

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

Appeal No. T/2016/69

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER for the North West of England issued on 21 November 2016

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

Appellant: Chigwell Taxi Co. Ltd.

Attendances:

For the Appellant: Samantha Orbell in person
For the Respondent: No attendance

Heard at: Field House, Breems Buildings, London, EC4A 1DZ

Date of Hearing: 17 March 2017

Date of Decision: 18 April 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that: this appeal be DISMISSED

Subject matter:

Restricted licence; fitness; financial standing; decisions and reasons.

Cases referred to:

Bradley Fold Travel Limited and Peter Wright v The Secretary of State for Transport [2010] EWCA Civ 659

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the North West of England (“TC”) made on 15 November 2016 and communicated on 21 November 2016, refusing an application for a restricted Public Service Vehicle Operator’s licence made by Chigwell Taxi Co. Ltd (Director Samantha Orbell).

The Background

2. According to a letter written by her on 9 August 2016, Samantha Orbell who is the sole Director of Chigwell Taxi Co Ltd resides with one Steven Festa whom she describes as her “life partner”. The couple have two children.

3. Steven Festa was formally a Director (seemingly the sole director) of Chigwell Cars Ltd which had been granted a licence (reference PF1105323) on a date in 2012. However, it had subsequently entered into liquidation and had been wound up on 2 September 2015 whilst owing a sum of £45001.00 to Her Majesty’s Revenue and Customs. The proposed operating centre for Chigwell Taxi Co Ltd was the same as that which had been used by Chigwell Cars Ltd.

4. When making the application on behalf of Chigwell Taxi Co Ltd Samantha Orbell did not disclose any link at all between herself and Chigwell Taxi Co Ltd on the one hand and Steven Festa and Chigwell Cars Ltd on the other. The application was made on the basis that she would, in addition to her existing taxi business, operate two 16 seat vehicles only for the purpose of transporting passengers to and from airports and children to and from schools for gain. The restricted licence was to cover that additional business activity. The completed application form is dated 16 October 2015.

5. The Office of the Traffic Commissioner (“OTC”) sought further documentation and information from her including details of any connection there might be to Chigwell Cars Ltd. Further, it was noted that on 12 November 2015 a member of staff at the OTC had telephoned Ms Orbell on the number given in the application form and the telephone had been answered by Steven Festa. In response to the inquiries Ms Orbell wrote back indicating that her company’s main occupation was that of a licensed taxi company, that the two vehicles she described as “minibus vehicles” would be used for the purposes indicated above and that “there is no connection with License PF1105323- Chigwell Cars Ltd.”. Nothing else was volunteered with respect to any connection between the two individuals or two companies.

6. More enquiries followed and it is clear that the OTC began to entertain suspicions to the effect that Chigwell Taxi Co Ltd was intended to be what it described as “a Phoenix” for Chigwell Cars Ltd. Essentially, it was thought that the intention might be for Steven Festa to run Chigwell Taxi Co Ltd using the licence which Ms Orbell was hoping to obtain in order to circumvent difficulties which Steven Festa might have encountered, given the history set out above, in obtaining a licence of his own.

7. On 14 June 2016 the OTC wrote to “the Directors” of Chigwell Taxi Co. Ltd (effectively a letter to Ms Orbell) seeking information from her accountant regarding the company’s main

occupation, clarification regarding the registered office of the company, clarification regarding certain large deposits which had been paid into the company's bank account, details of arrangements in place for the securing of compliance with the law relating to the driving and operation of the two vehicles, a copy of a proposed safety inspection sheet and (perhaps most importantly in the context of this appeal) "an explanation as to the relationship between the company and its directors and Steve Festa". Ms Orbell responded by letter (undated but received by the OTC on 27 June 2016) along with various enclosures. As to any connection between herself and Steven Festa she wrote;

"In answer to the question of good repute, I Samantha Orbell, am sole director of Chigwell Taxi Co. Ltd. Steven Festa was director of Chigwell Cars and no bearing on my company."

