRU should have given appropriate weight to this documentary evidence, none of which was suggested as being false. Had the TRU done so the TRU ought to have been satisfied on the balance of probabilities that David Neal held a valid operator's licence and that he was the user of the vehicle. If the TRU had any concern about the role of David Neal then, as part of its' inquisitorial role, acknowledged by the TRU, the TRU should have required disclosure of David Neal's interview, and provided the appellant with an opportunity to call David Neal (see below).'

6. In the Skeleton Argument, Mr Potter submitted that the Head of the TRU had arrived at a decision against the Appellant after admitting, and giving undue weight, to certain circumstantial evidence which he specified.

7. Mr Potter then referred to the manner in which the Head of the TRU had addressed the evidence pertaining to the interview conducted with Mr David Neal. He submitted that:
 - ‘10. This position becomes even more unfair by the manner in which David Neal’s interview was dealt with (see submissions below), and the failure to provide the appellant with the opportunity to call oral testimony from David Neal, and Dean Lyons, to address what is the real issue in the case, whether David Neal was the user of the vehicle on the date in question, he being in possession of a valid operator’s licence.
 11. The TRU clearly acknowledged that this material was effectively circumstantial, referring to it as “background material”, but nevertheless proceeded to admit it, and give inappropriate weight to it when reaching the material decision in this matter.
 12. The DVA submitted, and the TRU admitted in evidence, a discreet part of an interview they carried out with David Neal. The selection of a portion of the interview was objected to (page 58 of the transcript).
 13. Whilst the TRU observed that the DVA declined to place in evidence a copy of the full interview with Mr. Neal, and that the TRU placed no weight on any reference that the DVA made to that interview, it is submitted that the manner in which the interview was dealt with was flawed ...’
8. Mr Potter submitted that any relevant evidence such as the interview with Mr David Neal should have been disclosed to the Appellant prior to the hearing; that the practice in the civil or criminal courts is for prior disclosure; that the Appellant had never seen the transcript of the interview and there may have been aspects of it which were of assistance to the Appellant; as the Head of the TRU had referred to part of the interview then the whole of the interview should have been admitted; that the relevant authorities including *Stroud v Stroud* ([1963] 1 WLR 1080) and Phipson on Evidence were supportive of full disclosure. In summary, Mr Potter submitted that from both a procedural and evidential perspective the issue of the interview with Mr David Neal had not been dealt with correctly by the Head of the TRU to the Appellant’s detriment.
9. In light of that, Mr Potter made the following submissions on the admission of fresh evidence:
 - ‘14. In the circumstances the appellant submits that he should be entitled to have sight of the full interview with David Neal, and subsequently have the opportunity to call Mr. Neal to give evidence at a suitable date and time. Further, given the admission of wide ranging circumstantial material, most of which was considered to be relevant by the TRU, the appellant ought to be given the opportunity to call other additional evidence at an appropriate date and time, including from Dean Lyons, and on the issue of the waste carrier licence, and concerning supplementary banking material.
 15. Of course, it is accepted that these submissions require the Upper Tribunal to consider whether it would be proper to admit fresh evidence.

