

NCN: [2017] UKUT 271 (AAC)

Appeal No. NT/2017/11

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated 13 January 2017

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr Leslie Milliken	Member of the Upper Tribunal
Mr John Robinson	Member of the Upper Tribunal

Appellant:

Rockmount Services Ltd

Attendances:

For the Appellant: The appellant was present and was represented by Mr Magill instructed by Tara Walsh Solicitors

For the Respondent: The respondent was not represented

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

Date of hearing: 31 May 2017

Date of decision: 28 June 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be ALLOWED and the matter be remitted for consideration by the Respondent.

SUBJECT MATTER:- Application; fronting

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd & Peter Wright v Secretary of
State for Transport [2010] EWCA Civ. 695;

REASONS FOR DECISION

Background

1. This is an appeal from the decision of the Head of the Transport Regulation Unit, (“Head of the TRU”) to refuse the Appellant’s application for a goods vehicles operator’s licence.
2. The factual background to this appeal appears from the documents and the Head of the TRU’s decision and is as follows:-
 - (i) On 11 July 2016 an application for a standard international goods vehicle operator’s licence was received in the Department. The applicant was Rockmount Services Ltd. The sole director of the applicant company was stated to be Mr SP McGivern who was also the nominated Transport Manager.
 - (ii) Mr SP McGivern also holds an interim operator’s licence as a sole trader.
 - (iii) Additional information was sought from the applicant following the initial review of the application and, at later stages, to seek clarification of certain matters of concern to the Respondent.
 - (iv) On 13 January 2017 the Head of the TRU gave a decision refusing the licence application.

The decision of the Head of the TRU

3. The decision of the Head of the TRU was in the following terms:

‘Pursuant to Section 12(5) of the Goods Vehicles (Licensing of Operators) Act 2010 the application made by Rockmount Services Ltd is refused as the applicant has failed to demonstrate to the Department that it is of good repute pursuant to Section 12A(2)(b).’

The reasoning of the Head of the TRU

4. In her decision of 13 January 2017 the Head of the TRU set out the following substantive reasoning:

‘In reviewing the merits of this application, which with the exception of the following circumstances appears to be in order, I am reminded that licensing and regulation is based on trust. The Department must be able to trust that once a licence is granted an operator will comply with the statutory requirements and that should there be concerns in the future the Department must be able to regulate appropriately.

I refer myself to the definitions given by the Upper Tribunal in relation to ‘fronting’. These are 2011/34 Utopia Traction Ltd (paras 8 & 9).

“In the context of vehicle operator’s licensing ‘fronting’ means that a person, partnership or company, which does not have an operator’s licence, uses the operator’s licence held by another entity to conceal the fact that they are behaving in a way which requires them to have an operator’s licence of their own. It deprives the Traffic Commissioner of the right to control an ‘operator’, when Parliament has said that such an entity should be within his or her jurisdiction.”

This approach was followed in T2012/271 Silvertree Transport Ltd, at paragraph 4 of that decision the Tribunal provided another description of 'fronting':

Another way in which to describe the same situation would be to say that 'fronting' occurs when appearances suggest that a vehicle, (or fleet), is being operated by the holder of an operator's licence when the reality is that it is being operated by an entity, (i.e. an individual, partnership or company), which does not hold an operator's licence and the manner in which the vehicle is being operated requires, if the operation is to be lawful, that the real operator holds an operator's licence.'

In the case of a limited company it is the company that applies for and if granted holds the licence. Pursuant to regulation 5(2) of the Goods Vehicles (Qualifications of Operators) Regulations 2012 the Department, in determining whether a company is of good repute, can have regard to all the material evidence.

I have considered the evidence in this application and have determined that it points to the fact that Mr SP McGivern has openly declared that Rockmount Services Ltd is or will be Mr Connor McGivern's business and that it would be he, and not Mr SP McGivern, the sole named director, who would be running the company. Mr SP McGivern has set this business up for his son, although it is evident that Mr Connor McGivern has been and is a company director. He has been capable of setting a company up himself in the past. Mr Connor McGivern also appears to be able to make key business decisions without recourse to Mr SP McGivern.

