

NCN: [2018] UKUT 0098 (AAC)
Appeal No.: T/2018/01

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS**

**IN AN APPEAL FROM THE DECISION OF:
SARAH BELL, TRAFFIC COMMISSIONER FOR THE SOUTH EAST AND
METROPOLITAN TRAFFIC AREA
DATED 20 NOVEMBER 2017**

Before:

**Judith Farbey QC, Judge of the Upper Tribunal
Leslie Milliken, Specialist Member of the Upper Tribunal
David Rawsthorn, Specialist Member of the Upper Tribunal**

Appellant: DAVID KING trading as MILITARY WORLD

Attendance: The Appellant appeared in person

Heard at: Field House, 15-25 Bream's Buildings, London EC4A 1DZ

Date of hearing: 14 March 2018

Date of decision: 26 March 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED.

SUBJECT MATTER: Loss of good repute as operator; criminal convictions; disqualification; reasons for decision; proportionality

CASES REFERRED TO: *Ladd v Marshall* [1954] 1 WLR 1489; *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport* [2010] EWCA Civ 695; *T/2012/34 Martin Joseph Formby t/a G & G Transport; Stephenson & Turner 9/2000; 2008/580 & 2008/581 TS Dhaliwal and New Bharat Skips Ltd; Firstline International Ltd & William Lambie v Secretary of State for Transport* [2016] UKUT 0291 (AAC); *Andrew Harris t/a Harris of Leicester* [2014] UKUT 0483 (AAC)

REASONS FOR DECISION

1. This is an appeal from the decision of the Traffic Commissioner for the South East and Metropolitan Traffic Area ('the TC') made on 20 November 2017. By that decision, she revoked with immediate effect Mr King's operator's licence on the basis that he no longer met the requirement of good repute. She also disqualified him from holding or obtaining an operator's licence or being involved in an entity that holds or obtains such a licence for a period of five years from the date of her decision.
2. In his grounds of appeal, Mr King contends that the TC failed to give adequate reasons for selecting five years as the disqualification period and that the length of the disqualification is disproportionate. In written submissions sent to the Upper Tribunal by email on 12 March 2018, he makes the further submission that the decision to revoke the licence was disproportionate. At the hearing before us, he amplified his grounds of appeal and written submissions. We have taken into consideration everything that he has told us.

Background

3. This is not the first time that a licence associated with Mr King has been revoked. In March 2012, the Deputy Traffic Commissioner ('DTC') for the South Eastern and Metropolitan Traffic Area ordered that a company called A+ Logistics should have its operator's licence revoked on the basis of repute and financial standing. Mr King was a director of that company and was disqualified from holding an operator's licence for two years from 30 April 2012. The grounds for the DTC's decision included Mr King's conviction for perverting the course of justice. The DTC's written reasons state that the offence involved a false claim by Mr King that he had not been driving a vehicle that triggered a speed detection camera. Mr King was sentenced to 26 weeks imprisonment suspended for 18 months together with an unpaid work requirement. The documents show that this sentence was imposed on 20 November 2009.
4. On 19 March 2015, following a public inquiry ('PI'), Mr King was granted a standard international licence for two vehicles and two trailers in order to operate a different business called Military World. In a letter dated 15 November 2016, he informed the TC that on 21 October 2016 he had been convicted of being knowingly concerned in the fraudulent evasion of VAT between 2010 and 2012 for which he had been sentenced to two and a half years imprisonment. In this letter, Mr King attributed his offending behaviour to pressure from his former business partner. He said that he and his partner had stopped working together in late 2012. Since then, he had developed his own business having come out of a difficult part of his life.
5. As a result of the letter, the Office of the Traffic Commissioner ('OTC') wrote to Mr King on 15 May 2017 warning him that the TC was considering making a direction to revoke his licence on the basis that he was no longer of good repute.

He was invited to make representations against such a course. Mr King requested a PI which started on 27 September 2017. On that day, the TC adjourned the inquiry in order for Mr King to obtain further evidence of his offence and sentence. Mr King thereafter supplied a copy of a Pre-Sentence Report (PSR) dated 27 September 2017 which was available to the TC when the inquiry resumed on 23 October 2017.