16. The Upper Tribunal is referred to the case of *W. Martin Oliver Partnership –v- DVSA* 2006 UKUT 0070, at paragraph 45 ...,
17. Referring to the conditions;
 - (i) The interview documentation, and the oral evidence of Mr. Neal, Dean Lyons, the supplementary banking material, and documents and evidence concerning the waste carrier licence, would be admissible.
 - (ii) The key starting point is the failure to disclose the interview of David Neal. The DVA would not disclose this and consequently it could not be obtained by the appellant. The TRU, with knowledge of the existence of the interview, and that part of it had been referred to in evidence, did not direct disclosure of the interview when, it is submitted, the relevant procedures, and authorities, would have required disclosure of it. It is submitted that it would have been essential to see the content of the interview first before considering what other evidence would need to be called. The appellant had a reasonable expectation that the interview would be disclosed, and a material part of it would have been helpful to the appellant's case, otherwise the DVA would have relied on the totality of it. It may have contained evidence probative in the appellant's favour on the issue of user of the vehicle. Further, the appellant did not call David Neal in the first place as he had a reasonable expectation that the documents referred to above, specifically, documents concerning his ownership of the vehicle, the operator's licence belonging to David Neal, the hire agreement between the appellant and David Neal, and documents concerning payment for use of the vehicle, would have been sufficient to establish the appellant's case on the balance of probabilities.
 - (iii) It is likely that the evidence would have had an important influence on the result of the case.
 - (iv) It is submitted that such evidence would have been credible.'
10. At the oral hearing Mr Potter expanded on the submissions which he had made in his Skeleton Argument.
11. Immediately prior to the oral hearing before us, Mr Anderson provided a Skeleton Argument on behalf of the First Named Respondent. He submitted that the Head of the TRU was entitled to hear evidence which had been placed before her at the hearing; both parties were at liberty to seek to present any evidence it wished to the Head of the TRU at the hearing; the Head of the TRU heard the evidence placed before it at the oral hearing; the Head of the TRU evaluated the entirety of the evidence presented at the hearing in a fair and balanced manner; the Head of the TRU properly determined the weight to place upon each element of evidence presented at the hearing; the Head of the TRU reached findings of fact after hearing from the parties; the Head of the TRU applied the law in a reasoned and proportionate manner; he TRU reached

the decision properly on the balance of probabilities; and that the Head of the TRU applied the correct test in arriving at her decision.

12. In connection with the evidence pertaining to the interview with Mr David Neal Mr Anderson submitted that it could not be said that the Head of the TRU had improperly relied on the interview or parts of the interview to the prejudice or detriment of the Appellant. On the contrary it was clear that the Head of the TRU had placed no weight whatsoever on the contents of the interview and it was disregarded for the purposes of the decision. Mr Anderson submitted that the application to admit the entirety of the interview with Mr David Neal, and other additional materials and witnesses, as fresh evidence, failed the test for the admission of fresh evidence set out in paragraph 45 of the decision of the Upper Tribunal in T/2015/36 W. Martin Oliver Partnership. Mr Anderson submitted that the Appellant could, with reasonable diligence, have obtained all of the evidence for use at the hearing. Mr Anderson noted the contents of the notice of hearing which was sent to the Appellant and that he had the services of a legal representative before, at and after the hearing. At the oral hearing of the appeal before us, Mr Anderson expanded on the submissions which he had made in his Skeleton Argument.
13. Well in advance of the oral hearing before us, Miss Jones provided a Skeleton Argument on behalf of the Second Named Respondent. The submissions made in the Skeleton Argument were in response to the grounds of appeal which had been set out in the original notice of appeal which had been forwarded to the Upper Tribunal. As was noted above, by the time of the oral hearing before us, the issues advanced on behalf of the Appellant had narrowed. To that extent, therefore, not all of the submissions advanced by Miss Jones in her Skeleton Argument remained relevant. To her credit, however, at the oral hearing she provided detailed oral submissions on the narrowed issues.

The appendix to this decision

14. In the Appendix to this decision, we have set out a summary of the authorities and legislative provisions relating to (i) the proper approach on appeal to the Upper Tribunal in this jurisdiction (ii) the legislative provisions relating to detention and return of vehicles and (iii) the proper approach to fresh evidence before the Upper Tribunal.

Analysis

15. We are of the view that the decision of the Head of the TRU lacks a degree of coherence. The disjointedness derives from the approach which the Head of the TRU took to the application by the Appellant for the return of the vehicle and trailer combination. The proper approach to such applications has been set out by the Upper Tribunal (and the former Transport Tribunal) in a number of its decisions. In connection with the approach to be taken under the Northern Ireland legislative provisions, the decision of the Upper Tribunal in *NT/2017/26 Derek Lyons*.
16. In the instant case, while we are satisfied that the Head of the TRU was aware of the relevant legislative provisions, the approach which she undertook was not to undertake a systematic and structured application of those provisions, but, rather, to focus on the grounds which had been advanced on behalf of the Appellant and narrow her analysis to those grounds. The approach taken by the Head of the TRU was, to that extent not that defined and advocated in the relevant authorities.

