

Appeal No. T/2017/33

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

**ON APPEAL from the DECISION of the DEPUTY TRAFFIC COMMISSIONER for
the North East of England
Dated 18 April 2017**

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr M. Farmer	Member of the Upper Tribunal
Mr J. Robinson	Member of the Upper Tribunal

Appellant:

Paul Andrew Nimmo t/a P&N Travel

Attendances:

For the Appellant: The Appellant attended in person and was not represented

Heard at:

Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing:

19 September 2017

Date of decision:

7 December 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED and the decision of the Deputy Traffic Commissioner is confirmed

SUBJECT MATTER:-

Public Service Vehicle Restricted Licence; 'Main Occupation' test

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; T/2015/36 W. Martin Oliver
Partnership

REASONS FOR DECISION

The decision under appeal to the Upper Tribunal

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the North East of England dated 18 April 2017.
2. The factual background to this appeal appears from the documents and the Deputy Traffic Commissioner's decision and is as follows:-
 - (i) On 1 November 2016 an application for a Restricted Public Service Vehicle Operator's licence seeking authorisation for two vehicles was received in the office of the Traffic Commissioner.
 - (ii) In section 8 of the relevant application form the Appellant was asked to provide details of his 'business or main occupation'. His response was 'My main business is investment properties named Paul A Nimmo Properties.'
 - (iii) By way of correspondence dated 15 November 2016, the Appellant's application was acknowledged by the office of the Traffic Commissioner and he was requested to provide further details, as follows:

Main Occupation

1. Please clarify whether you are self-employed/an employee.
2. If self-employed please provide a copy of your latest Self Assessment tax return which discloses your taxable income or accounts.
3. Can you also provide an estimate/actual of your income from this source for the period 6 April 2016 to 5 April 2017.
4. If you are an employee please provide your latest P60 form along with the previous three months' payslips (i.e. August, September and October 2016).
5. Please give full details of the hours/days you work in this role.
6. If you drive in your main occupation please give details of the hours/days you drive.

PSV Operation

1. Subject to grant, please confirm what your intentions are in the operation of Public Service Vehicles e.g. school contracts.
2. Please state what your role will be within the operation of PSV e.g. manager.
3. Please give an estimate of your income for the period ended 5 April 2017.

4. If known, please state who will drive the PSV(s) ...
5. Please provide a copy of their driving licences.'

(iv) By way of correspondence dated 25 November 2016 the Appellant made the following replies:

Main Occupation

1. Self-employed
2. Self Assessment
3. Approximately £13800.00 however I have a property sale which is not included at that time.
4. N/A
5. Approximately 15 hours
6. Predominately driving is commuting between home and work, say 3 hours a week

PSV Operation

1. School Contract, Hotel, VIP & Airport deliveries & transfers
2. Proprietor/Manager
3. Estimate between January and April £4000.00
4. Until the Licence is approved, if approved, drivers have not been employed but I have several persons in mind for the job
5. N/A'

(v) Attached to the correspondence dated 25 November 2016 was a copy of a tax return for the tax year 6 April 2015 to 5 April 2016.

(vi) By way of e-mail correspondence dated 29 November 2016 the Appellant was asked to state what he did in a self-employed capacity. In his response, also of 29 November 2016 he stated that 'My main occupation is buying/renting property.'

(vii) On 12 January 2017 correspondence was forwarded to the Appellant in which it was indicated that the Traffic Commissioner had decided to convene a Public Inquiry (PI).

(viii) The PI call-up letter was forwarded to the Appellant on 3 March 2017. In that letter the Appellant was informed that the Traffic Commissioner wished to address a number of issues at the PI including whether the Appellant met '... the 'main occupation' or 'business' requirements to operate vehicles between 9 and 16 passenger seats under a restricted licence.'

(ix) In advance of the PI the Appellant provided a detailed written submission. In connection with the 'main occupation' issue the Appellant submitted:

'My main occupation is property; under no circumstances could I consider 2 Mini Buses could ever replace that. I have and access to a considerable portfolio extending to millions of pounds of family and wholly owned property both residential and industrial.'

- (x) The PI took place on 18 April 2016. The appellant was present but was not represented.
- 3. On 18 April 2017 the Deputy Traffic Commissioner made a decision to the following effect:

‘The Applicant’s application for a Restricted Public Service vehicle (‘PSV’) Operator’s Licence authorising of up to 2 PSV at any one time is REFUSED. The applicant has failed to satisfy me that the requirements set out in Section 13(3)(b) of the Act are met.’
- 4. The ‘Act’ is the Public Passenger Vehicles Act 1981, as amended.
- 5. The Appellant was notified of the decision of 18 April 2017 by way of correspondence dated 20 April 2017.

