



[2023] UKUT 4 (AAC)

Appeal No. UA-2022-0000658-NT

**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 10 March 2022

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr Andrew Guest	Member of the Upper Tribunal
Dr Phebe Mann	Member of the Upper Tribunal

Appellant:

Stephen Peter Hurley

Attendances:

For the Appellant: Mr Darren Finnegan BL

For the Respondent: None

Type of hearing: Face-to-face oral hearing

Date of hearing: 10 November 2022

Date of decision: 29 December 2022

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED.

SUBJECT MATTER:- Application for a standard international licence; good repute; offences sustained;

CASES REFERRED TO:- NT/2013/82 Arnold Transport & Sons Ltd v DOENI; NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI [2013] UKUT 618 AAC, NT 2013/52 & 53; Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695;

REASONS FOR DECISION

1. This is an appeal from the decision of the Head of the Transport Regulation Unit ('TRU') to refuse the Appellant's application for a standard international goods vehicle operator's licence.
2. The TRU is part of the Department for Infrastructure ('the Department')

Background

3. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-

- (i) An application for a standard international goods vehicle operator's licence was received in the Department from the Appellant on 20 November 2018. The application sought authorisation for 1 vehicle and 1 trailer.

- (ii) On the application, the Appellant declared the following convictions:

Offence	Date of conviction	Sentence
Disorderly behaviour	4 May 2015	4 months imprisonment Suspended for 2 years
Disorderly behaviour	18 October 2015	3 months imprisonment Suspended for 1 year
Resisting police	18 October 2015	3 months imprisonment Suspended for 1 year
Breach of non-molestation	16 May 2017	1 month imprisonment suspended for 1 year

- (iii) On 14 February 2019, the Appellant was informed that the application would be considered at a Public Inquiry.

- (iv) The Public Inquiry had not been convened by June 2019 and the Appellant forwarded email correspondence to the TRU expressing his frustration with the situation which were outside his control and which 'were unjustly penalising my ability to obtain an operator licence and run a successful business.' The Appellant also commented on the nature of the offences which he had declared, suggested alternative ways in which the application could be dealt with and requested an interim licence.

- (v) In email correspondence dated 19 August 2019 the TRU wrote to the Appellant explaining that the delays which the organisation were experiencing were unprecedented and advising that outstanding applications would be prioritised. The Appellant was also advised that in order to grant an interim licence, the Department would have to be sure that the requirements of financial standing and good repute would have to be met.

- (vi) The Public Inquiry had not been convened by 1 November 2019 and the Appellant, on that date, reapplied for an interim licence.

- (vii) It would appear that correspondence dated 28 November 2019 was sent to the Appellant informing him that his application for an interim licence was refused. The appellant asserts that he did not received this application.
- (viii) On 30 January 2020, the Appellant, based on his frustration with the slow progress on convening the Public Inquiry, withdrew his application.
- (ix) In March 2020 a further application for a standard international operator's licence, seeking authority to operate 1 vehicle and 1 trailer, was received from Ms JJ.
- (x) In email correspondence from an officer in TRU dated 23 April 2020, Ms JJ was asked to explain the derivation of trading name outlined in the application and explain her association with the Appellant. Ms JJ responded by indicating that she had no connection with the Appellant. Following notification that her application would be considered at a Public Inquiry, Ms JJ withdrew the application.
- (xi) In June 2021 the Appellant made a further application for a standard international goods vehicle operator's licence seeking authority for 2 vehicles and 2 trailers. In this application the Appellant made reference to the first application which he had made but not the application made by Ms JJ. In addition, the Appellant declared one of the convictions which had been declared in the first application (the breach of the non-molestation order) and a further conviction dated 5 September 2019 for possession of a Class A drug for which he received a £400 fine and a £15 levy.
- (xii) In correspondence dated 10 June 2021 from an officer in TRU, the Appellant was asked to provide additional information in support of the application including an explanation of his connection with Ms JJ. In a reply dated 16 June 2021 the Appellant indicated that he had no connection with Ms JJ.
- (xiii) In correspondence dated 9 September 2021, the Appellant was informed that the Department had decided to convene a Public Inquiry to consider the application in general, and more particularly, whether the Appellant met the statutory requirement to be of good repute.
- (xiv) The Public Inquiry took place on 9 March 2022. The Appellant was present and was represented by Mr Finnegan BL. The proposed Transport Manager, Mr GL, was also present. The Appellant had prepared a written statement for the Public Inquiry which is in the file of papers which is before us.
- (xv) On the same date the Presiding Officer refused the licence application.
- (xvi) An appeal against the decision dated 9 March 2022 was subsequently received in the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal.

