

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Case No GT/2172/2018

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant: Ms Clare Jackson of the office of the
Registrar of Approved Driving Instructors

For the Respondent: No attendance or representation

Decision: The appeal is dismissed.

REASONS FOR DECISION

1. In this decision, which relates to an appeal by the Registrar of Approved Driving Instructors, in order to avoid confusion I refer to the appellant as “the Registrar” and the respondent as “the instructor”.
2. On 28 December 2017 the instructor was convicted of the offence of being “in charge of a vehicle while alcohol level above limit”, contrary to section 5 of the Road Traffic Act 1988 (“the RTA”). The circumstances, put briefly, were that after sharing a bottle of wine with a friend who was on an infrequent visit from abroad, he went to his car to remove his teaching manuals and equipment rather than leave them in the car overnight parked on the highway verge, having previously experienced vandalism to, and thefts from, his vehicle. The key was in the ignition (for reasons which are not in evidence) but the car engine was cold when checked by the police.
3. The instructor reported his conviction promptly to the Registrar. On 15 February 2018 the Registrar issued a decision removing the instructor from the register of approved driving instructors under section 128(2) of the RTA on the ground that “he ceased... to be a fit and proper person to have his name included in the register.”
4. On his appeal, the First-tier Tribunal (“FtT”) on 22 June 2018 reversed that decision. The Registrar now appeals, with permission given by the Chamber President of the General Regulatory Chamber.
5. An oral hearing was directed at the request of the Registrar and held at Gateshead Court on 18 July 2019. On 15 July the instructor emailed the Upper Tribunal to say that due to a domestic accident that had resulted in what sounded like quite serious injuries he was unable to attend. It was unclear whether he was seeking a postponement and I caused a reply to be sent to him inquiring whether he would be in a position to participate by telephone, or wanted a postponement or for the hearing to go ahead. His reply was that he felt that the best option was for the hearing to take place in

his absence, and “minimise any inconvenience”. I caused a further reply to be sent to say that if he was in ill-health but would wish to attend, the Upper Tribunal and indeed the Registrar might have to put up with any ensuing inconvenience. I invited him to make an application for a postponement, containing a short description of the medical treatment he had received, if possible by 3pm on 16 July, but indicated that if no application was received, the hearing would proceed in accordance with his existing request. No such application was received, either in time or subsequently, and he did not attend on the day. I concluded that it was in the interests of justice for the hearing to proceed. He had been given every opportunity to apply for a postponement but it appeared to be his genuine wish that the hearing proceed in his absence. The Registrar’s representative had travelled a considerable distance, this Chamber of the Upper Tribunal only holds hearings on the North-East every few months and the parties had had the opportunity to make written representations previously.

6. Ms Jackson indicated that this was the first appeal ever brought by the Registrar against a decision of the FtT. The primary concern was that the decision was out of line with other decisions of the FtT. She indicated that the Registrar did not suggest that FtT’s decision was in error of law. This was a startling submission, as the jurisdiction of the Upper Tribunal in this regard is confined to appeals on a point of law: see s.11 of the Tribunals, Courts and Enforcement Act 2007. There was a clear inconsistency between the Registrar’s view in pursuing the appeal and the submission she was making. Ms Jackson is a civil servant and not a lawyer and I proposed that she be permitted to withdraw this concession and that the hearing proceed to examine the substantive grounds of the Registrar’s case and I would decide for myself whether any of them amounted to an error of law.

7. The offence is committed by being in charge of the vehicle when over the limit. There is however a statutory defence if the accused can show on the balance of probabilities the circumstances were such that there was no likelihood of his driving the vehicle while he remained over the limit: RTA s5(2). The FtT accepted the instructor’s evidence as truthful, which had included that he had been advised that expert evidence would be needed to establish that defence and the total cost would be £1,000 or so, more than he could afford. No challenge is made to that finding before me. When I put it to her Ms Jackson indicated that she did not take any point based on the instructor’s failure to avail himself of the statutory defence which, on his version of the facts, might have been open to him.

