

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

**Appeal No. UA-2023-001077-T
[2024] UKUT 386 (AAC)**

**ON APPEAL from a DECISION of a DEPUTY TRAFFIC COMMISSIONER in the
EAST OF ENGLAND TRAFFIC AREA**

Before: E Mitchell, Judge of the Upper Tribunal
S Booth, Specialist Member of the Upper Tribunal
K Pepperell, Specialist Member of the Upper Tribunal

Appellant: Direct Service Logistics UK Ltd

Commissioner's ref: OF2051837

**Date of Commissioner's
decision:** 12 July 2023

Representation: For the Appellant, James Backhouse of Backhouse Jones
Solicitors.

Heard at: Field House, Bream's Buildings, central London on 5
December 2023.

DECISION OF THE UPPER TRIBUNAL

This appeal is allowed.

Subject matter: public inquiries / proposals to revoke operators' licences / effective
and stable establishment / stays

Case law referred to: *Muck It v Secretary of State for Transport* [2006] RTR 9

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2023-001077-T
[2024] UKUT 386 (AAC)**

On appeal from a decision of a Deputy Traffic Commissioner in the East of England Traffic Area

Parties:

Direct Service Logistics UK Ltd

Appellant

Before:

**Upper Tribunal Judge Mitchell
Upper Tribunal Member Booth
Upper Tribunal Member Pepperell**

Hearing:

Field House, Bream's Buildings, central London on 5 December 2023.

Representation:

Appellant: James Backhouse of Backhouse Jones Ltd Solicitors

Decision date: 22 November 2024

DECISION

The decision of the Upper Tribunal is to allow the appeal.

The decision of a Deputy Traffic Commissioner in the Eastern Traffic Area, taken on 12 July 2023 (ref. OF2051837) involved errors of law. Under section 37(2) of the Goods Vehicles (Licensing of Operators) Act 1995, the Upper Tribunal **ALLOWS** this appeal and **SETS ASIDE** the Commissioner's decision revoking the operator's licence held by the Appellant.

REASONS FOR DECISION

Introductory matters

1. In these reasons, “the operator” means the Appellant, Direct Service Logistics UK Ltd, and “1995 Act” means the Goods Vehicles (Licensing of Operators) Act 1995.

2. We apologise for the delay in giving our decision following the hearing on 5 December 2023. As we understand the operator’s solicitor has been informed, the decision has been delayed due to the judge’s absence from duty, and subsequent limited duties, while recovering from serious injuries sustained in an accident in early 2024.

Summary of principal findings

3. There are two aspects of our decision that may be of wider significance.

4. The first concerns the Office of the Transport Commissioner’s practice of informing standard licence holders, in Proposal to Revoke (PTR) letters given for the purposes of section 27 of the 1995 Act, that, absent a request for an inquiry, the operator’s licence will be revoked. We find that this anticipates an unlawful decision-making process. Section 27(3) provides that a Traffic Commissioner may not revoke an operator’s licence without considering any representations duly made in response to a PTR letter / written notice of proposed revocation under section 27(2). An operator’s failure to request an inquiry does not permit a Traffic Commissioner to disapply section 27(3)’s requirement to consider an operator’s duly made representations before making a revocation decision.

5. The second concerns a Traffic Commissioner’s power to grant a stay of a regulatory decision (direct that a decision is not to come into effect). A Commissioner has no power to grant a time-limited stay under the 1995 Act such as the two week stay purportedly given in this case. The duration of a stay is set by Parliament in section 29(2) and (3) and a Traffic Commissioner may not lawfully stay a regulatory decision for some other period.

Background

6. The operator held a standard national operator's licence granted under the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act"). The licence originally specified, and thus authorised, use of a one vehicle and one trailer. The registration number of the authorised vehicle was FV66 BNE ("vehicle FV66 BNE").

7. On 21 December 2022, the Central Licensing Unit of the Office of the Traffic Commissioner (OTC) wrote to the operator stating that vehicle FV66 BNE had been added to a licence held by another operator and reminding it that a vehicle may not be specified on more than one licence. The letter stated that the Traffic Commissioner proposed to remove vehicle FV66 BNE from the operator's licence with effect from 4 January but that, alternatively, the operator could do this itself by logging on to the vehicle operator licensing (VOL) self-service facility. The OTC's letter stated that, if the operator believed that vehicle FV66 BNE should not be removed from its licence, "please let us know why as soon as possible".

8. According to OTC records, the licence specification history of vehicle FV66 BNE from 2022 to June 2023 showed:

(a) from 19 January 2022 to 23 November 2022, the vehicle was specified on a single operator's licence (Allways Garage Services Ltd);

(b) from 23 November 2022 to 4 December 2022, the vehicle was specified on three operator's licences (Allways, Direct Service Logistics Ltd, Omega Transport Ltd);

(c) from 4 December 2022 to 15 December 2022, the vehicle was specified on two operator's licences (Allways, Direct Service Logistics);

(d) from 15 December 2022 to 5 January 2023, the vehicle was specified on the same three operator's licences as for the period 23 November 2022 to 4 December 2022;

(e) from 5 January 2023 to 30 April 2023, the vehicle was specified on a single operator's licence (Omega);

(f) from 30 April 2023 to 15 June 2023, the vehicle was not specified on any operator's licence;

(g) from 15 June 2023 to 27 June 2023, the vehicle was specified on a single operator's licence (KJ Kowalewski Ltd);

(h) from 27 June 2023, the vehicle was again specified on three operator's licences (Kowalewski, Allways, Direct Service Logistics) although it seems that it may have been de-specified from Direct Service Logistics' operator's licence a few hours after being specified on 27 June 2023.