The Presiding Officer's decision

4. The salient parts of the Presiding Officer's decision are as follows:

'The circumstances which brought this application to Public Inquiry lie in issues of whether the applicant has established he is of good repute related to:

- The earlier application by Stephen Hurley for an operator's licence which had been withdrawn by him in January 2020;

- The subsequent application made by JJ, with whom the applicant is in a relationship. This second application was itself withdrawn in November 2020. Stephen Hurley accepted that the application made by his partner was designed as a "front", in the sense that he would in fact run the business and that his partner would help with the administration, but it would seem otherwise to the outside world. When challenged, his partner had attempted to deceive the Department into believing there was no link between her and Stephen Peter Hurley. The applicant admitted he was aware that this is what she had planned to do.
- The unspent convictions of Stephen Hurley, which were not disclosed in the current application, but which had been included in the previous application he had made.
- Further that during the process of consideration of the current application, in June 2021, Stephen Hurley had lied in giving a response to the Department about her application, where he denied links to JJ. She is his fiancée, and they are to be married shortly.

I was grateful for early sight of the witness statement of Stephen Hurley (and that of GL) which sets out the background and provides a frank explanation of events during both of the earlier applications and the one that is now before me.

This is of course Stephen Hurley's application and therefore the onus is on him to satisfy me that he has the necessary good repute to hold a licence, financial standing, has a TM with good repute and the necessary qualification to afford professional competence and that arrangements for the running of vehicles are sound.

I heard from Mr Hurley and received representations from Darren Finnegan of counsel on his behalf.

In weighing the arguments, I note in the positive that there is no suggestion that the applicant has operated LGVs without a licence and no criticism is made of him as an LGV driver. There are monies that show he meets the financial standing requirement and I have no immediate concerns about the proposed TM, albeit this would be his first appointment to the role. I accept that all relevant convictions were properly disclosed in the first application.

I accept that whilst his second application was incomplete, in that three of the older convictions were left out, in the mistaken belief of those who advised him that they were now 'spent', I do not find that to be the most significant factor in my decision.

In the negative, I struggle to accept that his first application was withdrawn out of frustration about the length of time the process was taking and whether he would ever be given a hearing date. The timing, and the indication that he intended to make another application point in another direction. I believe it to be more likely than not that the application was withdrawn in order to facilitate the making of JJ's application. I find the application made in the name of JJ to be a wholly dishonest attempt made in conjunction with his partner to undermine the regulatory system. It represents an extremely poor exercise of judgement, which was compounded at the point when JJ was challenged, when rather than admitting the nature of the deception continued with further lies. It is the case that when the current application was made in June 2021 that the applicant was not

transparent when again challenged about the nature of the earlier application by his partner and denied links to her.

The decision in the Upper Tribunal case of Aspey Trucks Ltd (2010/49) makes clear the role of the Presiding Officer or Traffic Commissioner as the gatekeeper to the haulage industry, when considering new applications. Those who are allowed entry must satisfy the Presiding Officer or Traffic Commissioner of their good repute. In answering the question whether I am so satisfied in respect of this application, I need to 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.

For whatever reason there has been a serious attempt to undermine the system both directly and indirectly perpetrated by Mr Hurley. It would be an affront to the regulatory system for a licence to be granted to an applicant prepared to mislead the regulator in relation to his application as recently as in June 2021.

It has been necessary for me to determine whether this applicant meets the test of repute. The positives are outweighed by the negatives. I find Mr Hurley is without good repute.