8. She also indicated that the Registrar did not seek to go behind the decision of the Magistrates Court. The instructor had submitted to the FtT that the Magistrates had departed from their sentencing guidelines in the sentence they had imposed, in recognition of the circumstances in which the offence had been committed. Along with a requirement for community service and compensation, they had imposed 10 penalty points. Although they were not in evidence before the FtT, subsequent reference to the sentencing guidelines confirms that this was indeed a departure. The level of alcohol, at 148

microgrammes of alcohol in 100 millilitres of breath, by a considerable margin exceeded the level which would normally result in disqualification from driving for 6-12 months. That, of course, shows both the seriousness of the offence in terms of the level of alcohol present but also the weight attached to the mitigating circumstances by the Magistrates.

9. The FtT was, similarly, impressed by the circumstances and the mitigation offered. It began by directing itself as to the significance of the register and the function of the Registrar and applied the Court of Appeal's decision in *Harris v Registrar of Approved Driving Instructors* [2010] EWCA Civ 808. Ms Jackson makes no criticism of the FtT's self-direction in that regard.

10. Nonetheless, it went on,

"...there were a number of factors which were to be placed in the balance which indicated that the instructor remained a fit and proper person whose name ought to remain in the Register:

- a. he had not driven under the influence of alcohol;
- b. there had been no danger to members of the public or to his pupils;
- c. nothing in the conviction reflected on his abilities as an instructor, for example, carelessness or impatience had not played any part in the events leading to his conviction;
- d. the tribunal inferred that the Magistrates had thought it would be disproportionate to disqualify him in the circumstances and had departed from their guidelines to avoid doing so;
- e. he has no other source of income and is a person of modest means;
- f. he had reported the conviction with commendable promptness to the Registrar;
- g. other than the conviction he had an unblemished record both in respect of driving and otherwise and was of good character;
- h. he had pleaded guilty at the first opportunity;
- i. he had complied with the community order and there had been no further matters which threw doubt on his character;
- j. it followed that the conviction arose from a one-off series of events which led to his committing what many people were likely to consider a "technical offence" in the particular circumstances of this case;
- k. there was no indication that he had a drink problem or that there were likely to be further similar offences committed by him.

11. In conclusion it

“... placed in the balance the weighty and justified concerns identified by the Registrar [i.e. those referred to in [9] above] and the nature of the conviction against the mitigating factors which the tribunal has considered above. After careful consideration the Tribunal found that the mitigating factors outweighed the concerns of the Registrar because the loss of the [instructor’s] livelihood was not justified against the background of the mitigating factors. In the circumstances the Tribunal found that it was unlikely that the [instructor’s] name being retained on the Register would have any significant impact on the public’s confidence in the Register and standards of those whose names were in the Register.”

12. I was not taken to authorities on “fit and proper person” but there is a helpful review of them, albeit carried out some years ago, in the *Harris* case.

13. Of the factors taken into account, Ms Jackson takes issue with the FtT’s reliance on the instructor’s modest circumstances which, she submits, should not be relevant to whether a person be retained on the list or not. Obviously any decision about whether or not to maintain a person on the register involves a person’s livelihood and requires a balancing exercise that is respectful of that fact, amongst others, and I did not understand Ms Jackson to be arguing otherwise. I understood her submission to be that a person’s particular economic circumstances are not relevant to whether they are to be considered a fit and proper person for the purposes of the register. Whilst I am inclined to accept that there will be many cases in which they will not be, in the present case, the instructor’s economic circumstances were relevant up to a point as on the facts found they were at any rate the principal cause in his not running the defence which apparently might well have been open to him.

14. She also takes issue with the relevance that his competence was unimpaired, this not being a case about competence. Much of the discussion in *Harris* and the authorities cited there is about the extent to which “fit and proper” is not limited by issues of competence but extends to matters of character. I do appreciate that in the specific context of driving instructors there are other conditions, such as those in s.127(3)(a) and (b), specifically directed to technical competence. However, even in *Harris*, counsel for the Registrar sought only to submit that “the focus...must be mainly on “personal qualities”, since “professional qualifications” are covered by other conditions” (emphasis added). I agree that it is not a case about competence but that particular factor, while not the main focus, may still be relevant as negating what might have been a problem area for the instructor if the circumstances had reflected adversely on his competence.

15. The FtT took into account a range of factors in addressing the “fit and proper person” test. Some may have been capable of bearing more weight than others but in the circumstances of the present case I do not consider

there was any that was legally irrelevant. If I were to be wrong in that in relation to an individual factor, I consider that there were sufficient factors whose relevance was undisputed which the FtT relied upon to enable me to conclude that its decision would have been the same.

