



UA-2024-001493-T

Neutral Citation No:
Appeals Nos. UA-2024-001493-T

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

**ON APPEAL from the DECISION of the DEPUTY TRAFFIC COMMISSIONER
FOR THE SCOTTISH TRAFFIC AREA (Mr Hugh Olson)**

Dated: 15 October 2024

Before:

Marion Caldwell KC	Judge of the Upper Tribunal
Mr Gary Roantree	Member of the Upper Tribunal
Mr Craig Barker	Member of the Upper Tribunal

Heard at: Employment Appeal Tribunal Building, 52 Melville Street,
Edinburgh EH3 7HF

Date of Hearing: 10 April 2025

Date of Decision: 2 May 2025

Appellant:	Edinburgh Coach Lines Ltd
Representation:	
Appellant:	Mr Mark Davies of Counsel

DECISION OF THE UPPER TRIBUNAL

The appeal is **ALLOWED** and the decision of the Deputy Traffic Commissioner to revoke the Appellant's operators standard licence is set aside. Further, the case is remitted for rehearing and determination at a Public Inquiry. We do not direct which individual Traffic Commissioner should conduct the Public Inquiry.

Subject Matter

Fresh evidence; sections 14ZA and 17 of the Public Passenger Vehicles Act 1981; natural justice; fair proceedings; revocation; the duty to hold a public inquiry.

Cases referred to:

Atbus Ltd. [2019]UKUT 0032 (AAC).

Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport [2010] EWCA Civ 695.

Bryan Haulage No 2 (2002/217).

Crompton t/a David Crompton Haulage v Department of Transport North Western Traffic Area [2003] RTR 34.

Ladd v. Marshall [1954] 1WLR 1489.

Introduction

1. This is an appeal from the decision of the Deputy Traffic Commissioner ("DTC") for the Scottish Traffic Area refusing the Appellant's application to designate Mr Peter Fyvie as transport manager and revoking the Appellant's operator licence. The Appellant was informed of the decision by letter dated

15 October 2024¹ . (Unless stated otherwise, all page references are to the electronic bundle page numbers.) On 18 October 2024, the Appellant (hereinafter referred to as “ECL”) applied for a stay of the revocation. On 23 October 2024, the DTC granted a stay pending appeal.

Legal Framework

2. Section 12 of the Public Passenger Vehicles Act 1981 (“the 1981 Act”) provides that a public service vehicle shall not be used on a road for carrying passengers for hire or reward except under a public service vehicle (“PSV”) operator’s licence granted in accordance with the Act.
3. Section 14ZA of the 1981 Act provides for, among other matters, the requirement for the operator to be professionally competent as determined in accordance with paragraphs 3, 4 and 6 of Schedule 3.
4. Paragraph 3 of Schedule 3 provides as follows:-

“References in Part II of this Act to professional competence are to the professional competence of an individual; and a company satisfies the requirements as to professional competence if, and so long as, it has a transport manager or transport managers of its road transport business who, or each of whom, is of good repute and professionally competent.”
5. Section 14ZA(3) requires an operator to have a designated transport manager in accordance with Article 4 of Regulation (EC) No 1071/2009 (“the 2009 Regulation”).
6. Section 17(1) of the 1981 Act provides that the Traffic Commissioner must revoke a standard licence if it appears that at any time to the Commissioner, the licence holder no longer satisfies the requirement to be professionally competent.

¹ Page 30.

