



Charles Moyo
[2023] UKUT 138 (AAC)

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

Appeal No. UA-2022-000958-T

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the East of England

Before: M Hemingway: Judge of the Upper Tribunal
S Booth: Member of the Upper Tribunal
K Pepperell: Member of the Upper Tribunal

Appellant: Charles Moyo

Respondent: Driver and Vehicle Standards Agency (DVSA)

Reference No: UOF 2053600

Representation:

For the Appellant: In Person

For the Respondent: Mr A Balkitis (Solicitor)

Heard at: Remote hearing administered from the Rolls Building in Central London

Date of Hearing: 4 May 2023

Date of Decision: 14 June 2023

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject matter:

Impounding

Cases referred to:

Bradley Fold Travel Ltd and Another v Secretary of State for Transport [2010] EWCA Civ 695.

Ladd v Marshall [1994] EWCA Civ 1

W Martin Oliver Partnership [2016] UKUT 70 (AAC)

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Mr Charles Moyo (the appellant). The appeal is directed towards a decision of the Traffic Commissioner (TC) made on 13 May 2022 following a public inquiry (PI), to refuse to release heavy goods vehicle GXZ 2858 (which had been detained by the respondent on 12 February 2022) to him. The appellant had claimed to be the owner of the vehicle.

2. We heard the appeal remotely utilising Cloud Video Platform in accordance with the appellant's stated preference. The hearing had been due to start at 10:30am. There was some delay in commencing the hearing. As to that, the telephone number provided by the appellant for the purpose of his joining the hearing remotely, proved to be unobtainable. An email sent to him elicited no response. An alternative telephone number was provided by one Mr S Nkambule, who had successfully joined and who the appellant was hoping to call as a witness (but see below). When our clerk telephoned the appellant on that number, she received a message to indicate that he was on another line. At approximately 10.55 am the appellant telephoned the Upper Tribunal's office. Attempts to have him join the hearing, utilising his laptop computer, proved unsuccessful. In the event, he was able to join by telephone. That meant he was able to hear the other participants but not able to see them. Similarly, it meant that we could not see him. But he indicated he was content with that, and the hearing eventually commenced at 11.15am. Once the hearing had commenced no technical difficulties were experienced. We are satisfied that notwithstanding the above initial difficulties, the appellant was able to put his case with the same degree of force and clarity as would have been the case had there been a more traditional face-to-face hearing. The appellant did not express any difficulties or concerns in that regard.

3. The factual background to the appeal is set out in the decision of the TC and related documentation. Put briefly, on 12 February 2022, a Driver and Vehicle Standards Agency (DVSA) traffic examiner impounded heavy goods vehicle GXZ 2858 at a motorway junction in Derbyshire. The vehicle was not specified on any goods vehicle operator's licence and was not displaying an "O-Licence Disc". The driver informed the traffic examiner that he was working for a company called Gasolo under the instruction of Selby Nkambule. Inquiries revealed that Gasolo was a trading name used by Selby Nkambule and that he had had a sole trader's operator's licence until 14 January 2022 when it had been revoked. The vehicle's registered keeper was one Ndumisio Dlamini who was a director of a company called Kasi Luv Ltd which was apparently in the process of applying for an operator's licence but did not possess one. It was decided to impound the vehicle because there seemed to be no basis for its legal operation.

4. On 7 March 2022 the Office of the Traffic Commissioner (OTC) received an application for the return of the vehicle from the appellant. He asserted that he was its owner. He claimed that the vehicle was not, at the time of its impounding, being used in contravention of section 2 of the Goods Vehicles (Licencing of Operators) Act 1995 (the Act). That section provides that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward, or in connection with any trade or business carried on by him, except under a licence issued under the Act. In support of his application the appellant claimed that the vehicle had been borrowed from him for the period from 9 to 12 February 2022 by a business called Tiny Transport.

5. The PI took place on 13 May 2022. Prior to that the OTC wrote to the appellant, on the direction of the Senior Traffic Commissioner, directing him to provide, at least twenty-one days prior to the PI hearing, documentary evidence of ownership of the vehicle and an explanation as to why it was asserted that the vehicle was not being used unlawfully on the date it was impounded.

