

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

**Appeal No. T/2018/64
NCN: [2019] UKUT 160 (AAC)**

**ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER notified on 3
September 2018**

Before: Mr M R Hemingway: Judge of the Upper Tribunal
Mr A Guest: Member of the Upper Tribunal
Mr J Robinson: Member of the Upper Tribunal

Appellant: Ghaffar Hussain Trading as GAFS Minibus Service

Reference: PB2007369

Attendances:

For the Appellant: In person

Heard at: Leeds Magistrates Court

Upper Tribunal Hearing: 22 February 2019

Date of Decision: 13 May 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject matter:

Satisfaction of the primary occupation requirements, contained in section 13(3)(b) of the Public Passenger Vehicles Act 1981.

Cases referred to:

None

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Mr Ghaffar Hussain (the appellant) from a decision of a Traffic Commissioner communicated to him by letter of 3 September 2018, refusing to grant his application for a restricted public service vehicle operator's licence. The application was refused under sections 13(3)(b); 14ZB(b); 14ZC(1)(a) and 14ZC(1)(b) of the Public Passenger Vehicles Act 1981 (the 1981 Act).

Some relevant legal provisions

2. Section 13 of the 1981 Act relevantly provides as follows:

13 – Classification of licences.

- (1) A PSV operator's license may be either a standard licence or a restricted licence...
- (2) ...
- (3) 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;
 - (b) public service vehicles not adapted to carry more than sixteen passengers when used –
 - (i) otherwise than in the course of a business 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.

3. Section 14ZB(b) relevantly provides:

14ZB. Requirements for restricted licences

- (1) The requirement of this section is that the traffic commissioner is satisfied that the applicant -
 - (a) is of good repute (as determined in accordance with paragraph 1 of Schedule 3); and
 - (b) has appropriate financial standing (as determined in accordance with paragraph 2 of Schedule 3).

4. Section 14ZC relevantly provides:

14ZC. – Requirements for standard and restricted licences

- (1) The requirement of this section is that the Traffic Commissioner is satisfied -
 - (a) that there will be adequate facilities or arrangements for maintaining in a fit and serviceable condition the vehicles proposed to be used under the licence; and
 - (b) that there will be adequate arrangements securing compliance with the requirements of the law relating to the driving and operation of those vehicles".

The background

5. The appellant originally applied for a restricted licence along with one Mohammad Nadeem. So, it was envisaged at that time that the two would run the proposed business (that business involving the provision of transport of members of the public for profit) in respect of which the licence was being sought, as a partnership. The appellant indicated that he was an accountant and was in business as such (he was later to indicate that his accountancy business had made a profit of £8230 for the tax year ending 5 April 2018); that he was primarily occupied with accountancy; but that he would give five to ten hours of his time each week to

the proposed business. The application was received by the Office of the Traffic Commissioner (OTC) on 28 September 2017 and was acknowledged by the OTC on 2 November 2017. At that point the OTC advised that since the application was being made by a partnership there was a need to clarify the main occupation of the partnership. No doubt the OTC had in mind the requirement contained at section 13(3)(b)(ii) of the 1981 Act. There was further communication between the appellant and the OTC resulting in his being advised that since the partnership was not able to demonstrate a main occupation or indeed any occupation other than that proposed if the licence were to be granted, it would be necessary for it to make an application for a standard licence. But no such application was ever made. Indeed, on 23 March 2018 the appellant informed the OTC that he now wanted his application to be treated on the basis that he would be the sole proprietor of the proposed business; that Mr Nadeem would no longer be involved; and that the application remained one for a restricted licence.

6. It is clear from copies of internal memoranda contained within the bundle which has been prepared for the purposes of this appeal, that the OTC had concerns as to the lack of detail in the information it was felt the appellant had provided in support of what was now his individual application. Those concerns revolved primarily around his main occupation; the nature of the proposed business and how it was to operate; and the suitability of the proposed operating centre. But the view was taken that he should be afforded an opportunity to provide full information. Accordingly, the OTC wrote to him on 7 August 2018 asking for specific information to support the application. The request was detailed and in these terms:

“The Traffic Commissioner has requested you provide the following information:

1. Written confirmation that Mohammad Nadeem will not be involved in the operation of the PSV.
2. Original bank statements for the period between 1 June and 1 July 2018. You must also show any overdraft facilities and credit card facilities. Any financial evidence must be in your name.
3. I note that, subject to the license being granted, you wish to have two vehicles authorised. I also note the nominated operating centre at 63 North Crescent, Rotherham, is a residential property and that it is not suitable for purpose. You must now provide additional photographs, and a detailed site plan giving measurements of the site that demonstrate the suitability of the operating centre. The photograph should highlight the parking area, any turning area, access/ egress points and the visibility splays at the exit point onto the public highway. Additionally, please confirm that there are sufficient parking spaces made available for your exclusive use at all times and whether you can enter and exit the proposed site in forward gear. Additionally, you may wish to nominate a more suitable, non-residential, operating centre. Should this be the case, please give the full address and postcode for the site, and again provide photographic evidence as detailed above.
4. It is noted that your main occupation is as an accountant. Please provide documentary evidence (such as your latest tax return, audited accounts, but this is not exhaustive) that demonstrates your income from this source. In addition, please also provide an estimate of your income for the period 6 April 2018 to 5 April 2019.
5. I note that the partnership intended to operate school and business contracts and that it intended to employ drivers. As the application is now for you as a sole trader, you must clarify what you intend to use the PSVs for, e.g. school contracts. You must provide a copy of any business plan that you have drawn up, along with supporting documentary evidence, such as costings, tendering documents, invoices etc, and give details of the estimated income from this source, for the period 6 April 2018 to 5 April 2019”.

7. The appellant did seek to respond. He told the OTC, in writing, that he would be the sole owner of the intended business. He provided a copy of his tax return for the tax year ending 5 April 2018 and some accounts. He provided some photographs regarding the

proposed operating centre, some bank statements, a document entitled “Business Plan – Gaf’s Minibus Service” and a document headed “Executive Summary”. It is fair to say that the latter two documents were quite skeletal in terms of the information provided with respect to the aims of the proposed business and the mechanics of how it would operate.

8. The Traffic Commissioner who then considered the case on the papers decided not to hold a public inquiry (PI) and decided to refuse the application. As to the question of the holding of a PI a Traffic Commissioner must not refuse an application for a licence without giving an applicant an opportunity to state his case at an enquiry “save where the application or the applicant’s conduct in relation to it is frivolous or unreasonable”. That is a consequence of the content of Regulation 6 of the Public Service Vehicles (Operator’s Licence) Regulations 1995.

9. The letter communicating the decision to refuse the application (sent on 3 September 2018) relevantly stated:

“The Traffic Commissioner has now reconsidered your application and I must now advise you that the Traffic Commissioner has refused your application without the offer of a public enquiry, as you have failed to meet the requirements set out in section 13 and 14 of the above Act, specifically:

- Section 13(3)(b) – Main occupation
- Section 14ZB(b)(Restricted) – Appropriate financial standing
- Section 14ZC(1)(a) – Facilities/ arrangements for maintenance
- Section 14ZC(1)(b) – Arrangements for driving/ operation of vehicles

May I also remind you of Regulation 6 of the Public Service Vehicles (Operator’s Licence) Regulations 1995 – 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 enquiry save where the application or the applicant’s conduct in relation to it is frivolous or unreasonable”.

10. The letter then went on to inform the appellant of his right to appeal the refusal decision to the Upper Tribunal. The appellant availed himself of that right.

The proceedings before the Upper Tribunal

11. In his written grounds of appeal, the applicant asserted, in effect, that it had taken too long to process his application; that he had provided sufficient relevant information; and that his application ought to have been granted. We held an oral hearing of the appeal which took place on 22 February 2019. At that hearing the appellant, essentially, made similar points. In response to questions put to him by the tribunal’s panel members, he said that he had provided an estimate for future earnings from his accountancy business as had been requested of him. He had told the OTC that the proposed business would be involved with school runs and transporting people to and from care homes. He would not, himself, be a driver for the business. He intended it to be a “side business”. The proposed operating centre was his own residential address and not that of Mr Nadeem.

Why we have decided to dismiss this appeal

12. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

“The Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport”.

13. The Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695. The Court applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56 where Woolf LJ held:

“44. ...The first instance decision is taken to be correct until the contrary is shown...An appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an appellant assumes is to show the case falls within this latter category”.