17. We have also noted that the Head of the TRU had thought it to be appropriate to widen her analysis from the key issues of lawful detention, ownership and the grounds on which an application might be made for return. In paragraph 56 of her decision, the Head of the TRU notes:

‘In turning to consider the grounds for return of the vehicle I have had regard to the weight that should be placed on **other matters**, not all of which are specific to the day of detention but which have arisen during the proceedings.’

18. The emphasis here is our own. We agree that the head of the TRU was obliged to address matters which had arisen during the course of the hearing, or became evident to her from the other documentary evidence which was before her. The analysis of the relevance of peripheral matters has to be undertaken in the context of the substantive issues which were before her. We return below to how these ‘other matters’ were addressed by the Head of the TRU.
19. We have also observed that there are other more minor aspects of the decision which are problematic. For example, in the section of the decision headed ‘Findings of Fact’ there are statements which are clearly not findings of fact.
20. None of the above means, however, that the decision of the Head of the TRU is ‘plainly wrong’.
21. We begin with the assertion by Mr Potter concerning the manner in which the Head of the TRU conducted the hearing. Mr Potter noted that the transcript of the hearing includes references to the proceedings being ‘adversarial’ and at other times ‘inquisitorial’. Mr Potter then submitted that it was the Head of the TRU who ‘... controlled the manner in which the hearing took place, and was responsible for the admissibility of evidence, and made decisions on the weight to be given to the evidence.’ There is nothing, in our view, which is problematic about the Head of the TRU having responsibility for the conduct of the proceedings. The transcript of the hearing records the Head of the TRU stating that her role ‘... is to remain neutral and ensure the fairness of the proceedings.’ In addition, the transcript makes it clear that the Head of the TRU had emphasised that all of the parties to the proceedings would be given the opportunity to adduce evidence and make submissions. In that respect she noted that the Appellant’s representative Mr Strawbridge had brought additional materials to the hearing which would be considered but which ought to have been disclosed to the DVA in advance.
22. We have noted that there is nothing complicated about Mr Potter’s statement that there was no challenge by the DVA to the Appellant’s ownership of the vehicle and that Mr David Neal held a valid goods vehicle operator’s licence. That was accepted by the Head of the TRU.
23. We turn to the Mr Potter’s submission that the Head of the TRU relied on and failed to give sufficient weight to evidence which was (i) adduced by the Appellant in support of his assertion that he had a leasing agreement with Mr David Neal and (ii) other circumstantial evidence.
24. We remind ourselves that that the assessment of evidence is for the Head of the TRU. Within that, the assessment of credibility is also a matter for the Head of the TRU. We were not present at the Public Inquiry. We are reminded that

the former Transport Tribunal and the Upper Tribunal (AAC) have frequently stressed that Traffic Commissioners (and, by extension, the Head of the TRU) have the advantage of seeing and hearing the witnesses, with the result that it is only in the clearest cases that the Tribunal or the AAC will differ from the Head of the TRU when it comes to assessing the evidence which is before her including the credibility of a witness. In addition providing that there is evidence to support a particular conclusion it is for the Head of the TRU to decide what weight, if any, to give to that evidence. Grounds of appeal, which state expressly or by implication that the Head of the TRU gave too much or too little weight to a particular piece of evidence, have little or no prospect of success.