The process of building confidence has begun only recently. Any progress made after the withdrawal of JJ's application has been undermined by the further lies in June 2021. In my view, if Stephen Hurley is to hold an operator's licence there needs to be clear blue water between the days of desperately poor decision-making and judgement and a position where a presiding officer is likely to be able to believe that Mr Hurley has been rehabilitated in a practical sense.

Time will tell whether the passage of time will be sufficient for Mr Hurley to satisfy the test of good repute. The process is not a mathematical one. When there is dishonesty or/and the exercise of poor judgement. the process of showing rehabilitation is necessarily a fraught one. Applicants need to prove a negative, but this is not an impossible task.

I note that the earlier convictions including a matter of resisting the police, relevant to Mr Hurley's capacity to handle authority become spent in January 2023, but the latter offences do not have that status until mid to late 2024

I conclude that the earliest date when the Department might legitimately be able to find repute had been demonstrated would fall between those dates, that is not before October 2023.

In the meantime, I can do no better than emphasise the obvious, that the applicant should avoid further convictions and if, and when, an application is made for it to be entirely accurate and interactions to be honest ones.

The application is therefore refused.'

5. In the revised Skeleton Argument, which was prepared for the oral hearing of the appeal, Mr Finnegan identified the following grounds of appeal:

'Grounds of Appeal

There are three Grounds of Appeal.

Ground of Appeal One – The decision was Wednesbury unreasonable

The Presiding Officer did not take into account the following:

- a. that Mr Hurley did not have anything fatal to hide in his first application and there had been no attempt to explore the motivation for the dishonesty (bearing in mind that a 'typical' fronting scenario involves a previous revocation or disqualification (MM Telford LTd. & RMT Transport Ltd. [2014] UKUT 0276 (AAC) [20]);
- b. the length of time Mr Hurley had waited to hear of a decision on his first application (16 months with no date set for a public inquiry);
- c. the possibility of using conditions to assuage any concerns in relation to dishonesty; d. that both Mr Hurley and the proposed transport manager Mr Laverty had extensive compliance systems ready to be implemented with documentary evidence of same brought to the inquiry; and
- e. the considerable personal upheaval in Mr Hurley's life at the time of the convictions.

Similarly, there were irrelevant factors considered, namely:

- a. the extrapolation of issues with authority flowing from the resisting police conviction which had not been explored in sufficient detail; and
- b. the mention of Bryan Hughes at [3] et seq. The inclusion of this was on the basis of its mention in Mr Hurley's written statement, however the matter was not a substantive issue during the hearing and does not account for the other matters which were in Mr Hurley's statement which did not receive mention in the decision.

At [18] and [19] of the decision, the Presiding Officer considered that, with the resisting police conviction due to be spent by January 2023 and the latter convictions becoming spent in mid to late 2024, that an application cannot be successful until October 2023 at the earliest.

This is an arbitrary imposition of a rehabilitation period. It appears that the latter offences (breach of a non-molestation order and possession of class A) are to reach a state of being almost spent before Mr Hurley can be of good repute. It therefore appears that a significant reason for declining the application was Mr Hurley's antecedents.

Alternatively, the Presiding Officer has declined the application based on Mr Hurley's dishonesty, but has used his convictions as a measure for setting rehabilitation in terms of repute. This is an irrational, alternatively unreasonable, decision. None of the convictions relate to dishonesty. As such, their statutory rehabilitation periods are of no relevance to deciding when Mr Hurley can attain good repute.

Ground of Appeal Two – The decision was not proportionate

19. Considering there was nothing fatal to hide (such as a previous disqualification), and that the lies were, in our respectful submission, explainable in the circumstances, the decision not to grant a licence with conditions was disproportionate. This submission is bolstered by the lack of road safety or fair competition concerns and considering that Mr Hurley had applied vigorous candour to the instant public inquiry.

Mr Hurley did not attend the public inquiry with clean hands. That he attempted to dishonestly circumnavigate the regulatory regime was fully admitted without attempts to excuse his behaviour. With this balanced against the **Aspey Trucks Ltd. [2010] UKUT 367 (AAC)** need for the TRU to exercise caution in who is allowed to enter the profession and the need for those individuals to be of good repute, the instant decision strikes the balance in a disproportionately cautious manner.