6. The appellant provided a limited degree of documentation for the purposes of the PI. As to what was provided the TC said this:

“7. Mr Moyo subsequently provided a copy of the first page of a V5 document showing that he had acquired the vehicle on 17 February 2022 (5 days after its impounding). He also provided copies of bank statements in his name covering the period 28 September to 30 November 2021. The import of these statements was not wholly clear, as there was no commentary and no explanation. I noted however that payments of £8000 and £7000 on 29 and 30 September respectively to Ndumiso Dlamini had been underlined, as had a payment from Miss T Ncube of £7000 on 30 September. I noted another payment (not underlined) from Miss Ncube to Mr Moyo of £8000 on 29 September.

8. No documents addressing the issue of lawful use were submitted”.

7. The TC noted that, in addition to the V5 document referred to above, the appellant handed to him a copy of the vehicle’s calibration certificate which was dated 2 February 2022. He said he had purchased the vehicle from Ndumiso Dlamini in September 2021 for £15000. He had been able to make those payments because, coincidentally, Miss Ncube had paid him £15000, an amount which she had borrowed from him, for unrelated purposes, at an earlier date. In response to questions from the TC the appellant indicated that he had no documentation to show that the £15000 which had been paid to Mr Dlamini was for the purchase of a vehicle. He said that the two were friends, so it was not thought there to be any need to document the transaction. He said he had not immediately arranged to transfer the “keepership” of the vehicle in September 2021 because, at that time, Mr Dlamini had been in Africa and so was not available to sign any paperwork.

8. The TC concluded that the appellant had failed to demonstrate his claimed ownership of the vehicle. The TC did not, therefore, go on to consider any other matters such as illegal usage of the vehicle and any knowledge the appellant might or might not have had of any such illegal usage. The TC explained his conclusion with respect to ownership (a conclusion which was itself fatal to the appellant’s application) in this way:

“Consideration of the evidence of ownership

13. I am in possession of a V5 certificate showing only that Mr Moyo acquired the vehicle on 17 February 2022, five days after it had been impounded. It shows that DVLA registered this transfer on 22 February. A V5 certificate is in any case not proof of ownership and I attach little weight to a certificate that shows Mr Moyo was not the registered keeper on the day the vehicle was impounded.

14. Equally, I can attach no weight to the evidence that Mr Moyo paid Mr Dlamini a total of £15000 on 29 and 30 September 2021. These payments could have been for anything. Indeed, Miss Ncube paid £15000 to Mr Moyo at the same time, so by Mr Moyo’s logic she could be the owner. In the absence of any invoice, bill of sale or receipt, I am unable to conclude that these payments were for the vehicle.

15. The other piece of documentary evidence provided by Mr Moyo is not helpful to his ownership claim. A tachograph calibration certificate which lists an unrelated trailer hire company as the customer is not evidence that Mr Moyo is the owner of the vehicle.

16. In conclusion, the paucity of documentary evidence of ownership is such that I cannot conclude, on the basis of probability, that Charles Moyo is the rightful owner of vehicle GXZ 2858”.

9. The TC’s written decision of 13 May 2022 was notified to the appellant by letter of 16 May 2022. On 22 July 2022 (outside the applicable one-month time limit) the Upper Tribunal received a Notice of Appeal. Although time was extended in order to admit the appeal, the vehicle was disposed of by the DVSA, the appellant having been informed that such would follow if he did not make an appeal within time. The appellant, though, has continued to pursue this appeal, presumably on the basis that if he can establish ownership, he will be entitled to receive any proceeds of sale once attendant costs of

the impounding, the storage and the sale of the vehicle have been deducted. We are not sure how much will be left.

10. The appellant's grounds of appeal are succinctly put. In completing the relevant section within form UT12 he wrote "on the day of seizure in use contravening the Goods Operating Act. Prior to that it was used by a licenced operator". The appellant also provided an unsigned document headed "statement" which reads as follows:

"My name is Selby Nkambule. I write to explain my involvement with the lorry GXZ 2558. On the 9th of February a lorry with registration 9MA60 DJO which I had leased to another company broke down with a load. The operator being new to the industry didn't have any contacts to help get the load to its destination while the lorry was being looked at. I then contacted Charles to borrow his lorry to the operator. I clearly stated that the lorry was being borrowed by Tiny Transport with the operator number ON2O 48486 and not me to help, which he did. I advised the operator not to put the lorry on the licences hence the lorry was going to be used for two days as by the time the disc comes, the lorry would be long gone and not needed anymore. Further to the above I would like to state that I will make myself available for questioning via video link. As I don't have a licence in the UK, I now live and operate in another country, or in person if need be".