Background

7. The factual background to this appeal appears from the documents, the decision of the DTC and the statement of Mr Peter Fyvie dated 27 March 2025. ECL was incorporated in 1978. The company directors are Ms Sinead Kavanagh and Mr Jeff Clarke. The company is a bus and coach operator. It was granted a Public Service Vehicle standard international licence (PM 0000103) with effect from 1 April 1992. It has two operating centres in Edinburgh, with authorisation for a total of 45 vehicles with 34 vehicles in possession². On 12 August 2024, Mr Fyvie was added to ECL's Vehicle Operator Licensing Service ("VOLS") online account as an administrator. This, Mr Davies informed us, was in anticipation of the departure of ECL's then designated transport manager ("TM"), Mr Jonathan Walton whom Mr Fyvie was to replace.
8. On 15 August 2024, Mr Walton used the VOLS online system to remove himself as TM. On 16 August 2024, the Office of the Traffic Commissioner ("OTC") wrote by email and by recorded delivery letter to ECL advising the company that it no longer satisfied the requirement of professional competence in the absence of a TM and that the TC was considering revocation of the licence. The operator was given until 30 August 2024 to respond to the letter.
9. On 16 August 2024, an application was submitted to nominate Mr Fyvie as the replacement TM. On 20 August 2024, Mr Fyvie's national CPC and international CPC were uploaded onto the VOLS system³.
10. On 27 August 2024, the OTC wrote to ECL informing the company that the TM application was incomplete and that the licence remained at risk of revocation until the application was completed and the TC had accepted a proposed transport manager. The company was given until 10 September 2024 to respond with the requested information and informed that failure to do so would result in the TC revoking the licence.
11. On 28 August 2024, Mr Fyvie sought to complete the TM1. He stated that he would be an internal TM and would work 8 hours a day, Monday to Friday. At

² Page 19.

³ Pages 13 and 14.

the conclusion of completing the form Mr Fyvie sought to submit it through the Gov.uk website. The website asked him to use a QR code to provide a picture of his passport. He attempted to do this but the system would not accept the photograph of the passport as there was too much light reflected. At 11.55 am Mr Fyvie received an email from Gov.UK One Login informing him that he must go to a Post Office to finish proving his identity.

12. On 31 August 2024, Mr Fyvie went to a Post Office in Dunbar with his passport to verify his identity. He completed that process with a member of the Post Office staff. He understood from the member of the Post Office staff that he had completed the process successfully and that that was the conclusion of the process of verification and that his completed details would be provided to the OTC.
13. On 2 September 2024, Mr Fyvie received an email from Gov.UK One Login with the subject heading "Sign in to view the result of your identity check". It stated:-

*"Dear PETER FYVIE,
You recently took your passport, which expires on 9 September 2026, to the Post Office at 9:04am on 31 August 2024.
The Post Office branch shown on your customer letter is 17A High Street, Dunbar, East Lothian EH42 1EN.
To view the result of your identity check, you need to sign in to your GOV.UK One Login: <https://return.account.gov.uk/resume>
Then you'll be sent to the service you need to use.
After you continue, you'll be able to view the result of your identity check."*

14. On 1 October 2024, an OTC case worker reported on the application to the TC. The case worker's submission narrated that the operator was applying to nominate Mr Fyvie as the new TM but stated that the application was incomplete and "there has been no response from the operator"⁴. The submission stated:-

"An application nominating Mr Fyvie was received on 16 August 2024. A single request letter was issued on 27 August 2024 requesting the online application was fully completed and declaration signed along with an effective management letter. It looks like the application was

⁴ Page 19.

*filled in online but there is no signed declaration and no effective management letter.*⁵

15. The submission narrated Mr Fyvie's personal details, his CPC qualifications and that he had confirmed that he would work 40 hours a week on TM duties, which met the starting point. It was also noted that he was the nominated TM on another licence. A previous history of an S marked prohibition in July 2024 in respect of the tyres on two vehicles was noted, it stated that the operator had altered and improved tyre management and the prohibition had resulted in no further action.
16. On 9 October 2024, the case worker made a recommendation to the TC as follows:-

"This submission is to consider a new transport manager following the removal of Mr Jonathan Walton. I note Mr Walton removed himself via Self Service on 15 August 2024. The standard loss of TM letter was sent the day after and an application to add Mr Peter Fyvie received the same day. Unfortunately, the application was incomplete and a single request letter sent. I note no period of grace was sought by the operator, and the caseworker has confirmed no response to our letter has been received. Looking at the users on this licence, I can see three admin users listed. I can also see there has been access to the portal since the letter was sent, and therefore no reason for the lack of response.