25. In this regard we are of the view that the assessment of the evidence undertaken by the Head of the TRU was rigorous and rational. The Head of the TRU gave a sufficient explanation of her assessment of the evidence, explaining why she took the particular view of the evidence which she did. Any conflict in the evidence before the Head of the TRU has been clearly resolved and explained.
26. We can find no fault with the assessment undertaken by the Head of the TRU of the documentary evidence adduced on behalf of the Appellant and the Appellant's own oral evidence. With respect to Mr Potter's submission we do not accept that the Head of the TRU relied on and gave undue weight to the 'circumstantial' evidence which he specified. Mr Potter made reference to paragraphs 56 and 57 of the decision of the Head of the TRU. Paragraph 56 is the paragraph of the decision which is referred in paragraph 17 above. In paragraph 17 we queried why the Head of the TRU determined that she was required to consider 'other matters'. Nonetheless, in her eventual analysis of those 'other matters', we are satisfied that the Head of the TRU addressed these in a coherent manner and that she did not place undue weight on these in her eventual decision.
27. In paragraph 57, for example, she notes that DVA had referred to a second vehicle for which Lyons haulage was the registered keeper. The Head of the TRU determined that this evidence '... was relevant to this hearing regarding building a wider picture.' At the oral hearing before us, we queried the relevance of the 'wider picture' to the issues arising in the appeal. It is the case, however, that the Head of the TRU adds that the second vehicle '... was not detained and is not the subject of the instant application. I have not disregarded the evidence as it provides a similar background but **I have not placed significant positive weight on matters relating to this vehicle.**' The emphasis here is our own.
28. We set out above the reasoning of the Head of the TRU on the two grounds on which the Appellant sought the return of the vehicle and trailer combination. We remind ourselves that the first ground was that at the time the vehicle was detained the person using the vehicle held a valid operator's licence. In relation to the first ground, the Head of the TRU refers, in paragraph 67, to the definition of the 'user of a vehicle'. That definition is to be found in section 58 of the 2010 Act. The context is that the Head of the TRU was addressing a submission in the first ground that at the time the vehicle was detained the person **using the vehicle** held a valid operator's licence and that person was Mr David Neal. Applying that definition, the Head of the TRU concluded that the actual driver of the vehicle, Mr Dean Lyons, did not own the vehicle, did not have possession of the vehicle under an agreement for hire and was not, on

the basis of the evidence which was before her, the servant or agent of Mr David Neal. That conclusion was arrived at without the requirement to consider the range of 'circumstantial' evidence to which Mr Potter referred.

29. In a parallel way, the conclusions of the Head of the TRU that the second ground on which the Appellant relied, namely that at the time it was detained the vehicle it was not being, or had not been, used in contravention of section 1 of the 2010 Act, are wholly sustainable and are not reliant on giving undue weight to circumstantial evidence.
30. We turn to the evidence of Mr David Neal. There are two aspects to the submissions which were made in connection with Mr Neal. The first is a submission that at the hearing the officers from the DVA introduced evidence from an interview under caution which was conducted with Mr Neal and that the admission of the evidence was procedurally unfair. Further, the DVA had declined to make available to the Appellant and his representative a copy of the full transcript of the interview, which itself was also unfair. In a parallel way, the Head of the TRU should have afforded the Appellant and his representative the opportunity to call Mr Neal as a witness. Finally, the Head of the TRU had given inappropriate weight to Mr Neal's evidence when reaching her decision.
31. By way of background in the submission which was prepared by the DVA for the hearing, there is the following reference at paragraph 29:

'On 28 March 2017 during an interview carried out with Mr David Neal he stated that he owned the trailer that was detained by the Department on 18 February 2017 and stated that he had purchased it from Lyons Commercials.'

32. In the bundle of documents which is before us there is a copy of an e-mail which had been forwarded by an officer in the TRU to an officer in the DVA. It states that e-mail correspondence had been received from Mr Strawbridge in which he had made an application for a transcript of the interview which had been carried out with Mr Neal on 28 March 2017. The request for a transcript to another officer in the DVA who replied, in e-mail correspondence dated 6 June 2017, as follows:

'The transcript requested relates to a ... interview carried out under caution with Mr Neal in connection with a ... matter and is therefore not disclosable to the appellant in these circumstances.