8. The OTC was not reassured. The TC dealing with the application, though, did not simply refuse it at that stage but, instead, caused a further letter to be written to the appellant company (effectively to Ms Orbell) of 27 July 2016 reiterating the need for further information including "a full explanation as to the relationship between the company, its directors, and Steve Festa". It was said that failure to respond or to provide the information within seven days would result in refusal.

9. Ms Orbell did respond albeit not within the requested seven days. In a letter of 9 August 2016 she wrote;

"I, Samantha Orbell am sole director and owner of Chigwell Taxi Co. Ltd. Steve Festa is my life partner (we are not and have never been married) and father of my two daughters. When Chigwell Cars failed I decided to take the opportunity to begin a new venture with the name of Chigwell Taxi Co Ltd using funds left to me by my deceased mother's estate. I took on staff and drivers with the intent of keeping people in jobs and also to demonstrate to my daughters that a woman can start and run a business, in other words anything is possible for them. In this endeavour I have taken advice from various people including Steven Festa, as to which insurance companies to approach for fleet insurance, what type of licences I need to apply for etc in order to operate in compliance with the law. I intend to try and provide the best service I can to increase customer satisfaction and business. Steven Festa will probably continue to offer advice when called upon but decisions will be mine alone. Steven Festa is an employee and no longer has an interest in running a business, I on the other hand do."

10. In response to other concerns which had been raised in the same correspondence, she said that the "large deposits" which had been referred to in earlier correspondence were payments from self-employed taxi drivers to Chigwell Taxi Co Ltd. in the form of "rent", which she subsequently clarified to us meant commission payments for work given to them by the company.

The Traffic Commissioner's Decision

11. The appellant had previously been warned in the letter of 14 June 2016 that the TC was considering making a decision without offering a Public Inquiry. She did not, at any stage, ask for one or argue that the TC ought not to take a decision on her application without one. According to Regulation 6 of the Public Service Vehicles (Operator's Licences) Regulations 1995, a TC shall not refuse an application for a licence, or grant it other than as requested without giving to an applicant an opportunity to state his/her case at a Public Inquiry save where the application or the applicant's conduct in relation to it is frivolous or unreasonable. That does appear to set a relatively stringent test before a decision may be made without the offer of a Public Inquiry though it is a test which the TC clearly considered to have been met on the facts of this case.

12. The TC's reasoning as to why he then decided to refuse the application is most fully set out in what seems to have been intended to have been an internal document of 15 November 2016 because it is marked "not for disclosure". However, that ship has sailed because as a result of the appellant appealing, a copy of it has appeared at page 121 of the appeal bundle. In any event, it does not appear to us that it contains any information which ought not to be disclosed. Indeed, as we shall explain below, the opposite is probably the case. Accordingly, and since it is necessary for the reasoning of the TC to be demonstrated in this decision, we have chosen to set it out. This is what is said;

"I have noted that the concerns raised by T C Turfitt. This is a matter that has been going on for some time and there have been at least two opportunities to provide the further and better particulars as requested. The disquiet regarding the absence of a satisfactory explanation for the contact with Mr Festa at the start of this application and maintenance remain. The response on the source of finance and the question as to how the drivers would be employed particularly following recent HMRC advice to the RHA also remains. T (sic).

he (sic) case of 2010/043 Stephen McVinnie makes clear that there is an expectation for parties to cooperate generally and this is especially important when under scrutiny by the DVSA or TC, "...A wise operator will take whatever steps are required to ensure that he takes advantage of every opportunity to submit relevant and helpful evidence before, and not after, matters come to a head, and well before a Traffic Commissioner sits down to make his or her final decision."

Although this is an application I consider that the same principles would apply, otherwise how are we to make an informed decision? This applicant seeks to join the jurisdiction and therefore it would incumbent upon them to provide all relevant information requested in a timely manner. Accordingly, and in view of the submissions detailed above [that is a reference to views expressed by a caseworker and team leader within the OTC], I remain to be satisfied as to sections 14 ZB(a) and (b), and 14 ZC(1)(b) including 13(3). Accordingly, the application is refused."