9. On 27 June 2023, the OTC sent a Proposal to Revoke (PTR) letter to the operator which informed it that the Traffic Commissioner was considering revoking the operator's licence because no vehicle was specified on its licence. The PTR letter drew the operator's attention to the Senior Traffic Commissioner's Statutory Document No. 4, in particular paragraph 40 (see below) and added, "access to a vehicle is part of the mandatory and continuing requirement for a stable establishment".

10. The PTR letter set a deadline of 19 July 2023 for receipt of any written representations that the operator wished to make, and for requesting a public inquiry. The letter also stated:

"If no request for a public inquiry is received by this date your operator's licence will be revoked."

11. The operator replied by email to the PTR letter on the day it was sent. The operator's email read as follows:

"Confused by the email.

We have the Vehicle FV66 BNE on our licence and it has not been removed, we have the plate 864267 from you guys.

I have logged on and yes I see its not on there, I have added it again."

12. The OTC responded by email, also sent on 27 June 2023:

"There has been no vehicle specified on the licence since 5th January 2023. I can see that you have added a vehicle today since receiving my email 20

minutes ago. I will inform the traffic commissioner but first please would you confirm:

- whether you have been using vehicle FV66 BNE (or any other) since 5th January 2023;
- how often”.

13. Later in the day on 27 June 2023, the operator emailed the OTC again. The email attached documentation about insurance and maintenance arrangements for vehicle FV66 BNE. The certificate of insurance stated that the policy came into effect on 1 December 2022, the term was one year, and the operator was the policy holder. The operator’s email went on:

“May I please ask also how and by who was this truck removed from our licence. I have no correspondence from your office about it being removed... Just so I can avoid this happening again.”

14. The operator’s email attached an undated letter from themselves, which stated:

“We have an agreement with Allways garage for a space and the use of a truck as/when needed, truck plates are FV66BNE.”

15. The OTC official dealing with the operator’s case was unable to provide information about how and when the operator was informed that vehicle FV66 BNE had been removed from its licence. The official suggested that the operator contact the Central Licensing Unit.

16. According to internal OTC notes, on 27 June 2023 an OTC official had a telephone conversation with a Mr Garrioch, director of another licence holder, Allways Garage Services Ltd, who “said he’d spoken to Luca [the operator’s transport manager] and could confirm he’d rented the vehicle FV66 BNE to Luca since 23 November 2023”. The official informed Mr Garrioch that “if there was a contract etc then it might be an idea to send it to me”. An internal OTC note, undated but probably written in late June / early July 2023, observed that “neither Mr Guerrini nor Kevin Garrioch have supplied any evidence relating to the ownership of FV66 BNE, nor any agreements relating to its hire and/or use”.

17. On 28 June 2023, the OTC wrote to the operator and drew its attention to the letter sent by the Central Licensing Unit on 21 December 2022, and explained that, in the absence of a reply to that letter, vehicle FV66 BNE was removed from the operator's licence on 5 January 2023. The OTC's letter also noted that the operator had not requested a public inquiry and said, "would you let me know your view please".

18. On 28 June 2023, the operator replied to the OTC's email. The operator's email, which was sent three minutes after receiving OTC's email, stated "no PI needed thank you" and again asked for details of how the letter of 21 December 2022 was sent because the operator wished to investigate whether correspondence was, for some reason, not being delivered to it.

19. On 28 June 2023, the OTC official dealing with the operator's case made the following note:

"Mr Guerrini [the operator's transport manager] has not really explained how or by whom FV66 BNE has been/is being used. Kevin Garrioch claims to have rented it to him but neither have provided any formal agreement. Ownership is unclear. The vehicles is insured to Direct Service Logistics and has been specified on other licences, at times simultaneously.

I did point out to Mr Guerrini that he has not requested a PI and gave him the opportunity to do so, but he has said not. I am not sure he fully appreciates the potential consequences of this."

20. On 12 July 2023, the Traffic Commissioner revoked the operator's licence. The Commissioner's decision letter read as follows:

"A vehicle was specified and removed on 27th June 2023, again leaving no vehicle specified. In the absence of a request for a public inquiry to be held the Traffic Commissioner has revoked your operator's licence with effect from 5th July 2023 under section 27(1) of the [1995] Act, which states that the 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) of the Act, namely that the operator has an effective and stable establishment..."

21. The Commissioner's revocation decision letter was emailed to the operator on 12 July 2023. The operator emailed OTC later that same day as follows:

"...We are now looking to purchase a truck immediately!

Is there no way to get a one month extension of this notice please?"

22. On 14 July 2023, the operator's newly instructed solicitors wrote to the OTC requesting a public inquiry and, pending an inquiry, for the operator's licence to be reinstated. The solicitors noted that the original deadline for requesting a public inquiry (19 July 2023) had not yet expired.

23. The OTC case file indicates that two factors were probably of particular significance in influencing how the Traffic Commissioner dealt with this case. As described in internal OTC notes, albeit apparently written after the revocation decision was taken, these were:

(a) "there is still no material evidence regarding any agreement about how FV66 BNE is owned/used/hired. The insurance certificate is suggestive but not conclusive";

(b) "lacking throughout has been evidence of intent by the operator to specify a vehicle. Even if the company had been aware of this requirement, they knew it once the PTR letter arrived and took no action until learning of the revocation. Only then did the operator state that it would look to purchase a vehicle immediately".

