

**Appeal No. T/2016/55**

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)**

**ON APPEAL from the DECISION of the TRAFFIC COMMISISONER FOR  
THE WALES TRAFFIC AREA (Mr. N Jones)**

**Dated: 10 August 2016**

**Before:**

|                        |                                     |
|------------------------|-------------------------------------|
| <b>Mr E. Mitchell</b>  | <b>Judge of the Upper Tribunal</b>  |
| <b>Mr M. Farmer</b>    | <b>Member of the Upper Tribunal</b> |
| <b>Mr D. Rawsthorn</b> | <b>Member of the Upper Tribunal</b> |

**Appellant:**

**Mr Raymond Kyle Heard (t/a Kyle's Executive Travel)**

**Attendances:**

Mr Heard appeared in person

|                          |                              |
|--------------------------|------------------------------|
| <b>Heard at:</b>         | Cardiff Civil Justice Centre |
| <b>Date of hearing:</b>  | 27 March 2017                |
| <b>Date of decision:</b> | 3 May 2017                   |

**DECISION OF THE UPPER TRIBUNAL**

IT IS HEREBY ORDERED that this appeal is DISMISSED. The decision of the Traffic Commissioner for the Wales Traffic Area to refuse Mr Heard's application for variation of a condition attached to his PSV operator's licence, taken on 10 August 2016, is UPHELD.

**SUBJECT MATTER:-**

Application for variation of condition attached to a PSV operator's licences; public inquiries before traffic commissioners

**CASES REFERRED TO:-**

*R v Special Adjudicator ex parte Paulino & Edoukou* [1996] IAR 122

**REASONS FOR DECISION**

**Background**

1. Mr Heard holds a restricted public service vehicle (PSV) operator's licence issued under the Public Passenger Vehicles Act 1981 (PPVA). Mr Heard is also involved in the taxi business.
2. On 29 January 2016, Mr Heard applied to the Traffic Commissioner for the Wales Traffic Area (hereafter "the Commissioner") for variation of a condition attached to his operator's licence. The licence was subject to a condition prohibiting him from operating more than one vehicle but he wanted this varied to permit him to operate two vehicles.
3. The application form completed by Mr Heard (form PSV 431) informs applicants that they must include all supporting documentation with their application and they should "make sure" they read the associated guidance notes.
4. On 8 February 2016, the Office of the Traffic Commissioners (OTC) wrote to Mr Heard to inform him that the information supplied in support of his application was incomplete. The letter instructed Mr Heard to supply certain information by 22 February 2016 including details of Mr Heard's main or full-time occupation, which he had stated was taxi business, and "your annual tax returns / self-assessments or audited accounts to determine your earnings from your main occupation".

5. On 14 March 2016, the OTC again wrote to Mr Heard. Their letter stated he had not supplied the material requested by the 22 February 2016 deadline and included this warning:

**“This letter is intended as a final attempt to resolve these issues by correspondence and you must now respond in full by no later than 28 March 2016”** (bold in original)

6. On 30 March 2016, the OTC received further information from Mr Heard which included:

(a) a hand-written note which simply stated “self: 24 hour taxi business, 16 hour mini buses”;

(b) a document prepared by an accountant dated 18 December 2015 and headed “KYLES EXECUTIVE TRAVEL – INCOME AND EXPENDITURE ACCOUNT FOR THE YEAR ENDED 31 MARCH 2015”. The document ended with the words “in accordance with instructions given to us we have prepared without carrying out an audit of the above Income and Expenditure Account”.

7. We note that Mr Heard did not supply his own income tax self-assessment return. Of itself, that was not objectionable since he had been required to provide either that document or audited accounts.

8. On 10 August 2016, the Commissioner rejected Mr Heard’s application. The Commissioner found that Mr Heard had failed to comply with repeated requests to supply the information necessary to determine his application. The Commissioner declined to hold a public inquiry before deciding the application because he considered it frivolous. The application itself was refused because the Commissioner was not satisfied that Mr Heard’s main occupation was working in the taxi business as he had claimed.

## **Legal Framework**

### *The main occupation rule*

9. A restricted PSV licence authorises the use of PSVs not adapted to carry more than eight passengers (although the number of PSVs that may be used is restricted: see below). However, Mr Heard wanted to operate two vehicles, as part of a passenger-carrying business, each of which had between 9 and 16 passenger seats.

10. A restricted PSV licence does not confer absolute authority to use larger PSVs as part of a passenger-carrying business. For vehicles adapted to carry between 9 and 16

passengers, the authority conferred by the licence extends only to vehicles used “by a person whose main occupation is not the operation of public service vehicles adapted to carry more than eight passengers” (section 13(3)(b)(ii) PPVA).

