



NCN: [2021] UKUT 0255 (AAC)  
Appeal No. T/2021/25

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

**ON APPEAL from DECISIONS of the TRAFFIC COMMISSIONER for the South Eastern  
and Metropolitan Traffic Area**

**Dated:** 19 February 2021

**Before:** M R Hemingway: Judge of the Upper Tribunal  
Mr D Rawsthorn: Member of the Upper Tribunal  
Mr A Guest: Member of the Upper Tribunal

**First Appellant:** MBBStrans Ltd

**Second Appellant:** MTM Skip Hire Ltd

**Third Appellant:** Przemyslaw Zalecki

**For the appellant:** Mr P Sadd (Counsel)

**Date of hearing:** 14 July 2021

**Date of Decision:** 14 October 2021

**DECISIONS OF THE UPPER TRIBUNAL**

1. The appeal of MBBSTrans Ltd against the decision of the Traffic Commissioner to revoke licence OK1139988 is dismissed.
2. The appeal of MBBSTrans Ltd against the decision to disqualify it from holding or obtaining an Operator Licence or from being engaged in the management, administration or control of any entity that holds or obtains such a licence in Great Britain for a period of three years from 23:45 hours on 31 March 2021 is dismissed.
3. The appeal of Przemyslaw Zalecki against the decision to disqualify him from holding or obtaining an Operator Licence or from being engaged in the management, administration or control of any entity that holds or obtains such a licence in Great Britain for a period of three years from 23:45 hours on 31 March 2021 is allowed. The matter is remitted to a Traffic Commissioner for reconsideration.
4. The appeal of MTM Skip Hire Ltd against the decision to revoke licence OK2023169 is allowed. The matter is remitted to a Traffic Commissioner for reconsideration.

**SUBJECT MATTER**

Revocation; Disqualification; Loss of Repute; Proportionality.

**CASES REFERRED TO**

Redski T 2003/07  
Randolph Transport Ltd T 2014/59  
Arnold Transport Ltd NT/2013/82  
Finch T 2010/29  
Bradley Fold Travel Ltd and Another v Secretary of State for Transport [2010] EWCA Civ 695



## REASONS FOR DECISION

### Introduction

1. There are, in this case, three appellants. The first appellant is MBBSTrans Ltd. We shall, from now on, simply call that appellant “MBBS”. The second appellant is MTM Skip Hire Ltd. We shall, from now on, simply call it “MTM”. The third appellant is Mr Przemyslaw Zalecki who, from now on, we shall simply refer to as “Mr Zalecki”. All three have appealed to the Upper Tribunal from decisions of the Traffic Commissioner (“TC”) made on 19 February 2021 (the date of the written reasons) following a public inquiry (“PI”) which had taken place on 24 September 2020 and 7 January 2021. The TC simultaneously made a decision concerning one Michael Filipek (who had for a time been the transport manager on the licence held by MBBS) disqualifying him from acting as a transport manager. But Mr Filipek has not appealed and has played no part in these proceedings.

2. As to the decisions of the TC which are under challenge before the Upper Tribunal, they were expressed by the TC as follows:

“With respect to MBBS:

#### MBBSTRANS LTD

“1. Pursuant to adverse findings under Section 26(1)(b),(f) and (h) of the Goods Vehicle (Licensing of Operators) Act 1995 and Section 27(1)(a) of the 1995 Act, MBBSTrans Ltd (“MBBS”) no longer meets a mandatory requirement of Section 13A(2) of the 1995 Act – Good Repute. Accordingly, the Licence is revoked with effect from 23:45 on 31 March 2021.

2.....

3. MBBS and Mr Przemyslaw Zalecki are disqualified from holding or obtaining a an Operator Licence or being engaged in the management, administration or control of any entity that holds or obtains such a Licence in Great Britain as provided by Section 28 of the 1995 Act for a period of three years from 23:45 hrs on 31 March 2021.

#### MTM SKIP HIRE LTD

4. Pursuant to adverse findings under Section 26(1)(b), (f) and (h) of the Goods Vehicle (Licensing of Operators) Act 1995, MTM Skip Hire Ltd (“MTM”) no longer meet a mandatory requirement of section 13B of Act 1995 – must not be unfit to hold a Licence. Accordingly, the Licence is revoked with effect from 23:45 on 31 March 2021”.

3. On 15 April 2021 Upper Tribunal Judge Hemingway granted a stay of the above decisions pending resolution of the appeals brought by the three appellants.

4. The appeal was heard on 14 July 2021 at Field House in London. All three appellants were represented by Mr P Sadd of Counsel to whom we are very grateful.

## Some relevant legislation

5. Section 13A relevantly provides as follows:

**“13A. – Requirements for standard licences**

(1) The requirements of this section are set out in sub-sections (2) and (3).

(2) The first requirement is that the traffic commissioner is satisfied that the applicant –

(a) ...

(b) is of good repute (as determined in accordance with paragraphs 1-5 of Schedule 3)...

6. Section 13B relevantly provides:

**13B. – Requirements for restricted licences**

The requirement of this section is that the applicant is not unfit to hold an operator's licence by reason of –

(a) any activities or convictions of which particulars may be required to be given under section 8(4) by virtue of paragraph 1(e) or (f) of Schedule 2;

(b) any conviction required to be notified in accordance with section 9(1) (convictions etc required to be notified subsequent to the making of an application).

7. Section 26 of the Goods Vehicles (Licencing of Operators) Act 1995 relevantly provides;

**26. – Revocation, suspension and curtailment of operator's licences.**

(1) Subject to the following provisions of this section and the provisions of section 29, a traffic commissioner may direct that an operator's licence be revoked, suspended or curtailed (within the meaning given in subsection (11)) on any of the following grounds –

(a)...