Staying the Commissioner's revocation decision

24. The operator applied to the Traffic Commissioner for a stay of the licence revocation decision. The application was decided by the Senior Traffic Commissioner on 9 August 2023. The Senior Commissioner decided to grant a 14 day stay, giving the following reasons for doing so:

"12...I do not judge the prospects of success [of the operator's proposed appeal to the Upper Tribunal] to be great. However, it is ultimately a matter for the Upper Tribunal to determine this appeal and in doing so will decide if the appellant has overcome the high hurdle on appeal. The mandatory and continuing requirements go directly to fair competition, but I am also aware of

the potential to attempt to reargue against the Upper Tribunal's decision in 2021/2165 Connor Construction (South West) Ltd. It is therefore appropriate for the Upper Tribunal to determine whether the decision under appeal should be stayed pending full argument. I will therefore stay this decision for 14 days from the date of this decision, in order to allow opportunity for a Judge of the Administrative Appeals Chamber to make that determination."

25. The operator applied to the Upper Tribunal for a stay of the Commissioner's revocation decision. In making that application, the operator's solicitor expressed doubt as to whether the Traffic Commissioner had power to grant a time-limited stay.

26. The Upper Tribunal granted the operator's stay application. The Upper Tribunal's stay determination included the following observations:

"6. Section 29(2) [of the 1995 Act] imposes a temporal limit on a direction granted by a Traffic Commissioner under that provision. If given, the regulatory act to which it relates "shall not take effect until the expiry of the time" there described. While the point has not been argued, it seems to me that this is an essential element of the power granted by Parliament to the Traffic Commissioner to stay the effect of a regulatory act. Parliament did not authorise a Commissioner to grant a stay of such duration as the Commissioner sees fit.

7. It seems to me that an application, made to a Commissioner under section 29(2), is an application to grant a stay whose effect will persist until such time as the applicant's appeal to the Upper Tribunal has been disposed of. If the Commissioner refuses to grant a stay of that nature, the application is effectively refused so that the Upper Tribunal then has jurisdiction, under section 29(3), to grant a stay. I therefore consider that I have jurisdiction, in this case, to consider the Appellant's application for a stay under section 29(3).

8. I allow the Appellant's application and direct that the Commissioner's revocation of the Appellant's operator's licence shall not take effect until the Appellant's appeal to the Upper Tribunal is disposed of. I give this direction because I see no obvious public safety or fair competition concerns in this case, and I consider that the Appellant's grounds of appeal cannot be considered either fanciful or hopeless.

9. I will shortly give case management directions for this appeal and point out that I minded to invite the Senior Traffic Commissioner to make written observations on the extent of the Commissioner's power under section 29(2)."

Legal Framework

Authorised vehicles

27. Section 5(1) of the Goods Vehicles (Licensing of Operators) Act 1995 enacts the following general rule about authorised use of vehicles under an operator's licence:

"Subject to the following provisions of this section, the vehicles authorised to be used under an operator's licence are—

(a) any motor vehicle in the lawful possession of the licence-holder (whether that motor vehicle is specified in the licence or not); and

(b) any trailer in the lawful possession of the licence-holder."

28. Section 5(2)(c) of the 1995 Act provides that an operator's licence may provide "that no motor vehicle that is not specified in the licence is authorised to be used under it".

29. Section 5(6) of the 1995 Act provides as follows:

"(6) A motor vehicle which is not specified in an operator's licence is not authorised to be used under that licence by virtue of subsection (1) after the period of one month beginning with—

(a) the day on which the vehicle was first in the lawful possession of the licence-holder, or

(b) (if later) the day on which the licence came into force,

unless, during that period, the licence-holder has given to a traffic commissioner a notice in such form and containing such information about the vehicle as is required by a traffic commissioner, and has paid the prescribed fee (if any) to a traffic commissioner."

30. Section 5(8) of the 1995 Act provides that a vehicle specified in an operator's licence "shall not...be capable of being effectively specified in any other operator's licence". Section 5(9) permits a Traffic Commissioner to direct the removal of a

vehicle from an operator's licence if it comes to the Commissioner's knowledge that the vehicle is specified in another operator's licence.

Revocation of operators' licences

31. The requirements that must be satisfied on an application for a standard operator's licence include those set out in section 13A of the 1995 Act. Insofar as relevant, section 13A provides as follows:

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

(a) has an effective and stable establishment in Great Britain (as determined in accordance with paragraph A1 of Schedule 3)...”.

32. Insofar as relevant, paragraph A1 of Schedule 3 to the 1995 Act provides as follows:

“(1) A person has an effective and stable establishment in Great Britain under section 13A(2)(a) if the person satisfies, or will satisfy on the issuing of an operator's licence, the requirements set out in sub-paragraph (2).

(2) The requirements are that the person—

...(b) has access to one or more goods vehicles that are authorised to be used under the person's operator's licence...”.

33. The Senior Traffic Commissioner's *Statutory Document No.4 Operating Centres, Stable Establishments & Addresses for Service* includes guidance given to the other Traffic Commissioners, which includes the following in relation to the 'effective and stable establishment' requirement:

“The requirement is that once an authorisation has been granted, the operator must have access to one or more vehicles. This is different from having vehicles specified on a licence but the vehicle(s) in question must be registered and be capable of being put into circulation. The vehicle(s) in question may be wholly owned or, for example, held under a hire-purchase agreement or a hire or leasing contract. An informal or unwritten agreement is unlikely to meet this requirement...”.