*The standard process is clear, and therefore I recommend the application to add Mr Fyvie is refused and the licence is passed to National Compliance for revocation."*⁶

17. As the application remained incomplete due to a lack of a failed signed declaration and effective management letter, with no period of grace having been requested, the case worked recommended that the application be refused and the licence revoked.

⁵ Page 19.

⁶ Pages 22-23.

18. On 11 October 2024, the DTC refused the application to add Mr Fyvie as TM because the application was incomplete and instructed that the licence be passed to National Compliance for revocation.
19. On 15 October 2024, the OTC wrote to ECL informing it of the DTC's decision and that the licence was revoked with effect from 15 October 2024.
20. On 15 October 2024, Mr Clarke emailed the OTC as follows:-

*"This letter has just come to my attention today, to our disbelief. We were of the understanding that the change of transport manager from Jonathan Walton to Peter Fyvie had been successful and that all the required documents and photo identification had (been) lodged. There are currently three qualified transport managers in the ECL team which makes this decision very difficult to accept. Would it be possible to have a conversation with you to discuss this apparent communication error?"*⁷

21. On 18 October 2024, the operator applied for a stay. The case worker's submission to the DTC for his consideration of the application for a stay, noted the following:-

".. Mr Fyvie had issues with completing his ID check and had mistakenly assumed that the Post Office would send the details to this office. One may expect that an operator and proposed transport manager would have been proactive in explaining the situation to this office and checking to ensure that all the required information had been received, as opposed to assuming that everything was in order. No communication was sent to the operator to confirm that Mr Fyvie had been accepted as the new transport manager, yet this assumption was made on the operator's behalf.

Nevertheless, the operator does have a nominated transport manager, namely Mr Fyvie, which does negate any road safety concerns, albeit confirmation has still not been received to the queries asked in the unanswered letter dated 27 August 2024.

⁷ Page 33.

Ultimately, the licence was revoked as the operator failed to respond to correspondence from this office and as a result, the application could not be processed. But given that the operator does have a transport manager in place, this reduces the risk to road safety and as a result, it is recommended that the request for a state is granted.”

22. On 23 October 2024, the DTC granted a stay of the revocation pending appeal to the Upper Tribunal.

Grounds of Appeal

23. The grounds of appeal are at page 55 of the bundle and are as follows:-

“Ground 1

In all the circumstances it was wrong and an error of law not to provide the Appellant with an opportunity to have the potential revocation of its licence considered at a public inquiry, with such an obligation stemming from the principles of natural justice as explained in Atbus Ltd [2019] UKUT 0032 (AAC).

The Appellant is a long-established, exemplary operator and it had taken prompt steps to appoint a replacement transport manager following Mr Walton’s departure. The letter of 15 October 2024 does not record any ground for revocation of licence PM0000103 (“the Licence”) other than the lack of a transport manager and the Appellant would contend that none exist.

To revoke the Licence without giving the Appellant the opportunity to present its case, including the steps taken by Mr Fyvie to comply with the request for information made by the Office of the Traffic Commissioner, at a public inquiry, represents a clear breach of the principle of natural justice as per Atbus.”

“Ground 2

In all the circumstances the decision to revoke the Licence by the application of the new operating instructions was disproportionate and an unreasonable interference with the Appellant’s rights under Article 1 of the First Protocol (as part II, schedule 1 of the Human Rights Act, 1998).”

24. In addition to the grounds of appeal, Mr Davies helpfully provided a written skeleton argument for which we are grateful.

