



***NUGENT INTERNATIONAL LIMITED, MR MICHAEL NUGENT***  
**[2024] UKUT 8 (AAC)**

**Appeal No. UA-2023-000004-NT**

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

**ON APPEAL from the DECISION of the Presiding Officer**

**Dated 29 November 2022**

**Before:**

<b>Kenneth Mullan</b>	<b>Judge of the Upper Tribunal</b>
<b>Mr David Rawsthorn</b>	<b>Member of the Upper Tribunal</b>
<b>Ms Kerry Pepperell</b>	<b>Member of the Upper Tribunal</b>

**Appellant:**

**Nugent International Limited  
Mr Michael Nugent**

**Attendances:**

For the Appellant: Mr McNamee, solicitor

For the Respondent: Ms Jones BL

**Heard at:** Tribunal Hearing Centre, Royal Courts of Justice, Belfast.

**Date of hearing:** 7 June 2023

**Date of decision:** 18 December 2023

### **DECISION OF THE UPPER TRIBUNAL**

IT IS HEREBY ORDERED that this appeal be ALLOWED in part (see paragraph 86 below).

**SUBJECT MATTER:-** Impounding; right to detain; ownership; fairness of proceedings; grounds for return

***NUGENT INTERNATIONAL LIMITED, MR MICHAEL NUGENT*** [2024] UKUT 8 (AAC)

**CASES REFERRED TO:-** Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695; *F&M Refrigerated Transport Ltd* ([2012] UKUT 401 (AAC)); *Alan Knight Transport B.V. Alan Michael Knight* ([2012] UKUT 453 (AAC)); *Sarah Boyes* ([2014] UKUT 0190 (AAC)) ('*Boyes*'); *Commercial Tradings Limited* ([2013] UKUT 0322 (AAC))

## **Background**

1. The factual background to this appeal appears from the documents and the Presiding Officer's decision and is as follows:

'On 2 September 2022, a Scania right-hand drive goods vehicle displaying the Bulgarian registration plate B6963BM and being used in conjunction with trailer unit C533289, was stopped by DVA Vehicle Examiner MK in the Belfast area.

The driver stated that he was employed by Michael Nugent Senior, and that Michael Nugent Senior was the owner of the vehicle. He further stated that the trailer was owned by Mr Nugent's son, Michael Nugent Junior.

The driver stated that he had been tasked to transport 5 Skyjack scissor lifts and a large metal boom from Oswestry to Dungannon.

As the vehicle was displaying a Bulgarian registration plate the driver was asked for the Community Licence for the vehicle. He produced a Bulgarian Community Authorisation with the embossed number 235094.

The driver was asked for evidence of an incoming international carriage from Bulgaria in order to comply with Article 462 of the Trade and Cooperation Agreement 2021 (TCA). He was unable to produce any documents stating that he had picked up the vehicle on the 30 August 2022 in Dublin and delivered a lorry to Dover, Kent.

DVA checks revealed that Michael Nugent Senior had been a director of Nugent Transport Limited who had had their licence revoked in February 2017. The vehicle had last been registered in the UK to that entity which had been dissolved in 2019.

DVA VE MK, in conjunction with the Chief Enforcement Officer, formed the view that the use of the vehicle and trailer required an operator's licence in Northern Ireland.

The vehicle and trailer were detained.

Following notice of detention being served and publication of formal notice in The Gazette, the applicants applied for return of the vehicle and trailer. The applications were referred to be considered at a detention hearing.'

## **The applications for the return of the vehicle and trailer**

2. In the file of papers which is before us are copies of two applications for the return of a detained vehicle.
3. The first, dated 16 September 2022, is in the name of Mr Michael Nugent stated to be 'T/A Nugent Commercials'.
4. The application contained the following submissions:

'My trailer was being used to transport sky lifts into Belfast. This was a return trip, the original was from Dublin to Dover. The vehicle was

stopped and checked by DVSA outside Dover without any issue being raised. I had no reason to believe that any issue would arise on the journey into NI.'

5. The first application was signed by Michael Nugent who described himself as the 'owner'.
6. The second application, also dated 16 September 2022, was in the name of 'Nugent International Ltd' with Michael Nugent described as a 'Director'.
7. The application set out the following grounds:

'My trailer was being used to transport sky lifts into Belfast. This was a return trip; the original was from Dublin to Dover. The vehicle was stopped and checked for operator's licence amongst other things, cleared to go. A minor problem with the lights was rectified – No issue was raised in relation to the operator's licence.'

8. The second application was signed by Michael Nugent who described himself as 'Director'.
9. In the file of papers which is before us is a copy of a Skeleton Argument, dated 25 October 2022, which was prepared by Ms Jones for the detention hearing. In paragraph 1, Ms Jones set out the following:

'Whilst it is noted from the application for return that there are two Applicants, namely Nugent International Limited in respect of the drawing vehicle and Nugent Commercials in respect of the trailer, DVA is content that both applications proceed together as they rely on the same factual matrix.'

10. The detention hearing' took place on 25 November 2022. Mr Michael Joseph Nugent and Mr Michael Thomas Nugent were present and were represented by Mr McNamee. Ms Jones represented the Respondent. There was one witness from the DVA.

#### **The Presiding Officer's decision**

11. On 29 November 2022 the Presiding Officer made a decision in the following terms:

'On an application for the return of a vehicle/trailer lawfully detained under the Regulations it is for the applicant to satisfy me as to ownership and to lack of knowledge of the unlawful use on the balance of probabilities.

The applicants have failed to satisfy me as to genuine legal ownership.

The applicants fail to satisfy me as to lack of knowledge of the unlawful use.

I therefore refuse the application by Michael Nugent Senior for return of the vehicle B6963BM.

I therefore refuse the application by Michael Nugent Junior for return of the trailer C533283.

The vehicle and trailer may be disposed of in accordance with the Regulations.'

**The Presiding Officer's reasons**

12. The Presiding Officer began by considering **the grounds for detention**. In paragraph 21, he set out certain principal evidence relating to the use of the vehicle, although he also referred to certain evidence relating to the trailer.
13. In paragraphs 22 to 26, he stated the following:
  - ‘22. All of the facts above support the contention that the Bulgarian licence was just a device to circumvent the revocation and Michael Nugent Senior’s inability to obtain an operator’s licence in the UK for essentially UK and UK/Republic of Ireland work. Mr Nugent was extremely vague as to the Bulgarian entity not even being able to relate its location in Bulgaria.
  23. I accept the DVA submission in the Skeleton argument that the applicants have provided no evidence of compliance with EU Articles 462 and 463.
  24. Under Article 462.1 – EU road haulage operators may undertake a laden journey from the territory of the Party of establishment (in this case Bulgaria) to the territory of another Party, or through the territory of another Party.
  25. Paragraph 2 requires a valid EU licence (in this case the licence had terminated in September 2019) and a driver with the Certificate of Professional Competence.
  26. Paragraph 7 allows up to two laden journeys within the UK within 7 days of unloading in the UK of the goods carried in a Article 462.1 compliant journey.’
14. The Presiding Officer then turned to the issue the issue of **ownership** in respect of both the **vehicle** and the **trailer**.
15. He noted that in the application for the return of the vehicle the applicant had entered his own name as an individual and had also entered ‘Nugent International Ltd’. He observed that Ms Jones had submitted that as Nugent International Ltd was shown as ‘dissolved’ in 2019 at Companies House, there was no lawful applicant. Mr McNamee had countered that accompanying evidence from Bulgaria clarified that the application was, in fact, being made by a Bulgarian entity. At paragraph 31, the Presiding Officer asserted that:

‘The problem with that contention is, firstly, that the Bulgarian entity is “Nugent International EOOD” or “Nyudzhan Interneshanal” EOOD, as shown on page 183 of the brief (National Bureau of Bulgarian Motor Insurers document).’
16. The Presiding Officer noted that the evidence of both Mr Nugents that the applications for return were completed by Mr McNamee and that they had simply signed what Mr McNamee had prepared. In respect of this submissions, the Presiding Officer concluded:

‘It is reasonable to expect an application completed by an experienced lawyer to be precise and accurate. I have seen nothing to confirm that “Nugent International Ltd” exists as a current and bona fide legal entity in Bulgaria.’
17. The Presiding Officer noted that the contact details for the business made no reference to the Bulgarian entity; there was no mention of the Bulgarian entity on application and the supporting Bulgarian documents were problematic in

that the insurance certificate was out-of-date and no translation of a specific document was provided. We return below to the following statements made by the Presiding Office at paragraphs 34 and 35:

‘However, even if Nugent International EOOD, is shown as the registered keeper in Bulgaria, this is only supporting evidence of ownership.

I cannot speculate as to the reason for the lack of clarity and precision on the application form but the reasonable assumption by DVA that it was a UK entity (that was subsequently found to have been dissolved) may have denied them the opportunity to interrogate the Bulgarian equivalent of Companies House to check whether Nugent International EOOD was still in existence.’

18. Noting that the evidence of Mr Nugent senior was that he had only found out that the operator’s licence had been terminated by the Bulgarian authorities on the day of the hearing, he concluded, at paragraphs 38 to 41:

’38. A reputable, genuine operator, whether in UK or operating to EC rules in Bulgaria should know that its licence has been revoked. Operators have cause to contact the licensing office with regard to renewals, vehicle specifications, and any material changes and 3 years is a long time to have had no cause to contact. I also note that the Bulgarian Community Licence produced by the driver was issued on 21st March 2017 and under Regulation (EC) no. 1072/2009 the normal date of expiration/renewal would be 21<sup>st</sup> March 2022. Had Michael Nugent Senior, on behalf of the Bulgarian Nugent International EOOD, sought to renew the licence at any time since September 2019 he would have ascertained that the licence was terminated.

39. In any event, I would have no doubt that the Bulgarian licensing authority would have sent formal notice of termination to the operator company.

40. To conclude on the question of ownership, I concur with Mr McNamee’s submission that the burden of proof is on the applicant and the standard is on the balance of probabilities, or, more likely than not.

41. I consider that on the information provided on the application form and short supporting statement, it is entirely reasonable for DVA to submit that the application has been made by a Northern Ireland company “Nugent International Limited” and that the application must fail as Companies House records show the entity as “dissolved”.’

19. The Presiding Office then conceded that he was prepared to consider the application on the basis that it had been made by the Bulgarian entity. He noted that he had been provided with a Bulgarian certificate of insurance which was out of date and Bulgarian registration document for the vehicle. In respect of the insurance, he noted that Mr Nugent senior had given evidence that the current insurance certificate was probably still in the vehicle. The Presiding Officer observed, however, that ‘even a current certificate of insurance would be **only supportive of ownership**.’ The emphasis here is our own.

20. With respect to the Bulgarian registration document, the Presiding Officer noted that caselaw confirmed that a registered keeper record is not conclusive evidence of ownership and that the equivalent United Kingdom document is headed with a statement to that effect. The Presiding Officer also observed, at paragraph 46:
- ‘There is no sales invoice, receipt, statement of accounts/assets, bank statement or any official document showing proof of purchase and legal ownership. When questioned as to these documents, Michael Nugent Senior asserted, “I own the vehicle”. He was also unable to answer as to how ownership passed from Nugent Transport Limited on its dissolution to the Bulgarian entity stating “I don’t understand your point....I didn’t sell the vehicle to anybody...I own the vehicle”.’
21. The Presiding Officer’s overall conclusion with respect to the ownership of the vehicle was set out in paragraph 52, as follows:
- Taking into account, the absence of authentic documentation regarding sale and purchase of vehicle B6963BM following the demise of Nugent Transport Limited, the history of potentially “phoenix” companies above, and, Mr Nugent’s evidence (and the manner of giving that evidence), I cannot possibly be satisfied, on the balance of probabilities, that the Bulgarian company holds genuine legal title to the vehicle.’
22. The Presiding Officer then turned to the question of ownership of the trailer. He began by noting that the evidence submitted in connection with this issue was:
- The trailer registration document at DVLA.
  - A Zurich Freight Liability Schedule 2021-22 for Michael Nugent t/a M Nugent
23. In respect of the registration document the Presiding Officer noted, (as he had with respect to the vehicle) that this document was not definitive proof of ownership. Further, the evidential value of the document was, in any event, against the applicant in that the registered owner was shown as ‘Mr Michael Nugent’ with an address which was that of ‘Mr Michael Nugent Senior’.
24. The Presiding Officer noted that parallel considerations applied to the insurance schedule, noting that this was in the name of ‘Michael Nugent T/A M Nugent’ when the application was in the name of ‘Michael Nugent T/A Nugent Commercials’. Further, the Schedule referred to “Business Activities – Haulage Contractor” while Michael Nugent Junior had given evidence that his business was ‘buying and selling lorries, not haulage.’ In addition, when questioned about ‘legal ownership. Michael Nugent Junior, while stating that he had paid £40000 for the trailer, and while he could name the vendor of the trailer as being Dennison Commercials, he did not produce an ‘invoice, proof of payment or sales receipt from that company.’
25. The Presiding Officer also noted that while the DVA’s booking reference for annual tests for the trailer showed ‘M T Nugent’, (Michael Nugent Junior) with his residential address, as the named address, this was ‘scant evidence of ownership as is the driver’s belief’.
26. In summary, the Presiding Officer concluded:

‘As with the vehicle, I can be satisfied as to possession but not as to legal ownership particularly having regard to the close links between father and son and their respective trading entities as detailed above.

The applicants cannot say that they took proof of ownership for granted as DVA set out a full skeleton argument putting them on notice that ownership was disputed.

Mr McNamee was also highly critical of what he described as DVA’s usual, unreasonable approach in requiring strict proof of ownership. In the circumstances, and particularly having regard to their solicitor’s experience of these matters, the applicants had ample opportunity to produce relevant documentation prior to the hearing, which is why I declined to have Michael Nugent Junior log in to his mobile phone whilst giving evidence in order to look for additional material.

Having found that legal ownership of the vehicle and trailer has not been established by the respective applicants on the balance of probabilities, the applications must fail, but I go on to consider the evidence seen and heard in respect of the applicants’ contended lack of knowledge of the unlawful use.’

27. Turning to the issue of ‘knowledge of lawful use’, the Presiding Officer concluded as follows:

‘As far as Michael Nugent Senior and Nugent International Ltd is concerned, he denies knowledge of the use of his vehicle or of the load being arranged by his son.

I have no doubt that the initial response of the driver was an accurate account of who he was working for and who had organised the load. The driver stated Michael Nugent Senior, based in Whitecross, County Armagh, and it was Michael Nugent Senior’s mobile phone number, a UK number, that VE MK was asked to call in the first instance. The driver made no mention of working for a Bulgarian company and the account of the telephone conversation with Mr Nugent Senior makes no mention of the driver working for or being employed by a Bulgarian company. The account also makes no reference to Michael Nugent Senior seeking to distance himself from the assignment by stating that he was on holiday in Spain and knew nothing about the use of his vehicle and that it was taken without his consent.