6. Mr King challenges some of the PSR's conclusions on the basis that he spent little time with the author of the report. He told us that he was suffering from the stress of the criminal proceedings when the report was compiled, which affected the quality of the information which he gave to the report-writer. The report nevertheless makes clear that he was convicted of three offences of tax evasion for three separate periods: between 1 January 2010 and 1 October 2012; between 14 November 2010 and 1 January 2013; and between 31 August 2012 and 1 March 2013. Given that the suspended sentence for perverting the course of justice was imposed in November 2009, it follows that part of his further offending behaviour would have taken place during the operational period of that sentence. Mr King did not dispute that this was the case, either before the TC or before us when we asked him about it.
7. As a result of his convictions for tax evasion, Mr King was sentenced to thirty months imprisonment and disqualified from being a director of any company for six years from October 2016.

Fresh evidence

8. We deal with the fresh evidence which Mr King attached to his most recent submissions and asked us to take into account. In deciding whether to admit evidence that was not provided to the TC, the Tribunal will apply the test in *Ladd v Marshall* [1954] 1 WLR 1489. It is part of the *Ladd v Marshall* test that the evidence should not have been previously available.
9. There are really two aspects to the fresh evidence in this case. The first aspect is the clip of documents at Annex C of Mr King's submissions, which relate to the liquidation and winding up of a company called Southern Logistics Ltd ('SLL') in 2009. The documents show that Mr King was a director of SLL from August 2005 to December 2008. The Case Summary before the TC says that the SLL licence was revoked in July 2010. Mr King says that SLL did not have its licence revoked but surrendered its licence as a condition of the grant of a licence to A+ Logistics. Either way, he relied on the SLL documents to prove that he was not a director when the licence came to an end, thereby seeking to distance himself from anything that happened to the licence in 2010.
10. We asked Mr King why he had not shown these documents to the TC. He told us that he was taken by surprise by the depth of questioning at the PI and did not appreciate that his role in SLL might be relevant to the issues. He submitted that information available to the OTC should be deemed to have been available to the TC and asked us not to treat the SLL documents as fresh evidence.

11. We accept that the OTC would have had similar information but, if Mr King wished to counter anything in the Case Summary, he should have done so at the PI. No unfairness arises from the TC's approach to questioning Mr King: he had ample opportunity to draw the TC's attention to documents and information about SLL and to make any submissions about SLL that he wished to make. The SLL documents were available to Mr King at the time of the PI and so are not admissible under *Ladd v Marshall*.
12. In any event, it is also part of the *Ladd v Marshall* test that the fresh evidence would probably have an important influence on the result of the case. In our view, the SLL licence did not play a material (let alone important) part in the TC's decision: she makes a brief and oblique reference to it at the beginning of her decision but it plays no material part in the outcome for Mr King. The SLL documents show that Mr King was the sole director of the company which accrued liabilities of £117,001 before the High Court's winding up order. We do not regard them as advancing Mr King's case. For these reasons, we do not propose to consider them any further.
13. Secondly, Mr King asked the Tribunal to consider a letter from his Probation Officer which is undated at Annex A of his most recent submissions. The letter confirms that Mr King did not accrue any negative reports or adjudications while serving his prison sentence and that he has complied fully with the conditions of his release. He is assessed as posing a low risk of reoffending. Mr King sought to rely on this assessment to counter the conclusion of the PSR that 'a strong pattern of dishonest offending is evident'. He said that he has a good relationship with his Probation Officer who knows him far better than the author of the PSR. It was nevertheless open to Mr King to produce evidence from the Probation Service to the TC. He was released from prison on 7 September 2017. The PI did not conclude until 23 October 2017. When the hearing was adjourned in September 2017, Mr King was clearly told by the TC that he could submit any further evidence that he thought would be helpful in putting his case to her (p92). He did not do so and, applying *Ladd v Marshall*, there is in our view no reason to admit this letter now.