11. Given that this is an impounding case the DVSA were joined as a respondent to the appeal. On 13 February 2023 the Upper Tribunal directed the appellant, in the event of his wishing to call or rely upon evidence which had not been before the TC, to make a written application to the Upper Tribunal within one month. Directions were also issued requiring skeleton arguments from the parties. The appellant did not make an application for the admission of fresh evidence and no skeleton arguments were received.

12. At the hearing the appellant did seek permission to introduce fresh evidence in the form of oral evidence from Selby Nkambule. We explained to him, in straightforward terms, what he would have to do to satisfy the criteria set out in *Ladd v Marshall [1954]* EWCA Civ 1, which applies with essentially full rigour to traffic cases as was made clear by the Upper Tribunal in *W Martin Oliver Partnership [2016]* UKUT 70 (AAC). In support of his application to produce fresh evidence the appellant asserted that Selby Nkambule was the person "who was going to explain everything" at the PI but that he had been unwell with Covid 19. But he was not able to explain how his evidence might assist with respect to the pivotal question of ownership of the vehicle at the relevant time. There was no corroborative evidence regarding Selby Nkambule's claimed illness at the time. There was no reason given as to why, even if had not been well enough to attend the PI, he could not have produced some form of witness statement or letter. There is no reference in the transcript of the PI of any request for an adjournment so that Selby Nkambule's oral evidence could be given on a later date. More importantly, there was no real reason to think that his evidence (as was effectively acknowledged by the appellant) could afford meaningful or significant assistance with respect to ownership of the vehicle. All of that being so we were comfortably satisfied that the *Ladd v Marshall* criteria was not met. That being so we declined to permit the appellant to adduce fresh evidence. It had not been demonstrated that it would assist us.

13. The hearing proceeded. The appellant asserted that the vehicle is his. He said he was "not the one who did the crime". He thought that the TC had unfairly punished him. The V5 certificate did have his name upon it. He had paid £15000 for the vehicle. The payments from Miss Ncube, albeit for the same amount, had been coincidental. He seemed unable to explain why, if he had purchased the vehicle in September 2021, there was no contemporaneous record of a change of ownership.

14. Mr Balkitis, for the respondent, argued that the TC had approached matters sensibly and carefully and had reached an outcome effectively dictated to him by the evidence.

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15. The appellant, in closing, and striking a somewhat conciliatory note, said he could not blame the TC for the outcome and observed, “the fault was on our side”. He said he was asking for “the court to be lenient”.

16. This appeal has been brought under section 37 of the Act. In considering an appeal such as this the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal has jurisdiction to hear and determine all matters (whether of fact or of law) but, as was explained in *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695, it is not required to rehear all of the evidence by conducting what would, in effect, be a new first-instance hearing. Rather, it reviews the decision of the TC on the basis of the evidence which was before the TC. In order to succeed before the Upper Tribunal an appellant must show that the process of reasoning and the application of the relevant law requires the Upper Tribunal to take a different view to that taken by the TC.

17. The appellant provided the TC with a V5 certificate but, in truth, with little else other than his oral evidence, regarding ownership of the vehicle at the time it was impounded. It was necessary, for him, to have succeeded before the TC, to have demonstrated he was the owner at that time. A V5 certificate is a logbook relating to a vehicle that is issued by the DVLA upon registration of a vehicle in the UK. As the TC himself observed (see above) it is not, of itself, evidence of ownership. Further, it would not have assisted the appellant in this case given that it is dated after the date of the impounding. The TC was right to note the absence of other documentation which one would expect to have been generated in circumstances where it had been claimed that a commercial vehicle had been purchased for the sum of £15000. In truth, given the paucity of the evidence provided, the TC’s decision to the effect that he could not be satisfied as to ownership was inevitable. We are certainly very far away from concluding that the TC was plainly wrong. No misdirection in law has been asserted by the appellant and none is apparent to us.

18. In the circumstances, we must dismiss this appeal.

M R Hemingway: Judge of the Upper Tribunal
S Booth: Member of the Upper Tribunal
K Pepperell: Member of the Upper Tribunal
Dated: 14 June 2023