(b) that the licence-holder has contravened any condition attached to the licence;

(c) ...

(ca)...

(d)...

(e)...

(f) That any undertaking recorded in the licence has not been fulfilled;

(g)...

(h) That since the licence was issued or varied there has been a material change in any of the circumstances of the licence-holder that were relevant to the issue or variation of the licence...

8. Section 27 of the Goods Vehicles (Licencing of Operators) Act 1995 relevantly provides:

**27. - Revocation of standard licences.**

(1) a traffic commissioner shall direct that a standard licence be revoked if at any time it appears to him that –

(a) the licence-holder no longer satisfies the requirements of section 13A(2)...

9. Section 28 of the Goods Vehicles (Licencing of Operators) Act 1995 relevantly provides:

**28.- Disqualification.**

(1) where, under section 26(1) or 27(1), a traffic commissioner directs that an operator's licence be revoked, the commissioner may order the person who was the holder of the licence to be disqualified (either indefinitely or for such period as the commissioner thinks fit, from holding or obtaining an operator's licence...

## The Background

10. The relevant historical and factual background is a little convoluted. We shall, below, take a little time to summarise it.

11. Mr Zalecki is the sole director of both MBBS and MTM. He has had some previous involvement with the regulatory system as referred to by the TC in his written reasons of 19 February 2021. In brief, he had previously been called to a PI, on three occasions, with respect to an entity called Rubbish Express Ltd as a result of various concerns surrounding vehicle roadworthiness and convictions for unsafe work practices. On 14 March 2014 the licence of that entity was revoked because Mr Zalecki had not notified the Office of the Traffic Commissioner (“OTC”) that it was heading into liquidation. On 1 September 2015 he had attended a PI which had been called in relation to an entity called Rubbish Express Haulage Ltd which was his wife’s company. He had signed a variation application purporting to be a director of that entity although he was not listed as such at Companies House. The licence was revoked and his wife was disqualified from holding or obtaining another licence on an indefinite basis. The Deputy Traffic Commissioner (“DTC”) who dealt with that case had commented with respect to Mr Zalecki *“I was unable to establish if he was acting as de facto director but would have disqualified him if this had been the case”*. The same DTC had considered a new licence application made by an entity called Skyrider Ltd. Mr Zalecki’s father was its sole director. The application for the licence was granted but with a condition that Mr Zalecki would not have any role in the day-to-day running of the transport side of the business. The entity subsequently acknowledged that that condition had been breached and the licence was subsequently revoked, with that decision being upheld by the Upper Tribunal (see paragraphs 5-7 of the TC’s written reasons in this case).

12. In due course Mr Zalecki became the sole director of MBBS and he notified this to the OTC in April 2020. The following month he applied to become its sole transport manager. The change of ownership of MBBS resulted in standard inquiries regarding its finances being made by the OTC. On 10 June 2020 he responded by indicating that MBBS did not have a bank account and that its finances were run through another limited company controlled by him called Parking London Ltd. The OTC also made enquiries as to training he had had as a transport manager. These issues caused the TC to conclude that the holding of a PI would be appropriate. It subsequently emerged that Mr Zalecki was the sole director of another company called ABC Christmas Tree Ltd. New licence applications had been submitted by that company and by Parking London Ltd. Further, on 28 August 2020, Mr Zalecki became the sole director of MTM which already possessed a restricted licence.

### **The Public Inquiry**

13. Originally, the only entity called to PI was MBBS. The call up letter of 17 August 2020 indicated, amongst other things, that the TC was concerned that there might have been a material change in the circumstances of the licence holder, that MBBS might not be of good repute, that MBBS might not have appropriate financial standing, and that it might not meet the requirement of professional competence. It was pointed out that if those requirements were not met then its licence would be at risk. It was also said *“If the Traffic Commissioner revokes a licence, she may also **disqualify** the company or any of its directors for a specific period or indefinitely from holding another operator’s licence, and from being a director of any company which holds such a licence. For this reason, it is important that you attend the inquiry”*. The date of the PI was specified as being 24 September 2020.

14. On 24 September 2020, Mr Zalecki attended on behalf of himself and MBBS. He did not, on that occasion, have legal representation. According to the transcript, the TC informed him that she had only just become aware of the outstanding applications which had been made on behalf of Parking London Ltd and ABC Christmas Tree Limited. Mr Zalecki told the TC that Mr Filipek was still MBBS’s transport manager but that he was currently in Poland. He explained he had not submitted certain documentation which had been requested in the call up letter because he had broken his leg and had, in consequence, been unable to get to his office. In the circumstances, which included the above and the fact of Mr Zalecki having become MTM’s sole director with that entity being an existing restricted licence holder, it was decided to adjourn the PI with the intention that these additional matters could all be considered at the same time.

15. The PI was reconvened (but on this occasion as a virtual rather than a face-to-face hearing due to national lockdown provisions) on 7 January 2021. Mr Zalecki was, once again, in attendance. On this occasion he was represented by his solicitor. Mr Filipek did not attend. The applications which had been made by Parking London Ltd and ABC Christmas Tree Ltd were withdrawn. Mr Zalecki also sought to withdraw his nomination as MBBS's proposed transport manager, an application for one Mr A Howes to be added as transport manager instead having been submitted one day prior to the date of the reconvened PI. But the TC observed "*however, as that matter was called, and as it was all very last minute, that application did remain live at the Public Inquiry*". Mr Howes, though, was also in attendance at the PI and did give some evidence.