In the alternative, the period of rehabilitation required before good repute can be established is both disproportionate and plainly wrong.

Jurisprudence from similar cases from the Upper Tribunal required the Presiding Officer to adopt a different view. In **Edward Coakley T/A CRA [2012] UKUT 77 (AAC)**, a PSV licence case, the sole director had two convictions for breach of the peace and one for assault. These convictions were “of insufficient seriousness to alter the finding of good repute” (Coakley at [9]).

In **T/2009/530 Boomerang Travel Ltd.** another PSV case, the applicant had convictions for AOABH for which he served 12 months imprisonment and, some time later, a conviction for common assault. The Upper Tribunal found that the earlier set of convictions had become spent and that the latter offence, although unspent, was ‘not sufficient on their own to deny Mr Pilkington his good repute’ (Boomerang at [4]).

The Tribunal is asked to take note of **Shearer Transport Ltd. [2013] UKUT 0489 (AAC)**. The applicant had convictions for striking a member of police staff with an instrument causing permanent disfigurement, supply of cannabis, possession of a firearm and possession of ammunition. For each of these offences he received a sentence of imprisonment. Mr Shearer then made an application for an operator’s licence and did not disclose any convictions. This licence was granted and a subsequent extension was granted. Eight years had elapsed before it became apparent that the operator had failed to disclose the convictions. The Traffic Commissioner revoked the operator’s licence and suspended Mr Shearer for 12 months.

At the other end of the scale, in **Formby [2012] UKUT 369 (AAC)** an appeal to the Upper Tribunal against a decision not to grant an operator’s licence was dismissed. The applicant had been convicted 10 years previous for conspiracy to supply Class A and Class B drugs. He had been sentenced to 14 years imprisonment. At the time of his application, the applicant was serving the remainder of his sentence on licence. Similarly, the facts of the key case of **Aspey** namely importation of class B with 11 years imprisonment, demonstrates the genre of offending which requires the balance to be struck against the granting of a licence.

In our submission the instant decision is demonstrably inconsistent with the case law supra. **Shearer** provides particular contrast. Both the convictions and the dishonest and deceitful attempt to hide those convictions are of considerable difference to Mr Hurley’s wrongdoing. Mr Shearer was disqualified for 12 months. Mr Hurley has an effective disqualification of 19 months. As such, it is submitted that there is no relationship of proportionality between the findings in the instant case and the sanction against Mr Hurley.

However, even in the absence of specific case law, the fact that Mr Hurley was denied good repute due to the presence of unspent convictions is an error of law due to being disproportionate. Alternatively, the time required for

Mr Hurley to wait before making a new application is similarly disproportionate.

No consideration had been given to the possibility of using conditions or undertakings to offset concerns of the TRU in relation to Mr Hurley's honesty.

Ground of Appeal Three - Insufficient reasons were given

Similar to what has been submitted at [17] *supra*, the reasoning of the Presiding Officer is rather unclear. Paragraph [12] leads us to conclude that the decision to refuse the licence is based on Mr Hurley's dishonesty in the J application and the June 2021 e-mail to NICOLO denying links to Ms J. However, [17]-[20] appear to suggest that it is the presence of unspent convictions, and not the attempt to mislead, which is the substantive reason for denying good repute.

Given that the reasons given are manifestly unclear, this indicates that the decision maker has failed to take into account relevant considerations or had taken into account irrelevant considerations (***Re Thompsons's Application (2004) NIQB 9 at (7)***). Similarly, reasons given by the Presiding Officer do not comply with the TRU guidance which states that a decision must be properly structured and provide sufficient intelligible reasons for the conclusion reached (**Department of Infrastructure, 'Practice Guidance Document No.10 - Format of Decisions' (2019) p.3 para. (81)**).

Similarly, at [17], the Presiding Officer explains that the process of gaining good repute is not a mathematical one. However, at [18] - [19] a mathematical process of finding the approximate median of three dates is set out.