In addition, Victor Treacy International, the freight ferry agent named by Michael Nugent Senior, stated that Michael Nugent, (address) made the bookings for vehicle B6963BM. That address and the email address and mobile phone number correspond with those of Michael Nugent Senior.

I find it impossible to believe that, if the Nugents’ account was true, neither the driver nor Mr Nugent Senior would have mentioned that the work was arranged and directed by Michael Nugent Junior, without Michael Nugent Senior’s knowledge or consent. The only logical explanation for them not mentioning it is that is simply not true. I find that Michael Nugent Senior had actual knowledge of the unlawful use. He has produced no evidence to suggest that he was working lawfully under the Bulgarian licence and I find in any event that he probably knew of the termination of that authority. He certainly has made no effort to check it since 2019 or to comply with international carriage



requirements. I refer to the DVA skeleton argument relating to Regulation 4(3)(b), at pages 168-9 of the brief, and my findings above.

It is likely that Michael Nugent Junior had some role in arranging the load with the freight agents Derryhale Transport Limited as his mobile number was given by Derryhale to DVA. However, the VAT number provided by Derryhale belonged to Michael Nugent, (address), Michael Nugent Senior's address and VAT number.

I find it more likely than not that the father and son worked closely together and that was why Michael Nugent Senior expressed no surprise to the DVA examiner that his vehicle was being used. Instead he sought to justify the journey, after speaking to his wife, by telling DVA VE MK that the vehicle was in Bulgaria on the 7th July 2022. He failed to back that up with consignment notes, invoices or any documentation other than a texted ferry crossing from Bilbao to Rosslare. I accept that he was in Spain from 23<sup>rd</sup> August to 9th September 2022 but that would, of course, not have prevented him from knowing, and being involved in, the arrangements.

As to Michael Nugent Junior's account that he did not realise that he could not use his father's (extinct) Bulgarian operator's licence for a journey originating in UK and finishing in UK, this is incredible. Michael Nugent Junior is a qualified transport manager and he has been involved in his father's previous transport businesses. He holds a current licence to drive LGVs. He has applied for an operator's licence in his own right and this application is still outstanding. He has applied because he knows that you cannot transport goods for hire or reward without a valid operator's licence being in force, yet this is exactly what he was doing on the 2nd September 2022.

He has provided no evidence of any attempt to comply with EC Articles 462 and 463 and the international carriage regulations. The statement in his supplementary grounds at page 185 of the brief is wholly unconvincing. He states, "Mr Nugent had not even considered the issue of whether an Operator's Licence was necessary given the fact that he was delivering his own piece of commercial machinery to Dover". When the driver was stopped he was on a separate return journey transporting another company's machinery arranged through a commercial freight agent at his behest.

The statement continues, "however, he was aware that his father's vehicle had an Operator's Licence and would have been confident that such Operator's Licence would have covered him to make that journey in any event". I find no reasonable basis for that confidence and having heard and seen Michael Nugent Junior give evidence at the inquiry I am satisfied that he knew the use was unlawful, or, was guilty of such a high degree of fault that actual knowledge can be imputed, through his wilful shutting his eyes to the obvious.'

### **The appeal to the Upper Tribunal**

28. In the notice of appeal submitted to the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal, Mr McNamee set out the following grounds of appeal:

**Ownership**

In relation to the issue of ownership the decision maker erred in treating this as an adversarial matter. The issue of ownership should be enquired into by the decision maker who should afford the applicant every opportunity to prove ownership. In this particular case the decision maker refused to countenance relevant and compelling evidence of ownership.

Further, the decision maker erred in law in considering his task was to ascertain legal ownership of both the trailer and vehicle. The proper test is set out in Regulation 2A of the Goods, Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012 which states that the department must determine the lawful owner. The test applied by the decision maker in this case was defined in his phrase as "genuine legal ownership". There is no such test provided for in the legislation. This error of law has infected every aspect of the decision maker's considerations of the issue of ownership.

As regards the proper test it is submitted that both Applicant's more than sufficient evidence to show that they were the lawful owners of both the lorry and the trailer.

**Lawfulness of original detention/culpability**

In relation to the justification for the original detention of the vehicle and trailer, the decision maker made a number of fundamental errors of law in his consideration of this matter. The decision maker drew conclusions which were not provided for on any evidential basis and ignored evidence which was placed before him on the issues of knowledge and culpability of the Applicants. It is submitted that the decision maker ignored in its entirety the case law as set out in the case law. In particular the law set out in the case of *Nolan Transport [2012] UKUT 221 (AAC)*.

29. In the application for permission to appeal, Mr McNamee also made submissions about the fairness of the proceedings before the Presiding Officer.

**The further submissions at the oral hearing before the Upper Tribunal**

30. At the oral hearing, Mr McNamee relied on the contents of a written Skeleton Argument.
31. In relation to the question of ownership of both the vehicle and the trailer, he asserted that the Presiding Officer, in seeking to establish 'genuine legal ownership' had applied the incorrect test. The test set out in regulation 2(a) of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) was one of 'lawful ownership'. Mr McNamee referred to a parallel test in paragraph 10 of Schedule 3 to the Customs and Excise management Act 1979. He submitted that sufficient evidence of ownership was presented on behalf of both applicants as follows:

'Trailer unit C533289 (N8195878):

This vehicle is commonly referred to both by reference to the registration number N8195878 and the registration number C533289. The UK. Registration Certificate was presented as part of the Applicants' proofs due to the fact that it was necessary to establish that trailer NBI 95878 was the same vehicle as vehicle registration

C533289 and was insured by Zurich. The Goods Vehicle Test Certificate produced by the Department was presented as proof of ownership by the Applicant and contained all of the details of the vehicle, citing the name of owner as Michael Nugent. Documents exhibited by the DVA at page 26 show this MOT test had been paid for by the Applicant's bank card. In the overall circumstances it is submitted that it is inconceivable that on the balance of probabilities and taking into account the extremely cogent evidence given by the Applicant that the Presiding Officer was not satisfied that it was more likely than not that the applicant was the lawful owner.

This vehicle was being operated by the Applicant, having been shipped from Dublin into the UK by the Applicant, and made a return journey to Northern Ireland which had been arranged by the Applicant. After detention it was advertised in the Belfast Gazette, with no other claims to ownership arising. The Applicant gave consistent and cogent evidence of where and when he purchased the vehicle and how much he paid for the vehicle. Cross-examination of the Applicant seemed to be directed towards indications that the Applicant's father might be a possible candidate for ownership, ignoring the fact that his father was present during the entire proceedings and subsequently gave evidence that the Applicant was the owner. It should be noted that this particular type of vehicle was specifically constructed to carry the goods which the Applicant's business dealt in. In all of the above circumstances it is therefore apparent that the decision of the Presiding Officer is plainly wrong.