16. What was said at the PI hearing of 7 January 2021 has been recorded in a transcript. It is not necessary for us to go through everything which was said. Mr Sadd, on behalf of the appellants, has subsequently highlighted certain matters which we have had regard to. Picking out some of those, we note that Mr Zalecki had indicated at the PI, when asked why he had failed to disclose a criminal conviction when applying to be added as director on MBBS's licence, that he had not thought a health and safety conviction amounted to a criminal offence; that he had stated Mr Filipek had acted as transport manager on the MBBS licence between June and August 2020 and had visited the premises "*several times*"; that he had incorrectly indicated at the adjourned PI of 24 September 2020 that he was MBBS's only driver; that he had subsequently sought to explain the giving of such inaccurate information at the PI hearing of 7 January 2021 by stating "*I think it was stress*" and stating he had not intended to tell the TC "*something what is not true*". It is also pointed out by Mr Sadd, in written submissions to the Upper Tribunal, that the transcript reveals no recorded exchange between the TC and his solicitor "*about possible outcomes including disqualification*".

### **The Traffic Commissioner's decisions**

17. The actual decisions made by the TC as recorded in her written reasons have already been set out above. The TC made it clear that she had considered, in addition to what had been said at the PI, various documents including written representations made on behalf of the appellants; a DVSA tachograph analysis report prepared by traffic examiner Paul Clarke of 6 January 2021; and the Senior Traffic Commissioner's Statutory Guidance and Statutory Directions. She explained there is "*clear and consistent case law from the Upper Tribunal that a Traffic Commissioner is entitled to treat the conduct of a sole director effectively as the conduct of the Ltd Company and good repute or fitness is determined accordingly*". She then said this;

#### **"Consideration and findings**

15. I had the benefit of seeing, hearing, and assessing Mr Zalecki as a witness on two occasions – in person on 24 September 2020 and at the virtual hearing on 7 January 2021. My overall impression is that Mr Zalecki is not a truthful or compelling witness. This is based on the following:

- i. Mr Zalecki failed to produce the statutory records required for the first hearing set out in the call in letter date 17 August 2020, due by no later [sic] 17 September 2020 (see page 10 of Public Inquiry bundle).
- ii. Mr Zalecki was unaware prior to the first hearing date that his transport manager had gone to Poland or when he would be back. Mr Zalecki told me on 24 September 2020 that it was essentially none of his business. I find this an extraordinary statement to make about the individual who is meant to be exercising continuous and effective management of transport operations.
- iii. Mr Zalecki told me that his Transport Manager was away and as he had broken is [sic] leg (13 September 2020) there was no one else to help him gather the evidence. He gave no reason as to why my office were not contacted in

advance to explain this/ seek alternative direction. Further the findings below indicate that this was not accurate.

- iv. Mr Zalecki told me that he was the only driver and that the specified vehicle (EY11NDK) was parked up since he broke his leg on 13 September 2020. He specifically stated that no agency/other drivers were used. To obtain independent evidence, I directed that the raw data be sent to DVSA. The subsequent analysis report shows that Mr Zalecki deliberately misled me – 6 other drivers have been behind the wheel of that vehicle. The vehicle was used on Monday 21 September (the same week as the Public Inquiry) and went back into use on Friday 25<sup>th</sup> September (the day after the Public Inquiry). This is a gross breach of trust. If I had known the real position, I would have asked direct questions on how the transport was being managed with Mr Zalecki indisposed and his transport manager absent.
- v. During this period Mr Zalecki did not check (or arrange for someone else to check) the driver licences or driver cards to ensure each had the appropriate Licence to drive the vehicles, any endorsements which may impact MBBS' insurance terms or driver cards to see if the drivers would be within their lawful hours. After they drove for MBBS, Mr Zalecki did not have their driver cards downloaded. Mr Zalecki suggests that he was unaware of the requirement as they are 'relief' drivers. This is not a credible statement from an individual who holds a transport manager CPC qualification, especially one who undertook 2 days of refresher training in June 2020.
- vi. Mr Zalecki paid the drivers in cash with no paperwork, which creates scope for a fraud on the revenue.
- vii. The Traffic Examiner report also showed that the company card had not be [sic] locked in and that the vehicle unit was not downloaded between 5 May 2020 and 3 September 2020. Mr Zalecki said he though Mr Filipek had done this. This does not explain why Mr Zalecki did not know because as a director and driver he should have seen analysis – even if it was to say zero infringements/ no missing mileage reported.
- viii. The Preventative Maintenance Inspection sheet dated 17 September 2020 clearly shows that Mr Zalecki or the 'relief' drivers were not doing effective walk round checks. Mr Zalecki continued to allow other drivers to drive the vehicle until he was fit to drive again himself in mid November 2020. The PMI dated 30 October 2020 has numerous driver reportable items on with no corresponding driver defect sheet. Effective daily walk round checks are a crucial part of any maintenance system.
- ix. The maintenance documentation produced for MBBS demonstrates an inadequate PMI regime to ensure the vehicle is always roadworthy. By way of example, tyre pressures are not monitored at PMI, the type of brake test is not always clear but measured brake test are not happening at every PMI and there is no audit trail for tyre removal and retorque.
- x. Mr Zalecki chose to engage drivers to meet his commercial need but did not arrange for one of them or anyone else to gather the statutory records that were required prior to the hearing on 24 September 2020.
- xi. Mr Zalecki failed to ensure the production of statutory records from the previous director/ owner of MTM as a condition of taking over the company. At the same time, he says the only reason he purchased the company was for the Operator's Licence. Mr Zalecki is fully aware that a Licence holder must produce records for a set period. He had only completed his CPC refresher a couple of months previously. It was Mr Zalecki's obligation to obtain those records as part of the package, but he did not bother to do so.
- xii. Mr Zalecki failed to disclose his negative history on the director's declaration form for MTM.

xiii. The first time after 24 September 2020 that Mr Zalecki notified my office of Mr Filipek's ongoing absence or request a period of grace was his witness statement for the Public Inquiry received on 29 December 2020 i.e. when it was too late for me to do anything meaningful at all.