I have considered the statements made to that effect against the statements also made by Mr SP McGivern that he will take responsibility for adhering to the conditions on the licence. For reasons above I remain concerned about who the true operator would be. I find that on balance that it would be Mr Connor McGivern who would, in effect, be the true operator and controlling mind of the company and who, if a licence were to be granted to the company, should ultimately be held responsible and accountable for compliance with the licensing regime on its behalf.

The applicant has been provided with a number of opportunities to clarify the roles and responsibilities within the company. The application appears to be an attempt of a corporate veil in order to shroud the true controlling mind from any future obligations as a director or any appropriate regulatory action should there be any issues in the future. By being made in the company's name the application, in effect, provides a 'front' for Mr Connor McGivern, who is already currently a director in another company and was a past director in a now dissolved company.

This would enable him to operate without having the responsibilities of either Director or licence-holder. This is further underpinned by Mr SP McGivern's responses which suggest that, while retaining the title of Director, he would quickly abdicate his responsibilities and obligations as a director to Mr Connor McGivern [*initially I will assist, it's his business, Connor will be running the business, etc*].

The burden of proof on application for a licence is on the applicant. The finding of 'fronting' above reflects negatively on the trust that could be built up between the Department and the operator and therefore also on the company's ability to satisfy the Department, on application, that it is of good repute.

The applicant Rockmount Services Ltd has been requested to clarify the position on a number of occasions. However based on the responses received it has failed to demonstrate to the Department that it is of good repute pursuant to Section 12A(2)(b) of the Goods Vehicles (Licensing of Operators) Act 2010 on the grounds that the application is a 'front' for another individual and/or company, namely Mr Connor McGivern and/or CGM Tipper hire Ltd. For that reason the Department is obliged to refuse the application and does so.'

The appeal to the Upper Tribunal

5. An appeal against the decision of the Head of the TRU was received in the office of the Upper Tribunal on 14 February 2017.

6. The Appellant set out the following grounds of appeal:

'My application for a Standard International Goods Vehicle Operator's Licence for the use of 2 vehicles has been refused by the Department on the basis that the Department is concerned I would be 'fronting' the business for my son ...

I dispute this assertion and state that it was my intention to create a family business. I am willing to surrender my licence for SP McGivern which I would be separately managing.'

The oral hearing

7. The appeal was listed for oral hearing on 31 May 2017.

8. As was noted above, the Appellant attended the oral hearing of the appeal represented by Mr Magill. In a written submission, the following grounds of appeal were set out on behalf of the Appellant:

'It is apparent that the only grounds for refusal of the Licence in this case is the allegation of "fronting". It is not accepted that this is a case of fronting. Ordinarily fronting involves circumstances wherein the applicant has been untruthful about the circumstances and tries to hide the fact that somebody else is involved in the business. This is patently not the case herein. To the contrary, the Applicant has been nothing but upfront regarding the fact that his son (Mr Connor McGivern) will be involved in the day to day operations of Rockmount Services.

The Applicant herein is the sole Director of Rockmount Services. He also intends to be the fulltime Transport Manager for that company. The Applicant has a vast experience in the owning and operating of transport companies. As you are aware he has another company. However, this company employs a Transport Manager and the Applicant has limited day to day involvement in that business and leaves the operations and management of that company very much in the hands of [the] Transport Manager ...

It is the Applicant's intention to set up this new business to deal in an entirely different type of Haulage, namely aggregate. It is the Applicant's medium to long-term intention that this business will be for

the benefit of his son. His son will be the driver of one of two vehicles operated by the business. However, the Applicant is fully aware of the onerous nature of the obligations placed upon an Operations Manager. He feels that it is a great responsibility and the discharge of those obligations and responsibilities requires considerable experience. He is not satisfied that his son presently has that experience. It is for this reason that he intends to act as Director and Transport Manager of the business until such time as his son has adequate maturity, responsibility and experience to apply in his own name for an Operator's licence. The Applicant will remain the sole controlling force of this business until that time.