34. Section 27 of the 1995 Act requires a Traffic Commissioner, in certain cases and subject to certain procedural requirements, to direct revocation of an operator's licence. Insofar as relevant, section 27 provides as follows:

“(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 one or more of the requirements of section 13A...

(2) Before giving a direction under subsection (1) in respect of a licence, a traffic commissioner shall give to its holder notice in writing that he is considering giving such a direction.

(3) A notice under subsection (2) shall state the grounds on which the traffic commissioner is considering giving a direction under subsection (1) and —

(a) shall invite the licence-holder to make written representations with respect to those grounds . . . , and

(b) shall state that any such representations must be received by the commissioner dealing with the matter within 21 days of the date of the notice;

and a traffic commissioner may not give a direction under subsection (1) without considering any representations duly made under this subsection.”

35. Our understanding is that an OTC PTR letter constitutes the written notice required by section 27(2).

36. Section 27 of the 1995 Act also confers power on a Traffic Commissioner to give the licence holder an opportunity to remedy an apparent regulatory breach before proceeding to revocation:

“(3A) A notice under subsection (2) may set a time limit for the licence-holder to rectify the situation.

(3AA) The time limit set under subsection (3A) may not exceed, beginning with the day after the date of the notice—

(a) 6 months...

(3B) If the licence-holder rectifies the situation within the time limit set under subsection (3A), the traffic commissioner must not make the direction under subsection (1).

(4) This section has effect subject to section 29 (and, in particular, nothing in subsections (3) to (3B) above shall be taken to affect a person's right under section 29(1) to require the holding of an inquiry).”

37. Section 36 of the 1995 Act confers power on a Traffic Commissioner to review, and vary or revoke, certain decisions if “satisfied that a procedural requirement imposed by or under any enactment has not been complied with in relation to the decision.” Reviewable decisions include decisions to refuse an application for an operator’s licence but not a decision to revoke an operator’s licence.

Public inquiries

38. Section 29(1) of the 1995 Act provides that a Traffic Commissioner “shall not” give a (revocation) direction under section 27(1) without first holding an inquiry “if the holder of the licence...requests that an inquiry be held”. The general rule under section 35(3) is that an inquiry shall be held in public.

39. Our attention has not been drawn to any statutory provision which sets a time limit within which a licence holder must exercise the right to request an inquiry. Often, however, the OTC appear to set a time limit which aligns with the statutory time limit for making written representations under section 27(3). In other words, a request for an inquiry is often required to be received within 21 days of the date of the notice issued under section 27(2).

Stays

40. A ‘stay’ is conventional shorthand for a direction given under section 29(2) or (3) of the 1995 Act. Those provisions read as follows:

“(2) A traffic commissioner may direct that any direction...given...by him under —

(a) section 26(1)...

(b) section 27(1)...

shall not take effect until the expiry of the time within which an appeal may be made to the Upper Tribunal against the direction...and, if such an appeal is made, until the appeal has been disposed of.

(3) If a traffic commissioner refuses to give a direction under subsection (2) the holder of the licence...may apply to the Upper Tribunal for such a direction.”

Senior Traffic Commissioner’s observations

41. Under the Tribunal Procedure (Upper Tribunal) Rules 2008, a Traffic Commissioner is not a Respondent to an appeal against the Commissioner’s decision. This is because, for the purposes of an appeal against the decision of a

person or body other than a tribunal, the definitions in rule 1(3) of the 2008 Rules define “respondent” as “in...any other appeal except a road transport case, the person who made the decision that has been challenged”, and “road transport case” as “an appeal against a decision of (a) a traffic commissioner...”.

42. Since the Traffic Commissioner is not a party to an appeal in a road transport case, the Commissioner cannot make submissions without the permission of the Upper Tribunal. In this case, the Upper Tribunal decided to invite the Senior Traffic Commissioner to make written submissions about the extent of a Commissioner’s stay powers under section 29(2) of the 1995 Act because it considered it appropriate that “the Senior Traffic Commissioner should be given the opportunity to make written observations before the Upper Tribunal gives a published decision that might address the extent of a Traffic Commissioner’s procedural powers, and which may affect the Commissioner’s established practices”.

43. The Senior Traffic Commissioner did not provide his own written submissions. Instead, he arranged for an official in his Corporate Office to do so who wrote as follows:

“In this case the Traffic Commissioner was not satisfied by the application for a stay, but in order to ensure that all relevant grounds were raised by the appellant, additional time was allowed by adopting a similar approach to that demonstrated by the Upper Tribunal in the cases of 2023/1031 *Eric Stevenson Morrison*, 2023/1324 *Abbey Coaches (Darwen) Ltd and Rigby’s Executive Coaches* 2021/2165. In effect the Traffic Commissioner granted a holding stay to allow the appellant to fully consider their grounds of appeal so that they could satisfy the decision maker that a stay was required.”

Appellant’s arguments

Ground 1 – whether the operator satisfied the stable and effective establishment requirement

44. If the requirement in paragraph A1(2)(b) of Schedule 3 to the 1995 Act is read in conjunction with the authorised vehicle provisions of section 5, it is clear, argues the operator, that paragraph A1(2)(b) imposes a two-part test. The operator must have access to a vehicle, and the vehicle must meet the requirement of an authorised vehicle under section 5.