16. In terms of the positive aspects put forward on behalf of Mr Zalecki on 7 January 2021 and repeated in the subsequent representations/ closing submissions from Ms Evans:

- i. Mr Zalecki did notify his ownership of MBBS and MTM but this is being asked to give credit for something he was obliged to do.
- ii. There are no driver infringements by Mr Zalecki. The credit I can give is limited as it is not for Mr Zalecki to select which part of the Licence undertakings he decides to meet.
- iii. There is a clear roadside encounter.
- iv. Mr Zalecki has engaged an external transport consultant to assist with compliance since the beginning of December 2020 and this arrangement will continue.
- v. Mr Zalecki's accepted advice that his nomination as transport manager was unlikely to be accepted and found an external transport manager.
- vi. The newer vehicle will be on a R & M service contract and all vehicles will be subject to proper brake testing.
- vii. The Transport Consultant will do a toolbox talk to all drivers on all relevant matters.
- viii. Mr Zalecki took on board my concern that the proposed MTM Skip Hire Limited work required a Standard Licence. He lodged an application to upgrade as well as to move the operating centre to the same as MBBS for management efficacy.
- ix. An undertaking is offered for both Licences to be the subject of an independent systems audit in 6 months.

17. In view of Mr Zalecki's history and my findings at paragraph 15 above, the starting point for this case in terms of SGSD 10 Annex 4 SEVERE. The positives are superficial when weighed against deliberately lying to me on 24 September 2020 and the risk to road safety caused by his cavalier attitude to compliance since 5 May 2020 and with previous Licences. Repute is a mandatory and continuing requirement and although repute must be considered as at the date of any decision that does not mean that the past simply becomes irrelevant. The Upper Tribunal has said that "*in many cases, the present is simply the culmination of past events*", as per 2014/059 Randolph Transport Ltd and Catherine Tottenham. Mr Zalecki told me on 7 January 2021 that he did not mention relief drivers at the earlier hearing because he was worried about my reaction. My role is to manage risk and ensure a level playing field. This may have included not adjourning the case at all or to take some other interim action, such as suspending the Licence. By misleading me Mr Zalecki prevented me from fulfilling my statutory functions effectively. Looking at the evidence, Mr Zalecki has put commercial need ahead of compliance, a continuation of his behaviours which led to previous Public Inquiries, a revocation, and the condition on Skyrider Limited (which he breached).

18. As of 7 January 2021, it is admitted that Mr Filipek has not undertaken any transport duties since 24 September 2020 and therefore there has been an absent Transport Manager since at least the end of August 2020. Mr Filipek has never notified my office of his absence. We may be living in challenging times, but the Senior Traffic Commissioner issued the Statutory Document 'Contingency and Emergency Planning (Covid 19)' on 17 March 2020 (a full week before the first lockdown). This document together with the linked comprehensive practical advice document have been regularly updated ever since. The recurring theme is to tell you traffic commissioner of what the problem is and how you propose to manage the risk. It is also clear that unless you are upfront then regulatory action is still a possibility.

19. Bearing in mind the Operator and transport manager only had one vehicle to manage, the state of affairs in terms of maintenance described above and no records of drivers hours and tachograph analysis, not even the driver card, is inexcusable. Mr

Zalecki told me that before going to Poland Mr Filipek did visit several times and see the lorry and they would discuss compliance. I do not believe him. Based on Mr Zalecki's approach and conduct to date, the more likely reality is that at Mr Zalecki's behest Mr Filipek agreed to lend his name so that transport operations could start immediately after purchase with an air of legitimacy. The transport manager is key to ensuring safety, as per SGSD 3. By lending his name in this way Mr Filipek has left it to chance whether someone is seriously injured or worse. I have no hesitation in finding that his good repute is lost. This is entirely in line with the case law and STC Statutory Documents.

20. Mr Zalecki has no scruples in doing what is necessary to achieve his own ends. Mr Zalecki has given me numerous promises in relation to external help and training. However, on balance the history and current evidence is that Mr Zalecki cannot be trusted to follow through. Mr Zalecki is prone to ignoring what he knows should be done when it suits and the promises are entirely self-serving. Mr Zalecki is a flawed character whose acts and omissions demonstrate that further training and supervision are unlikely to counteract his cavalier attitude to anything other than his own needs. I do not have to wait for an incident to happen. If I am notified by the proposed transport manager or consultant that their services are dispensed with, it will still take several weeks to get Mr Zalecki back to Public Inquiry. This is an unacceptable risk based on 2020 behaviours – Mr Zalecki simply cannot be trusted and it is entirely appropriate that MBBS is put out of business. This is a bad case and I must find that MBBS is no longer of good repute and Mr Zalecki as an individual is not of good repute. The latter finding is directly relevant bearing in mind he sought to be a transport manager until very recently and purportedly undertook the role for MBBS in Mr Filipek's absence.