Mr Neal's statement has only been referred to within the DVA submission concerning the vehicle's detention in so far as Mr Neal provided information to a Vehicle Examiner regarding his ownership of the trailer in question. This was a legal obligation conferred on him under Section 40 of the Goods Vehicle (Licensing of Operators) Act (NI) 2010 in so far as providing the examiner with the name and address of the owner of the vehicle or of the person whose servant or agent the driver is. DVA can also provide assurance that it will not be tendering any evidence concerning further statements made by Mr Neal beyond its claim that he owned the trailer.'

33. The e-mail goes on to state that a copy of the transcript would be made available to Mr Neal should the 'matter' referred to proceed any further.

34. There is a further e-mail, dated 6 June 2017, in the bundle of documents which is before us which is from an officer of the TRU to Mr Strawbridge and setting out the substance of the reply noted in paragraph 32 above. There was no further reply from Mr Strawbridge in connection with the disclosure of the transcript of the interview.
35. It is the case, therefore, that the Appellant's solicitor, Mr Strawbridge, in advance of the hearing, was aware that he would not be provided with a transcript of the interview with Mr Neal. The correspondence which was forwarded to the Appellant, informing him of the date, time and venue of the hearing is dated 1 June 2017. The Appellant was invited to attend and he was informed of his right to be legally represented, to give evidence, to call witnesses, to cross examine witnesses and to address the Department both on the evidence and on the subject-matter of the proceedings.
36. Under a heading '**ACTION YOU MUST TAKE NOW**', the Appellant was advised of the following:
- 'As the Department can only return property to the lawful owner of the trailer the matter of determining ownership will be considered as part of the hearing. **You are therefore required to submit documentary proof and/or other physical evidence to demonstrate that you are the true owner of the trailer to the Department no later than 15 March 2017.**
- You should consider immediately whether to seek informed advice and/or representation from a solicitor or other representative. If you do, you should pass this letter and associated documents to them as soon as possible to allow sufficient time for the proper preparation of your case.
- You should collect any further documentary evidence you would wish to have considered at the Hearing.'
37. It is clear, therefore, that the Appellant was aware of his right to call witnesses, make submissions and obtain other documentary evidence. The transcript of the hearing shows that there was a reference to the interview conducted with Mr Neal and the following submission by Mr Strawbridge:
- 'Finally, we do take issue with the reference and the selection from Mr Neal's interview under caution, that information at Paragraph 29 and that whilst we are not privy to the full contents of that interview, now is the decision maker, that should be borne in mind.'
38. The word 'now' is more likely than not meant to be 'nor'. Apart from this statement, Mr Strawbridge made no further challenge to the references to the interview with Mr Neal or made no further challenge to the failure to provide a copy of the transcript.
39. We cannot agree that Mr Strawbridge was taken by surprise by the reference to part of the interview conducted with Mr Neal and it is clear that he took no further action to rectify the deficit in not having a copy of the full transcript of the interview. Mr Strawbridge made no attempt to call Mr Neal as a witness and, given that the Appellant had an apparent working and legal relationship with Mr Neal, we cannot see how that could not be facilitated. Further, Mr Strawbridge made no application to adjourn the hearing for the purpose of calling Mr Neal as a witness.

40. We are able to address the submission that Head of the TRU had given inappropriate weight to Mr Neal's evidence when reaching her decision. She did not. At paragraph 58 of her decision she stated:

'DVA declined to place in evidence a copy of an interview with Mr Neal which was carried out under caution. **I therefore place no weight on any reference DVA made to that interview.**'