**Tractor Unit B696 3BM:**

The Applicant Nugent International Ltd claimed ownership of this vehicle and was represented by the director Mr Michael Nugent (Senior). The Department asserted and the Presiding Officer appears to have accepted that the application was made by Nugent International Ltd, a Northern Ireland company which was dissolved in 2017. The actual Applicant is Nugent International Ltd, a Bulgarian company. It is submitted on behalf of the Applicant that the assertion that the Applicant was the dissolved company is and was completely unsustainable given that;

- i. Such dissolved company had ceased to exist as a legal entity and therefore in law could not make an application.
- ii. That the documents accompanying the application form in order to support ownership of the Bulgarian registered vehicle clearly identified the Bulgarian company Nugent International Ltd and no other company.
- iii. That the Presiding Officer ignored the fact that it was indicated in the clearest terms that the legal representative of the Applicant was representing the Bulgarian limited company.

...

The Tribunal is referred to documents at pages 136 and 137. Further it is referred to the document at page 196 which was presented by the Department to establish the fact that the Operator's Bulgarian Licence had been revoked. The Presiding Officer in the course of the hearing indicated that he was prepared to accept the document at pages 196-199 as proof that the Bulgarian Licence had been revoked but not as

proof that the Bulgarian company Nugent International Ltd, with the director Michael Thomas Nugent, existed. He does however in his Judgement consider the issue of ownership on the basis that the application has been made by the Bulgarian company Nugent International (EOOD having been confirmed by Officer W as the Bulgarian equivalent of Ltd).’

32. Mr McNamee noted that there had only been one applicant for the return of the vehicle and observed that correspondence from the DVA dated 23 September 2022 concerning the statutory notification of the detention of the vehicle was sent to ‘Nyudzhant Interneshanal EOOD in Bulgaria.

33. On the question of ‘knowledge of unlawful use, Mr McNamee made the following submissions:

‘It is submitted that where Mr Michael Nugent Senior has provided uncontested evidence that he was out of the country at the time of the use of his vehicle and where that the tachograph records show that the vehicle had been parked up for a number of months, that the Presiding Officer’s findings that Mr Michael Nugent Senior had actual knowledge of the unlawful use is based on nothing other than speculation. The inability of the Applicant to question Officer K adversely hampered Mr Nugent Senior’s ability to establish his knowledge or lack of same of the transaction, conclusions were drawn by the Presiding Officer which were not supported by the evidence. The conclusion that Mr Nugent Senior expressed no surprise to the DVA examiner that his vehicle was being used is entirely speculative, as is the Presiding Officer’s finding that he (no doubt in relation to this transaction) worked very closely with his son.’

34. Mr McNamee also made assertions concerning the fairness of the proceedings before the Presiding Officer and bias. At the oral hearing, he requested that any reference to bias should be replaced by procedural unfairness. He submitted that the Officer K had not attended the hearing before the Presiding Officer and that, accordingly, he had been prevented from cross-examining him. He had not been informed in advance about this. He submitted that Officer K’s evidence fell into the category of hearsay and while the Presiding Office tribunals was not prevented from considering hearsay evidence, he ought to have been careful about the weight to be attached to it. In support of this submission, he referred to the comments of the Upper Tribunal in paragraph 8 of its decision in *F&M Refrigerated Transport Ltd* ([2012] UKUT 401 (AAC)). The file of DVA papers was also absent and this denied him the opportunity to examine relevant documents.

35. Mr McNamee asserted that the Presiding Officer was critical that further proofs had not been provided when there had not been a direction from the Head of the TRU for such proofs. Significantly, Mr Nugent Junior had been prevented from providing proof of purchase of the trailer.

36. Finally, Mr McNamee made the following submissions:

‘By witness statement dated 14 November 2022, the Department effectively changed the entire basis of their allegation of unlawful use from breach of cabotage rules to absence of Operator’s Licence. This document was emailed directly to a secretary in the Applicants’ solicitors office, which email stated the following- "Good afternoon, Please see attached further evidence provided by the DVA for the Detention Hearing on 25 November. This should be added to the

existing pack provided previously. Thank you, John". Nowhere in this correspondence was it indicated that the further evidence fundamentally altered the Department's position, nor was it indicated that it should be brought specifically to the attention of the solicitor dealing with the case or to the attention of the Applicants. As per the Departments' request, this evidence was placed with the existing file and as stated during the course of the hearing the legal representative was outside of the jurisdiction for a medical procedure. The Applicants, feel that the criticisms of them for not having had knowledge of the contents of the statement prior to the start of the detention hearing were therefore unjustified.'

37. Mr McNamee made further oral submissions on what he submitted was a change by the Department in the basis for determination to detain the vehicle.
38. For the respondent, Ms Jones relied on the content of the Skeleton Argument which she had prepared for the hearing before the Presiding Officer supplemented by further oral submissions. In the Skeleton Argument, Ms Jones set out the following summary position:

'Conclusion

This is a case of a user of a vehicle carrying on his trade without lawful compliance to the legislation.

Whilst the ending of the Transition period following Brexit has altered the application of EU Regulation in this Jurisdiction, the effect of the TCA continues the mutual recognition of the European-wide regulation of this industry. The need for such regulation is important both for road safety, standards and fair competition. The effect of the new regime under TCA does not have any material impact on this application.

For the reasons set out above the DVA would state that the application should be refused. The Applicants have failed to establish ownership nor lawful compliance and this vehicle has been used in this jurisdiction in an unlicensed manner.

The DVA assert that the evidence points to the user of the vehicle being an unlicensed operator established and operating within Northern Ireland.'

### **The legal principles relevant to detention and return**

39. Under the provisions of section 1(1) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010, (the 2010 Act) it is unlawful, in Northern Ireland to use a goods vehicle on a road, for the carriage of goods, either for hire or reward or for or in connection with any trade or business carried on by the user of the vehicle, without holding a licence, (known as 'an operator's licence), issued under the Act. By section 1(6) a person who uses a vehicle in contravention of this section is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.
40. Section 44 of the 2010 Act provides that Schedule 2 to the 2010 Act 'shall have effect'. Schedule 2 contains detailed powers to make Regulations concerning the detention etc of goods vehicles used in contravention of section 1 of the 2010 Act and, in paragraph 8(4) of Schedule 2, it sets out grounds for return which may be included in the Regulations.
41. The right to impound goods vehicles is set out in regulation 3 of the Goods Vehicles (Enforcement Powers) Regulations (Northern Ireland) 2012, (the

2012 Regulations), which came into force on 1 July 2012. Regulation 3 of the 2012 Regulations is in these terms:-

“Where an authorised person has reason to believe that a vehicle is being, or has been, used on a road in contravention of section 1 of the 2010 Act, he may detain the vehicle and its contents”.

42. Authorised person is defined in paragraph 1(1) of section 58 of the 2010 Act and means ‘(a) an examiner appointed by the Department under Article 74 of the 1995 Order; or (b) any person authorised in writing by the Department for the purposes of the 2010 Act’. The ‘1995 Order’ is the Road Traffic (Northern Ireland) Order 1995.
43. By virtue of regulation 9(1) of the 2012 Regulations, the **owner** of a vehicle detained in accordance with regulation 3 may, within the period specified in regulation 8(2), apply to the Department for the return of the vehicle. There is a definition of ‘owner’ in regulation 2 of the 2012 Regulations:

‘owner’ means, in relation to a vehicle or trailer which has been detained in accordance with regulation 3--