14. We have borne the above fully in mind in deciding this appeal.

15. It seems to us, from perusing the papers, that although the OTC and the Traffic Commissioner who had ultimately made the decision which forms the subject of this appeal, were concerned about a range of matters, the primary concern was in relation to the question of whether the “main occupation” test as set out in section 13(3)(b)(ii) had been met. It is clear from the restrictions contained within section 13(3) of the 1981 Act that Parliament did not intend that restricted public service vehicle licence operators would use those restricted licences to operate vehicles on a commercial basis as their main business or work activity. Since the burden was upon the appellant to demonstrate he should be issued with the particular licence he was seeking, it was for him to demonstrate that the proposed business would not be his main occupation. In our view, that required him, to provide information of some detail regarding his accountancy business and also regarding the proposed public service vehicle business.

16. As to the accountancy business, it will be apparent from what we have already said that it has, at least in the relatively recent past, generated little in the way of income. That is reflected in the tax return for the tax year ending 5 April 2018. To state the obvious, it would not require a great deal in the way of profitability from the proposed public service vehicle business for that, from an income perspective at least, to become the appellant’s main occupation. The appellant did indicate an anticipated net profit of £15,240 from his accountancy business for the 2018/2019 tax year. However, he has not provided any meaningful written nor oral explanation as to how that estimate had been arrived at. There is little to cause us to think the estimate went beyond a mere guess. That, of course, makes it very difficult to undertake a comparison with the proposed public service vehicle business. As to that, as indicated, the “Executive Summary” and the “Business Plan – Gafs Minibus Service” documents are brief and largely uninformative. There is a suggestion in each that the proposed business “yearly sales forecast” is £14,440. Presumably, that is intended to be an estimate as to the likely income of the business during its first year of operation. But again, no meaningful explanation has been provided at any stage as to how that figure has been arrived at. It is said that such a figure would translate into a likely net profit of £805. Such is stated in

the appellant's grounds of appeal to the Upper Tribunal. But we have been offered no explanation as to how that figure is arrived at and nor was the OTC.

17. The OTC's decision letter of 3 September 2018 did make it clear to the appellant that one basis for refusal was the failure to meet the "main occupation test". It would have been better had the decision letter gone into a little more detail as to why the Traffic Commissioner had taken that view. But in this case, we do think it would have been apparent to the appellant that such a view had been taken as a result of a failure to provide information of substance regarding the likely profitability of both businesses, the nature of their likely future operation and the appellant's likely involvement in each. He has, it is fair to say, provided a level of information but the Traffic Commissioner clearly took the view that insufficient had been provided to enable him to demonstrate that he ought to be issued with the restricted licence he was seeking. In our judgment it cannot realistically be argued that, in reaching that view, the Traffic Commissioner was plainly wrong. Indeed, given the paucity of the information provided in support of the application, it is really quite difficult to see how any other view could rationally have been reached. So, subject to any error that there might have been in not offering a PI we would conclude that the appellant must fail in his appeal to us. Our view as to the "main occupation test" means it is unnecessary for us to go on to consider the other bases for refusal which we have set out above.

18. Turning then to the PI issue, the Traffic Commissioner, as noted, decided not to hold one. We have already set out the test which has to be met before a Traffic Commissioner can properly reach a decision on an application such as this absent the offer of a PI. That test, we remind ourselves, is a stringent one. It is not enough, for example, for it to be thought that an application is weak or relatively so.

19. We would observe that the appellant has not, either in his written grounds to the Upper Tribunal or in what he said to us at the hearing, asserted that he should have been offered a PI. Nor has he asserted that, had such an offer been made, it would have been taken up. Nevertheless, we have asked ourselves whether the Traffic Commissioner ought to have made such an offer. As to that, we have already noted our view that he had provided little in the ways of meaningful or substantial evidence to demonstrate what appeared to us to be the key issue regarding "main occupation". That was so despite opportunities to provide further information having been given. Whilst in our view it is possible that further information might have emerged had there been a PI (though our experience at the oral hearing of the appeal before the Upper Tribunal might be taken to suggest otherwise) we are unable to say that the Traffic Commissioner was plainly wrong in deciding that, having regard to the test we have set out above, there was no obligation to offer one in the circumstances of this case. We would, though, express the view that, speaking generally, we would expect it to be quite rare for applications to be refused absent the offer of a PI given the stringency of the test. We would also add that the decision letter might have benefitted from a little more detail as to why, in this particular case, it had been decided there should be no such offer. But none of this means that the claimant should succeed in his appeal before us.

Conclusion

20. This appeal to the Upper Tribunal is dismissed.

M R Hemingway
Judge of the Upper Tribunal
Dated 13 May 2019