21. Whilst MTM is a Restricted Licence it required an upgrade to meet Mr Zalecki's business needs. In any event, The Upper Tribunal in their decision *NT/2013/082 Arnold Transport & Sons Ltd v DOENI* included: *we "underlined the word 'fitness' in both these provisions because it is critical to understanding the breadth of the requirement to be of good repute. It means, for example, that an operator who cannot be trusted to comply with the operator's licensing regime is unlikely to be fit to hold an operator's licence".* It follows that my findings in relation to Mr Zalecki culminate in the revocation of the MTM licence as well.

### **Disqualification**

22. SGSD No. 10 usefully summarises the relevant considerations where a period of disqualification by be appropriate:

*Para: 58 "Disqualification is a potentially significant infringement of rights and the Upper Tribunal has indicated that whilst there is no 'additional feature' required to order disqualification it is not a direction which should be routinely ordered. There may be cases in which the seriousness of the operator's conduct is such that a traffic commissioner may properly consider that both revocation and disqualification are necessary for the purposes of enforcing the legislation. The provisions are in general terms, consistent with the concept of deterrence, but assessment of culpability and use of words such as penalty should be avoided. The case law indicates a general principle that at the time the disqualification order is made that the operator cannot be trusted to comply with the regulatory regime and that the objectives of the system, the protection of the public and fairness to other operators, requires that the operator be disqualified".*

*Para 59: "In certain circumstances a traffic commissioner may order that an individual is not only disqualified from holding or obtaining an operator's licence but also from being involved in management, administration or control of the transport operations on an entity that holds or obtain [sic] such a Licence in Great Britain. The Upper Tribunal had regard to a decision of the Transport Tribunal and in particular that a traffic commissioner must "ensure that the purpose of an order is not undermined or defeated by a disqualified person becoming involved with the management of another operator's licence." This will be even more important where a traffic commissioner is concerned regarding the risk of "fronting".*

*Para 61: "Traffic commissioners are reminded that consideration of the period of any order for disqualification will always turn upon the facts of the individual case.....it is*



*clear that each case must be considered on its own merits and relies on the traffic commissioner to assess what is necessary to balance the objectives of the legislation including the protection of the public and ensuring fairness to the legitimate licensed transport industry against the potentially significant infringement of the licence holder's or individual's rights."*

Para 62: *"When imposing a disqualification, there should be an assessment of the evidence and submissions as to the effect of any order in setting the appropriate length of the order. 96 Once the period of time is determined traffic commissioners are reminded of the need to set out the relevant findings of fact, the analysis of the relevant actions of those concerned and the appropriate balancing exercise, so that the licence holder is aware of the material used to justify disqualification."*

23. Mr Zalecki's behaviour in relation to Rubbish Express Limited, Rubbish Express Haulage Limited and Skyrider Limited is a matter of record. In 2020, Mr Zalecki bought two companies that already had Licences to gain immediate access to the industry. This gave him an opportunity to demonstrate that his old ways were behind him when it was likely he would be called to a hearing at some point. Instead Mr Zalecki has clearly demonstrated that he is no more trustworthy now than previously. Mr Zalecki runs by his own rule book and compliance, road safety and competing with others are treated as optional. For this reason, in my judgment, a period of disqualification is appropriate and proportionate. The period of 3 years is perhaps at the lower end of the STC guidance for this course of conduct. That said it properly reflects my disquiet and whether Mr Zalecki is permitted back into the fold thereafter will turn on its merit at the time. Traffic Commissioners take their gatekeeping role very seriously.

24. I have no doubt from my above findings that Mr Zalecki is capable of highly manipulative behaviour. He may well seek someone else to 'front' a business to allow him to carry on under the radar. For those reasons I have adopted the approach endorsed by the then Transport Tribunal in 2005/457 Leslie John Ings T/a Ings Transport including reference to management, administration and control. I also send a clear message to anyone tempted by Mr Zalecki to front for him risks their own Licence and disqualification.

#### **Addendum**

25. For the record, if I did allow the Licences to continue, I would have accepted Mr Howes as transport manager. This decision is in no way a reflection on his repute or competence."

18. That then represents the TC's reasoning as to the decisions under challenge before the Upper Tribunal.

#### **The grounds of appeal**

19. The written grounds of appeal may be found in a document attached to form UT12. The contentions set out in the grounds were built upon by Mr Sadd both in his written submission of 13 July 2021 and his oral submissions at the hearing.

20. In outline, the grounds relied upon before the Upper Tribunal were as follows:

Ground 1 – the TC had been wrong or in error of law in concluding that *"at Mr Zalecki's behest Mr Filipek agreed to lend his name"* to the licence held by MBBS, there being no proper evidential basis for such a finding.

Ground 2 – the TC had been wrong or in error of law in her assessment as to the credibility of Mr Zalecki given that a number of matters she had relied upon in her credibility assessment did not go to questions of honesty.

Ground 3 – the F-tT had been wrong or in error of law in identifying the failings of MBBS as falling within the “severe” category as identified in annexe 4 to the Senior Traffic Commissioner’s statutory document no. 10 when considering the appropriate sanction.

Ground 4 – the TC, in deciding the appropriate sanction was one of revocation, had reached an outcome which was disproportionate.

21. The above grounds relate to the first appellant.

Ground 5 – the TC had been wrong or in error of law in purporting to revoke MTM’s restricted licence on the basis that it was “unfit” to hold such a licence given that fitness is not a legally permissible basis for the revocation of such a licence.

Ground 6 – the TC had failed to make findings sufficient to justify a decision to revoke MTM’s restricted licence and had failed to properly identify or address the correct legal tests.

Ground 7 – the TC had been wrong or in error of law in failing to separately consider the situation of MTS (as distinct from the position of MBBS).