- (a) in the case of a vehicle which at the time of its detention was not hired from a vehicle-hire firm under a hiring agreement but was registered under the Vehicle Excise and Registration Act 1994, the person who can show to the satisfaction of an authorised person that he was at the time of its detention the lawful owner (whether or not he was the person in whose name it was so registered);
- (b) in the case of a vehicle or trailer which at the time of its detention was hired from a vehicle-hire firm under a hiring agreement, the vehicle-hire firm; or
- (c) in the case of any other vehicle or trailer, the person who can show to the satisfaction of an authorised person that he was at the time of its detention the lawful owner.’
44. The importance of identifying the legal owner of the detained vehicle was emphasised in the decision of the Upper Tribunal in *Alan Knight Transport B.V. Alan Michael Knight* ([2012] UKUT 453 (AAC) (*‘Knight’*)), both in the context of the legislative provisions relating to impounding and to the right of appeal to the Upper Tribunal. At paragraphs 3 to 11, the Upper Tribunal said the following:

‘3) At the hearing of this appeal, the Mr Knight was represented by Mr R Locke, who submitted a skeleton argument for which we were grateful. The first point made was that the Deputy Traffic Commissioner had been wrong to find that the application before him had been made by the company and not by Mr Knight personally. There was, submitted Mr Locke, some ambiguity in relation to the application form to the Traffic Commissioner that, he said, could reasonably be regarded as an application from Mr Knight in his personal capacity, notwithstanding the contents of the application form read as a whole, and all that had been said at the hearing. Mr Locke suggested that the company, or its Transport Manager, might properly be regarded as having applied on behalf of Mr Knight in his personal capacity.

- 4) We decided that this matter was something upon which the tribunal should form, and indicate, an early view because, on the agreed facts in relation to ownership, the true identity of the original applicant might affect the Deputy Traffic Commissioner's jurisdiction (and, indeed, our jurisdiction) and should be decided as a preliminary matter.
- 5) Regulation 10 of the 2001 Regulations provides that the owner of a vehicle detained in accordance with Regulation 3 may apply to the Traffic Commissioner for the return of the vehicle. An application must specify which grounds within Regulation 4(3) apply – one of which, namely 4(3)(c), is that although at the time the vehicle was detained it was being, or had been, used in contravention of S.2 of the 1995 Act, the owner did not know that it was being, or had been, so used.
- 6) It has been long accepted that, first, it is for VOSA to show that they had reason to believe that the detained vehicle was being, or had been, used on a road in contravention of S.2 of the 1995 Act. The standard of proof is the balance of probability. In this case there was no challenge to VOSA's right to detain the goods vehicle, which was carrying goods on the road in connection with the user's trade or business, but which was not being operated under the authority of a valid operator's licence.
- 7) Where, as here, use in contravention of S.2 has been accepted, the burden of proof then shifts to the alleged owner to establish ownership on the balance of probability, and then to establish, to the same standard, one of the grounds set out in Regulation 4(3) of the 2001 Regulations (as amended) for the return of the vehicle. For these reasons, and because Regulation 10 provides no right of application except to the owner of the detained vehicle, it is our view that only the owner may apply for the return of an impounded vehicle. Consequently, where there is doubt, the identity of an applicant needs to be clearly established because if the applicant is not the owner, the Traffic Commissioner has no jurisdiction to consider a claim for return of the vehicle to the applicant.
- 8) Regulation 13 provides that an appeal may be made to the Upper Tribunal against a determination of the Traffic Commissioner. We find, as a matter of law, that a person or other entity cannot derive a right of appeal under Regulation 13 if they were not a valid party in the proceedings before the Traffic Commissioner. If ownership is in dispute, an adverse finding by the Traffic Commissioner as to ownership may be appealed to the Upper Tribunal if the appellant made the application to the Traffic Commissioner and asserted ownership before the Traffic Commissioner. But where a person or company asserts or accepts that they were not the owner then, in our judgment, they may not apply to the Traffic Commissioner on their own behalf, and they may not appeal to the Upper Tribunal under Regulation 13.
- 9) In the present case, Alan Knight Transport BV accepted that it was not the owner of the vehicle. Before the Deputy Traffic

Commissioner there was no suggestion that, despite appearances to the contrary, the true applicant had been Mr Knight in his personal capacity or that the Transport Manager or Alan Knight Transport BV had applied on behalf of Mr Knight as an individual. Indeed, after the Deputy Traffic Commissioner had given his ex tempore decision, Mr Knight asked if there was a chance that he might be permitted to apply as an individual.

- 10) Having looked at the application form for ourselves, and read the transcript carefully, we conclude that Alan Knight Transport BV was the only entity to apply to the Traffic Commissioner for the return of the vehicle. This was the finding of the Deputy Traffic Commissioner and we find no good reason to take a different view. Indeed, in our judgment, no other interpretation is sustainable. That being so, we think it unwise to deal with the merits, if any, of Mr Knight's personal position in relation to any of the grounds set out in Regulation 4(3).
- 11) It follows that Alan Knight Transport BV, which accepts that it was not the true owner of the vehicle but was merely the hirer, had no right to apply to the Traffic Commissioner for the return of the vehicle and, therefore has no right of appeal to the tribunal. It also follows that Mr Knight as an individual, as owner of the vehicle, has no standing before us, as he was not a party to the proceedings below, and has not made a valid application to the Traffic Commissioner.'

45. The decision in *Knight* was considered in *Sarah Boyes* ([2014] UKUT 0190 (AAC)) ('*Boyes*'), the Upper Tribunal said the following, at paragraphs 6 to 11:

- '6. In *Alan Knight Transport B.V. and Alan Michael Knight* [2012] UKUT 453 (AAC) the tribunal held that the only person entitled to apply (under Regulation 10 of the Regulations) for the return of an impounded HGV is the owner. If there is any doubt as to whether or not the person applying for the return of the vehicle is in fact the owner of the vehicle the issue must be resolved first because the Traffic Commissioner has no jurisdiction to order the return of the vehicle to anyone else. In the circumstances of the present case, "owner" means in relation to the detained vehicle, the person who can show to the satisfaction of an authorised person that he or she was, at the time of its detention, the lawful owner (whether or not he or she was the person in whose name it was registered).

7. In the earlier appeal of *Sarah Boyes* [2013] UKUT 0285 (AAC) the tribunal confirmed its approach to appeals from decisions of Traffic Commissioners:

Since the hearing, the tribunal has become aware of the judgement of the Supreme Court in *Regina (Jones) v First-tier Tribunal (Social Entitlement Chamber) and Another – The Times* 31/5/2013. In this case, the Supreme Court found that an appellate body should not venture too readily into findings of fact made by specialist first-instance decision makers. ...



The Supreme Court held that the First-tier Tribunal was a specialist tribunal and had made a rational finding of fact that was open to it, even if others may reasonably take a different view - and it was not open to review by the Upper Tribunal (which had respected the First-tier Tribunal's finding) or by the Court of Appeal.

We do not think it necessary to invite representations from Mrs Boyes as to the effect of this judgement as it simply reinforces that of the Court of Appeal's own decision in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ 695. Here, the judgment was to the effect that, even where an appellate tribunal has full jurisdiction over law and fact, as we do, there is a distinction to be drawn between the case where the appellate tribunal might take a different view from that of the specialist first-instance decision-maker, and the case where it concludes that the process of reasoning, and the application of the relevant law, *require* it to adopt a different view from the Traffic Commissioner (our emphasis). Only in the latter case would it be appropriate to interfere.