The Tribunal's approach

14. As to our approach to the issues that arise in this appeal, the Upper Tribunal has full jurisdiction to hear and determine all matters whether of law or fact. However, we are not simply rehearing the case before the TC. We apply the approach in paragraphs 30-40 of the judgment of the Court of Appeal in *Bradley Fold Travel Ltd and Peter Wright v Secretary of State for Transport* [2010] EWCA Civ 695. An appeal before the Upper Tribunal takes the form of a review of the material before the TC. In order for an appeal to succeed, it is necessary to show that 'the process of reasoning and the application of the relevant law require the tribunal to adopt a different view'. Put another way, it might be said that an appellant has to demonstrate that the TC's decision was 'plainly wrong'.
15. In addition, we have considered the question of trust. As the Upper Tribunal observed in paragraph 17 of *T/2012/34 Martin Joseph Formby t/a G & G Transport*:

‘We must bear in mind that operator licencing is based on trust. Traffic Commissioners must be able to trust those to whom they grant operator’s licences to operate in compliance with the regulatory regime. The public and other operators must also be able to trust operators to comply with the regulatory regime’.

16. We agree with the TC’s emphasis on trust. In our view, the issue of trust is key to this case.

Revocation

17. The relevant statutory provisions about good repute are contained in paragraphs 1-5 of Schedule 3 to the Goods Vehicles (Licensing of Operators) Act 1995. Under paragraph 2 of the Schedule, a TC shall determine that an individual is not of good repute if that individual has more than one conviction for a serious offence. Under paragraph 3, a serious offence includes an offence for which a person is sentenced to imprisonment for a term exceeding three months. Mr King was convicted on three counts of tax evasion. It is now well-established that each count must be regarded as a separate criminal offence (*Stephenson & Turner 9/2000*). Therefore, Mr King has accrued more than one conviction for a serious offence and falls to be treated on a mandatory basis under the statute as a person who is not of good repute.

18. The TC was aware of this mandatory statutory outcome but went on to consider whether European law (namely, Article 6 of Regulation 1071/2009) demanded a different answer. Article 6 deals with the conditions relating to the requirement of good repute. The principle of proportionality is mentioned in particular in Article 6(2)(a). The TC concluded that revocation was proportionate because Mr King is not trustworthy in relation to a regulatory regime that needs to trust operators to comply with laws, rules and regulations.

19. We are not sure that the principle of proportionality was applicable. The Upper Tribunal has previously held that the mandatory loss of repute provisions in Schedule 3 to the 1995 Act are not subject to proportionality: see *2008/580 & 2008/581 TS Dhaliwal and New Bharat Skips Ltd*. However, *Dhaliwal* preceded the 2009 Regulation and concerned differently-worded provisions. We have considered the Tribunal’s more recent observations in *Firstline International Ltd & William Lambie v Secretary of State for Transport* [2016] UKUT 0291 (AAC). In the context of revocation, the Tribunal said at paragraph 27 of its decision that Article 6(2)(a) ‘adopts the device of forcing a proportionality analysis into the assessment of good repute’. It went on to suggest at paragraph 32 that there is ‘merit in considering proportionality as a matter of course’. However, the Tribunal in *Firstline International* was not concerned with the mandatory provisions that apply to serious convictions. We do not think that its observations necessarily carry across to those provisions.

20. We have in addition considered Article 6(3) of the Regulation which in essence stipulates that if a person has serious criminal convictions, his or her good repute cannot be regained until a ‘rehabilitation measure’ has been taken. Article 6(3)

makes no reference to considerations of proportionality. In the present case, Mr King was still serving his sentence at the date of the TC's decision - albeit that he was on licence – so that it would be difficult to say that he had been rehabilitated under Article 6(3).