Preliminary matters- application to adduce fresh evidence

25. On 27 March 2025, the Appellant's representatives submitted two statements with supporting annexes; one from Mr Peter Fyvie and one from Ms Beverley Bell, the Appellant's representative.
26. Bearing in mind that the Upper Tribunal cannot take into account circumstances which did not obtain at the time of the determination subject to appeal, the principles for allowing fresh evidence to be heard, and which apply to the Upper Tribunal, are laid down in the case of *Ladd v. Marshall* [1954] 1WLR 1489 where Denning LJ held (at 1491):

"To justify the reception of fresh evidence...three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

27. We had read the statements in advance of the submission to enable us to decide this issue. Mr Fyvie's statement narrates that prior to Mr Walton leaving ECL, the operator intended Mr Fyvie to become the designated TM. It relates his interaction with the VOLS system from 12 August 2024, his attempts to complete and upload the TM1 form, the difficulties he experienced in proving his identity online and that he attended a Post Office with his passport to verify his identity. He explained that he had understood from the member of staff at the Poast Office that he would not require to do anything further. Clearly, that was incorrect. Mr Fyvie recalled receiving the email of 2 September 2024, but could not confirm that he had acted upon it. He assumed this was the confirmation email the Post Office staff had told him to expect. He stated that he had not read that carefully enough. He explained that he had become so fixated on his difficulties trying to verify his identity that he forgot about the letter of 27 August 2024 and the further information required. He explained that if the OTC had sent him another email specifically about this or even called him, he would have completed the process. The annexes to his statement are emails to Mr Fyvie from VOLS and one from Gov.UK One Login.

28. Ms Bell's statement narrates her qualifications, experience and expertise in transport law and how she was instructed by ECL on 15 October 2024 when the licence was revoked. She is a former Traffic Commissioner for the North West Traffic Area and Senior Traffic Commissioner. She retired from the latter post in 2017 and set up her current consultancy business. Her statement explains that in her experience a TC would normally send a "propose to revoke" letter rather than rely on a letter such as the letter of 27 August 2024. In paragraph 8 of her statement she tells how, on 16 October 2024, she called a senior civil servant at the OTC to query the procedure followed by the DTC. The Annex to her statement is her attendance note of that call. The attendance note, she says, records that she was told new instructions to OTC staff from TCs are that if there is no response to correspondence then staff are specifically prohibited from contacting the operator and are instructed that the case must be referred to the TC to revoke the operator's licence. The civil servant advised her that this is referred to as the "single request letter process". As the last letter was sent on 27 August 2024 there was no further contact made by the OTC and the matter was referred to the TC for revocation. The new procedure, she was told, is not in the Senior Traffic Commissioner's Guidance. The civil servant told her that, as far as he was aware, the new operating instruction had not been issued to the industry. Paragraphs 9 and 10 of Ms Bell's statement and parts of her attendance note contain legal opinion.
29. Mr Davies invited the Upper Tribunal to admit the statements in accordance with the test set out in *Ladd v Marshall*, as applied to the Upper Tribunal's procedure in *Thames Materials* 2002/40:

"...

- (i) *The fresh evidence must be admissible evidence.*
- (ii) *It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.*
- (iii) *It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.*
- (iv) *It must be evidence which is apparently credible though not necessarily incontrovertible.*

We would have thought that the first condition hardly needed to be stated but it is quite apparent from the terms of Mr Clarke's statement that it needs to be stressed. There are authorities which indicate that condition (ii) is the critical condition."