45. Paragraph 40 of Statutory Document 4 construes the relevant regulatory requirement so that the operator must have access to one or more vehicles. This does not inevitably require a vehicle to be specified on a licence but ‘the vehicle(s) in

question must be registered and be capable of being put into circulation in conformity with the legislation of that Member State'. In this case, it was not clear that, by reference to paragraph 40, the operator's arrangements were non-compliant. It had a vehicle under a monthly ad-hoc hire agreement, which benefited from insurance arranged by the Appellant, and before it was removed, the vehicle had been specified on the operator's Licence. This was clearly an arrangement under which the operator could call upon the hire vehicle and use it ad-hoc. Few Operators would pay for HGV insurance if they did not have access to the vehicle. At the hearing, Mr Backhouse argued that the Traffic Commissioner overlooked the significant annual insurance premium (£7,500), a sum which no operator would be likely to expend on a vehicle to which it did not have access. The policy was more than 'suggestive' that the operator had access to a vehicle. The Commissioner's focus on ownership of the vehicle was irrelevant or, if it was relevant, certainly not determinative.

46. Moreover, argued Mr Backhouse at the hearing, paragraph 40 of Statutory Document 4 does not exclude informal or unwritten agreements. It states that these are 'unlikely' to suffice, which leave open the possibility that they might suffice, although paragraph 40 provides no further guidance on when this may be the case. Mr Backhouse argued that it was always a question of fact whether a particular agreement, even if informal or unwritten, satisfied the statutory requirement. In this case, he submitted, it was not open to the Commissioner to find that vehicle FV66 BNE was not available because such a finding lacked a proper evidential basis. That was because the evidence – insurance policy and Allways garage's confirmation that the vehicle was available for use by the operator – pointed in the opposite direction. The fact that the vehicle was, at times, used by others did not prevent it from being available to this operator.

47. At the hearing, Mr Backhouse argued that the finding that 'lacking throughout' was an intention by the operator to specify a vehicle failed to take into account that the operator *did* specify vehicle FV66 BNE on its licence in December 2022 and, as soon as it realised in June 2023 that the vehicle was no longer specified, immediately took steps to re-specify it. The OTC case file shows that officials could not identify how the letter, supposedly informing the operator that vehicle FV66 BNE had been removed from its licence in January 2023, was sent to the operator. This was relevant to the question whether 'lacking throughout' was an intention to specify a vehicle and should have been factored into the Commissioner's analysis. At the hearing, Mr Backhouse further argued that the operator's response to the PTR letter's revelation that the vehicle was no longer specified on its licence provided

strong evidence that it had previously been ignorant of this fact, but, again, this was not taken into account.

48. The Traffic Commissioner refused to consider the operator's request, made on 12 July 2023, to allow it one month in which to acquire a vehicle. The request should have been construed, argues the operator, as a request to exercise the power under section 27(3A) to provide a 'period of grace' in which to remedy the regulatory breach. Even if it is assumed that the operator was in breach of paragraph A1(2)(b) of Schedule 3 to the 1995 Act (which is not conceded), this was 'out of step' with paragraph 84 of the directions given in the Senior Traffic Commissioner's Statutory Document 4 especially in the light of the operator's evidenced willingness to cooperate with the OTC. Granting a period of grace in which to acquire a vehicle was surely far more proportionate than revoking the operator's licence.

49. Alternatively, since the operator believed that it met the available vehicle requirement, there was a dispute of fact that should have caused the Traffic Commissioner to convene a public inquiry even in the absence of a request for an inquiry.

Ground 2 – burden of proof

50. Contrary to the leading authority *Muck It v Secretary of State for Transport* [2006] RTR 9, the Traffic Commissioner failed to recognise that the burden was on him to establish that the operator no longer met regulatory requirements. As a licensed operator, the Appellant was not required to prove to the Commissioner that it still satisfied relevant regulatory requirements.

51. The Commissioner had no evidence that a vehicle was not available to the operator yet removed vehicle FV66 BNE without either informing the operator or requesting return of its operator's license disc. The OTC's PTR letter effectively put the operator to proof that it met the available vehicle requirement, the revocation decision letter failed to engage with the operator's reply and, for an unknown reason, the Commissioner revoked the operator's licence with retrospective effect. Overall, this was a clear instance of a reversal of the burden of proof, established by *Muck It*, which also failed properly to respect the operator's rights under Article 1 of the First Protocol to the European Convention on Human Rights as given effect by the Human Rights Act 1998.

52. At the hearing, Mr Backhouse accepted that, on the material before the Traffic Commissioner at the PTR stage, there were legitimate regulatory concerns. On the face of it, six months had passed during which no vehicle had been specified on the

operator's licence. However, once it became apparent that the operator had not received notification of vehicle FV66 BNE's January 2023 removal from its licence, did in fact have a fully insured vehicle available and wished to remain in business, there was no longer a reasonable basis for revoking the licence. In particular, the fact that there was no material before the Commissioner to contradict the operator's case that it did not receive notice of the January 2023 removal of vehicle FV66 BNE meant there was no proper justification for proceeding immediately with revocation. In doing so, the Commissioner effectively ruled that the operator had failed to show that it met the stable and effective establishment requirement, which was a reversal of the required burden of proof for regulatory action against operators that already hold an operator's licence. That might have been the correct approach had the Commissioner been dealing with a fresh application for an operator's licence but not for an operator with a current, valid operator's licence.

Ground 3 – unfairness / failure to convene public inquiry

53. The operator argues that the Traffic Commissioner failed to give effect to the operator's right under the 1995 Act to a public inquiry prior to a revocation decision being taken. Overall, the procedure followed was unfair.