16. It seems to me that the worst that might be said of the FtT's decision is that it does not explain the relevance of some of the more marginal factors or the weight that it gave to each. However, there is no reasons challenge before me and in my view rightly so. Whether a person is a "fit and proper person" is ultimately a judgement call, taken within the context of the statutory framework within which it falls to be applied. The FtT was mindful of that framework and its implications and explained the factors which led it to its conclusion. To require more than that would in my view be to expect too much of the FtT, in effect requiring it to give reasons for its reasons.

17. Ms Jackson also takes issue with the conclusion that "it was unlikely that the [instructor's] name being retained on the Register would have any significant impact on the public's confidence in the Register and standards of those whose names were in the Register." In cases of this type, the composition of the FtT is laid down by the *Practice Statement: composition of tribunals in relation to matters that fall to be decided by the General Regulatory Chamber on or after 6 March 2015* and the two members sitting with the judge are required to have "substantial experience in transport operations and its law and practice". The specialist tribunal decided upon the matter before it. The Registrar may disagree but that does not mean that the FtT was in error of law by reason of such difference of view and it was not.

18. Ms Jackson indicated that it is a particular concern of the Registrar that the case is out of line with other decisions. The Registrar is apparently not aware of others on the register who have more than 6 penalty points. She also referred me to the decision of the First-tier Tribunal in five cases which had been heard together in 2012.¹, which indicated (at para 5(xi)):

"A total of 6 penalty points is regarded as the "tipping point". By this we mean that some appeals by those with 6 penalty points succeed while others fail."

Ms Jackson told me that that had been the practice since 2002 and so far as she was aware remained the practice of the FtT to this day.

19. In similar vein, the FtT at para 7(xii) of the linked cases indicated:

"We are not aware of any successful appeal by an Appellant with more than 6 penalty points currently endorsed on his or her licence. In our view there are two reasons why the Tribunal has consistently maintained that position. The first reflects the bad example set by an ADI with more than 6 points endorsed on his or her licence. The

¹ D/2012/425 Harrison; D/2012/427 Punnen-Thomas; D/2012/431 Thomas; D/2012/434 Dar; D/2012/443 Ndaye

second reflects the fact that it is in the public interest that the public have confidence in the Register. In our view retaining on the Register the name of an ADI with more than 6 penalty points endorsed on his or her licence will have the effect of undermining public confidence in the Register. In this specific case we are satisfied that the nature of the offence and the fact that the Appellant has 10 penalty points on his licence clearly outweighed the evidence in the Appellant's favour."

20. Ms Jackson (who also appeared below) did not indicate whether that case was referred to in the proceedings below but one of the panel members in the present case had also sat in the five linked cases and was highly likely to have been aware of the FtT's approach in those and other cases.

21. In any event, the five linked cases do not help the Registrar in an appeal on point of law only. Decisions of the FtT do not of course create any binding precedent. The approach of the FtT to the five linked cases, while notably rigorous in the importance given to 6 penalty points as a tipping point, could not and did not exclude the possibility that a person with more than 6 penalty points might be retained on the register. The law does not say (as it could have done) that anyone with 6 penalty points is to be removed from the register and in the extract quoted above the tribunal in the linked cases went on to consider the "specific case" before it and to balance the factors for and against the appellant in that case before deciding that he should not remain on the register.

22. In the present case, the panel went through a similar process. Its conclusion was a different one. Given the endless possible variations of the circumstances in different cases before the FtT, that is inevitably a possibility. The fact that it has occurred does not mean the present FtT was in error of law.

23. As the jurisdiction of the Upper Tribunal is confined to appeals on a point of law, there is no basis for the Upper Tribunal to intervene in the absence of one. Although Ms Jackson's concession near the beginning may not have been intended or its implications fully understood, it was ultimately correct.

24. I do understand the Registrar's concerns, but the circumstances were clearly found by the specialist tribunal to be exceptional. Ms Jackson is concerned lest the floodgates be opened: merely because I have held that the FtT was entitled to reach the conclusions it did, for the reasons it gave, should not give rise to the floodgates being opened. Beyond that, it is not for me to advise the Registrar on how to maintain what she regards as the appropriate line notwithstanding the present case.

CG Ward
Judge of the Upper Tribunal
24 July 2019