13. As to the legislation quoted, the references are to sections of the Public Passenger Vehicles Act 1981. Section 13(3) indicates that restricted licences may be granted where public service vehicles not adapted to carry more than sixteen passengers are to be used otherwise than in the course of a business of carrying passengers or by a person whose main operation is not the operation of public service vehicles not adapted to carry more than eight passengers. Section 14 ZB(a) requires an applicant to be "of good repute". Section 14 ZC(1)(b) requires such an applicant to have "appropriate financial standing". Section 14 ZC(1)(b) contains a requirement that there be adequate arrangements for securing compliance with the requirements of the law relating to the driving and operation of the vehicles which are to be used under the terms of the licence.

14. It is readily apparent, though, despite the above list of matters, that the central issue was always the initial failure to disclose details surrounding Steven Festa and which relates to repute.

15. The decision having been made, it was then communicated to the appellant in the form of a letter of 21 November 2016 sent by a caseworker at the OTC. The salient part of the letter, which so far as we can tell is the only document sent to the appellant which contains any reasoning behind the decision reads as follows;

"I refer to your application for a Restricted PSV operator's license. The Traffic Commissioner has considered the case and I must now advise you that your application has been refused as

you have failed to meet the requirements set out in section 14 of the above Act. Specifically,
Section 13(3)(b) – main occupation
Section 14B(a) – is of good repute
Section 14ZB(b) – has appropriate financial standing.”

The letter then went on to inform the appellant of her right of appeal to the Upper Tribunal.

The proceedings before the Upper Tribunal

16. The grounds of appeal are contained in a letter written by Ms Orbell of 23 November 2016. She asserted that she had provided sufficient documentation to justify the granting of her application and expressed disquiet as to the amount of time it had taken before a decision had been reached.

17. The appeal was listed for an oral hearing which Ms Orbell attended accompanied by her office manager.

18. She indicated, initially, that she did not wish to add to what had been said in the letter of appeal. She acknowledged her relationship with Steven Festa but said that he was no longer interested in running a business himself. She employs him to mend motor cars which are used in her business. She did not think it important to disclose a personal relationship. Her main business has a fleet of some 40 motor cars. She is an honest person.

The proper approach on appeal to the Upper Tribunal

19. The jurisdiction and powers of the Upper Tribunal when hearing an appeal from the TC are governed by Schedule 4 to the Transport Act 1985 as amended. Paragraph 17(1) provides that the Upper Tribunal is to have full jurisdiction to hear and determine all matters whether of law or fact. However, it is necessary to bear in mind that such an appeal is not, for example, the equivalent of a Crown Court hearing an appeal against a conviction from a Magistrate’s Court where the case effectively begins all over again and is simply reheard. Instead, an appeal hearing before the Upper Tribunal takes the form of a review of the material before the TC. In this context we take full account of the valuable guidance to be found in a passage from paragraphs 30-40 of the judgment of the Court of Appeal in *Bradley Fold Travel Limited and Peter Wright v The Secretary of State for Transport* [2010] EWCA Civ 695. We also note that the appellant bears the burden of showing that the decision under appeal is wrong and that, in order to succeed, she must show that “the process of reasoning and the application of the relevant law require the tribunal to adopt a different view”. Put another way, it might be said that in order to succeed the appellant has to demonstrate to the tribunal that the decision of the TC was “plainly wrong”.

Our decision and our reasoning

20. We have chosen to view the decision of the TC as being, essentially, a composite decision the first part of which was to decide that regulation 6 of the 1995 Regulations applied so that it was not necessary to offer a Public Inquiry and the second part to decide, on the basis of the material before him, to refuse the application. The two are, of course, intertwined because if

the circumstances set out in Regulation 6 were not met then the subsequent decision would, in all probability at least, not have been soundly made.

21. As already stated, the appellant has never asserted that the TC ought to have held a Public Inquiry. That is despite the indication in the letter of 14 June 2016 that the TC was reserving his right to refuse the application without the offer of one. It is clear that the basis of his ultimate decision not to offer one was the belief that the failure to disclose any link to Steven Festa until a very late stage indeed in the application process was to be regarded as deliberate or evasive and that that amounted to frivolous or unreasonable conduct.

