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

Appeal No. UA/2021/002168/T
[2022] UKUT 192 (AAC)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the North East of England Traffic Area.

Before:

M Hemingway: Judge of the Upper Tribunal
A Guest: Member of the Upper Tribunal
G Roantree: Member of the Upper Tribunal

Appellant:	PED Plant Limited
Respondent:	Harrogate Borough Council
Reference Number:	OB2031770
Heard at:	Leeds Employment Tribunal Buildings
Date of Hearing:	31 May 2022
Representation:	
For the Appellant:	Mr M Clark
For the Respondent:	Mr J Yearsley (Counsel)
Date of Decision:	18 July 2022

DECISION OF THE UPPER TRIBUNAL

This appeal is dismissed.

Subject matter:
Availability of operating centres
Planning Disputes

Cases referred to:
Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695
2003/87 J Hansford
2004/202 D Holloway
Subic Solutions Limited [2010] UKUT 468 (AAC)

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by PED Plant Limited ("the appellant") through Mr J Pedel who owns and runs the company, from a decision of the Traffic Commissioner ("the TC") made on 21 January 2021 refusing to grant a restricted goods vehicle operator's licence. On 16 April 2021 the Harrogate Borough Council was joined as a respondent in the proceedings.

2. The appeal was listed for a traditional face to face hearing in Leeds on 31 May 2022. The appellant was represented at the hearing by Mr M Clark, who owns the land where the proposed operating centre is located. Mr J Pedel also attended and participated in the hearing. Mr M Clark's brother Mr S Clark was also present, and he assisted his brother in the task of providing representation. Mr J Yearsley of Counsel represented Harrogate Borough Council, hereinafter "the local authority".

3. During the course of the hearing we received oral submissions from Mr M Clark (assisted where appropriate by S Clark and J Pedel) and from Mr Yearsley. We are grateful to all of them. At the end of the hearing, we indicated to the parties that we would reserve our decision on the appeal. In these written reasons we explain why we have decided to dismiss the appeal.

The Background Circumstances

4. There is, in this case, quite an extensive factual background. We shall briefly set it out.

5. Prior to the appellant's application for a restricted licence, a planning dispute had arisen involving Mr M Clark and the local authority. The primary trigger for that dispute appears to have been Mr Clark's stationing and use of a caravan for residential purposes, on land owned by him, without the obtaining of planning permission. But issues were also raised regarding a variety of other matters including what was said to be the unauthorised use of the land "*for the storage of civil engineering/commercial vehicles*". The local authority issued an enforcement notice on 21 August 2014 and Mr Clark appealed to the Planning Inspectorate, which is a Government Agency. The Planning Inspectorate dismissed the appeal and upheld the notice but with variations in favour of Mr Clark. One of the results was that the use of the land for the storage of civil engineering/commercial vehicles was permitted. The Planning Inspectorate issued its decision to that effect on 25 June 2015.

6. On 26 May 2017, in a move linked to the decision of the Planning Inspectorate, the local authority issued a "*Certificate of Lawful Use*" under the Town and Country Planning (Development Management Procedure) (England) Order 2010. The salient part reads:

> "The evidence supporting the application is sufficiently robust, precise, and unambiguous to justify issuing a certificate for (1) the construction of a dwelling pursuant to planning permission 97/01795/FUL (2) the storage of commercial/civil engineering vehicles and building materials, and (3) for the area of land outlined in red on the plan attached to be used as a garden space ancillary to Tarran Barn Cottage. Section 191 of the Town and Country Planning Act 1990 has therefore been fulfilled sufficiently to grant a lawful certificate for these elements of the works".

7. Put simply, the issuing of the Certificate meant that it was lawful for the land to be used in the various ways referred to above including for the storage of commercial/civil engineering vehicles.

