



NCN: [2020] UKUT 372 (AAC)
Appeal No. T/2020/26

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

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before: M Hemingway: Judge of the Upper Tribunal
S James: Member of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal

Appellant: Transform Driveways Limited

Reference: OC2031650

Date of Hearing: 15 December 2020 (papers consideration)

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is dismissed.

CASES REFERRED TO

Bradley Fold Travel Ltd v Secretary of State for Transport [2010] EWCA Civ 695.

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Transform Driveways Limited (the Operator), from a decision of the Traffic Commissioner for the North West of England (“TC”), embodied in a letter of 25 April 2020, refusing to grant a standard national operator’s licence authorising the use of one vehicle.

2. We decided the appeal on the papers (that is to say without a hearing) with the consent of Mr Colin Cowan, who is a director of the Operator and who has taken responsibility for representing the Operator before the Upper Tribunal. That was the mode of disposal he had urged upon us and we acceded having found ourselves satisfied, given the content of rules 2 and 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, that it was both just and appropriate to do so.

3. The Operator, in order to be entitled to the licence it sought, was required to demonstrate, amongst other things, that it met requirements concerning its financial standing and that it had provided appropriate notice, by way of an advertisement, of its application for a licence, so as to enable objections to be made. As to the former, the requirement may be found at section 13A(2)(c) of the Goods Vehicles (Licensing of Operators) Act 1995. As to the latter, section 11(1) of the 1995 Act mandates refusal of an application without a consideration of the merits (subject to subsection 11(3) the content of which has no application here), unless the requirements of section 11(2) are met. Those requirements are met where within the period beginning 21 days before the date of the application and ending 21 days after that date, notice of the application in the prescribed form and containing prescribed information has been published in one or more newspapers circulating in the locality affected by the application.

4. The application was made online on 9 March 2020. An “advert template” was provided but no evidence as to the placing of any advertisement meeting the above requirements, in an appropriate publication, was submitted. On 16 March 2020 the Office of the Traffic Commissioner (OTC) wrote to the Operator explaining, amongst things, that there was a need for evidence to be provided of the placing of an appropriate advertisement and that there was a need, with respect to the financial aspects, to evidence ready access to a sum of £8,000 over a 28 day period the last date of which must be not more than two months from the date of receipt of the application. Further, it was made clear with respect to the advertisement that the evidence should be in the form of the relevant full page of the newspaper containing the advertisement as proof of publication that the application had been advertised in the prescribed format in a local newspaper circulating in the vicinity of the nominated operating centre on any one date between 17 February 2020 and 6 April 2020. It was said that such evidence should be provided by 30 March 2020. Satisfactory evidence not having been received by that date, the OTC again wrote to the Operator, on 31 March 2020, once more seeking evidence of finance and the evidence previously specified with clarity and precision and referred to above concerning the advertisement. On 1 April 2020 the Operator supplied some evidence of finance in the form of bank statements. However, the bank statements were not considered to be acceptable evidence because they were not in the name of the business entity, in other words the Operator. Nothing concerning the placing of the advertisement was provided. Rather than simply refusing the application at that stage, a response which would have been open to the TC, an e-mail was sent to the Operator on 14 April 2020, giving an

extension until 21 April 2020 to provide the evidence sought. On 25 April 2020 the OTC wrote to the Operator to say that since satisfactory evidence had not been received, the application was being refused under section 11(1) and section 13(5) of the 1995 Act. Pausing there, it does appear that at some point after the sending of the e-mail of 14 April 2020 (though not necessarily before the deadline of 21 April 2020) the Operator submitted a bank statement, in the name of Transform Driveways Limited, showing entries from 2 April 2020 to 15 April 2020. However, for the bulk of that period the account was overdrawn and there does not appear to have been any evidence of an overdraft facility being in place.

5. The Operator appealed to the Upper Tribunal. In the grounds of appeal which were prepared by Colin Cowan, it was said that he had been busy due to a family member having been ill with the coronavirus such that the application did not have his full attention. He invited the Upper Tribunal to “reconsider” the decision of the TC and stressed that he was not in a position to make a fresh licence application (presumably as an alternative to proceeding with this appeal) due to the “fees involved”. He provided the front page of an issue of the Liverpool Echo newspaper of 16 March 2020 and an inner page containing the advertisement regarding the licence application.

6. Paragraphs 17(1) of Schedule 4 to the Transport Act 1985 provides:

“the Upper Tribunal are to have full jurisdiction to hear and determine on 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”.

7. Paragraph 17(3) of that Schedule provides that the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Another v Secretary of State for Transport* [2010] EWCA Civ 695. It was stated that the Upper Tribunal has the duty, on an appeal to it, to determine matters of fact and law on the basis of the material before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to adopt a different view to that taken by a TC.

8. Even on the account offered by the Operator, it is clear that the TC could not possibly have been satisfied that the requirements set out at section 11(2) of the 1995 Act had been met. That is because the Operator does not assert that evidence of the publication of the advertisement had been supplied to the TC prior to the decision of 25 April 2020 having been made. That is despite the opportunities which had been given to provide such evidence and which are detailed above. So, on the basis of the material before the TC, no other decision could possibly have been made. Insofar as it might be argued that the provision of the material supplied with the grounds of appeal now shows that there had been compliance at the material time, we note that the, it is fair to say very stringent, provisions concerning the production of new evidence on appeal, as set out in *Ladd v Marshall* [1954] 1 WLR 1489 apply in traffic cases (see *T/2015/36 W. Martin Oliver Partnership*). In this case, whilst we understand the difficulties which must have been caused to Mr Cowan due to the unfortunate illness of a family member, what is said about this in support of the appeal is brief and does not begin to

show that the evidence now supplied in the form of the newspaper could not have been obtained with reasonable diligence, for submission to the OTC. Indeed, it would have been a relatively straightforward and undemanding task to get hold of a copy of the newspaper and send it to the OTC's office. As to finance, the OTC's requests for the specific evidence sought were reasonable. The figure of £8,000 was correctly based on the content of Regulation (EC) No 1071/2009 of the European Parliament and of the Council ("the Regulation"). According to section 13A(2)(c) of the 1995 Act, financial standing is to be determined in accordance with the Regulation. The TC was right to disregard money in an account not in the name of the business entity given that the Operator is a Limited Company (see T/2013/77 *Hughes Bros Construction Ltd*). The bank statements in the name of the Operator covered only a brief period (less than the 28 days requested) and, for the most part, showed a debit balance without evidence of an overdraft facility.

9. In light of the above, we dismiss the appeal and uphold the decision of the TC under section 11 of the 1995 Act. Further and in the alternative, we uphold the decision of the TC under section 13(5) with respect to financial standing.

10. We note Mr Cowan's observation that he is unwilling or unable to pay the necessary fees for a further licence application. That is a matter for him. But we do not, for ourselves and without in any way seeking to pre-judge the outcome of any application which might be made, detect any obvious reason why, subject to proper evidence being provided at the appropriate stage, such an application would be bound to fail.

11. For the above reasons, this appeal to the Upper Tribunal is dismissed.

M Hemingway
Judge of the Upper Tribunal
Dated: 29 December 2020