In light of the foregoing, the Applicant has indicated that he would be more than content that conditions be placed on the grant of the Licence to ensure that the Licence is suspended, if at any time the Applicant ceases to have a level of involvement as detailed above.

9. At the oral hearing, Mr Magill expanded on the grounds set out in the written submission.
10. At the oral hearing, the Respondent was not represented. Correspondence had been received in the office of the Upper Tribunal on 20 March 2017 in which the Respondent advised that it did not intend to participate in the appeal.

The proper approach on appeal to the Upper Tribunal

11. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

'There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: "*the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view*". The Tribunal sometimes uses the expression "*plainly wrong*" as a shorthand description of this test.'

12. At paragraph 4, the Upper Tribunal had stated:

'It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been

argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.'

Analysis

13. In summary, the basis for the decision of the Head of the TRU to refuse the licence application was her conclusion that the applicant company did not satisfy the requirement set out in section 12A(2)(b) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. The requirement in section 12A(2)(b) is that the applicant has to be of good repute. The reason why the Head of the TRU concluded that the condition was not satisfied was based on her concern that the application was a 'front' in order that another party, namely the son of the sole director of the applicant company, would obtain the benefit of a goods vehicle operator's licence himself without having to go through the formalities of making an application for one or adhere to the consequent duties and obligations of a licence holder. With respect to the Head of the TRU her decision involves the misapplication of the jurisprudential principles concerning 'fronting' and, as a consequence, and in line with the test set out in Bradley Fold, is plainly wrong.
14. We accept the submissions which have been made on behalf of the Appellant by Mr Magill. This is not an application in which the Applicant company has sought to hide anything from the Respondent. We are of the view that in his dealings with the Respondent, through his responses to the requests for clarification, that he has been over-enthusiastic in reporting his ambitions and hopes for his son's future participation in a new family business. Such eagerness is understandable at the commencement of a new business enterprise. It may be that the Respondent has, in turn, been too cautious about what was the real picture and been too quick to identify concerns where none have existed.
15. The true position has been presented to us through the written and oral submissions and as set out above. The sole director of the Applicant company, Mr SP McGivern was to be in sole control of the business in the medium to long-term. His son, Connor McGivern, would be employed in the business but it was recognised that he lacked the acumen and experience to discharge the obligations and duties associated with running what would even be a modest transport business. Most significantly, we accept the submission that it would be only if and when the son acquired sufficient expertise and experience that consideration would be given to allowing him to apply for an operator's licence in his own right in connection with the new family business. It seems to us that if all else was satisfactory with the application then it could have been granted and any concerns about 'fronting' reviewed after a period of operation of the licence.
16. Without intending any pun, this was a case where the sole director of the Appellant company was endeavouring to be 'upfront' and to assist as best he could. It is a measure of his desire to be helpful that he has stated his agreement to the imposition of conditions on the grant of a licence or for the interim licence to be surrendered.

17. We have noted that a recommendation had been made by the Deputy Head of the TRU to hold a Public Inquiry to clarify matters and, possibly, to address the question of the interim licence held by the director of the Appellant company. The Head of the TRU made her decision without following-up that recommendation. It may well have been the case that a Public Inquiry would have helped to resolve matters.
18. We allow the appeal and remit the matter for reconsideration by the Respondent. We have noted, however, that the Head of the TRU was satisfied that the requirements for the grant of an operator's licence were satisfied and that apart from the question of repute based on an incorrect perception of 'fronting' it would appear that the application would have been granted. The Head of the TRU had stated in her decision that '... in reviewing the merits of this application which with the exception of the following circumstances appears to be in order.' The 'following circumstances' were concerned with 'fronting' and the question of repute. Given that the Upper Tribunal has decided that there was no basis on which to refuse the application on the basis of 'fronting', we hope that the Respondent will now be content to grant the application. As noted above, if there are any outstanding queries or conflicts to be resolved then that might be achieved through the holding of a Public Inquiry.

A handwritten signature in black ink, reading "Kenneth Mullan". The signature is written in a cursive style and is positioned above a light grey rectangular background.

**Kenneth Mullan, Judge of the Upper Tribunal,
28 June 2017**