8. On 13 March 2020 the appellant made its application for a restricted licence. It was indicated that its Operating Centre would be located at Tarran Barn Cottage (the land which was the subject of the lawful use certificate just referred to). It was indicated that it was proposed to use only one vehicle under the terms of the licence. Following the publication of a Statutory Notice concerning the proposed location of the Operating Centre, the local authority indicated to the Office of the Traffic Commissioner ("OTC") that it objected to the granting of the application. In an email of 1 April 2020, it explained its objection in this way:

> "The planning permission history and status of this land is complex. Tarran Barn Cottage is a residential dwelling not suitable for use as an operating centre and does not have any planning permission for this activity. Were it to be used for this purpose this would be a breach of planning control that would not be immune from planning enforcement action. However, a portion of its associated land has a long-standing historic use, acknowledged by the local planning authority, for the purposes of the storage (not operation) of civil engineering/commercial vehicles. This acknowledged storage use is for a strictly limited area of the associated land only. The surrounding area is predominantly quiet rural countryside the character of which could be significantly harmed contrary to local and national planning policy, by the unauthorised operation of a commercial vehicle centre. The access along Bar Lane is narrow."

9. There was subsequent correspondence involving the appellant, Mr Clark, and a Mr J Cullen the local authority's principal planning enforcement officer. Whilst there was an attempt to raise some technical points regarding what were said to be imperfections in the way in which the local authority had sought to raise its objections, the primary point taken on behalf of the appellant was to the effect that the Certificate effectively authorised all of the functions which PED Plant would be performing at its proposed Operating Centre such that planning enforcement action could not be taken or, if it were to be taken, would be doomed to failure. The local authority, however, disagreed, taking the view that the Certificate did not authorise use of the land as an Operating Centre. The local authority also contended that there were suitability issues on the basis that the location of the proposed Operating Centre was adjacent to a Site of Special Scientific Interest and that the use of the land as an Operating Centre would result in "*more noise, visual disturbance and potential pollution to the adjacent SSSI*".

The Law

10. Subject to specific exceptions which have no application here, section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the Act") provides that no person shall use a goods vehicle on a road for the carriage of goods for hire or reward or for or in connection with any trade or business carried on by him except under a licence issued under the Act.

11. Section 13C contains some requirements which must be met by applicants for both standard and restricted licences. Section 13C(5) provides as follows:

> "A heavy goods vehicles licence must specify at least one place in the traffic area concerned as an operating centre of the licence-holder, and each place so specified must be available and suitable for use as an operating centre of the licence-holder (disregarding any respect in which it may be unsuitable on environmental grounds)".

12. Thus, unless a proposed Operating Centre is both suitable and available, a licence will not be issued.

The TC's decision and reasoning

13. A case worker employed by the OTC prepared a summary of the issues and competing arguments for the TC. That included the following observations and recommendation:

> "Mr Smith [that is an intended reference to Mr M Clark] explains that the land in question has been granted a Certificate of Lawful Use which gives a list of activities that are immune from law enforcement. One of these activities is the storage of civil engineering/commercial vehicles and building materials. He states, "Mr Pedal already has the right to deliver and collect from the site, this also includes deliveries to the site from suppliers of building materials so the activities are already legitimately being carried out without the need to apply for planning. There is little or no difference between storage and logistically removing a stored vehicle from storage to put to use so as it then becomes operational. To grant the operator's licence would have no further detrimental effect on the surrounding area as the activities are being carried out on this site already and are lawful.
>
> The Council later confirmed that whilst they are aware the site benefits from a Certificate of Lawfulness for the storage of commercial/civil engineering vehicles and building materials, it is considered that amending this use to that of an HGV operators centre requires planning permission as the latter use is "sui generis" (within a class of its own) and as such permission is required to amend the use of the land. It is not considered by the Council that Mr Pedal's application can be modified in a manner which would overcome their concerns. Mr Smith [Mr Clark] disputes this and states that the use of storage falls clearly within the defined limits of Class B8 and therefore cannot be sui generis".