41. That is unequivocal.
42. The second context for the evidence of Mr Neal was the application by Mr Potter to adduce, as fresh evidence before the Upper Tribunal, the evidence in the transcript of the interview, the oral evidence of Mr Dean, oral evidence from the Appellant's son, Mr Dean Lyons and certain supplementary banking materials. As was noted above, Mr Potter submitted that all four limbs of the test for admission of fresh evidence before the Upper tribunal, as set out in paragraph 45 of the decision in T/2015/36 W. Martin Oliver Partnership are met.
43. With respect, we disagree. We are positive that limb (ii) of the test is certainly not satisfied. As a reminder, limb (ii) is in the following terms:
- 'It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.'
44. In this instance we substitute for 'public inquiry', the 'detention' hearing which took place on 8 June 2017.
45. As was noted above, the Appellant was represented by an experienced legal representative who was aware of the issues which were likely to have been raised at the hearing. We have set out above our conclusions on the failure by Mr Strawbridge to address the absence of the transcript of the interview with Mr Neal at the oral hearing. Those conclusions are equally applicable to Mr Neal's own oral evidence. There is no reason why the relevance of the evidence relating to Mr Neal could not have been identified prior to the hearing and steps taken to adduce that evidence. Those steps could have included, as a minimum, calling Mr Neal as a witness, and/or making an application in connection with the absence of the full transcript of the interview.
46. Similar principles apply in connection with the oral evidence of the Appellant's son. He was central to the events leading to the detention of the vehicle and trailer. Specific assertions were being made about his working relationship with Mr Neal. There is no reason why he could not have been called as a witness at the hearing.
47. Finally we see no reason why the additional banking material, now sought to be adduced could also not have been made available at the hearing, as it relates to matters pertaining at the time of the detention.
48. As was noted above, the test which we have to apply is whether the decision of the Head of the TRU was 'plainly wrong'. We are wholly satisfied that neither the law nor the facts impel us to interfere with the decision of the Head of the TRU as per the decision in *Bradley Fold* and the appeal is dismissed.

A handwritten signature in black ink, reading "Kenneth Mullan". The signature is written in a cursive style with a large initial 'K'.

**Kenneth Mullan, Judge of the Upper Tribunal,
2 February 2018**

Appendix

The proper approach on appeal to the Upper Tribunal

In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

‘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 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. (*‘Bradley Fold’*) 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.’

At paragraph 4, the Upper Tribunal had 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.’

The legislative provisions relating to detention and return of vehicles

Under the provisions of section 1(1) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010, (the 2010 Act) it is unlawful, in Great Britain to use a goods vehicle on a road, for the carriage of goods, either for hire or reward or for or in connection with any trade or business carried on by the user of the vehicle, without holding a licence, (known as ‘an operator’s licence’), issued under the Act. By section 1(6) a person who uses a vehicle in contravention of this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

Section 44 of the 2010 Act provides that Schedule 2 to the 2010 Act 'shall have effect'. Schedule 2 contains detailed powers to make Regulations concerning the detention etc. of goods vehicles used in contravention of section 1 of the 2010 Act and, in paragraph 8(4) of Schedule 2, it sets out grounds for return which may be included in the Regulations.

The right to impound goods vehicles is set out in regulation 3 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012, (the 2012 Regulations), which came into force on 1 July 2012. Regulation 3 of the 2001 Regulations is in these terms:-

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

Authorised person is defined in paragraph 1(1) of section 58 of the 2010 Act and means '(a) an examiner appointed by the Department under Article 74 of the 1995 Order; or (b) any person authorised in writing by the Department for the purposes of the 2010 Act'. The '1995 Order' is the Road Traffic (Northern Ireland) Order 1995.

By virtue of regulation 9(1) of the 2012 Regulations, the **owner** of a vehicle detained in accordance with regulation 3 may, within the period specified in regulation 8(2), apply to the Department for the return of the vehicle. There is a definition of 'owner' in regulation 2 of the 2012 Regulations:

'owner' means, in relation to a vehicle or trailer which has been detained in accordance with regulation 3--

- (a) in the case of a vehicle which at the time of its detention was not hired from a vehicle-hire firm under a hiring agreement but was registered under the Vehicle Excise and Registration Act 1994, the person who can show to the satisfaction of an authorised person that he was at the time of its detention the lawful owner (whether or not he was the person in whose name it was so registered);
- (b) in the case of a vehicle or trailer which at the time of its detention was hired from a vehicle-hire firm under a hiring agreement, the vehicle-hire firm; or
- (c) in the case of any other vehicle or trailer, the person who can show to the satisfaction of an authorised person that he was at the time of its detention the lawful owner.'