21. We have nevertheless considered the justice of the case and whether revocation was a proportionate outcome. Mr King emphasised that he had operated the licence in a way that was fully compliant with all regulatory obligations from March 2015 (when it was issued) to October 2016 (when he ceased to trade as a consequence of the criminal proceedings). He confirmed that he had worked hard while in prison to establish a plan for his release which included using his operator's licence. That plan had been thwarted and he was unemployed with no source of income. He asked us to view his offences as being historic only and said that he had not offended since 2013 which is now five years ago. He reiterated his submission to the TC that he has learned his lesson and moved on in life.
22. We appreciate that Mr King was keen in prison to work towards restarting his business on release and that he may have suffered adverse financial consequences as a result of the TC's decision. We also accept that there is no evidence that he has reoffended since 2013. Mr King made similar points to the TC and she took them into account when reaching her decision.
23. However, on the other side of the scales, Mr King has been convicted of tax evasion which is an offence of dishonesty. He was convicted on three counts spanning several years, such that his offending behaviour was plainly not a one-off occurrence. Given the repetition, it is hard to conclude that his offending happened only because of the undue influence or unscrupulous behaviour of his business partner. Secondly, some of Mr King's offending behaviour took place while he was the subject of a suspended sentence order. We agree with the TC that his past willingness to breach his suspended sentence order undermines his present, stated commitment not to offend again. The breach of the suspended sentence order in our view demonstrates a lack of ability to learn from the past. Thirdly, his convictions for tax evasion must be viewed in the context of his previous conviction for perverting the course of justice, which also demonstrated dishonesty. While that conviction was the subject of the earlier PI and the earlier decision of the DTC, we take the view that the TC was entitled to take it into account in looking at Mr King's history as a whole and in deciding whether Mr King is ready to be trusted.
24. We agree with the TC too that Mr King has shown a lack of candour in the regulatory process. First, there is the letter of November 2016 in which Mr King mentioned only one charge of tax evasion when he had been convicted on three counts. We gave Mr King an opportunity to explain why this failure did not amount to a lack of candour with his regulator. He told us that he reported the sentence and not the number of charges. He submitted that he had written the letter in the best possible way. We do not agree. We agree with the TC's conclusion that he was not candid.

25. Secondly, as we have mentioned, Mr King has attributed his offending to the bad influence of his former business partner. However, he and his partner ceased to work together in 2012. The TC was careful to ask questions about the chronology of the offences. In response to her questions, Mr King accepted that the tax evasion had gone into 2013. We agree with the TC that his partner could not be regarded as carrying influence in relation to tax evasion that extended into 2013. We agree that Mr King has shown lack of candour to his regulator in relation to the cause of his offending.
26. Against this background, we are not persuaded that it was disproportionate for the TC to revoke the licence. We see no reason to interfere with the TC's decision which in our view provided the right outcome.

Disqualification

27. The TC deals in brief terms with disqualification at paragraph 20 of her decision. We accept that she could have provided fuller reasons in that paragraph. However, paragraph 20 should not be read in a vacuum but in the context of the TC's various findings made earlier in her decision. When the TC's decision is read as a whole, we take the view that her decision to disqualify Mr King for a five-year period is readily understood. The TC is essentially saying that the history of dishonesty means that Mr King could not be trusted with a licence within five years.
28. Mr King submits that the period of five years is disproportionate, going beyond regulatory objectives and amounting to a punishment. We have considered his submissions with care but we agree with the TC. The history of convictions combined with Mr King's lack of candour in the regulatory process mean that the TC was not plainly wrong to disqualify Mr King for five years. We have taken into account that Mr King wishes to use an operator's licence to earn a livelihood and that the disqualification period may have a significant financial effect on him. Nevertheless, any hardship to Mr King must be balanced against the public interest in operators adhering to rules. We find no grounds to interfere with the TC's decision.
29. As a barometer for our decision that the five-year period is proportionate, we have taken into consideration the rehabilitation period for Mr King's offending under the Rehabilitation of Offenders Act 1974, following the approach of *Andrew Harris t/a Harris of Leicester* [2014] UKUT 0483 (AAC) at paragraph 13. It suffices in this case to consider Mr King's custodial sentence for tax evasion which was thirty months. The end of the rehabilitation period for a thirty-month sentence is the end of the period of 48 months beginning with the day on which the sentence (including any licence period) is completed. We calculate that the rehabilitation period is therefore the thirty months of the sentence plus 48 months which is in effect six and a half years (see section 5(2) of the Act). The five-year disqualification period is not discordant with the rehabilitation period; nor is it discordant with the six-year disqualification from being a company director.

30. For these reasons, this appeal is dismissed.

(signed on the original)

JUDITH FARBEY QC
Judge of the Upper Tribunal
26 March 2018