> "Harrogate Borough Council object to the grant of this application on the grounds of suitability and lack of planning permission. They believe a planning application would be refused by the local authority due to the close proximity of the adjacent SSSI. Their objection was received in time, copied to the applicants, and signed by a person authorised for that purpose, therefore I recommend it is ruled valid.
>
> There is an ongoing dispute between the council and the site owner Matthew Smith [Clark]. The site has been issued with an enforcement notice although not in relation to the use of HGV's. At present no planning application has been submitted by the site owner. He believes planning approval is not required as the site has been granted a Certificate of Lawful Use which allows the storage of civil engineering/commercial vehicles on his land. The intended use of the site has been explained to the council, who confirmed the CLU does not allow the operation of goods vehicles and that a planning application for this use is required.
> Guidance confirms that a site is available pending a full determination by the council, however the site must be available at the point of determination. The site owner is not prepared to submit a planning application therefore it does not appear that the site can be considered as available. For this reason, I recommend that the application is refused under Section 13C (5) of the Act."

14. The TC, at that stage, suggested the parties be approached with a view to attempting to reach some form of agreement. However, the OTC's subsequent attempt to encourage agreement foundered. The appellant indicated he did not seek to have the matter considered at a Public Inquiry and the TC, as confirmed in a letter of 29 December 2020, decided to refuse the application. In explaining why, he said this:

> "This is a planning issue and there is dispute over whether or not the owner of the site has sufficient permission for the site to be used as an operating centre. Therefore, at present I am not assured as to the availability of the site for this purpose. The STC guidance is clear that a Traffic Commissioner should not become embroiled in planning disputes. It is clear that there are contradictory interpretations of what constitutes the action of commercial vehicle storage and operation of the site. I do not feel that this is an issue that a Traffic Commissioner should be asked to resolve, and the dispute should be considered by planning law experts in the first instance, through the civil courts if required.
>
> Statutory Document Number 4 explains how a Traffic Commissioner should interpret the law in relation to operating centres and stable establishments. Section 51 of the document confirms: "Traffic Commissioners cannot and should not become involved with matters of planning law or consent. A site is available, pending a final determination, but it must actually be available at the date of determination not a date set in future. The Transport Tribunal has stated that Traffic Commissioners should not be invited or expected to investigate or resolve outstanding questions of property law".

15. The reference to "*STC Guidance*" and "*Statutory Document Number 4*" is a reference to Guidance issued by the Senior Traffic Commission for Great Britain under Section 4C(1) of the Public Passenger Vehicles Act 1981 and by reference to section 1(2) of the Goods Vehicles (Licensing of Operators) Act 1995. Its stated purpose is to provide information as to the way in which the Senior Traffic Commissioner believes that Traffic Commissioners should interpret the law though it does not, of course, bind the Upper Tribunal. The reference

to the "*Transport Tribunal*" is a reference to the predecessor of the Upper Tribunal with respect to this jurisdiction.

The grounds of Appeal

16. On our reading there are 5 written grounds of appeal. There can, we think, fairly be summarised in this way:

> Ground 1 - The local authority's objection had been based on "*environmental grounds*" and, therefore, the TC had erred in refusing it on non-environmental grounds.
>
> Ground 2 - The local authority's objection did not comply with procedural requirements and was not valid.
>
> Ground 3 - The TC had misunderstood "*the facts of the case*". That is to say, the TC had failed to appreciate that planning permission was not required for the relevant land to be used as an Operating Centre because the activities which would be carried on under the licence were already authorised by the Certificate.
>
> Ground 4 - The TC had given inadequate reasons for his decision to refuse a licence.
>
> Ground 5 - The TC had been biased.