54. The operator's initial reply to the PTR letter exhibited confusion about how vehicle FV66 BNE came to be removed from its licence but was silent in response to the invitation to request a public inquiry. Only when 'chased' by OTC staff, one day into the period for requesting an inquiry, did the operator email 'No PI needed, thank you'. Analysis of the correspondence shows that the operator did not appreciate the significance of its email – that it would be followed by the Traffic Commissioner rejecting its written representations and evidence and proceeding to revoke its licence. The OTC's 'chaser' email said nothing about the significance of declining an inquiry and, indeed, internal OTC notes show that officials doubted whether the operator understood its significance. The evidence shows that, at this point, the operator had been unaware of the January 2023 removal of vehicle FV66 BNE from its licence. The operator's decision to decline an inquiry should have been assessed in the light of its representations that it believed it met the 'stable establishment' requirement. The operator said that no public inquiry was needed because it had already explained its position regarding the stable establishment requirement. Mr Guerrini, on the operator's behalf, was seeking to deal with the issue effectively and rapidly.

55. The PTR letter informed the operator that, if it failed to request a public inquiry, its licence would be revoked. It is clear that, when the operator said 'No PI needed,

thank you' in response to OTC's 'chasing' email, it did not envisage revocation of its licence. On the contrary, the evidence showed that it was seeking to understand what it needed to do in order to remain in business. The correspondence shows that the operator was either led to believe by the OTC that declining a public inquiry would no longer lead inevitably to revocation or that it misunderstood the PTR letter's statement that, absent a request for a public inquiry, its licence would be revoked. Either way, it was unfair for the Traffic Commissioner to proceed directly to revocation without correcting the operator's evident misunderstanding about the consequences of failing to request a public inquiry. This is underscored by OTC internal notes which show that the official dealing with the operator's case suspected that it did not appreciate the significance of declining a public inquiry.

56. The Traffic Commissioner proceeded to revoke the operator's licence before expiry of the deadline for requesting a public inquiry set in the PTR letter. The Commissioner's refusal to accede to the operator's request for a public inquiry, and reinstate the licence, made after the revocation decision but before the original inquiry request deadline, was plainly unreasonable. It deprived the operator of its right to a hearing and deprived the Commissioner of the opportunity to make a properly informed decision. The OTC's actions in this case were contrary to the spirit of the inquiry-related provisions of the 1995 Act because these aim to prevent revocation where an operator is not 'aware of where it's at', as Mr Backhouse put it at the hearing, in the regulatory process. The reason for imposing a time limit for requesting an inquiry is to allow the operator time to reflect and seek advice. The Traffic Commissioner should not have truncated the period for the operator to request an inquiry.

57. The operator only knew that the Traffic Commissioner disagreed with its representations when it received the revocation decision letter. This was the first point at which the Commissioner's thinking was revealed and the first time at which the operator was able to make a properly informed decision as to whether to request an inquiry. Overall, the inquiry request process was fundamentally flawed and made the revocation decision fundamentally unfair.

58. Under Article 13 of Regulation (EC) No 1071/2009, it appears that a time-limit for rectifying a regulatory breach cannot be set until the Commissioner finds a regulatory breach. At the hearing, Mr Backhouse argued that, on a strict reading of section 27 of the 1995 Act, a time limit for dealing with the Traffic Commissioner's regulatory concerns should nevertheless have been set. It was certainly 'odd' that no opportunity was given to the operator to put matters right was given in the light of its stated intention to acquire its own vehicle.

Ground 4 – decision-making transparency

59. The OTC bundle, which was not available to the operator before it appealed to the Upper Tribunal, disclosed internal OTC communications about the operator and a number of other local operators. The Traffic Commissioner made a decision by reference to submissions and representations that were never disclosed to the operator. This was procedurally unfair, and the unfairness was exacerbated by the apparent involvement of another Traffic Commissioner in internal revocation deliberations. At the hearing, Mr Backhouse submitted that it was quite clear from the OTC bundle that, as well as the Deputy Traffic Commissioner who decided to revoke the operator’s licence, a number of OTC staff and the Senior Traffic Commissioner were involved in analysing the operator’s position. The point, argued Mr Backhouse, is that, where an OTC official determines not to hold a public inquiry, so that matters are decided on paper, there must be absolute transparency as to the matters taken into account in making the decision.

60. We permitted the operator to advance ground 4, despite its absence from the original grounds of appeal, because it was based on information that was not available to the operator when it lodged its notice of appeal against the Traffic Commissioner’s decision.

Disposal

61. The operator submits that the Commissioner’s licence revocation decision must be quashed. If the Upper Tribunal thinks that the operator meets the stable and effective establishment requirement, that is the end of the matter. If the Upper Tribunal is unconvinced, this case should be remitted to the Commissioner.

Conclusions

Why the licence revocation decision was taken unfairly (ground 3)

62. We shall deal first with ground 3, which we are satisfied is made out.

63. We begin by setting out our concerns about the decision-making process anticipated in the PTR letter sent to the operator on 27 June 2023. The PTR letter was clearly intended to act as the written notice required by section 27(2) of the 1995 Act. The PTR letter, as well as inviting written representations, stated that, “if no request for a public inquiry is received by this date your operator’s licence will be revoked”. In our judgment, this statement anticipated an unlawful decision-making process, that is one which was contrary to section 27(3)’s injunction that the Traffic Commissioner may not give a revocation direction under section 27(1) “without

considering any representations duly made". The PTR letter / section 27(2) notice informed the operator that, absent a request for an inquiry, the operator's licence would be revoked. In other words, written representations would make no difference. If the operator failed to request an inquiry, revocation would inevitably follow. Such a process fails to give effect to section 27(3)'s requirement that a Traffic Commissioner may not revoke an operator's licence under section 27(1) without considering any written representations duly made by the operator in response to the PTR letter / section 27(2) notice.