At [11], the issue of the failure of explicitly mention the earlier set of convictions in the instant application is addressed. This paragraph is straddled by the paragraph on positive factors and the paragraph on negative factors. The Presiding Officer says that this consideration is not the most significant factor, however, it is unclear as to what camp this factor falls.

Relief'

The appellant asks the Upper Tribunal to substitute its decision and direct that the appellant has good repute for the purposes of section 1 2A(2)(b) of the **Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010**.

Alternatively, we ask the Upper Tribunal to suggest a more appropriate duration for Mr Hurley to prove he is fully rehabilitated before reapplying for a licence.

Conclusion

On the basis of the foregoing, to be supplemented in oral submission, the appellant respectfully submits that the above Grounds of Appeal should succeed and that this appeal is accordingly allowed.'

Relevant legislative provisions

6. Sections 2(1)-(4), 12(2)-5), 12C, 12D and 12E of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 ('the 2010 Act') provide:

2. "Standard" and "restricted" licences

(1) An operator's licence may be either a standard licence or a restricted licence.

(2) A standard licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods—

- (a) for hire or reward, or
 - (b) for or in connection with any trade or business carried on by the holder of the licence.
- (3) A restricted licence is an operator's licence under which a goods vehicle may be used on a road for the carriage of goods for or in connection with any trade or business carried on by the holder of the licence, other than that of carrying goods for hire or reward.
- (4) Notwithstanding subsections (2) and (3), a company may use a goods vehicle on a road for the carriage of goods for hire or reward under a restricted licence instead of a standard licence if (but only if) the goods concerned are the property of a company which is—
- (a) a subsidiary of the first company,
 - (b) a holding company for the first company, or
 - (c) a subsidiary of a company which is a holding company both for that subsidiary and for the first company.
- (d) if the Department thinks fit, whether the requirement of section 12D is satisfied.

12. Determination of applications for operators' licences

- (1) On an application for a restricted licence the Department must consider—
- whether the requirements of sections 12B and 12C are satisfied; and
 - if the Department thinks fit, whether the requirement of section 12D is satisfied.
- (2) Subsections (1) and (2) are subject to sections 10 (publication of application) and 47(2) (payment of application fee).
- (3) In considering whether any of the requirements of sections 12A to 12D are satisfied, the Department must have regard to any objection duly made under section 11(1)(a) in respect of the application.
- (4) If the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) or (2) are not satisfied, it must refuse the application.

12C Requirements for standard and restricted licences

- (1) The requirements of this section are that it must be possible (taking into account the Department's powers under section 14(3) to issue a licence in terms that differ from those applied for) to issue a licence in relation to which subsections (2) to (6) will apply.
- (2) There must be satisfactory arrangements for securing that the following are complied with in the case of vehicles used under the licence—
- (a) Article 56 of the Road Traffic (Northern Ireland) Order 1981 (drivers' hours); and
 - (b) the applicable Community rules, within the meaning of Article 2 of that Order.

- (3) There must be satisfactory arrangements for securing that vehicles used under the licence are not overloaded.
- (4) There must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition.
- (5) The licence must specify at least one place in Northern Ireland as an operating centre of the licence-holder, and each place so specified must be available and suitable for use as an operating centre of the licence-holder (disregarding any respect in which it may be unsuitable on environmental grounds).
- (6) The capacity of the place specified as an operating centre (if there is only one) or both or all of the places so specified taken together (if there is more than one) must be sufficient to provide an operating centre for all the vehicles used under the licence.
- (7) In considering whether the requirements of subsections (2) to (6) are satisfied, the Department may take into account any undertakings given by the applicant (or procured by the applicant to be given) for the purposes of the application, and may assume that those undertakings will be fulfilled.
- (8) In considering whether subsection (5) will apply in relation to a licence, the Department may take into account any conditions that could be attached to the licence under section 20(1)(a) (conditions of licences) and may assume that any conditions so attached will not be contravened.
- (9) In considering whether subsection (5) or (6) will apply in relation to a licence, the Department may take into account whether any proposed operating centre of the applicant would be used—
 - (a) as an operating centre of the holders of other operators' licences as well as an operating centre of the applicant; or
 - (b) by the applicant or by other persons for purposes other than keeping vehicles used under the licence.