The appeal to the Upper Tribunal

- 6. On 19 May 2017 an appeal to the Upper Tribunal was received in the office of the Upper Tribunal.
- 7. The Appellant has set out the following Grounds of Appeal:

‘I cite the following which I feel give me the basis of appeal.

My application for a PSV operation was made after considerable thought. Initially I was unsure of which type of licence to apply for. I had discussions with a company several months before my actual application. Initially I thought a licence for 4 buses would be my preferred route simply on the basis of flexibility or possible but eventual expansion if I was successful. But after it was explained to me what was involved by a transport consultant company called OLMC I decided the conditions were not appropriate for me with particular regard to employing a transport manager. I decided a restricted licence was the only option available to me for what I wanted. This does not seem to have been considered by (the Deputy Traffic Commissioner) in any depth.

(The Deputy Traffic Commissioner) referred to my main occupation. This has been addressed in considerable detail in Martin Streich’s statement which I ask to be considered.

(The Deputy Traffic Commissioner) has referred to my tax return. The return was up to April 2016 and did not include current income/expenditure and therefore does not seem relevant. This is also covered on the enclosed statement for your consideration.’
- 8. The Appellant’s Grounds of Appeal also addressed other aspects of the decision of the Deputy Traffic Commissioner. We address those other aspects of the decision below.
- 9. Attached to the notice of appeal was a seven page written document headed ‘Statement of Truth’ and dated 17 May 2017. To that document were attached three appendices and copies of a number of e-mails. The ‘Statement of Truth’ was prepared by Mr Martin Streich who stated that he was not related to the Appellant but had known him and his family for twenty-two years and assisted them with ‘... the administration of parts of their business.’ He submitted that he was making the statement in support of the Appellant’s appeal.
- 10. It is clear that the ‘Statement of Truth’ is made up of a mixture of submissions on the issues arising in the appeal and references to additional new evidence which was not before the Deputy Traffic Commissioner. At the time of receipt of the appeal submission, including notice of appeal and supporting materials, it

was unclear to us whether Mr Streich was acting as the Appellant's representative. We formed the view, at that stage, that the Appellant was entitled to have a representative and to the extent that the 'Statement of Case' did make submissions on issues which were relevant to the decision under appeal, we would consider those. We took a different view as to the new evidence and we return to that matter below.

11. On that basis, we note the following submissions made by Mr Streich. In general terms, he noted that the Appellant had decided not to obtain legal representation for the PI but decided to attend in person '... on the basis that he would tell the simple truth.'
12. He gave a detailed explanation of the background to the making of the application and the involvement of a firm of transport consultants (OLMC) in giving advice. Further, he made reference to aspects of the decision of the Deputy Traffic Commissioner concerning relationships between the Appellant and other named individuals. We address those aspects of the decision below. Mr Streich referred to the tax return which had been provided by the Appellant with his correspondence to the office of the Traffic Commissioner dated 25 November 2016. Mr Streich submitted that as of that date this return, for the previous tax year, was the only one which was available.
13. Mr Streich submitted that the Appellant had misunderstood a question which had been asked of him in the correspondence from the office of the Traffic Commissioner dated 15 November 2016. He submitted that when he was asked about income for the period from 6 April 2016 to 5 April 2017 he had assumed that this meant income from 'the buses' and, because a licence had not been granted, the answer had to be 'nil'.

The process of the oral hearing before the Upper Tribunal

14. As was noted above, the Appellant attended the oral hearing before the Upper Tribunal. At the outset, the Appellant submitted a bundle of documents. He indicated that Mr Martin Streich was not his representative but worked for him and had prepared the additional documentation. The bundle included a document headed 'Addendum to Statement of Truth of Martin Streich', two statements and copies of three envelopes. The 'Addendum' was, in fact, an amended version of the 'Statement of Truth' which had accompanied the notice of appeal. The amendments included additional submissions as to (i) whether the Appellant had a tenancy agreement to occupy a unit (ii) the Appellant's income and his main occupation (iii) a further HRMC tax return (iv) a more recent tenancy agreement for an office block and 'ancillaries' and a submission on the merits of the appeal.
15. The Appellant was provided with an explanation of the jurisprudential principles relating to the submission of fresh evidence before the Upper Tribunal and was given a copy of the decision of the Upper Tribunal in T/2015/36 W. Martin Oliver Partnership. He was given the opportunity, while the Upper Tribunal heard another appeal, to give consideration to the 'fresh evidence' question and, if required, to apply for an adjournment in order seek additional advice.
16. On resumption of the oral hearing, the Appellant submitted that he now understood that he should not have submitted additional evidence. He stated that he now felt that he was unsure as to what he was getting into. He had attended the hearing on his own and now realised that he should have obtained some legal representation.
17. The Appellant gave evidence about his work as a property developer and the farm which he described as being more of a 'small holding'. He set out the

background to his decision to apply for a Restricted Public Service Vehicle Operator's licence and the type of work which he had hoped to attract. Crucially he confirmed that the evidence which he had given to the Deputy Traffic Commissioner concerning the potential income to be derived from school-based contracts was correct and that his evidence was based on what he had been told by Darlington Council.