30. Regarding the first condition, Mr Davies submitted that Mr Fyvie's evidence was admissible. It was factual and it provided the context to the TM application and the difficulties Mr Fyvie experienced with the online platform and trying to add information. Ms Bell's statement in paragraphs 1-4 was factual. Paragraphs 5-8 narrated her experience of the propose to revoke procedure and her call to the OTC. The annex to her statement recorded the telephone call. He submitted that Ms Bell's statement, other than paragraph 10, and her attendance note were admissible regarding the new operating instructions to OTC. He did not seek to have paragraph 10 admitted.
31. Addressing the second condition, Mr Davies noted that in *Thames Materials* a public inquiry ("PI") had already taken place whereas in this case there had been no PI. If there had been a PI then this evidence would have come out and it would have been available to the UT. Mr Davies argued that the second condition discloses why the statements should be admitted because they provide the context as to why a PI was not convened and to refuse to admit them would rob the Appellant of the ability to present the Upper Tribunal with the reasons why the licence was revoked by the DTC.
32. Considering the third and fourth conditions, Mr Davies submitted that the statements are plainly important in providing context and the reason there was no PI and that they provide credible evidence of the factual position that led to no PI being convened and the licence being revoked.
33. We accept Mr Davies' submission that the factual evidence provided by Mr Fyvie and Ms Bell is admissible and important, such that it would have been liable to have an important influence on the DTC's decision. Further, we have no reason to doubt that it is also evidence which may presumably be believed. Considering the second condition referred to in *Thames Materials*, in this case there was no PI for a combination of reasons, it would seem. Mr. Fyvie tells us that he mistakenly believed he need do nothing further once he had gone to the Post Office to confirm his identity. In addition, he had become so concerned

with the identity verification, that it put out of his mind that he had not provided a letter to the OTC setting out how his TM duties would be fulfilled. Also, he failed to notice that he had not received confirmation from the OTC that his nomination had been accepted. As a result, he was in ignorance of the fact that he had not complied with the OTC's requirements and neither he nor the company directors realised that they should be seeking a period of grace and/or a PI. While not entirely in point, the following passage from Lord Denning's judgment in *Ladd* (at p 1492) is instructive:-

“Again, if it was proved that a witness made a mistake on a most important matter and wished to put it right, and the circumstances were so well explained that his fresh evidence was presumably to be believed, then again there would be ground for a new trial: see Richardson v Fisher⁸.”

34. While Mr Fyvie did not make a mistake in his evidence, he clearly was in error over what procedure he had to follow and what he had, and had not, completed of the required documentation. While these omissions and this inattention to detail may be criticised, these failures do not appear to have been done in bad faith, or to have been a deliberate attempt to defy the regulatory system or to mislead the OTC. In all the circumstances, we decided to admit the fresh evidence of Mr Fyvie and the factual evidence of Ms Bell. Paragraphs 9 and 10 of her statement and the parts of the attendance note containing legal opinion are not admitted.

Appellant's submissions

Background

35. Mr Davies stated that ECL was a long standing PSV operator with 35 executive coaches, 50 employees and a turnover of £1.5m. It was part of the Eirebus Group which had in excess of 100 public service vehicles in operation. The licence was essential to ECL's business.

⁸ (1823) 1 Bingham 145

36. Following the letter of 27 August 2024, on 31 August 2024, Mr Fyvie sought to complete the form required by the OTC online, stating that he would be an internal TM working 8 hours a day Monday to Friday. He was unable to verify his identity by uploading a photograph of his passport. He went to the Post Office and did this on 31 August 2024. Mr Fyvie ought to have used the Post Office verification emailed to him to complete the online form. However, he did not realise that having understood that this would be carried out by the Post Office. Mr Fyvie has confirmed that his fixation on the verification process caused him to forget to provide a letter confirming how his TM duties would be fulfilled.
37. The Appellant did not receive any communication from the OTC between 27 August 2024 and 15 October 2024 when the OTC letter was sent informing ECL that the licence had been revoked.
38. ECL immediately sought advice from Ms Bell's consultancy. Ms Bell had a telephone conversation with a member of staff at the OTC in which the latter indicated that new operating instructions had been provided to Central Licensing Office staff to the effect that there should be no further attempt to follow up partially completed applications and that licences should simply be revoked (see Annex to Ms Bell's statement).

