



NCN: [2024] UKFTT 00551 (GRC)

Case Reference: D/2023/217

**First-tier Tribunal
General Regulatory Chamber
Transport**

**Determined at an Oral Hearing
on: 19th June 2024**

Before

HHJ DAVID DIXON

Between

ROSIE BEAR-ROBINSON

and

**THE REGISTRAR OF APPROVED
DRIVING INSTRUCTORS**

Appellant

Respondent

Decision: The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal concerns a decision of the Registrar of Approved Driving Instructors (“the Registrar”) dated 28th April 2023, to remove her from the Register after she failed to undergo three consecutive “continued ability and fitness to give instruction” tests, contrary to the requirements of the Road Traffic Act 1988. The Registrar’s decision was made following consideration of the circumstances and the Appellant representations, Tests were offered on 26th February 2020, 7th September 2021 and 1st March 2023.
2. The Appellant now appeals the Registrar’s decision by pleading dated 9th May 2023. Her grounds of appeal are that she was out of the country for the first failure and with COVID and other issues that test was missed. The second test the Appellant says was cancelled by the DVSA. She says that a third test was set in October 2022 but a medical issue arose and she missed the test due to the stress of the whole situation. The third test as defined by the Registrar was in March 2023 which she missed as she was on a special holiday. She thought she had sent an email to this effect but can’t find it, and there is a possibility that it wasn’t actually sent.
3. The Appellant begs for the chance to undertake a further check test, saying she will make herself available at any time.
4. The Respondent indicates that the Appellant hasn’t had a check test since 2014 and has not attended 3 tests. Insufficient evidence of good reasons for missing the tests has been provided and thus the Registrar felt he had no option but to remove the Appellant’s name from the Register.

Mode of Determination

5. The case was listed for an oral determination which was conducted by the CVP hearing system.
6. The Appellant attended and was represented by Mr Bown of Counsel. Ms Claire Jackson represented the Respondent.
7. The Tribunal considered a bundle of evidence containing 26 pages and an Appellant bundle containing 45 pages, consisting of references, a statement/argument from the Appellant, social media entries showing photographs of foreign travel, medical details and more.

Evidence

8. The Respondent indicated its case was as per the documentation supplied. Ms Jackson indicated that there had been a number of tests cancelled and rearranged between 2014 and the final date of note, due to COVID and a plethora of other reasons.

9. The Appellant gave evidence that during the relevant period she was living alone and running her ADI business. She confirmed that her statement in her trial bundle was an accurate reflection of the facts.
10. In terms of the check test on 23/2/20 she said she was in Australia, and did not get notification of the test date due to being abroad. Upon her return she did not receive a notification that she had failed to attend or indeed anything regarding the first miss.
11. As far as the 7/9/21 miss, initially she believed this test was cancelled, but now accepts that it was simply missed. She was unable to indicate where she was, or anything about the date, but stressed it was not a refusal to attend the test. She indicated at the time she was not well with Covid symptoms and another condition. In April 2022 she was diagnosed with an arthritic condition and was taking medication to deal with the pain. The effect of the medication was to slow her down generally, but that was necessary as the pain at the time was really bad; mainly in her knees "but everywhere really".
12. She asserted that whether it was confusion, the pain or something else it was that that led to the failure to take a test, not a deliberate act. Once again she indicated that she did not receive any formal notification of a missed test. However, under further questioning did accept that the invitation for the third missed test did point out that earlier tests had been missed and that a failure to attend the next test would be treated seriously.
13. On 1/3/23 the Appellant said she was in Sri Lanka, on a special holiday celebrating her 60th birthday. She had received notification of the third check test before leaving the UK, and she said she recalled she cancelled the test as a result of the pre-booked holiday. She accepted the DVSA had not produced the email and further accepted that might be because she had not clicked send.
14. The email was not available from the Appellant. She indicated that she had checked her computer and didn't know if it had been deleted due to an automated function within her device, but said that she had not altered the machine settings to change things from the norm. She said that a friend might have, but didn't press the point with force.
15. She denied that her failure to attend was a deliberate refusal, saying she would take a test if one was offered now.
16. She described how being an ADI was her only income and losing her licence would obviously affect her.
17. She made references to the testimonials made, which described her in glowing terms both as an instructor but also a colleague.

Submissions

18. Mr Bown on the Appellant's behalf submitted that the Tribunal must find that there was a deliberate refusal. It must be more than negligence, absent mindedness, or casual error. Here he said there was no direct evidence of refusal and therefore the Tribunal would have to look at the circumstantial picture to determine if there was a deliberate

act here, or someone who through whatever circumstances had missed things in a very different way.

19. He said the test was high as it would involve removing the Appellant's livelihood and the Tribunal must look with care, particularly bearing in mind the Appellant's good character, to come to the view that this was a deliberate attempt to avoid the rules.
20. After the Tribunal indicated the first failure wasn't of note, he indicated for the second failure that it might simply be that as a result of pain, medication or otherwise the appointment was simply missed. He said the initial account of the appointment being missed didn't assist the Appellant, but bearing in mind the other cancellations that have undoubtedly occurred (as evidenced by Ms Jackson from the DVSA) error might be a real possibility.
21. As for the third failure he argued that the cancellation email might have been sent and the DVSA not found it; that it had been deleted from the Appellant's computer as well, or it might not have been sent by accident. Whatever the position it was argued that if she was going to deliberately avoid the test (and its consequences) she could just have said she didn't receive the notification about it. Her account of trying to cancel it due to the holiday supported her credibility and as a result should lead the Tribunal to accept that once again this wasn't a deliberate refusal.
22. Finally, Mr Bown stressed the Appellant's good character and urged the Tribunal consider the proportionality of a removal for the Appellant.