The reasoning of the Deputy Traffic Commissioner

18. The reasoning of the Deputy Traffic Commissioner on the substantive issue arising in the appeal was as follows:

(The Appellant) appeared before me on the 18 April 2016. He was unrepresented. During the course of the Enquiry hearing he gave evidence to me concerning his income ...

By Section 13(3) of the Act:-

'A restricted licence authorises the use (whether on national or international operations) of –

- a. Public service vehicles not adapted to carry more than eight passengers; and
- b. Public service vehicles not adapted to carry more than 16 passengers when used –
 - i. Otherwise than in the course of the business of carrying passengers; or
 - ii. by a person whose main occupation is not the operation of public service vehicles adapted to carry more than eight passengers.'

The Applicant has sought to rely on Section 13(3)(b)(ii) in making this application.

During the course of processing this application the Central Licensing Unit ('CLU') of the Traffic Commissioner requested further information from the Applicant concerning his 'main occupation' and the proposed PSV operation if the licence was granted. The request is at page 34 of the index bundle of documents prepared by the OTC for this Enquiry ('the Brief').

The Applicant responded to the CLU by his letter of 25 November 2016, enclosing a copy of his tax return for the year 6 April 2015 to 5 April 2016 ... This Return states he was self-employed in this tax year. He declared on the Supplemental UK Property Tax Return form that he received a total from rents and other income from property of £12,480 gross (with property expenses of £4000 declared, giving a pre-tax profit of £8480 for the year). In addition, he separately, declared other gross income of £2240 (before deduction of allowable expenses of £980 and tax).

The applicant had declared his main occupation on application as property investment trading as ... He confirmed to me on questioning that the figures given on the UK Property Tax Return form related to a shop with a flat above, currently the only property owned by him that is generating any income. (He owns some 5 other properties, but these are currently non-habitable and three of these are also subject to possible compulsory purchase as part of a highways scheme deferring any refurbishment work). The Applicant was unable to attribute the 'other income' to any specific activity when questioned. He did not know what this related to. He explained that he received income (always in cash) of variable amounts 'when needed' from his father as

consideration for managing his father's (very significant) portfolio of residential and commercial properties. There is no formal arrangement for this. In addition, he explained that he sells assets from the Farm (with his father's permission) and retains the proceeds of such sale net of auction costs to provide additional income for himself, which he states is reflected in the ad hoc variable payments into the bank on the account statements provided by him. In addition to showing the rent received from ... Borough Council for his rented property of £300 per calendar month (£15,600 per annum).

When questioned about his business plans for P&N Travel using the 2 discs applied for, the Applicant advised me that his father had funded the purchase of 2 PSV currently off road, to help and start this sole trader business ... He had made general enquiries of the Council and expected a gross income of £400 or so each term time week (depending on the particular route serviced) for each vehicle. He also intended to seek other work such as Hotel VIP and Airport deliveries and transfers, in addition to the school contract work.

The Applicant is the holder of the UK driving licence entitlement to drive Passenger Carrying Vehicles (PCV) and stated his intention to drive one of the vehicles if the licence is granted.

Having considered the above, I find that the Applicant has failed to satisfy me that his 'main occupation' will not be the operation of two 9-16 seater PSV if this application is granted at this time. The documentary evidence of declared income produced by him shows a gross income of £14,720 for the year 2015-16. School contract for two vehicles, using the Applicant's own estimates, could reasonably be expected to generate a gross income significantly in excess of such amount, even before other potential work, is taken into account.

Having found as above I have determined as set out in paragraph 1 above.'

19. The 'determination' referred to by the Deputy Traffic Commissioner was as set out in paragraph 3 of our decision above.

The proper approach on appeal to the Upper Tribunal

20. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the 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.’