The Hearing

17. It was argued, before us, in line with the content of Ground 3 above, that the proposed activities under the licence in relation to the Operating Centre were already covered by the Certificate of Lawful Use. Further, it was said that there would be no increase in journeys or vehicle movements as a consequence of the grant of a licence and the utilisation of the land as an Operating Centre, over and above the number of journeys and the number of vehicle movements currently being made. There might even be a reduction in journeys in consequence of the use of a larger vehicle rather than a number of smaller vehicles which are being currently used. It was stressed that the appellant is a small operator.

18. Mr Yearsley, for the local authority, asserted that there was a dispute of substance regarding the need, or otherwise, for planning permission before the relevant land could be used as an Operating Centre. That was so whatever the appellant might think about the merits of the dispute. It was not for the TC to seek to "*become a Judge of planning law*" and adjudicate upon such a dispute. The conclusion he had reached about that was an appropriate one. Nor was it for the Upper Tribunal to seek to adjudicate upon planning matters even if it were to think any planning application ought to be granted.

19. Mr M Clark, in closing, suggested that a TC should not involve himself in planning law issues but that that was exactly what this TC had done. Pausing there, we think the point Mr Clark was seeking to make at that stage was that a TC should make a decision regarding the availability of an Operating Centre without having regard to issues or disputes relating to planning at all.

20. There was a suggestion, at the end of the hearing, that a further document which the appellant might seek to rely upon might be submitted to us after the hearing. We indicated we would permit a further 7 days for that to happen, but no such document has been supplied.

The Upper Tribunal's Approach

21. The Upper Tribunal, in appeals such as this, is not permitted to take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal (see paragraph 17 (3) of Schedule 4 to the Transport Act 1985).

22. Paragraph 17 (1) of the above Schedule provides "*The Upper Tribunal are to have full jurisdiction to hear and determine on all matters (whether of law or of fact) for the purposes of the exercise of any of their functions under an enactment relating to transport*". But in *Bradley Fold Travel Limited and Anor v Secretary for State Transport [2012] EWCA Civ 695*, the Court of Appeal explained that the then Transport Tribunal (now the Upper Tribunal) is not required to rehear all of the evidence by conducting what would, in effect, be a new first instance hearing. Instead, it has the duty to hear and determine matters of fact and law on the basis of the material which was before the TC but without having the benefit of seeing and hearing from witnesses. The appellant "*assumes the burden*" of showing that the decision which is the subject of the appeal is wrong. In order to succeed an appellant must show not merely that there are grounds for preferring a different view but that there are objective grounds upon which it ought to be concluded that the different view is the right one. Put another way, the appellant must show that the process of reasoning and the application of the law requires the Upper Tribunal to take a different view.

Our analysis of the Grounds of Appeal

23. Certain of the grounds we have summarised above may be dealt with shortly. We shall address the ones which fall within that category first of all.

24. As to ground 1, the local authority had, in fact, raised issues concerning environmental factors but also issues regarding the lawfulness or otherwise of the use of the relevant site as an Operating Centre. In any event, the TC was tasked with deciding whether or not the requirements set out at Section 13C(5) were or were not satisfied. As such, assuming this was the appellant's contention, the TC did not err in determining such matters. Indeed, he was statutorily obligated to do so and would have erred in law, had he not done so. We reject this ground of appeal.

25. As to ground 4, the TC's reasoning, as set out above, was succinct. But succinctness, of itself, is not to be criticised. The key issue upon which the decision was based (the availability of the operating centre given the planning dispute) was a narrow one. It is readily apparent

from what the TC said why it was that he had concluded that he could not be satisfied as to availability given the circumstances of the dispute. There was no inadequacy of the reasoning and we reject this ground of appeal.

26. Ground 5 amounts to an allegation of bias. However, no evidence of actual bias has been provided. Further, it is not apparent to us that an informed and independent observer might find any reason whatsoever to perceive bias. The ground as put, in our view, simply amounts to an allegation that the TC must have been biased because he did not resolve matters in favour of the appellant. But, of course, that simply does not follow. We reject this ground of appeal. We would add, more generally, that an allegation of bias is necessarily a very serious allegation even if entirely unmeritorious and such really ought not to be made absent very careful thought and good reason for making it.

