



NCN: [2021] UKUT 137 (AAC)
Appeal No. T/2020/44

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

ON APPEAL from the 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: South View Scaffolding Ltd

Respondent: Peter Monger

Reference: OF2031095

Considered on the papers: 11 May 2021

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is dismissed.

SUBJECT MATTER

Restricted licences.

CASES REFERRED TO

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

REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by South View Scaffolding Ltd (the appellant) from a decision of the Traffic Commissioner for the East of England (TC) embodied in a letter of 11 August 2020 refusing to grant its application for a restricted national goods vehicle operator's licence.

2. Consent was given on behalf of the appellant for the appeal to be decided on the papers. Indeed, that was the preference which was expressed. The respondent, who has been joined as an objector to the proposed use of the relevant site as an operating centre, has also given consent. He has not otherwise played an active role in these proceedings. We are satisfied it is fair and appropriate to decide the appeal in this manner. It is not apparent that the holding of a hearing would take matters any further. We would also point out that the appellant has been sent copies of the file of papers produced by the OTC and has been given an opportunity to comment upon them prior to this appeal being decided.

3. The appellant's licence application was acknowledged by the Office of the Traffic Commissioner (OTC) on 20 May 2020. At that time the OTC sought additional information and evidence in support of the application including information relating to the financial requirements and a photograph of the operating centre. On 28 May 2020 additional information and evidence was provided including evidence of available funds of £3,100 in a "reserve account". It seems that some photographs were provided at a slightly later stage. Some written objections were then received from local residents who said they were concerned as to various adverse consequences the use of the proposed premises as an operating centre might have. This generated a flurry of correspondence but, on 15 June 2020, the OTC wrote to the appellant seeking specific information most of which related to the suitability or otherwise of the operating centre. In particular, the appellant was asked to respond to concerns expressed by a number of objectors to the proposals; to provide information concerning the timings of proposed activities at the operating centre; to give information regarding the likely number of vehicle movements; to confirm the size of the vehicles it was intended to operate; and to provide a plan of the proposed centre. The OTC has produced in a bundle of papers prepared for the purposes of this appeal, a copy of a covering e-mail sent to the appellant at an e-mail address given on its behalf when the licence application was made, which indicates that a copy of the letter itself was sent as an attachment to that covering e-mail. No reply was received and on 2 July 2020 largely similar information was asked for once again. This letter was expressed to be "a final attempt to resolve these issues" and a full response was asked for by 16 July 2020. Indeed, it was stated that "If on that date the application remains incomplete, it will be refused". Again, a covering e-mail indicating that the letter itself was being sent as an attachment, has been produced. Again, the e-mail was sent to the e-mail address previously supplied to the OTC on behalf of the appellant.

4. On 11 August 2020, no response from the appellant having been received, the OTC wrote to the appellant informing it that the application had, indeed, been refused. The refusal decision was said to have been taken by the TC although there is some internal documentation alluding to the possibility that it might have been taken under delegated powers on behalf of the TC. This has not been an issue raised in the appeal, nothing would seem to turn on it, and anyway we would accept, if the letter says the decision has been made by the TC, then it will have been. The letter explained that the application had been refused under section 13B and section 13C(5) of the Goods vehicles (Licensing of Operators) Act 1995. Section 13B is concerned with an applicant's fitness to hold an operator's licence. Section 13C(5) is concerned with the availability and suitability of operating centres or proposed operating centres.

5. The appellant clearly did receive the letter of 11 August 2020, because it responded the following day by e-mail, using the e-mail address it appears the letter of 2 July 2020 had been sent to. It was asserted in that e-mail that "The only letter from OTC we have had was

dated 20th May, which we dealt with”. It was specifically asserted that no letter of 15 June had been received, and nothing was specifically said as to the letter of 2 July 2020. The appellant was informed, in effect, that if it was unhappy with the outcome it could appeal to the Upper Tribunal or make a fresh licence application. We are unaware of any fresh application having been made so we assume the appellant chose the former option only.

6. The appellant’s notice of appeal was received by the Upper Tribunal on 7 September 2020. Essentially, it was argued that since the appellant had not (it was said) received relevant correspondence from the OTC, it could not be faulted for not answering it. It said that the letters of 15 June 2020 and 2 July 2020 had not “shown on our self-service account”.

7. Paragraph 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”.

8. 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 & Anor 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 take a different view to that taken by a TC.

9. We are satisfied it was appropriate for the OTC and TC to make inquiries of the appellant as to the suitability of its proposed operating centre. Indeed, the contrary has not been argued. The TC clearly did make the decision to refuse the application on the assumption the letters sent by the OTC had been properly sent. As to that, we note that the e-mail address used for the sending of the letters of 15 June 2020 and 2 July 2020 was one which had been supplied to the OTC on behalf of the appellant under a part of the application form headed “contact details” when the licence had been sought. We note that other items of correspondence sent by the same means to the same e-mail address had been received by the appellant. We have in mind, in particular, the decision letter of 11 August 2020. We appreciate it has been argued on behalf of the appellant that neither letter was received, and we do not dismiss the possibility that there might be some technical explanation for non-receipt of communications sent by electronic means. But in light of the above we think it much more likely than not that the e-mails were properly sent, were received and were then, for whatever reason, disregarded. We are certainly unable to conclude it has been shown that the TC was plainly wrong or indeed wrong at all to conclude they would have been sent and received, when the decision under challenge was made.

10. In the circumstances we must dismiss the appeal. In doing so we uphold the decision of the TC concerning the operating centre. But as to fitness, we note that no explanation for a finding of unfitness has been provided in the decision letter and we are not able to detect any basis for such a finding for ourselves. Had the refusal of the licence been on fitness grounds only we would very probably have allowed the appeal at least on the basis that any adverse finding as to fitness was not properly explained. We make that point because it may

have some relevance as to what the TC's starting point might be if the appellant makes a fresh licence application.

11. This appeal to the Upper Tribunal is dismissed.

M R Hemingway
Judge of the Upper Tribunal
Dated: 11 June 2021