21. The Upper Tribunal In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI was considering an appeal to the Upper Tribunal against a decision of the Head of the Traffic Regulation Unit under the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. There is no doubt, however, that the principles set out by the Upper Tribunal in paragraph 8, are derived from parallel appeals, such as the one in the instant case, where the appeal is against a decision of a Traffic Commissioner under the Goods vehicles (Licensing of Operators) Act 1995 and Regulations made under that Act – see paragraph 4 of NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI.

The proper approach to fresh evidence before the Upper Tribunal

22. In T/2015/36 W. Martin Oliver Partnership, the Upper Tribunal said the following, at paragraphs 40 to 41 and 45 of its decision:

‘40. We begin by considering the proper approach to be adopted when the Upper Tribunal, in an appeal against a decision of a Traffic Commissioner, is met with an application by a party to the proceedings to adduce new or fresh evidence. We have no hesitation in confirming that the proper approach is as set out in the decision of the then Transport Tribunal in Thames Materials and confirmed by the Upper Tribunal in Cornwall Busways Limited. We have already noted that the decision in Thames Materials has a conclusive basis in the decision of the Court of Appeal in Ladd v Marshall. Further, we have noted that the former Transport Tribunal has been consistent in its application of the principles in Thames Materials.

41. The appellate structure in the transport jurisdiction was the subject of significant revision with the implementation of the Tribunals, Courts and Enforcement Act 2007. Appeals from decisions of the Traffic Commissioner lie to the Upper Tribunal – see Article 7(a)(viii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2008. At that stage there was an opportunity to revisit the jurisprudence of the former Transport Tribunal to determine whether that jurisprudence remained appropriate or required revision in light of the new tribunal appellate structure or in light of other procedural developments. In respect of the procedure to be adopted for applications to adduce fresh evidence, the Upper Tribunal endorsed the former procedure of the Transport Tribunal relying on its consistency and coherency – see Cornwall Busways Limited.

...

45. For the record, therefore, we repeat that the test to be applied is whether the following conditions are met:

- ‘(i) The fresh evidence must be admissible evidence.
- (ii) It must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry.

- (iii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.
 - (iv) It must be evidence which is apparently credible though not necessarily incontrovertible.’
23. The appellant in T/2015/36 W. Martin Oliver Partnership sought permission to appeal against the Upper Tribunal’s decision. In refusing the application, the Court of Appeal Judge (Rt Hon Lord Justice Flaux) gave the following reasons:
- “1. The sole ground of appeal is that the Upper Tribunal erred in law in applying the principles derived from Ladd v Marshall [1954] 1 WLR 1489 to its determination as to whether to allow fresh evidence to be adduced. The applicant argued before the Upper Tribunal and argues in its grounds of appeal and counsel’s skeleton argument that a more flexible approach, somewhat akin to that adopted in criminal appeals under section 23 of the Criminal Appeals Act 1968 should have been adopted.
2. The Upper Tribunal and its predecessor the Transport Tribunal has consistently followed the principles of laid down by the Court of Appeal in Ladd v Marshall in considering application to adduce fresh evidence. The Upper Tribunal followed and applied those principles here. It was entirely correct to do so.
3. The ground of appeal is unarguably hopeless and totally without merit.”

Our analysis

24. We have no hesitation in upholding the decision of the Deputy Traffic Commissioner. Having heard from and seen the Appellant, we found him to be an honest and credible individual who was ready to co-operate with us in our determination of the issues arising in the appeal. As was noted above, his candour and sincerity included a concession that the evidence which he had given to the Deputy Traffic Commissioner concerning the potential income to be derived from school-based contracts was correct and that his evidence was based on what he had been told by ... Council. Given that and given the unchallenged additional evidence which was before the Deputy Traffic Commissioner concerning the income which the Appellant derived from other sources, including property development and management, as set out in the tax return and other information which had been submitted by the Appellant in advance of the PI, we have not been satisfied that it could be said that the decision of the Deputy Traffic Commissioner in the instant case was ‘plainly wrong’. Indeed it is our view that the Deputy Traffic Commissioner could not have reached any other decision. On that basis, the reasoning of the Deputy Traffic Commissioner, as set out in paragraph 18 above, is unassailable.
25. It is the case, however, that the Appellant, through Mr Martin Streich, in the notice of appeal and through the further documentation provided at the oral hearing before us, has sought to adduce fresh evidence. Submissions have been made that the fresh evidence sheds new light on certain of the issues arising in the appeal, more particularly, the question of the Appellant’s main occupation, the income which he derives from his property development and management work and the potential income which he might derive from his work as an operator of a public service vehicle. The further question which arises, therefore, is whether we should admit this fresh evidence.