22. There might, in fact, be something to be said for the view that the TC had not been in a position to satisfactorily conclude that the appellant's conduct had been frivolous or unreasonable without first holding a Public Inquiry and hearing an explanation from her regarding her failure to disclose. However, in our judgment, given that Regulation 6 clearly does envisage that there will be situations where a Public Inquiry need not be offered we would conclude that, in principle, it was open to the TC to form the view he did as to the regulation 6 conditions on the written material before him. So, we have gone on to ask ourselves whether he was plainly wrong in deciding as he did. We have concluded that he was not. Clear questions had been asked of Ms Orbell on more than one occasion regarding any link between her and Steven Festa and or Chigwell Cars Ltd. It was significant that she had only ever disclosed anything about him at all at the very end of the process when it had been made clear to her that a decision was imminent and when it must have been equally clear that, without her doing something other than what she had done so far, that application was very likely to fail. We heard from her about this but do not accept her assertion that she did not realise that she was required to disclose anything about him.

23. As to the actual refusal of the application, Ms Orbell asserts that Steven Festa will have no involvement with the actual running of her new business. However, the thrust of the TC's conclusion as to the repute issue related to her failure to disclose relevant matters regarding him at an earlier stage. Essentially, it had been concluded that she had not been open and honest in pursuing her application and that she had effectively sought to hide her link to him. We have already set out our view that the TC was not plainly wrong in the context of his decision not to offer a Public Inquiry, to decide that there had been dishonesty or at least significant evasiveness on her part. It follows that we reach the same conclusion when evaluating whether his ultimate decision to refuse the application was plainly wrong. Honesty and openness in the context of the regulatory process is extremely important. Without it the regulators' task would be significantly more difficult, burdensome, time consuming and expensive. We have concluded, therefore, that the TC's decision to refuse the licence on grounds of repute was not plainly wrong. It was clearly sufficient, of itself, to underpin the decision notwithstanding the various other concerns which he had expressed when explaining it. It is not, therefore, necessary for us to say anything further in any particular detail regarding those aspects though we would observe that, on the material before us, it does appear that the required financial standing had, in fact, been demonstrated by the provision of bank statements evidencing the presence of comfortably sufficient funds.

24. In light of the above we have decided that this appeal to the Upper Tribunal has to be dismissed. We would, though, just like to offer some further observations. We were a little concerned that the reasoning as contained in the document marked "not for disclosure" was not communicated in full to the appellant. The actual decision letter was somewhat less detailed. Of course, where a Public Inquiry is held, there will often follow a detailed

extempore or a detailed written decision which will make it entirely plain why, if it be the case, that an application has been refused. Here, though, it cannot be said that the detail of the TC's rationale was fully communicated to the appellant. Whilst we have a significant degree of disquiet about that, it has not been a material issue in this case because the application and refusal raised simple and straightforward issues and it was obviously apparent to the appellant, as it is to us, that the real or substantial basis for refusal was the simple failure to disclose. Nevertheless, we would suggest that in situations such as this care should be taken to ensure that full reasoning is communicated in written form. That is important because in cases less straightforward than this one a potential appellant will have to have the reasoning before him/her in order to be able to, first of all, make an informed decision as to whether or not to appeal to the Upper Tribunal at all and, then, assuming a decision to appeal is made, to formulate appropriate grounds.

25. We would also express a degree of disquiet about the fact that, whilst the decision clearly was made by a TC, no written document containing the TC's own signature and evidencing the decision was ever produced. No issue has been taken about this and we are not minded to take one ourselves since, as we say, we are entirely satisfied that the decision was properly taken by a TC. Nevertheless, we think that a view may be taken that as a matter of good practice, a document stating what the decision is and containing the signature (be it electronic or otherwise) of the TC who has made it ought to be generated and a copy sent to the parties.

26. In the above circumstances the appellant's appeal to the Upper Tribunal is dismissed.

Signed

**M R Hemingway
Judge of the Upper Tribunal**

Dated:

18 April 2017