64. While the operator does not, in terms, argue that the process by which its licence was revoked was contrary to that required by section 27(3), in our view the section 27(2) notice / PTR letter's mistaken interpretation of section 27(3) did play a significant role in undermining the fairness of the Commissioner's revocation decision. We shall now explain why.

65. The PTR letter was sent to the operator on 27 June 2023. It informed the operator that, absent a request for a public inquiry by 19 July 2023, its operator's licence would be revoked. The operator's initial emailed response, sent on 27 June 2023, asserted that it was unaware that vehicle FV66 BNE had already been removed from its licence. The email also informed the OTC that the operator had logged on to the VOL self-service facility and "added it [vehicle FV66 BNE] again". We find that the operator did take steps on this date to add the vehicle to its licence. OTC records, and the email sent by an OTC official on 27 June 2023, confirm this. This was a clear sign that the operator wished to remain in business. If there was any doubt on this point, it was dispelled by the operator's further email sent to OTC on 27 June 2023 which provided details of vehicle FV66 BNE's insurance and maintenance arrangements and sought information about how the vehicle's removal was communicated "just so I can avoid this happening again". That statement was not indicative of an operator that intended to cease trading.

66. Next, on 28 June 2023, that is one day after the PTR letter was sent, the OTC wrote to the operator noting that it had not requested a public inquiry and stating, 'would you let me know your view please'. In response the operator emailed 'no PI needed thank you'.

67. In our view, it would have been better if the OTC had not, one day after sending the PTR letter, chased the operator for an update on its public inquiry stance. The PTR letter set a date by which a inquiry was to be requested and we see no good reason for prompting the operator to make up its mind before then. However, that did not, of itself, render the decision-making process unfair.

68. What made the decision-making process unfair was the OTC's failure to recognise what should have been obvious about the operator's decision to decline to request a public inquiry. The 27 June 2023 PTR letter clearly informed the operator that, absent a request for a public inquiry, its licence would be revoked. This was akin to informing the operator that, if it did not request a public inquiry, it would be taken to have conceded that its licence should be revoked, and it was to cease trading as an operator of goods vehicles. But the operator's dealings with the OTC in the 24 hours or so after the PTR letter was sent made it abundantly clear that the operator wished to remain in business. It should have been obvious, therefore, that the operator had either failed to appreciate the consequences of not requesting a public inquiry or was under the impression that its correspondence with the OTC overrode the stricture in the PTR letter that, absent a request for an inquiry, its licence would be revoked.

69. In our judgment, fairness required this operator to be reminded that, by declining a public inquiry, it was effectively conceding that its licence would be revoked. The operator was prompted to request or decline an inquiry only one day after receiving the PTR letter, against a correspondence background that made it clear that the operator wished to remain in business. We do not think there is any real doubt that, in these circumstances, fairness required some sort of reminder but, if there is, it is dispelled by the fact that the PTR letter's statement that a failure to request an inquiry would inevitably lead to revocation was itself an unlawful failure to give effect to a statutory provision, section 27(3) of the 1995 Act, part of whose purpose is to ensure fair treatment of operators in the revocation decision-making process.

70. We are satisfied that the PTR letter's statement that, absent an inquiry request revocation would follow, was relied on by the Commissioner in deciding to revoke the operator's licence. The decision letter stated, "in the absence of a request for a public inquiry to be held the Traffic Commissioner has revoked your operator's licence with effect from 5th July 2023". It cannot properly be argued that the operator's failure to request an inquiry played no part in the decision to revoke its licence.

71. We decide that the Traffic Commissioner's decision to revoke the operator's licence involved an error on a point of law because it was taken unfairly or, to put it another way, in breach of natural justice. This appeal succeeds and we set aside the Traffic Commissioner's revocation of the operator's licence.

The Appellant's remaining arguments

72. It is not necessary for us to adjudicate on the Appellant's remaining grounds of appeal but, since they have been argued, we shall briefly give our opinions on the main arguments advanced.

73. Certain arguments within grounds 1 and 3 rely on events that followed the Traffic Commissioner's revocation decision. However, paragraph 17 of Schedule 4 to the Transport Act 1985 provides as follows:

“(1) The...Upper Tribunal [has] full jurisdiction to hear and determine all matters (whether of law or of fact) for the purposes of any of [its] functions under an enactment relating to transport.

In the case of the Upper Tribunal, this is subject to sub-paragraph (3).

...(3) The Upper Tribunal may not [on an appeal from any determination of a traffic commissioner other than an excluded determination] take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.”

74. The present appeal does not involve an excluded determination (see paragraph 17(4)) of Schedule 4 to the 1985 Act). It seems to us that we are precluded by paragraph 17(3) from entertaining those of the operator's arguments that rely on circumstances that came into existence after the Commissioner decided to revoke the operator's licence. For instance, the arguments that the Commissioner unfairly failed to construe the operator's post-decision correspondence as a request for a 'period of grace' and wrongly failed to 'reinstate' the licence in response to the operator's post-decision request for a public inquiry.