7. We share the Deputy Traffic Commissioner's anxiety that there is no documentary evidence to show what happened to the vehicle after it was purchased by the limited company in 2004. If the vehicle was of significant value, any unpaid creditors of the limited company, and HM Revenue and Customs, would have a legitimate interest in knowing how the asset was disposed of, to whom, and for what consideration. Business disposals have a number of accounting and tax implications, as do substantial gifts to individuals. We see no reason why, in these circumstances, the Deputy Traffic Commissioner should have accepted that, just because Mrs Boyes had been a director of the limited company when the vehicle was bought by the company, she became the lawful owner of its assets after it was wound up, especially as the winding-up occurred some months after Mrs Boyes had resigned as a director. Such automatic acquisition of corporate assets is not a process known to law, and does not follow from the known facts and available evidence.
8. We also find no error in the Deputy Traffic Commissioner's analysis regarding "Boyes Transport". There is evidential ambiguity as to who uses this trading name and that ambiguity is highly pertinent. The need to establish ownership in impounding cases goes beyond the establishment of jurisdiction, or the identification of the person (or entity) to whom the vehicle might be returned. Two of the grounds for return of the vehicle to the owner, as set out in Regulation 4(3), relate to the knowledge of the owner at the time when the vehicle was being used, or to steps taken by the owner prior to it being used. Thus, in relation to these grounds, if the owner is a partnership rather than a sole individual, the collective knowledge of the partnership (rather than of one individual member of the partnership), or any steps taken by or on behalf of the partnership as a whole, will be the relevant considerations.
9. Turning to Mrs Boyes' complaint that, had the vehicle not been impounded, she would not have been called upon to prove her ownership of the vehicle, we think this case highlights an important point. People or trading entities that purchase, acquire, sell or lease goods vehicles will be well aware of the operator licensing regime, and of the powers of the DVSA in relation to certain goods vehicles that are used on the roads in

circumstances requiring the authority of an operator's licence. In the event that such a vehicle is impounded, establishing lawful ownership is a basic 'condition precedent' before any person or entity can make an application to the Traffic Commissioner for its return. It therefore behoves any owner of any such valuable asset to obtain and retain appropriate probative documentation in order to show by whom, how and when ownership of the vehicle was acquired.

10. This appeal against the Deputy Traffic Commissioner's conclusion that Mrs Boyes had not established lawful sole ownership fails. The Deputy Traffic Commissioner's approach cannot be impugned. She, rightly, considered the question of ownership first, placing the onus of proof upon the person claiming to be the sole lawful owner. The findings and conclusions reached are consistent with the evidence and, indeed, the lack of evidence. The Deputy Traffic Commissioner gave Mrs Boyes every opportunity to prove her case – even permitting a further 10 days after the hearing for further documentary evidence to be submitted. In all the circumstances, we find that neither law nor reason require us to interfere with the Deputy Traffic Commissioner's determination. We agree that, after the Deputy Traffic Commissioner had reached this determination, she was under no obligation to proceed further. Accordingly, it would be inappropriate for the tribunal to embark upon its own examination of the facts surrounding the impounding.'
46. In *Commercial Tradings Limited* ([2013] UKUT 0322 (AAC)), the Upper Tribunal said the following, at paragraphs 4 to 12:
  - '4. We considered all the matters set out in the appeal file in order to decide whether the decision of the Traffic Commissioner was plainly wrong. We also considered the way in which the hearing was conducted.
  5. At an early stage in the hearing and again during the evidence of Andrew Hill the Traffic Commissioner sought to clarify who was said to be the owner of the vehicle. Having done so the Traffic Commissioner amended the claim so that it made it clear that it was the Appellant company which claimed to be the owner of the vehicle. We have considered whether or not this was the correct way in which to proceed. We are satisfied that it was.
  6. Regulation 10(1) of the Goods Vehicles (Enforcement of Powers) Regulations 2001, ("the 2001 Regulations") provides that it is "the owner of a vehicle detained in accordance with Regulation 3" who is given the right to apply for the return of the vehicle. The fact that the right to apply for the return of a detained vehicle is confined to the owner is hardly surprising given that the result of a successful application is an order under Regulation 14 of the 2001 Regulations for the return of the vehicle to the owner. The requirement for the claimant to satisfy the Traffic Commissioner, on the balance of probability, that he, she or it is the owner of the detained vehicle is an essential step in avoiding an order for the return of a vehicle to someone who later turns out not to be the owner. While it is a rare event in the experience of the members of the Tribunal the present appeal demonstrates the possibility of a second

application being made in relation to the same vehicle, arising out of the same impounding.

7. The expression “owner” is defined in Regulation 2. For the purposes of the present appeal it means “the person who can show to the satisfaction of the Traffic Commissioner that he was at the time of its detention the lawful owner (whether or not he was the person in whose name it was so registered)”.
8. In our experience it is not unusual for applications for the return of detained vehicles to be completed in a way, which leaves the identity of the person claiming ownership uncertain. Indeed the present appeal provides two examples. In our view identifying the person who is claiming to be the owner is so important that unless the position is clearly set out in the claim the Traffic Commissioner is entitled to take steps to seek clarification. It seems to us that the better course is to seek clarification at the outset, though it may be that the issue will only emerge in the course of the evidence. Once the position becomes clear it seems to us that it is sensible to amend the application so that it clearly states who is claiming to own the impounded vehicle. In our view the steps taken by the Traffic Commissioner to clarify who was claiming to own the vehicle cannot be faulted.
9. The next question was whether the Traffic Commissioner was correct in allowing Andrew Hill a further seven days in which to provide documentary proof of ownership of the vehicle. If his oral evidence was correct it strongly suggested that documentary proof would be available to confirm what he said. In those circumstances we are satisfied that the Traffic Commissioner was correct to allow some time for the documents to be produced. In our view any other course would not have been in the interests of justice because it would have deprived the Traffic Commissioner of potentially decisive evidence. Given the requirement to determine applications for the return of impounded vehicles speedily it seems to us that the period of seven days, which the Traffic Commissioner allowed, achieved the right balance between allowing enough time for the documents to be produced, without contributing to unnecessary delay.
10. In the grounds of appeal Andrew Hill has sought to explain one of the discrepancies, which persuaded the Traffic Commissioner that the claim to ownership had not been established. Leaving aside the question of whether it would be appropriate to admit fresh evidence we are not persuaded that this explanation assists the Appellant. The suggestion that the invoice was sent to the wrong company raises more questions than it answers. For example: (i) what did the company in Esher do when it received a claim for payment for a vehicle, which it had not bought, (assuming that this was the case)? (ii) If the invoice was sent to the wrong address what prompted the Appellant to pay £5,000?
11. We are quite satisfied that the Traffic Commissioner gave compelling reasons for concluding that the Appellant had failed

to show, on the balance of probability, that it was the owner of the vehicle. Those reasons are not undermined by the matters raised in the grounds of appeal. Significantly Andrew Hill did not provide the Traffic Commissioner, (or the Tribunal), with any documentary evidence of the person or company to whom the cheque for £5,000 was paid, nor did he explain the discrepancy in the amount. In our judgment the reasons given by the Traffic Commissioner remain compelling and her conclusion that the Appellant has failed to prove ownership must stand.