The regulation 8(2) time period is the period of twenty-one days from the publication of notice of detention in the Belfast Gazette.

In paragraph 90 of its decision in *Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/60), the Upper Tribunal summarised the scheme for the right to impound and claim for return, under the parallel legislative scheme applicable in Great Britain, as follows:

'Three points need to be stressed at this stage. First, it is for VOSA 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. The standard of proof required is the balance of probability ... Second, once VOSA have established they had the right to detain a vehicle it is for the owner to prove ownership of the vehicle or vehicles to which the claim relates. Again the standard of proof required is the balance of probability ... Third, it is for the owner to show, on the

balance of probability, that one of the grounds set out in regulation 10(4) of the 2001 Regulations, as amended, has been established.'

The reference to regulation 10(4) should be 4(3) but nothing turns on that.

The **grounds** on which an application for the return of an impounded vehicle may be made are set out in regulation 4(3) of the 2012 Regulations, as follows:

- '(3) The grounds are--
- (a) that, 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) that, 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) 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;
 - (d) that, 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.'

The proper approach to fresh evidence before the Upper Tribunal

In T/2015/36 W. Martin Oliver Partnership, the Upper Tribunal said the following, at paragraphs 40 to 41 and 45 of its decision:

- '40. We begin by considering the proper approach to be adopted when the Upper Tribunal, in an appeal against a decision of a Traffic Commissioner, is met with an application by a party to the proceedings to adduce new or fresh evidence. We have no hesitation in confirming that the proper approach is as set out in the decision of the then Transport Tribunal in *Thames Materials* and confirmed by the Upper Tribunal in *Cornwall Busways Limited*. We have already noted that the decision in *Thames Materials* has a conclusive basis in the decision of the Court of Appeal in *Ladd v Marshall*. Further, we have noted that the former Transport Tribunal has been consistent in its application of the principles in *Thames Materials*.
41. The appellate structure in the transport jurisdiction was the subject of significant revision with the implementation of the Tribunals, Courts and Enforcement Act 2007. Appeals from decisions of the Traffic Commissioner lie to the Upper Tribunal – see Article 7(a)(viii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008. At that stage there was an opportunity to revisit the jurisprudence of the former Transport Tribunal to determine whether that jurisprudence remained appropriate or required revision in light of the new tribunal appellate structure or in light of other procedural developments. In respect of the procedure to be adopted for applications to adduce fresh evidence, the Upper Tribunal endorsed the former procedure of

the Transport Tribunal relying on its consistency and coherency – see Cornwall Busways Limited.

...

45. For the record, therefore, we repeat that the test to be applied is whether the following conditions are met:

- ‘(i) The fresh evidence must be admissible evidence.
- (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.
- (iii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
- (iv) It must be evidence which is apparently credible though not necessarily incontrovertible.’

The Appellant in T/2015/36 W. Martin Oliver Partnership sought permission to appeal against the Upper Tribunal’s decision. In refusing the application, the Court of Appeal Judge (Rt Hon Lord Justice Flaux) gave the following reasons:

“1. The sole ground of appeal is that the Upper Tribunal erred in law in applying the principles derived from *Ladd v Marshall* [1954] 1 WLR 1489 to its determination as to whether to allow fresh evidence to be adduced. The applicant argued before the Upper Tribunal and argues in its grounds of appeal and counsel’s skeleton argument that a more flexible approach, somewhat akin to that adopted in criminal appeals under section 23 of the Criminal Appeals Act 1968 should have been adopted.

2. The Upper Tribunal and its predecessor the Transport Tribunal has consistently followed the principles of laid down by the Court of Appeal in *Ladd v Marshall* in considering application to adduce fresh evidence. The Upper Tribunal followed and applied those principles here. It was entirely correct to do so.

3. The ground of appeal is unarguably hopeless and totally without merit.”