12D. Further requirement for standard and restricted licences

The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose.

General principles on the operation of the Act and Regulations

7. At paragraphs 10 to 13 of the decision in NT/2013/82 Arnold Transport & Sons Ltd v DOENI, the Upper Tribunal set out the following general principles in the operation of the legislative provisions in Great Britain and Northern Ireland:

'Some General Principles

10. An operator's licence can only be granted if the applicant satisfies the Department that the relevant requirements, set out in s. 12 of the 2010 Act as amended, have been met. [The expression Department is used in the legislation but for the purposes of the decisions required to be taken under the legislation it is the Head of the TRU who takes them]. The relevant requirements are now set out in Paragraph 17(5) of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012, ("the Qualifications Regulations), which substitutes a new s.12 and adds ss. 12A-12E to the 2010 Act. The Qualifications Regulations also

contain important provisions in relation to Good Repute, Professional Competence and Transport Managers.

11. The grant of an operator's licence does not mean that an operator can then proceed on the basis that the requirements that must be met in order to obtain a licence can thereafter be disregarded. In our view it is clear both from the terms of the 2010 Act and from Regulation 1071/2009 that these are continuing obligations, which an operator is expected to meet throughout the life of the licence. It is implicit in the terms of s. 23, which gives the Department power to revoke, suspend or curtail an operator's licence, that this can take place at any time and for any reasonable cause, including matters covered by the requirements of s. 12 as amended. It is explicit in s. 24, which provides that a standard licence shall be revoked if at any time it appears that the licence-holder is no longer (i) of good repute, (ii) of appropriate financial standing or, (iii) professionally competent. The underlining, in each case is ours. First, we wish to stress that once it appears that the licence-holder is no longer of good repute, or of appropriate financial standing or professionally competent the licence must be revoked because the Act makes it clear that there is no room for any exercise of discretion. Second, the use of the expression 'at any time' makes the continuing nature of the obligations crystal clear.
12. The Tribunal has stated on many occasions that operator's licensing is based on trust. Since it is impossible to police every operator and every vehicle at all times the Department in Northern Ireland, (and Traffic Commissioners in GB), must feel able to trust operators to comply with all relevant parts of the operator's licensing regime. In addition other operators must be able to trust their competitors to comply, otherwise they will no longer compete on a level playing field. In our view this reflects the general public interest in ensuring that Heavy Goods Vehicles are properly maintained and safely driven. Unfair competition is against the public interest because it encourages operators to cut corners in order to remain in business. Cutting corners all too easily leads to compromising safe operation.
13. It is important that operators understand that if their actions cast doubt on whether they can be trusted to comply with the regulatory regime they are likely to be called to a Public Inquiry at which their fitness to hold an operator's licence will be called into question. It will become clear, in due course, that fitness to hold an operator's licence is an essential element of good repute. It is also important for operators to understand that the Head of the TRU is clearly alive to the old saying that: "*actions speak louder than words*", (see paragraph 2(xxix) above). We agree that this is a helpful and appropriate approach. The attitude of an operator when something goes wrong can be very instructive. Some recognise the problem at once and take immediate and effective steps to put matters right. Others only recognise the problem when it is set out in a call-up letter and begin to put matters right in the period before the Public Inquiry takes place. A third group leave it even later and come to the Public Inquiry with promises of action in the future. A fourth group bury their heads in the sand and wait to be

told what to do during the Public Inquiry. It will be for the Head of the TRU to assess the position on the facts of each individual case. However it seems clear that prompt and effective action is likely to be given greater weight than untested promises to put matters right in the future.'

The proper approach on appeal to the Upper Tribunal

8. 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. 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.'

Analysis

9. The basis for the Presiding Officer's decision to refuse the application was that the Appellant could not satisfy the requirement to be of good repute. The substantive decision is summarised in paragraphs 14 and 15 as follows:

'For whatever reason there has been a serious attempt to undermine the system both directly and indirectly perpetrated by Mr Hurley. It would be an affront to the regulatory system for a licence to be granted to an applicant

prepared to mislead the regulator in relation to his application as recently as in June 2021.