Relevant law and Guidance

39. Mr Davies began his submissions by setting out what he submitted was the relevant law and guidance from authority. He made reference to section 14ZA of the 1981 Act and the requirements for standard licences and, in particular, professional competence. Section 17(1) requires the TC to revoke a standard licence if it appears at any time that the holder no longer satisfies the requirement of professional competence. Section 17(4) provides that the TC shall not revoke a licence without first holding a PI, if the holder requests that, however, as was noticed in the case of *Atbus Ltd*⁹, the legislation does not otherwise preclude a TC from holding a PI.
40. Mr Davies relied on Recital 12 of the 2009 regulations which provides as follows (the underlining is emphasis provided by Mr Davies);

⁹ [2029] UKUT 0032 (AAC), paragraph 27.

“Fair competition and road transport that is fully compliant with the rules call for a uniform level of monitoring by Member States. The national authorities responsible for monitoring undertakings and the validity of their authorisations have a crucial role to play in this respect, and it is appropriate to ensure that they take suitable measures if necessary, in particular in the most serious cases by suspending or withdrawing authorisations or declaring as unsuitable transport managers who are repeatedly negligent or who act in bad faith. This must be preceded by due consideration of the measure with respect to the proportionality principle. An undertaking should, however, be warned in advance and should have a reasonable period of time within which to rectify the situation before incurring such penalties.”

41. Under reference to *Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport* Mr Davies accepted that it was for the Appellant to show that the decision of the DTC was “plainly wrong”.

42. In *Atbus* the Upper Tribunal considered the revocation of a licence pursuant to section 17(1)(a) of the 1981 Act based on an apparent failure to reply to a letter requiring the nomination of a new Transport Manager and it held that:

“...principles of natural justice will sometimes dictate that [a public inquiry] should be held.”

43. In finding that the circumstances in that case were such that the Traffic Commissioners should have convened a public inquiry, and remitting the matter for one to be so organised, the Upper Tribunal noted that:

“The Appellant had operated his business for some time. There had been no clear evidence of concerns likely to justify revocation other than the transport manager issue. The steps which the Appellant had taken to appoint a new transport manager could not realistically be regarded as free from potential criticism but some steps, at least, had been taken. Revocation is undoubtedly a serious step to take. There was the possibility that relevant evidence would emerge during the course of the PI and/or that relevant arguments of a factual or legal nature would have been put. We have concluded, therefore, that in this case the circumstances and matters of fairness dictated that a PI ought to have been held.”

44. Mr Davies submitted that it has long been established by the appellate courts that operator licences are valuable property for the purposes of Article 1 of the First Protocol and that whilst they can be revoked in pursuit of a legitimate aim, the action must be proportionate (see *Crompton t/a David Crompton Haulage v Department of Transport North Western Traffic Area* [2003] R.T.R. 34, cited with approval by the Upper Tribunal in *Bryan Haulage No. 2* (2002/217), leading to the formulation of the question, “is the conduct such that the operator ought to be put out of business?”).
45. Article 1 of the First Protocol provides that:
“1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Ground 1

46. Mr Daves argued that this is a case, as in *Atbus*, where the circumstances dictated that a public inquiry should have been held in accordance with the principles of natural justice. The Appellant is a long established company and operator. It is part of a significant group of companies and, as its filed accounts show, of substantial means. There is no clear evidence of concerns that would be likely to justify revocation other than the issue with the nomination of a new TM. The only previous history noted in the papers provided by the Office of the Traffic Commissioner¹⁰ is a preliminary hearing called in July 2024, which was resolved with no further action necessary which, he submitted, demonstrated that any concerns that might have arisen were assuaged without the need even to issue a warning .

¹⁰ Pages 25026.