*Conditions specifying maximum number of vehicles (restricted PSV licences)*

11. Section 16(1) PPVA requires a traffic commissioner, on granting a PSV operator’s licence, to “attach to it one or more conditions specifying the maximum number of vehicles...which the holder of the licence may at any one time use under the licence”. In the case of restricted licences, the general rule in section 16(1A) is that the maximum number of vehicles that may be specified is two (although regulations may enact exceptions to the general rule).

12. Section 16(6) PPVA permits the holder of a PSV operator’s licence to apply to a traffic commissioner for variation of a condition specifying the maximum number of vehicles to be used under the licence. Section 16(6) also requires an applicant to “give to the traffic commissioner such information as he may reasonably require for the discharge of his duties in relation to the application”.

13. Section 50(4)(a) PPVA confers a right of appeal to the Upper Tribunal against a traffic commissioner’s refusal of an application to vary a condition attached to a PSV operator’s licence.

*Requirements for traffic commissioners to hold public inquiries*

14. Section 54(1) PPVA confers a general power on a traffic commissioner to hold such inquiries as he or she thinks fit in connection with the exercise of the commissioner’s functions. A commissioner is also required by the PPVA to hold a public inquiry, if duly requested, in certain cases:

- (a) before taking action to revoke a standard PSV operator’s licence (section 17(4));
- (b) before taking action under section 17(2) in relation to a restricted or standard licence on any ground specified in section 17(3) (section 17(4)). Under that section, a traffic commissioner has power to revoke or suspend a licence, vary a condition attached to a licence and attach a fresh condition;
- (c) before making a finding that a transport manager is not of good repute or is not professionally competent (Schedule 3(7));
- (d) before varying, at a commissioner’s instigation, the measures with which a disqualified person must comply before a disqualification order may be cancelled or varied (Schedule 3(7C)(6)). We note that, in this same set of provisions, the PPVA

does not require public inquiries to be held before a commissioner refuses an application to vary measures.

15. Regulation 6 of the Public Passenger Vehicles (Operators' Licences) Regulations 1995 (1995 Regulations) also provides:

“A traffic commissioner shall not refuse an application for a licence, or grant it other than as requested without giving to the applicant an opportunity to state his case at an inquiry save where the application or the applicant's conduct in relation to it is frivolous or unreasonable.”

16. For completeness, we also note that similar public inquiry requirements apply to the making of PSV operator disqualification orders or directions under section 28 of the Transport Act 1985.

17. Regulation 8 of the 1995 Regulations requires a traffic commissioner to invite representations before altering a condition under 16(5)(a) PPVA. In such cases, the commissioner must also issue a notice of proposal which, amongst other things, must state either that (a) the commissioner proposes to hold an inquiry; or (b) the commissioner does not propose to hold an inquiry unless the licence holder within 14 days requests in writing that an inquiry be held. However, these requirements do not apply where the alteration was made at the licence-holder's request.

### **Mr Heard's appeal to the Upper Tribunal**

18. We intend no disrespect by our observation that Mr Heard's grounds of appeal, both in writing and as advanced at the hearing, were not always easy to follow. Be that as it may, our understanding is that he advances the following arguments:

(1) he was not given a fair 'crack of the whip' by the Commissioner. If only someone had clearly explained to him the information he was required to supply, he would have done so. The Commissioner should have given him a second chance;

(2) the Commissioner's four or so months delay in deciding his application had lulled him into assuming he had provided all the supporting information required;

(3) the Commissioner was simply wrong to find that he had failed to provide all the information he had been asked to supply. We found this ground difficult to reconcile with the above grounds;

(4) his conduct of his application for variation of a licence condition could not properly be described as frivolous;

(5) since there was nothing wrong with his vehicles and general operation, what purpose was served by refusing his application? He was a *bona fide* operator who took good care of his vehicles and was safety-conscious in all that he did.

19. At the hearing, Mr Heard confirmed that all information supplied by him to the OTC was included within the papers supplied to the Upper Tribunal. Nothing was missing.

### **Conclusions**

20. We dismiss this appeal.

21. In summary and as explained below, we conclude;

(a) the Commissioner's findings were not plainly wrong, nor were his reasons for rejecting Mr Heard's application;

(b) while the Commissioner might have misunderstood the law concerning duties to hold public inquiries, any such mistake was immaterial (by which we mean it could not have had an effect on the Commissioner's ultimate decision).