It has been necessary for me to determine whether this applicant meets the test of repute. The positives are outweighed by the negatives. I find Mr Hurley is without good repute.'

10. We begin by considering the grounds of appeal advanced in connection with the substantive decision. The first of these was that the decision was *Wednesbury* unreasonable.
11. Turning to the specifics of this ground, Mr Finnegan started by arguing that the Presiding Officer did not consider certain factors which were relevant. The first of these was that the Appellant did not have anything to hide and that there had been no attempt to explore the motivation for the dishonesty. With respect to Mr Finnegan, we do not accept this argument. There was no requirement to explore the motivation for the dishonesty. It was there in unequivocal terms and required no further analysis.
12. The second factor which Mr Finnegan asserted was not taken into account was the length of time which the Appellant had to wait to hear about the outcome of his first application. In *NT/2021/11 Trevor Cathers and Trevor Cathers Ltd*, (Cathers') the Upper Tribunal said the following, at paragraph 10:

'In paragraphs 21 to 37 of its decision in *NT/2017/16 Damien Toner* ([2017] UKUT 0353 (AAC)), the Upper Tribunal reviewed the jurisprudence (both at common law and in the context of the duties of a decision-making authority under the Human Rights Act 1998) relevant to delay in decision-making and the effect of delay on the reliability of the decision when eventually promulgated. This analysis was in a Northern Ireland case where the decision-making authority was the TRU. To avoid prolixity, we do not replicate paragraphs 21 to 37 in this decision.'
13. In *Cathers*, there was a delay of four years and three months in the processing of the Second Appellant's application for a standard international good vehicle operator's licence. In paragraphs 16-22, the Upper Tribunal set out an analysis of the significance of the role and function of the TRU and its Head. In paragraph 26, the Upper Tribunal said the following:

'We direct the Department to note that this is not the first decision in which the Upper Tribunal has commented on the quality of the decision-making within the TRU. It is clear that the lessons which have been outlined in previous decisions have not been learnt and that the present decision-making process is redolent of carelessness and inattention and which appears to be systemic.'
14. The Upper Tribunal then turned to the question as to whether delay in decision-making affected the fairness of the substantive decision which were eventually made. After analysing the relevant jurisprudence, it found that it did not. An application for leave to appeal the decisions in *Cathers* to the Court of Appeal were dismissed by the court.
15. In the instant case, we agree that the delay in determining the first application was fairly significant. Nonetheless, we do not agree that the delay affected the reasonableness of the eventual outcome decision. We have observed that in paragraph 12 that the Presiding Officer did not accept that the reason that the Appellant had withdrawn the first application was borne out of his frustration

about the length of time the decision-making process was taking. Rather, the Presiding Officers concluded that the timing of the withdrawal decision and the indication that the Appellant was going to make another application was to facilitate the making of Ms JJ. That was a conclusion which the Presiding Officer was entitled to make and was not at all unreasonable.