47. Mr Davies said that whilst Mr Fyvie has, in his statement, accepted that there are steps he should have taken to check that attending at the Post Office was the end of the process/that he should have submitted a letter, and therefore the process of nominating him cannot be regarded as free from criticism (as in *Atbus*), the Appellant had made a *bona fide* application to nominate him supported by his certificates of professional competence in accordance with Article 21 of the 2009 Regulation.
48. Mr Davies noted that Mr Fyvie's nomination, and the effect this had on any concerns as to road safety, was explicitly recognised by the Office of the Traffic Commissioner when considering the stay application¹¹.
49. This was, Mr Davies argued, a matter of a communication error as expressed by its director, Mr Clarke¹², for an operator that had at the time three qualified Transport Managers in its operation. In fact, ECL had four TMs Mr Davies stated, because Mr Clarke is also a qualified TM. Those are the kind of material facts, he said, that the Appellant would have been in a position to advance had the decision been taken by the Traffic Commissioner, in accordance with the provisions of natural justice, to convene a PI rather than proceeding straight to the revocation of the licence. Indeed, as Mr Fyvie himself notes in his statement, a simple email or phone call from the Office of the Traffic Commissioner would have immediately rectified matters.
50. In all the circumstances, Mr Davies invited the Upper Tribunal to allow the appeal and to remit the matter for a public inquiry .

Ground 2

51. Further, or in the alternative, Mr Davies submitted, the Appellant contends that the application of the 'new operating instructions' (indicated by a member of the OTC staff to Ms Bell) represents a disproportionate interference with its property for the purposes of Article 1 of the First Protocol. The new operating

¹¹ Paragraph 25 above.

¹² Paragraph 23 above.

instructions appear to operate in a way that is contrary to decision of the Upper Tribunal in *Atbus* insofar as it precludes any inquiry into the wider circumstances and simply requires a blunt instrument approach, i.e.: an operator no longer satisfies the mandatory requirement pursuant to section 14ZA of the 1981 Act and therefore any licence must be revoked without further enquiry. The Appellant would contend that such an approach removes the requirement for the Traffic Commissioners to consider the issue of proportionality prior to making a decision and, therefore, negates the need to ask the long-established question, “is the conduct such that the operator ought to be put out of business?”. Such a removal does away, submitted, with the need to conduct a fair balancing exercise in accordance with Article 1 of the First Protocol.

52. Mr Davies said he was not suggesting that the need for a Traffic Commissioner to ask the question will arise in every case: there will be many where, having sent the “proposed to revoke” letter, no response is received or there is no indication from the operator that it is trying to remedy the situation. In such circumstances, it would plainly not be disproportionate to proceed with revocation without further ado.
53. However, considering circumstances such as have arisen in this matter, if the new operating instructions are applied, the *Bryan Haulage* question can only ever be answered by the Traffic Commissioners in the positive and it will always result in operators being put out of business.
54. The Upper Tribunal is respectfully invited to find that the application of the new operating instructions led to an outcome in this case that is plainly wrong and to remit the matter for a public inquiry.

Discussion and decision

55. The following principles (extracted from the Digest of Traffic Commissioner Appeals) as to the proper approach to an appeal in the Upper Tribunal can be found in the decision of the Court of Appeal in the case of *Bradley Fold Travel Ltd & Peter Wright –v- Secretary of State for Transport* [2010] EWCA Civ. 695:

- “(1) *The Tribunal is not required to rehear all the evidence by conducting what would, in effect, be a new first instance hearing. Instead it has the duty to hear and determine matters of both fact and law on the basis of the material before the Traffic Commissioner but without having the benefit of seeing and hearing the witnesses.*
- (2) *The Appellant ‘assumes the burden’ of showing that the decision appealed from is wrong.*
- (3) *In order to succeed the Appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which the Tribunal ought to conclude that the different view is the right one. Put another way it is not enough that the Tribunal might prefer a different view; the Appellant must show that the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view.”*
56. The Tribunal sometimes uses the phrase “plainly wrong” as a shorthand description of this test. (NT/2013/52 & 53 *Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI*, paragraph 8).
57. From the material available to us, we accept that, other than the issue of the replacement of the TM, there were no grounds for the revocation of the operator’s licence. As Mr Davies submitted, and we agree, such a licence is valuable property both in practical terms and for the purposes of Article 1 of the First Protocol. It was essential for the operation of the Appellant’s business. Whilst we acknowledge that if mandatory requirements are not satisfied revocation will be inevitable, revocation of a licence means the loss of a valuable possession. Revocation should be proportionate to the conduct involved¹³ and the operator should be given a fair opportunity to correct the situation, if able to do so.
58. In *Bryan Haulage*, The Upper Tribunal stated (paragraph 11):-
- “In applying the Crompton case it seems to us that traffic commissioners and the Tribunal have to reconsider their approach. In cases involving mandatory revocation it has been common for findings*