22. Mr Heard's application was not dealt with unfairly. The PSV 431 application form clearly informed Mr Heard it was his responsibility to supply evidence in support of his application. In two subsequent letters, the OTC provided him with a checklist of outstanding material. Mr Heard had ample opportunity to supply the necessary supporting material. We find he was treated fairly. He is a commercial operator and it was always open to him to obtain professional advice.

23. There is only so much the OTC can reasonably be expected to do to assist applicants. This may not simply be a matter of resources.

24. The relevance of supporting information and, in turn, the overall adequacy of an application, is determined by the requirements of the licensing scheme. If OTC staff were to assist applicants to perfect their applications by stating, for example, that particular omissions had to be rectified in order to improve an applicant's prospects of satisfying such and such a licensing requirement, they might run the risk of straying into giving advice or pre-judging a traffic commissioner's determination of an application. This is not to be read as the Upper Tribunal telling the OTC how to go about administering applications, simply that we do not accept Mr Heard's argument that the Commissioner's decision was flawed because, before it was taken, neither the OTC nor the Commissioner went through his application point-by-point, identified information gaps and told him how he should go about filling them.

25. An applicant is not entitled to draw any inference from the period of time for which an application has been under consideration. A whole host of factors may affect how long it takes to deal with an application and an applicant may be ignorant of many of these. The key point for present purposes is that an applicant cannot assume that, because an application is taking longer to determine than expected, the application is in order.

26. The Commissioner was not satisfied that, if he granted Mr Heard's application, his operation would be run in compliance with the main occupation rule. The Commissioner cannot waive that legislative rule because in other respects an operation might meet the licensing requirements. We decide that the Commissioner was not plainly wrong to conclude that Mr Heard had failed to satisfy him as to compliance with the main occupation rule. Mr Heard's direct evidence on that point consisted of a two line written statement and he did not supply the financial evidence that the Commissioner felt he needed in order to be satisfied as to the main occupation rule. The Commissioner was not plainly wrong to find that Mr Heard had not supplied the raw data necessary for him to be persuaded that the taxi business, rather than operating public service vehicles, was Mr Heard's main occupation.

27. The OTC papers show that Mr Heard did not supply the supporting material that he had been instructed to supply. He was asked to supply either his income tax self-assessment return or an audited income and expenditure accounts, in order for the Commissioner to determine his earnings for his main occupation.

28. We accept that the instruction given could have been clearer. Arguably: (a) the instruction could have expressly required Mr Heard to supply income and expenditure accounts for both his businesses; and (b) the instruction ran the risk of obscuring the important question, which was determination of Mr Heard's main occupation, by stating income tax or income and expenditure information was needed "to determine your earnings from your main occupation". On this latter point, the instruction could instead have said something like 'the Commissioner requires self-assessment returns and/or audited accounts because your sources of earnings may be relevant in determining what is your main occupation'. In this case, however, of the two options presented, Mr Heard took the option of supplying income and expenditure accounts rather than a tax return. But he then failed to comply with the instruction given by OTC as to the type of accounts required, supplying accounts which expressly stated they were unaudited. Moreover, they related only to his mini-bus operation rather than his taxi work despite Mr Heard having himself claimed that, of the two, he spent more time on taxi work.

29. We think the Commissioner might have misunderstood the law concerning operators' rights to request public inquiries. As the legal framework set out above shows, the PPVA does not require a commissioner to hold a public inquiry before

refusing an operator's application for variation of a licence condition specifying maximum numbers of vehicles. As a result, there was no question of Mr Heard having the right to a public inquiry absent a finding that his application was frivolous (or unreasonable).

30. We acknowledge, however, that the Commissioner may simply have been relying on his frivolous finding to justify refusing to exercise his general power to hold a public inquiry. If so, he was not plainly wrong to do so in the light of the history of Mr Heard's application as described above in these reasons.

31. What the law means by "frivolous" – in which sense the Commissioner must in our view have been using the word – is not aligned with current everyday usage. In *R v Special Adjudicator ex parte Paulino & Edoukou* [1996] IAR 122, for example, the Court of Appeal said a claim could be frivolous because "examination of the facts demonstrates a high probability of failure". A judicial finding that something is frivolous does not necessarily equate to a finding of frivolity (in its everyday sense).

32. We should observe that we do not think Mr Heard can fairly be described as someone who acts with frivolity, or a devil-may-care attitude, in relation to licensing matters, nor do we think that is what the Commissioner meant by his frivolous finding. But Mr Heard ended up with the same result as an operator who acts in that way and so he may wish to consider obtaining professional advice if he makes a fresh application for variation of the conditions attached to his restricted PSV licence.

**Mr E Mitchell, Judge of the Upper Tribunal,  
3 May 2017**