12. While that finding is sufficient to dispose of the appeal we would simply add that, in our view, the Traffic Commissioner was entitled to conclude that the Appellant had failed to prove lack of knowledge of use in contravention of s. 2 of the 1995 Act. She had the advantage of seeing and hearing Andrew Hill and she has given good reasons for rejecting his evidence.'
47. The regulation 8(2) time period is the period of twenty-one days from the publication of notice of detention in the Belfast Gazette.
48. In paragraph 90 of its decision in *Nolan Transport v VOSA & Secretary of State for Transport* (T/2011/60) ('*Nolan*'), the Upper Tribunal summarised the scheme for the right to impound and claim for return, under the parallel legislative scheme applicable in Great Britain, as follows:

'Three points need to be stressed at this stage. First, it is for VOSA to show that they had reason to believe that the detained vehicle was being or had been used, on a road, in contravention of s.2 of the 1995 Act. The standard of proof required is the balance of probability ... Second, once VOSA have established they had the right to detain a vehicle it is for the owner to prove ownership of the vehicle or vehicles to which the claim relates. Again, the standard of proof required is the balance of probability ... Third, it is for the owner to show, on the balance of probability, that one of the grounds set out in regulation 10(4) of the 2001 Regulations, as amended, has been established.'
49. The reference to regulation 10(4) should be 4(3) but nothing turns on that.
50. The **grounds** on which an application for the return of an impounded vehicle may be made are set out in regulation 4(3) of the 2012 Regulations, as follows:
  - (3) The grounds are--
    - (a) that, at the time the vehicle was detained, the person using the vehicle held a valid licence (whether or not authorising the use of the vehicle);
    - (b) that, at the time the vehicle was detained, the vehicle was not being, and had not been, used in contravention of section 1 of the 2010 Act;
    - (c) that, although at the time the vehicle was detained it was being, or had been, used in contravention of section 1 of the 2010 Act, the owner did not know that it was being, or had been, so used;

- (d) that, although knowing at the time the vehicle was detained that it was being, or had been, used in contravention of section 1 of the 2010 Act, the owner--
- (i) had taken steps with a view to preventing that use; and
  - (ii) has taken steps with a view to preventing any further such use.'

### **Analysis**

51. We begin by analysing whether the respondent had the **right to detain the relevant vehicle**? As noted in paragraph 48 above, the Upper Tribunal in *Nolan* decided that the first question to be answered is whether the authorised person had reason to believe that the detained vehicle was being or had been used, on a road, in contravention of section 2 of the 2010 Act.

52. The vehicle and trailer were detained on 2 September 2022.

53. The statement of Vehicle Examiner MK, dated 10 October 2022, notes the following:

'I considered the vehicle was being used and operated from Northern Ireland for the following reasons.

- Vehicle registration number B6963BM was right hand drive
- It was previously registered to Nugent Transport Ltd
- Nugent Transport Ltd had their Northern Ireland operator's licence revoked
- The Registered keeper of trailer C533289 is Michael Nugent (Junior)
- The driver Micheail Eugene Kennon has a Northern Ireland driving licence
- The driver stated he was working for Michael Nugent from Whitecross
- Michael Nugent whom I had been talking to held a UK mobile number
- The goods were being carried on an internal UK journey for a Northern Ireland based freight forwarder
- The vehicle was carrying goods for hire or reward in Northern Ireland with no evidence of a laden journey originating from Bulgaria

In view of my findings I formed the opinion the vehicle combination was most likely being used and operated by a Northern Ireland resident who had "Flagged out to Bulgaria" due to the fact his operator's licence had been revoked.

I discussed my findings with the Chief Enforcement Officer and he agreed the user of the vehicle combination required an operator's licence in Northern Ireland and had knowledge of the scheme. He agreed that as this vehicle did not have a Northern Ireland operator's licence it should be detained under Schedule 2 of the Goods Vehicle (Licensing of Operators) Act (Northern Ireland) 2010 and the Goods

Vehicle (Enforcement Powers) Regulations (Northern Ireland) 2012 article 3 as the requirements of the legislation hadn't been met.'

54. We are of the view that the requirements of Regulation 3 of the 2012 Regulations (as set out in paragraph 41 above) were met on the date of detention. The process of a stop and detention or stop and release is an information gathering exercise culminating in a decision based on an analysis of the totality of the information included responses from the driver and operator gathered at the stop or by phone at the time of the stop. The Vehicle Examiner has correctly gathered evidence and made a sound judgement based on an analysis of that evidence.
55. In her Skeleton Argument, dated 25 October 2022, which was prepared for the oral hearing before the Presiding Officer, Ms Jones states that:
- 'Given the clear grounds under which the detention was authorised, it is asserted that said detention was lawful. The DVA are entitled to use their powers under Regulation 3 when there is reason to suspect that the goods vehicle was being operated in contravention of Section 1 of the 2010 Act.'
56. Ms Jones goes on undertake a detailed analysis of 'international carriage following the ending of the UK/EU transition period'. These are the cabotage rules.
57. In a further witness statement dated 14 November 2022, Vehicle Examiner MK states that:
- 'On the 27 September 2022 I contacted the Bulgarian authorities regarding the alleged community authorisation certificate 1 I 71290002 with a perforated number 235094 which I obtained from the driver of vehicle registration number B6963BM on the 2 September 2022 Exhibit MKS, a reply from Boyko Ranovski on behalf of the Executive Agency Road Transport Administration within the Ministry of Transport, Information Technology and Communications of the Republic of Bulgaria was received on the 09 November 2022. Which is shown on Exhibit MK35. This shows that the rights arising from the use of Community Licence certified copy no. 1171290002 perforated No 23 5094 was terminated as of 09 September 2019, a copy of the termination letter is attached which is shown on Exhibit MK36.'
58. In his decision the Presiding Officer, at paragraph 21, refers to certain of the DVA evidence and concludes, as follows:
- 'I find that DVA had reasonable grounds for believing that the detained vehicle and trailer were being, or had been used, on a road in contravention of the legislation.'
59. The Presiding Officer, at paragraphs 23 to 25, also makes reference to the submissions of Ms Jones concerning the cabotage rules.
60. In his initial grounds of appeal, in the notice of appeal, Mr McNamee challenges the lawfulness of the detention decision but makes no reference to the cabotage rules. In his Skeleton Argument and in lengthy oral submissions, however Mr McNamee submitted that the respondent 'changed the entire

basis of their allegation of unlawful use from breach of the cabotage rules to absence of operator's licence.

61. We repeat that we are wholly satisfied that there was sufficient evidence available to the authorised person to allow him to have reason to believe that there was a contravention of section 2. It is our view that while mentioned by Ms Jones and the Presiding Officer, the non-satisfaction of the cabotage rules played little part in the detention decision.
62. We turn to the question of **ownership**.
63. In paragraphs 44 to 46 above, we have noted the decisions of the Upper Tribunal in *Knight*, *Boyes* and *Commercial Tradings Limited*. The principles which emerge from those cases are as follows.
64. The legislation requires the owner to apply for the return of the vehicle. There can be only one owner be it an individual (sole trader), partnership or limited company. Whatever the status of the applicant they have to prove that they are the owner or represent the owner and have the authority to act for the owner. The first two (sole trader and partnership) are easy to prove, the third slightly more involved. In the case of a non-natural owner a director has to prove that they are a director of the applicant company and therefore acting on behalf of the company.
65. If they pass the first test then they must prove ownership of the vehicle (or trailer). The proof of ownership is a bill of sale which gives title or another document of equal force (but not the vehicle registration document) but there is an inherent risk in relying upon registered keeper documents, bookings of MOT tests, payment for insurance, servicing etc. These may go to proof of ownership but must be treated with considerable caution because a vehicle owned by a finance company and leased to an operator would appear in exactly the same way on the documentation as one owned i.e. the vehicle registration document is in the name of the keeper (the operator) and the operator arranges mot tests, pays for insurance, servicing etc, and, accordingly, would fail the test of being indisputable proof (i.e. capable of one and only one meaning). The methodology that in the absence of a bill of sale or other form of title that a "summation" of arranging and payment for MOT tests, servicing records and insurance constitutes ownership based on the balance of probabilities. An argument that "no one else has come forward to lay claim title to the vehicle" is not positive proof of ownership.
66. It is our experience that operators will quite happily use different entities as it suits them to their advantage but cannot, in our view, avail when that use of multiple entities works to their disadvantage because they have been careless. The decision in *Knight* was an example of this. The extant case is a lesson for individuals that if they decide to form a limited company for their business activities (for whatever reason, tax advantages, protection of personal assets, reduce liabilities, remove personal liability) they then cannot switch back and forth as it suits them and, furthermore, they must operate consistently and demonstrate clarity of entity and activity. At the end of the day the Head of the TRU must have absolute certainty of who is operating vehicles and that they - the operator - are compliant operating in a safe and lawful manner. To allow operators to operate otherwise introduces an unacceptable degree of risk to the general public.
67. In the file of papers which is before us are copies of two applications for the return of a 'detained vehicle'.