26. The proper approach to the admission of fresh evidence before the Upper Tribunal is as set out in paragraphs 22 and 23 above. In summary, the Appellant has to persuade us that the test set out in paragraph 45 of T/2015/36 W. Martin Oliver Partnership is satisfied. We are not persuaded that limb (ii) – that it must be evidence which could not have been obtained, with reasonable diligence, for use at the public inquiry – is satisfied. In his oral evidence to us, the Appellant has conceded that he ought to have obtained legal guidance and assistance in connection with his appearance at the PI. This was despite the fact that the PI call-up letter emphasised the importance of obtaining such representation. It is clear, however, that the Appellant has had access to a significant source of such direction in the form of Mr Martin Streich, described by the Appellant as an employee of his. Although the submissions which have been made by Mr Streich contain certain unusual phraseology (such as ‘Statement of Truth’) they are nonetheless, carefully prepared, articulate and coherent. Mr Streich has asserted that he has known the Appellant and his family for twenty-two years and assists them in the administration of parts of their business. It is not the case, therefore, that Mr Streich has come to the Appellant’s aid out of the blue. In these circumstances, it is our view that the fresh evidence, sought to be adduced with the notice of appeal and at the oral hearing before us, is evidence which, with reasonable diligence, could have been obtained for use at the PI. It is, therefore, not admitted by us.

Another matter arising

27. After setting out her reasoning in paragraphs 3 to 12 of her decision, the Deputy Traffic Commissioner added the following:

‘The Applicant is at liberty to re-apply but is advised that, should he apply again for a Restricted PSV Operator’s Licence, he provides with his application a complete statement of all of his sources of income and amounts received and ensures that these are consistent with and supported by annual accounts, tax returns and bank account statements in his name, and demonstrates how the total of such income received is reasonably expected to continue to exceed that from the operation of the vehicle(s) if a licence is granted.

Having determined as above, I have not proceeded to make formal findings on the matter of the Applicant’s good repute, also an issue for consideration at this Public Inquiry. For the purposes of any application in future, I record that the Applicant stated at inquiry that he was in a romantic relationship with [Ms KN a.k.a. Ms KG] for some 12 months until December 2016. He has had no further contact with her or her mother [AB] of... Taxis since that time, and has not been in contact with her ex husband [TB] for ‘many years’.

(The Appellant) denies that this application was made by him as a ‘front’ for ... Taxis or any member of the B family. In response to questioning on the timing of this application (received 1 November 2016) co-incident with a public inquiry hearing regarding the operator’s licence (now previously) held by [TCB] on the 25 October 2016, (the Appellant) submits that this is wholly unrelated and that his application was for his own business, independent and previously under contemplation for some time. He provided copies of a cheque stub for a payment of £508 to OLMC dated 31 March 2016 and extracts from emails which he described as between OLMC and himself, from December 2015 and March and April 2016, to support such assertions of his prior planning to gain a licence of his own. I would advise him to provide the full unedited email trails with OLMC and evidence of the 31 March 2016 cheque payment from his account with any future application, together with

explanations concerning the timing of such enquiries which appear to be coincident with the start of the relationship with [KB] and the arrangements apparently made by [KB] with [ATB], as well as the reason for the apparent delay until 1 November 2016 to make this application.'

28. It is clear to us that the decision by the Deputy Traffic Commissioner to refuse the application for a Restricted Public Service Vehicle Operator's Licence was based solely on her reasoning on the issue of the 'main occupation' test. Although the call-up letter to the PI made reference to the issue of good repute, the Deputy Traffic Commissioner has made no findings on the issue and any reference to the evidence available to her on repute was in the context of any future renewed application for a licence. We have noted that certain of the submissions made on behalf of the Appellant in the notice of appeal and the further documentation received at the oral hearing before us related to this issue, and aspects of the fresh evidence (the two witness statements, for example) which was submitted to us were also directed to it.
29. We have not had to address the issue of repute because it formed no part of the decision of the Deputy Traffic Commissioner. There is, however, a suggestion in the additional comments of the Deputy Traffic Commissioner that were the Appellant to renew an application for a Restricted Public Service Vehicle Operator's Licence, then repute will be an issue for consideration in relation to that application. It is entirely a matter for the Appellant but it is the case that he, and his adviser, may wish to pay attention to what the Deputy Traffic Commissioner was stating in connection with the matter.

Disposal

30. We are wholly satisfied that neither the law nor the facts impel us to interfere with the decision of the Deputy Traffic Commissioner as per the decision in Bradley Fold and the appeal is dismissed.
31. The decision of the Deputy Traffic Commissioner dated 18 April 2017 is confirmed in all respects.



**Kenneth Mullan, Judge of the Upper Tribunal,
6 December 2017**