75. Regarding ground 1, we do not consider that it is open to us, on the evidence, to find that the operator satisfied the 'effective and stable establishment' requirement on the basis that it had access to one or more authorised vehicle. We do not feel able to make a sound finding that the requirement was satisfied without further evidence being available, or at least being sought, in particular as to the nature of the hiring arrangements for vehicle FV66 BNE which the operator says are in place. That does not mean that we find that the requirement was not satisfied, only that the evidence before us is insufficient to make a finding either way.

76. The argument within ground 2 that the Commissioner wrongly placed on the operator the burden of showing that it remained compliant is not, in our view, particularly strong. The OTC is not privy to all information held by an operator, such

as, in this case, the hiring arrangements for vehicle FV66 BNE. If the OTC requests relevant regulatory information from an operator, that is not tantamount to requiring the operator to prove that it remains compliant. And, if the OTC draws an adverse inference from a failure to provide requested information, again, that is not tantamount to requiring the operator to prove that it remains compliant.

77. There may be force in the operator's argument, which features in grounds 1 and 2, that the Traffic Commissioner should have made findings of fact concerning the operator's notification (or non-notification) that vehicle FV66 BNE had been removed from its licence. However, the absence of such findings does not show that the Commissioner mistakenly required the operator to prove that it remained compliant. If anything, and we make no ruling on this point, their absence might suggest an error of law on the ground that the revocation decision was not supported by sufficient findings of fact.

78. We see little, if any, support for the argument that the Deputy Traffic Commissioner's revocation decision was not the product of his own independent regulatory judgement. It is entirely natural, and unobjectionable, for arrangements to be made for OTC officials to make regulatory recommendations to Traffic Commissioners. The fact that a final decision might mirror official recommendations does not show that a Commissioner failed to apply his or her own mind to the regulatory issue. There would be no point in making such recommendations if the Commissioner was expected to discount them. Regarding the supposed involvement of another Traffic Commissioner in this revocation decision, we see no evidence that the final decision was anything other than the exercise of Deputy Commissioner Denton's independent regulatory judgement. There is nothing objectionable in different Commissioners being involved at different times in the analysis of a particular regulatory issue, nor in a different Commissioner deciding an application for stay of a regulatory decision, and this does certainly not show that the substantive regulatory decision was taken under the direction of some Commissioner other than the named decision maker.

Stays

79. We have to say that the written submissions provided about the nature of the Traffic Commissioners' power to grant stays under the 1995 Act, in response to an invitation extended to the Senior Traffic Commissioner, were of little assistance. They amounted to an assertion that if the Upper Tribunal can give time-limited stays, why not the Traffic Commissioners?

80. In our view, an integral part of the power, under section 29(2) and (3) of the 1995 Act, to direct that certain regulatory directions shall not take effect (be stayed) is the time limit specified by Parliament. Parliament conferred power to direct that certain regulatory decisions “shall not take effect until the expiry of the time within which an appeal may be made to the Upper Tribunal...and, if such an appeal is made, until the appeal has been disposed of”. A direction that purports to set a different expiry date for a stay is not a valid exercise of the power conferred by section 29. In our view, neither the Traffic Commissioners nor the Upper Tribunal have power to grant a stay for any period other than that specified in section 29(2). If no appeal is made to the Upper Tribunal, a Commissioner’s stay ceases to have effect upon the expiry of the time for appealing. If an appeal is made to the Upper Tribunal, a stay granted by a Commissioner, or the Upper Tribunal itself, has effect until the appeal is disposed of.

81. Had Parliament intended for stays granted under the 1995 Act to be capable of ceasing to have effect at some point before an appeal is made to the Upper Tribunal, or an appeal disposed of, it would have made provision to that effect. Indeed, that is what Parliament did when providing for stays of certain regulatory decisions given under the Public Passenger Vehicles Act 1981. Section 50(7) of the 1981 Act provides that “where a traffic commissioner has given a [staying] direction under [section 50(6)] he or another commissioner may withdraw it at any time”. The absence of a similar provision in the 1995 Act is a clear indication that Parliament did not intend for stays under that Act to expire before the time specified in section 29(2).

82. The Upper Tribunal has not, to my knowledge, purported to give a time-limited stay. In certain cases, it has granted a stay but informed the operator that the staying direction may be set aside if properly argued grounds of appeal are not supplied by a particular date. That is not the same thing as granting a stay to expire on some date other than that specified in section 29 of the 1995 Act. The Upper Tribunal has the same powers, rights, privileges as the High Court in relation to all matters incidental to its functions (section 25(1), (2) of the Tribunals, Courts and Enforcement Act 2007) and this, if for no other reason, permits it to set aside a staying direction if it transpires that it should not have been given.

83. We should add that nothing in our decision is intended to limit any power that a Traffic Commissioner may have, after making a licence revocation decision, to amend that decision by extending the date on which the licence revocation takes effect.

Disposal

84. The Deputy Traffic Commissioner's decision to revoke the operator's licence is set aside. We do not consider it necessary to order any provision for reconsideration of this matter by a Traffic Commissioner. We do not order reconsideration of this case at a public inquiry because that would usurp the operator's freedom to request, or not request, an inquiry. It is for a Traffic Commissioner to decide whether regulatory action should be taken in respect of this operator by, for instance, issuing a fresh notice under section 27(2) of the 1995 Act and nothing in this decision is to be read as limiting a Commissioner's freedom to do so.

E Mitchell

**Judge of the Upper Tribunal
Authorised for issue,
on 22 November 2024**

Section 37(2), Goods Vehicles
(Licensing of Operators) Act
1995.