The Law

23. Section 125 (5) of the Road Traffic Act 1988 imposes a condition for an Approved Driving Instructor to submit themselves for a test of continued fitness and ability if required to do so by the Registrar.¹
24. Where an Approved Driving Instructor fails to attend a test of continued fitness and ability or fails such a test, the Registrar may remove that person from the register under s. 128(2) (c) or (d) of the 1988 Act.²
25. An appeal against the conduct of a check test by a person who has failed it lies to the Magistrates' Court and not to this Tribunal.³
26. An appeal to this Tribunal against the Registrar's decision proceeds as an appeal by way of re-hearing i.e. the Tribunal stands in the shoes of the Registrar and takes a fresh decision on the evidence before it. It must give such weight as it consider appropriate to the Registrar's reasons⁴ as the Registrar is the person tasked by

¹ <http://www.legislation.gov.uk/ukpga/1988/52/section/125>

² <http://www.legislation.gov.uk/ukpga/1988/52/section/128>

³ <http://www.legislation.gov.uk/ukpga/1988/52/section/133>

⁴ See *R (Hope and Glory Public House Limited) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31. <http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html>. Approved by the Supreme Court in *Hesham Ali (Iraq) v*

Parliament with making such decisions. The Tribunal does not conduct a procedural review of the Registrar's decision-making process.

Conclusion

27. The Tribunal considered carefully all the evidence in this appeal.
28. The Tribunal concludes that failing to attend offered check tests is a serious matter. The Registrar was confronted with a situation where the Appellant offered little supported explanation why she had been unable to take the check tests offered, and this hampered an effective review.
29. The Tribunal has had the advantage of seeing and hearing from the Appellant. The first failure to attend occurred at a time when the Appellant was abroad. The Tribunal is prepared to accept this. It seems that the Appellant had opted to use a local SIM and therefore her phone number changed. She would therefore not have received any calls/texts from the DVSA. The Tribunal is prepared to put this matter to one side. The explanation is plausible and the Tribunal didn't feel it necessary to press this particular point.
30. The second failure is now accepted to be unexplainable. There was some confusion over which miss this was, but it is now accepted that the medical issue raised related to a different occasion than that the Registrar relies upon. The Appellant can't advance a reason for missing this test, but adds to "err is human". The Tribunal finds it difficult to accept that an ADI would simply have no knowledge of a check test, or a reason for missing the same. The pain and medication issues weren't advanced to the degree to suggest the Appellant was unable to function. The Tribunal was therefore left in a position of being very unhappy about the lack of reason for failing to attend.
31. The third miss was when she was on her celebratory 60th holiday. She believes that an email was sent informing the DVSA of the need to rearrange the test, but has not provided the same. Her account that the email might have been deleted by automatic settings on the computer simply does not fit. The account is simply too fanciful. The suggestion that the DVSA had lost the email, again is not accepted. The first this point was raised was during the hearing; there is no basis put forward. Further it is a remarkable coincidence that both sides have "lost" the email. The Tribunal therefore has to find on the evidence, and has no difficulty doing so, that the email if it was drafted was never sent.
32. The Tribunal carefully listened to the Appellant's account that an email was sent seeking to cancel the booked slot and the acceptance that it might not have been sent, and has then reflected on that account. If the email was not sent it would have remained in the draft section of the email service and then noticed later. The Appellant did not refer to the same happening. The Appellant knew a failure to complete the check test would be serious, but didn't get a receipt for her email, nor had she received a fresh date. This didn't seem to cause any issue for her, even though it was "weeks before her holiday." The Tribunal on the balance of probabilities, looking at the

evidence with care, has to come to the view that the email was never drafted; anything else simply doesn't fit.

33. The Appellant has then just not attended for the third check test. Was this a refusal? In light of the second failure the Tribunal comes to the view it was. Having missed the second test for no good reason, the Tribunal is driven to the conclusion that the third was also a deliberate miss.
34. The Appellant seeks to argue that even allowing for this she has not "refused" to be tested, indeed she offers to be tested now. It is accepted that sometimes a refusal can be seen from the way an individual behaves. Here, the question for the Tribunal is whether the combined situation here shows that the Appellant has failed to submit to testing.
35. The Registrar was in position of having little explanation to support the excuses advanced. It seems the explanations provided were in effect wrong to a degree in any event. Whatever the position, on the evidence available to the Registrar, he had little choice but to remove the Appellant. The Tribunal now has more materials, but sadly find itself in a situation where it doesn't accept all of the evidence advanced by the Appellant. The factual situation simply did not fit with the overall position and the Tribunal comes to the view that there was a refusal to be tested. Under those circumstances the Tribunal too comes to the view that the Appellant must be removed from the Register.
36. The proportionality of that decision, when balanced by the good character, shown through testimonials and more, has been carefully considered. The Tribunal is well aware of the implications of this decision, but of paramount importance is the need for ADIs to be teaching to the required standard, and to be able to show that they are. Here the Appellant has shown through her actions that she is not willing to be tested, and accordingly with regret the decision to remove is upheld.
37. The appeal is therefore dismissed with immediate effect.

(Signed)

HHJ David Dixon

DATE: 19th June 2024