¹³ *Crompton*.

to have been made along the lines of ‘I find your conduct to be so serious that I have had to conclude that you have lost your repute: accordingly, I have also to revoke your licence because the statute gives me no discretion’. The effect of the Court of Appeal’s judgment is that this two-stage approach is incorrect and that the sanction has to be considered at the earlier stage. Thus, the question is not whether the conduct is so serious as to amount to a loss of repute but whether it is so serious as to require revocation. Put simply, the question becomes ‘is the conduct such that the operator ought to be put out of business?’. On appeal, the Tribunal must consider not only the details of cases but also the overall result.”

59. While Mr Fyvie and the company directors were at fault for failing to monitor the TM appointment process and to fully complete it, nevertheless, the company was making a genuine attempt to have a TM appointed. At least one TM and, possibly four, were working for the operator. Accordingly, road safety does not appear to have been at risk during this muddled and bungled attempt to have Mr Fyvie appointed. Their failures were at the modest end of the scale.
60. In our judgment, in the circumstances that were or ought to have been known to the DTC: that this was an operator with a good track record, which had been in business for a long time, which was attempting to appoint a nominated TM, which had been uploading information onto VOLS after the “single request letter” of 27 August 2024, should have caused the DTC to pause before taking the serious step of revoking the licence and putting the operator out of business. The *Bryan Haulage* question was not addressed. We agree with Mr Davies’ submissions that in this case, as in *Atbus*, the circumstances and matters of fairness dictated that a PI ought to have been held. By proceeding directly to revocation without further ado, the DTC was plainly wrong.
61. Another matter which concerns us is that it is not clear from the appeal bundle and internal memoranda of the OTC whether the DTC had been informed that after the letter of 27 August 2024 and before the revocation, Mr Fyvie had responded to the letter by uploading certain information onto the VOLS system, albeit he had not completed the entire process. The suggestion in the recommendations to the DTC quoted in paragraphs 17 to 19 above is that there

had been “no response” from the operator. That is not strictly correct. If the DTC’s decision not to appoint Mr Fyvie and to revoke the licence was partly based on this incorrect and incomplete information then the decision is in error of law. If the DTC was aware that further information had been uploaded onto VOLS after the letter of 27 August 2024, then in our judgment that should have prompted further inquiry and is all the more reason that a PI should have been directed rather than proceeding to revocation. Relevant evidence relating to Mr Fyvie’s application would possibly have emerged at the PI leading to his appointment and avoiding revocation. Or, indeed, the direction for a PI might, itself, have led to matters being rectified in advance of a PI.

62. We do not consider that it is necessary for the Upper Tribunal to make a ruling that the “single request letter” procedure will lead to unfairness in every case. However, in this case, for the reasons already discussed, we agree with Mr Davies’ submission that its application led to a decision that is plainly wrong.

Decision

63. The decision of the DTC dated 15 October 2024 revoking the Appellant’s licence is set aside and the case is remitted to the TC to hold a PI. Of course, it may be that matters can be resolved before the PI hearing date, rendering the PI unnecessary.

**Authorised for issue
On 2 May 2025**

**Marion Caldwell KC
Judge of the Upper Tribunal**