16. The third factor which Mr Finnegan submitted was relevant and which had not been taken into account was the possibility of 'using conditions to assuage any concerns in relation to dishonesty'. We are of the view that the substantive decision of the Presiding Officer i.e. to refuse that application was not plainly wrong was one which, on the basis of the evidence which was before him, he was entitled to make, and was proportionate, having been made after balancing the positive and negative features of the case.
17. The final factor which Mr Finnegan asserted was relevant and was not considered was 'the considerable upheaval in Mr Hurley's life at the time of the convictions'. We observed that at the heart of the decision to refuse the application was what the Presiding Officer described as a 'serious attempt to undermine the system both directly and indirectly perpetrated by Mr Hurley'. The Presiding Officer did not place any great emphasis on the fact of the convictions and, indeed, in paragraph 11 of his decision, noted that the fact that the Appellant had not declared three of his older convictions, in the mistaken belief that they were spent, was '... not the most significant factor in my decision.'
18. Mr Finnegan, under the *Wednesbury* ground, also noted that there were factors which were not relevant and which were taken into account. These were the mention by the Presiding Officer of (i) the Appellant's capacity to handle authority and (ii) his association with another individual. In respect of (ii) we do not agree that this was a factor in respect of the Presiding Officer's substantive decision to refuse the application but was more relevant to the Presiding Officer's secondary decision on what everyone in this case has called the 'rehabilitation period', more properly the period before which the Appellant could regain his repute and make a further application for a licence. Mr Finnegan, under the *Wednesbury* ground also argued that the rehabilitation period was arbitrary, irrational, and unreasonable. We deal below with the argument in connection with the rehabilitation period.
19. Mr Finnegan's second ground of appeal against the substantive decision to refuse the application was decision was not proportionate. More specifically, he argued that the Appellant's dishonesty was not hidden, was explainable and was not balanced against the lack of road safety or fair competition concerns, and the Appellant's honesty. We have already noted that the substantive decision of the Presiding Officer to refuse that application was not plainly wrong was one which, on the basis of the evidence which was before him, he was entitled to make, and was proportionate, having been made after balancing the positive and negative features of the case. In that balancing exercise, the Presiding Officer, in paragraph 10, stated that there was no criticism of the Appellant as a driver, that there were no concerns about the proposed Transport Manager and that the Appellant appeared to meet the financial standing requirement.
20. In this second ground of appeal, on proportionality, Mr Finnegan set out certain jurisprudence from the Upper Tribunal specific to the impact of convictions on the question of repute and the issue of the rehabilitation period. We observe that each of the decisions mentioned by Mr Finnegan turn on their own individual facts and do not serve as binding precedents. To repeat, we do not

agree that the substantive decision of the Presiding Officer was plainly wrong or disproportionate.

21. Mr Finnegan's third and final ground of appeal was that the reasons set out by the Presiding Officer were insufficient. To the extent that this ground is aimed at the substantive decision we do not accept that the reasons are insufficient.

22. We turn to Mr Finnegan's challenge to the rehabilitation period. He summarised this as follows:

'Similarly, at [17], the Presiding Officer explains that the process of gaining good repute is not a mathematical one. However, at [18] – [19] a mathematical process of finding the approximate median of three dates is set out.'

23. As was noted above, Mr Finnegan has also asserted that the length of the rehabilitation period is disproportionate.

24. We agree with Mr Finnegan on both grounds. The Presiding Officer's reasoning in connection with the rehabilitation period is somewhat disjointed. As Mr Finnegan has observed that in paragraph 17 of his decision, the Presiding Officer has noted that the process of deciding the length of the rehabilitation period is not a mathematical one but then makes a calculation of the length of the period based on dates on which the Appellant's convictions become spent. We also have concerns that the Presiding Officer included the factor of the Appellant's ability to handle authority into his equation. Finally, we also agree that the length of the rehabilitation period is disproportionate and fails to balance certain positive factors in the Appellant's favour. Those positive factors were reinforced by his oral evidence to us at the hearing.

25. In these circumstances, the appeal is allowed.

26. We make the following Direction:

'The decision of the Department was in two parts:

The first was that the application for a restricted licence should be refused as the Appellant could not satisfy the condition of being of good repute. We confirm that part of the decision which is not plainly wrong

The second part was that the earliest date when the Department might legitimately be able to find repute has been demonstrated is not before October 2023. We find that this part of the decision is plainly wrong on the basis of inadequate reasoning, that an extraneous factor was taken into account and the length of the period of deemed lost repute is disproportionate.

We substitute our own decision for the Presiding Officer's decision on the length of the rehabilitation period. We find that the earliest date when the Department might legitimately be able to find that repute has been established is not before the last day of March 2023.

It is a matter for the Appellant whether he wishes to make a further application for a licence after 1 April 2023. It is our view that if he does and if a standard international licence is granted, then in addition to the usual standard international licence undertakings it would be appropriate that there should be an undertaking that the Appellant will commission an independent audit of his operation six months after the date of the grant of the licence and that a report of that audit will be forwarded to the Head of the TRU for his consideration.'

A handwritten signature in black ink on a light grey background. The signature reads "Kenneth Mullan" in a cursive script.

**Kenneth Mullan, Judge of the Upper Tribunal,
19 January 2023**