Ground 8 – insofar as findings concerning MBBS were held against MTS, MTS relies upon MBBS’s grounds set out above.

22. The above grounds relate to the second appellant. The following relate to the third.

Ground 9 – the TC was wrong or in error of law in imposing an order of disqualification without first indicating to the third appellant and his legal representative that such was a possibility, and without inviting submissions with respect to that matter.

Ground 10 – insofar as the decision to disqualify the third appellant was based upon the TC’s findings with respect to the first appellant, the third appellant relies upon the grounds relied upon by the first appellant.

Ground 11 – the TC was wrong or in error of law to disqualify the third appellant for a period of three years or had reached an outcome which was disproportionate.

### **The hearing before the Upper Tribunal**

23. As indicated, the three appellants were represented by Mr Sadd of Counsel. We are grateful to him for his careful oral submissions, his careful written submissions and the documentation which he provided to us in support of his arguments. By the time the hearing commenced we had, in addition to the documentation contained in the Upper Tribunal’s appeal bundle (which runs to 551 pages) his written submissions of 13 July 2021 referred to above, decisions of the Upper Tribunal in *Redski Wholesalers Ltd [2013] UKUT 0194 (AAC)*; *Randolph Transport Ltd [2014] UKUT 0460 (AAC)*; *Arnold Transport and Sons Ltd v DOENI [2014] UKUT 0162 (AAC)*; *David Finch [2010] UKUT 284 (AAC)*; and *Keith Bute and others [2020] UKUT 00047 (AAC)*, and a report of Traffic Examiner Paul Clark of 6 January 2021 with appendices.

24. Before us, Mr Sadd maintained the various contentions which we have summarised above. There were important distinctions with respect to the requirements imposed upon the holder of a standard licence and the requirements imposed upon the holder of a restricted licence. The TC would have required compelling evidence to make the finding she had regarding collusion between Mr Zalecki and Mr Filipek. But such evidence was simply not

there. It was true that Mr Zalecki had provided the TC with inaccurate information to the effect that he was the only person who had driven his vehicle in circumstances where others had done so too (see paragraph 15 iv of the TC's written reasons). But he had been worried as to what the TC might have thought had he told her the true position, he had been under stress, and he has provided a "*human reason*" for his failing. Many of the adverse findings relied upon by the TC did not actually go to Mr Zalecki's honesty. The above instance of misleading which Mr Zalecki had subsequently acknowledged was not, of itself, enough to justify revocation of the MBBS licence. The licence of MTM had been revoked on legally impermissible grounds. No signal that disqualification was being considered had been given by the TC before such a decision had been taken. Such a signal could have been provided during the PI or in post-PI email exchanges between the TC and the solicitor for the appellants. Representations, if such a signal had been sent, could have been made not only as to any decision to disqualify but also as to the length of such a disqualification period.

### **The approach of the Upper Tribunal**

25. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

"The Upper Tribunal are to have full jurisdiction to hear and determine on all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment related to transport".

26. Paragraph 17(3) of that Schedule provides that the Upper Tribunal may not take into consideration any circumstances that did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Another v Secretary of State for Transport [2010] EWCA Civ 695*. It was stated that the Upper Tribunal has the duty, on an appeal to it, to determine matters of fact and law on the basis of the material before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to take a different view to that made by the TC.

### **Our analysis**

27. We shall deal, first of all, with the grounds relating to the way in which the TC dealt with MBBS. Ground 1, in the submission of Mr Sadd, represented a particularly egregious failing by the TC who, it is said, reached a finding that Mr Filipek had, at Mr Zalecki's request, "agreed to lend his name" to the relevant licence, when there was, it is said, no proper evidential basis for such a finding.

28. There were, as we have said, previous incidences in which Mr Zalecki had fallen foul of the regulatory system, including an instance when his involvement in a licence had led to a breach of a condition which had been imposed upon the operator (see paragraphs 5-7 of the TC's written reasons). Mr Zalecki, the sole director of MBBS, had deliberately sought to mislead the TC at the PI as indeed (albeit with some mitigation) was acknowledged before us. We have in mind, in this regard, the TC's finding at paragraph 15 iv of the written reasons (see above). We do not think the TC was wrong or overstating the position when she described that attempt to mislead her as "*a gross breach of trust*". As to Mr Filipek, he had not attended the PI hearing of 7 January 2021, despite being called to it. The TC found he had not undertaken any transport duties since 24 September 2020. He had not notified the OTC that he was not performing his duties and nor, until 29 December 2020, had Mr Zalecki (see paragraph 15xiii of the TC's written reasons). The lack of recent contact between the two is underscored by Mr Zalecki having told the TC on 24 September 2020 that Mr Filipek had gone to Poland and that he did not know when he would be returning or, indeed, when he had gone to Poland in the first place (see pages 358 and 359 of the Upper Tribunal bundle and paragraph 19 of the TC's written reasons). We acknowledge that the conclusion that Mr Filipek had agreed to lend his name to the licence "*so that transport operations could start immediately after purchase with*

*an air of legitimacy*” might, on one view, be regarded as a little bit of a stretch. But given the previous record of Mr Zalecki with respect to regulatory matters, given his acknowledged dishonesty before the TC (and we shall say more about general credibility issues below), given Mr Filipek’s apparent indifference to the PI and to his ongoing duties as transport manager, we are not able to say, notwithstanding the trenchant criticisms of the TC which have been offered, that she was plainly wrong in reaching that conclusion. This ground of appeal is not made out.