68. The first, dated 16 September 2022, is in the name of Mr Michael Nugent stated to be 'T/A Nugent Commercials'. The first application was signed by Michael Nugent who described himself as the 'owner'.
69. The second application, also dated 16 September 2022, was in the name of 'Nugent International Ltd' with Michael Nugent described as a 'Director'. The second application was signed by Michael Nugent who described himself as 'Director'.
70. It is accepted that that the applications for return were completed by Mr McNamee and that the Nugents had simply signed what Mr McNamee had prepared.
71. While respecting the decision in *Knight*, we are satisfied that it can be distinguished on its own facts. We are also mindful of the decisions in *Boyes* and *Commercial Tradings Limited*. We accept that the applications for the return of the detained vehicle and trailer were completed in what was, at best, a clumsy manner. Rather than nominate a single person or business entity as an owner, there were several entries which could have caused confusion. The fact that it was accepted that the forms were completed by Mr McNamee, an experienced representative, does not assist the applicants. Nonetheless, Mr McNamee did add a submission which identified the owner of the vehicle as Nugent International limited and the owner of the trailer as Michael Nugent Junior.
72. There is further evidence in support of ownership. Various items of documentation were submitted. The respondent wrote to the address of Bulgarian business entity with notice of the detention and right to seek its return.
73. Certain aspects of the Presiding Officer's reasoning with respect to ownership are problematic. Mr McNamee correctly notes that the Presiding Officer had been prepared to accept one of the Bulgarian documents as proof that the Bulgarian licence had been revoked but not that the Bulgarian entity existed. Further, and as is noted above, at paragraph 17, he seems to accept that more could have been done by the respondent to explore the validity of the Bulgarian entity. He is dismissive of the documentation supplied in support of ownership, submitting that it is not definitive but merely supportive. He refuses to look at Mr Michael Nugent Junior's phone, during the course of a submission that it provides evidence of a payment for the trailer, during the course of the hearing, which, arguably, amounts to a procedural error. The conclusion that it was reasonable for the DVA to conclude that the application for the return of the vehicle had been made by Northern Ireland company, Nugent International Limited which was dissolved in 2019 is somewhat perverse.
74. We are of the view that had the applications for return been completed in accurate manner, including Nyudzhan Interneshanal EOOD for the vehicle or, as was discussed in *Commercial Tradings Limited* at paragraph 8, the Presiding Officer had been more proactive in establishing ownership, then there may have been a different outcome in respect of ownership.
75. In conclusion, our view is that the reasoning of the Presiding Officer of the question of ownership is sufficiently problematic as to be 'plainly wrong'.



76. That does not mean, however, that the applicants will succeed in their applications for the return of the vehicle and trailer. That is because it is for the owner to show, on the balance of probability, that one of the grounds set out in regulation 10(4) of the 2001 has been established. To repeat, the grounds are:
- (a) that, at the time the vehicle was detained, the person using the vehicle held a valid licence (whether or not authorising the use of the vehicle);
  - (b) that, at the time the vehicle was detained, the vehicle was not being, and had not been, used in contravention of section 1 of the 2010 Act;
  - (c) that, although at the time the vehicle was detained it was being, or had been, used in contravention of section 1 of the 2010 Act, the owner did not know that it was being, or had been, so used;
  - (d) that, although knowing at the time the vehicle was detained that it was being, or had been, used in contravention of section 1 of the 2010 Act, the owner--
    - (i) had taken steps with a view to preventing that use; and
    - (ii) has taken steps with a view to preventing any further such use.'
77. We start with Mr Michael Nugent Junior and the trailer. It is our view that he cannot, in anyway, show that any of the grounds set out in regulation 10(4) has been established.
78. Mr McNamee submits that ground (a) might apply. We do not accept that. We are of the view that Mr Michael Nugent knew exactly what he was doing and was calculating in the actions which he took. The standard is the balance of probabilities. We would go further and say that Mr Michael Nugent Junior knew that at the time the vehicle was detained that it did not hold a valid licence. None of the other grounds can be established by Mr Michael Nugent Junior.
79. I turn to Mr Michael Nugent Senior and the vehicle. The only ground which can be advanced on his behalf is that in (c). It is our view that he cannot, in anyway, show that any of the grounds set out in regulation 10(4) has been established. We have concluded that it is highly likely that Mr Michael Nugent Senior was complicit in the actions of his son. The reasoning of the Presiding Officer in this respect is sound and thorough.
80. We turn to **other matters arising in the appeal.**
81. As noted above, Mr McNamee argued that we should give consideration to the test set out in paragraph 10 of Schedule 10 to the Customs and Excise Management Act 1979. As indicated in the oral hearing this is a completely separate regulatory scheme which has no application in this case.
82. Mr McNamee raised the absence of Vehicle Examiner MK at the hearing before the Presiding Officer and, therefore, the inability to consider the DVA file. Mr McNamee also submitted that the evidence of the Vehicle Examiner should be treated as hearsay and of consequent weight. There is nothing to

this argument. Mr McNamee is an experienced representative and should, if he thought that he was at a disadvantage, have made an application for an adjournment and a direction for the attendance of the Vehicle examiner together with the file. I would add that the transcript shows that certain of the exchanges during the oral hearing were robust, but Mr McNamee was able to hold his own.

83. Mr McNamee raised the late receipt of the further witness statement from the Vehicle Examiner dated 14 November 2022 and accompanying further evidence. Once again, there is nothing to this. It would appear that the materials were dispatched in a timely manner and had been out on file in Mr McNamee's office without him being alerted to them. Further, he could have made an application for an adjournment to obtain further time for their consideration but failed to do so. Mr McNamee also used some of this evidence in support of one of his submissions.
84. Mr McNamee noted that the Vehicle Examiner had taken a holiday in Bulgaria and had visited the area where the Bulgarian business entity was said to be based. Once again, there is nothing in this. While the Vehicle Examiner's actions could be described as somewhat unusual, the Presiding Officer did not take them into account.
85. Mr McNamee made a submission that a 'one- off' breach of the legislative provisions should not result in an automatic detention of a vehicle. Each case is taken on its individual merits.

#### **Disposal**

86. In summary, therefore, we allow the appeal in part, concluding that the decision of the Presiding Officer with respect to **ownership** is wrong but that the rest is not. The detentions were lawful, and it has not been established that there are any grounds for return.



**Kenneth Mullan**

**Judge of the Upper Tribunal**

**18 December 2023**