29. Turning then to ground 2, this amounts in effect, to a challenge to the soundness or adequacy of reasoning underpinning the TC’s conclusion that Mr Zalecki was “*not a truthful or compelling witness*”. The specific criticism is that a number of the considerations relied upon by the TC (see paragraph 15 of the TC’s written reasons as set out above) simply did not go to dishonesty.

30. Mr Zalecki, as we have already noted, does accept that he deliberately sought to mislead the TC when giving evidence at the PI hearing of 24 September 2020. He said the vehicle operated under the relevant licence had not been driven since 13 September 2020 when he had broken his leg though a subsequent analysis report had revealed, by the time of the second PI hearing, that “*six of the drivers had been behind the wheel of that vehicle*” during the relevant period. We have recorded what Mr Sadd has had to say about what he argues is really an understandable human failing caused by stress and anxiety regarding what the TC’s response might have been had he initially told the truth. But again, as we have already mentioned, we think the TC was right to regard that as amounting to “*a gross breach of trust*”. Respect for the regulatory regime is of great importance and, of course, Traffic Commissioners sit at the very top of that regime and, put simply, should not be lied to. There is then, with respect to matters which in our view clearly do fall within the province of direct dishonesty, the failure on the part of Mr Zalecki to disclose “*his negative history on the director’s declaration form for MTM*” (see paragraph 15 xii of the TC’s written reasons). He did not declare a criminal conviction arising out of what was described as a “*health and safety prosecution*” which led to his being fined. He suggested, during the course of the PI, that he had not thought it to be a “*criminal judgment*”. Before us Mr Sadd observed, that in completing the same form, Mr Zalecki had disclosed other matters which might have been thought to have been adverse to him. It seemed odd, he suggested, that he would do so if he were seeking to be dishonest. We note the point made but we think it reasonable to suppose that if a person has been convicted of a criminal offence he or she will know that he has. Certainly, the TC concluded this to have been an example of deliberate dishonesty and we are unable to say that she was plainly wrong or wrong at all in doing so and it follows that we are unable to say that she was wrong in taking it into account in her assessment as to his general credibility.

31. Mr Sadd’s real point though, is that the other considerations do not relate to dishonesty. We are not going to go through each one of them but various of the points relied upon by the TC show an indifference to important matters relevant to road safety and compliance with the regulatory system such as a lack of knowledge about when Mr Filipek would be returning to the UK (a man who was meant to be exercising continuous and effective management of the transport operations), a failure to produce proper written documentation for the PI, and a failure to ensure effective walk round checks were being undertaken or, at least, a failure to evidence that they were. In our view the TC could and would have reached the same decision as to his credibility based solely upon his decision to deliberately mislead her at the PI and his decision to seek to hide his criminal conviction. But the other matters say something about his character and his willingness to operate without proper regard to what the regulatory system might reasonably expect of him in the context of road safety. We are not able to say that the TC was wrong to take the range of matters into account which she did in assessing his credibility and, indeed, questions of repute. We reject that ground of appeal.

32. As to ground 3, it is, of course, the position that, as is said in annexe 4 to Senior Traffic Commissioner statutory document no. 10 “*each case must be dealt with on its own facts*”. This was a case where, according to the TC’s findings, there had been a transport manager who had, as was known by Mr Zalecki, not been fulfilling his duties. That was a matter of real gravity.

There had been the deliberate dishonesty to the TC herself. There were other technical failings too. Notwithstanding Mr Sadd's contention that those were of limited severity, we are comfortably satisfied, taking account of the global picture, that the TC was entitled to identify the failings as falling within the "severe" category and that she was not plainly wrong in so doing. We reject that ground of appeal.

33. As to ground 4, to some extent it seems to us that that ground is or was dependent upon what we were to make of the first three grounds. But in any event, against a background of previous regulatory concerns, operating without proper transport manager input and the identified dishonesty, there was a proper basis for the TC to revoke the licence. Further, she did so having properly considered the evidence and having made clear adverse findings. In truth, it might have been difficult for the TC to have rationally justified any action falling short of revocation but we are certainly some distance from concluding that her decision as to revocation was plainly wrong or disproportionate. We reject that ground of appeal.

34. The above deals with the grounds which relate to MBBS and the decision to revoke its licence. Since we have rejected all of those grounds, we say now that the appeal of MBBS with respect to the revocation of its licence is dismissed. We also dismiss its appeal with respect to its disqualification from holding or obtaining an operator's licence. We see nothing in the arguments advanced on behalf of MBBS to suggest that we could do anything other than that with respect to the disqualification decision given that we are upholding the decision to revoke the licence.

35. We have now found it convenient to consider the appeal of Mr Zalecki, regarding his disqualification and the period of it, before considering the situation of MTM. That being so, we now move onto consider ground 11. Put simply, what is suggested here is that the TC fell into error through imposing a disqualification upon him without alerting him or his representative that such was within her contemplation and without inviting submissions on the point. Mr Sadd, in pursuing the point, has drawn our attention to the decisions of the Upper Tribunal in *Bute and Others [2020] UKUT 00047 (AAC)* and *Finch [2010] UKUT 284 (AAC)*. In *Finch*, which involved an appeal brought by an appellant who had been unrepresented before the F-tT the Upper Tribunal remarked that it had been troubled by the lack of any focused discussion as to the need for, length of or consequences of a lengthy period of disqualification both throughout the PI which had been held by the TC and in the TC's subsequently produced written decision. In *Bute* it was accepted that there was nothing in the transcript of the PI or the subsequently produced written decision to show that an opportunity to make submissions on disqualification or its length had been given. The Upper Tribunal, without deciding in terms whether that failure had amounted to procedural unfairness or an error in law, went on to decide the matter for itself. But the fact that it found it necessary to do that does suggest it had thought there to be some error in the way the TC had dealt with matters.

36. A similar situation arose in the case of *Saint Mickalos Company Ltd and Michael Timinis [2019] UKUT 0089 (AAC)*. This was a case where an appellant had appeared before a TC at a PI with a legal representative. At the PI the TC dealt with matters relevant to the revocation of a licence but it was submitted to and accepted by the Upper Tribunal that, whilst there had been mention of the possibility of disqualification in the call up letter there had been no mention of it being under contemplation, during the PI. Having carefully considered historical authorities including the *Finch* case mentioned above, the Upper Tribunal said this:

"20. Mr Clarke stated that in the present case the question of disqualification was not addressed by the Traffic Commissioner and she did not expressly invite the appellant's representative to address her on this issue; as she should have done. She should have invited submissions on whether or not there was a need for disqualification at all, if so what length of disqualification was proportionate and appropriate and, on the consequences of disqualification.

21. We agree with the general principles set out by Mr Clark and derived from the authorities to which he referred. If a Traffic Commissioner has disqualification or some

other sanction in mind, then it is only right and fair that the operator should have an opportunity to address her specifically about that before any decision on disqualification or other sanction is made”.

37. In that case the Upper Tribunal decided that disqualifications which had been imposed could not stand and it set them aside and remitted to the TC so that the question of disqualification could be considered afresh and so that submissions could be made to the TC as to that and as to the length and consequences of any disqualification if such was to be imposed.

38. For ourselves, we would have thought there might be something to be said for the contention that, once the prospect of disqualification is raised in the call up letter, at least in the case of a represented appellant, the onus would then fall upon the representative to make submissions even absent a direct invitation from a TC to do so. But in the above case the Upper Tribunal squarely addressed the issue in detail. As we have said, previous authorities were considered. A clear view was reached. We are not prepared to say that that case represents authority for the proposition that a TC will always fall into error in failing to raise the prospect of disqualification but the decision represents a strong statement to the effect that, for the most part, that will be the case. We will not depart from the reasoning of the Upper Tribunal in that case. That being so, whilst we might ourselves have resolved matters a little differently had the situation been free of authority, we have concluded that, notwithstanding the failure on the part of Mr Zalecki or his representative to raise the issue at either PI hearing or indeed in further written submissions, the TC fell into error in imposing a disqualification without warning that that possibility was in her mind and without inviting submissions on the point. Accordingly, the TC’s decision on disqualification with respect to Mr Zalecki (but not with respect to MBBS) is set aside. That being so, it is not necessary for us to give any separate consideration to ground 11.

39. We then move onto the grounds relating to MTM. We shall be brief and shall take all of those grounds together. Whilst Mr Sadd has focused the bulk of his fire upon his argument that the TC selected an unavailable ground for revocation, we have approached matters slightly differently. The situation of MTM is dealt with only very briefly at paragraph 21 of the written reasons. But that paragraph does seem to suggest the TC had a fitness requirement in mind. In setting out the actual decision with respect to MTM (see above) reference is made to section 13B of the 1995 Act and, again, to fitness.

40. In looking at section 13B there is a requirement that an applicant must not be unfit “*by reason of*” and then options are set out at sub-paragraphs (a) and (b). But no reference is made by the TC to either sub-paragraph. That being so, on our reading, the precise basis for the decision to revoke MTM’s licence is unclear. As was explained in *Shaun Andrew Taylor and Mark Taylor [2010] UKUT 397 (AAC)* “*not only is the operator entitled to see what the Traffic Commissioner had in mind when reaching a decision, it is also important for the Upper Tribunal to be able to do so, if the decision is appealed*”. In our view, in a case where it has been decided to revoke a licence, the specific statutory authority which is being relied upon has to be specified with clarity. We accept that, in many other respects, the TC’s written reasons drip with clarity but we do think there has been a failure here. That might be because the TC was primarily concerned with other more serious considerations relating to MBBS and Mr Zalecki himself. But MTM, as an individual entity, is entitled to proper (even if brief) reasons as to why its licence has been revoked. Accordingly we set aside the TC’s decision to revoke MTM’s licence.

## **Disposal**

41. So, we have dismissed the appeals of MBBS. We have allowed the appeal of Mr Zalecki with respect to his disqualification, as an individual, from holding an operator’s licence. We have allowed MTM’s appeal against revocation. We think, with respect to Mr Zalecki, remittal is the proper course. That was the course taken in the *St Mickalos* case and it will

enable submissions to be made, against the background of our findings regarding MBBS and the loss of repute, as to whether he ought to be disqualified and, if so, for how long. We will hold back from expressing our own views as to those matters. Given that we have concluded remittal is the proper course with respect to Mr Zalecki we take the same view with respect to MTM, so that all matters may be considered afresh by a different TC.

### **The Stay**

MBBS has, as we understand it, continued to trade notwithstanding the revocation of its licence. But given our decision, (notwithstanding that we have allowed the other appeals) that situation cannot now continue. But we accept that time ought to be given for an orderly winding up of the business. Accordingly, the decision to revoke licence OK1139988 belonging to MBBSTrans Ltd shall come into force and the stay given by Upper Tribunal Judge Hemingway with respect to MBBSTrans Ltd shall end at 23:59 hours on 25 November 2021.

**M R Hemingway  
Judge of the Upper Tribunal  
Signed on 14 October 2021**

**A Guest  
Member of the Upper Tribunal**

**D Rawsthorn  
Member of the Upper Tribunal**