27. We now turn our attention to ground 2 which merits a little more by way of explanation and evaluation. The ground is best understood, we think, as a contention that the TC erroneously overlooked failings on the part of the local authority to lodge and notify its objection to the TC and to the appellant.

28. Section 12 of the 1995 Act relevantly provides:

> **12. - Objections to, and representations against, issue of operator's licences.**
> (1) Any of the persons mentioned in subsection (2) may make an objection to the grant of an application for an operator's licence on the ground –
> (a) That any of the requirements of sections 13A to 13D are not satisfied in the case of the application; or
> (b) that any place in the traffic area concerned which, if the licence is issued, will be an operating centre of the holder of the licence, will be unsuitable on environmental grounds for use as such.
> (2) The persons who may make such an application are-
> …
> (d) A planning authority.
> (3) …
> (4) …
> (5) …
> (6) Any objection under subsection (1) (a) shall be made –
> (a) Within the prescribed time;
> (b) In the prescribed manner.
> (7) Any objection under subsections (1)(b) or representations under subsections (4) shall be made –
> (a) Within the prescribed time after the making of the application to which they relate;
> (b) In the prescribed manner.
> (8) Where a Traffic Commissioner considers there to be exceptional circumstances that justify his doing so, he may direct that an objection or representations be treated for the purposes of this Act as duly made under this section, notwithstanding that the objection was not, or the representations were not, made within the prescribed time or in the prescribed manner.
> (9) Any objection under subsection (1) shall contain –
> (a) In the case of an objection under paragraph (a), particulars of the ground on which it was made,

> (b) In the case of an objection under paragraph (b), particulars of any matters alleged by the person making the objection to be relevant to the issue to which it relates. …"

29. The above represents the wording, as it was, at all material times for the purposes of this appeal.

30. Regulation 11 of the Goods Vehicles (Licensing of Operators) Regulations 1995, requires objections made under section 12 of the Act to set out the basis for the objection, to be signed, and to be copied to the licence applicant on the same day or the next working day after delivery to the TC. Regulation 12 also requires the objection to be made within a 21-day period commencing immediately after notice of the licence application was published (the requirement for publication being contained within section 11(2) of the Act).

31. It is, we think, effectively the position of the appellant that those or some of those requirements were not complied with such that the TC was not entitled to give consideration to the objection.

32. We accept that not all of the above requirements were complied with by the local authority when making its objections to the grant of the licence or that, at least, we accept that the material before us does not show that they all were. In particular, whilst it seems clear that the written objections were lodged within the applicable 21-day time limit, it does not appear that the written objection initially lodged with the TC was signed (notwithstanding an apparent suggestion from an OTC caseworker that it was) and it does not appear that a copy was sent to the appellant on the day of lodgement or the following day. The TC, though, does have a power (see above) to treat objections as having been duly made even where not made in the prescribed manner, if satisfied that there are exceptional circumstances to justify that being done. The TC's reasoning did not include any express finding that there were such exceptional circumstances but, in our view, it may readily be inferred that he had so concluded bearing in mind that the issue of the need to consider exercising such discretion had been drawn to his attention by the caseworker who was assisting him; and that the impact of the coronavirus pandemic upon administrative procedures undertaken by many organisations including, we assume, local authorities had been significant. We have, therefore, proceeded on that basis. But additionally, and in any event, we would make the obvious point that section 13 of the Act requires a TC to consider (the phrase used is "must consider") whether the requirements of sections 13A and 13C are satisfied. As already noted, section 13C(5) contains a requirement that the Operating Centre must be available to be so used. Thus, irrespective of the position regarding compliance with requirements for the lodging of objections, the TC had to decide the question of availability and, of course, had to do so on the basis of all of the material in front of him. For those reasons we do not consider this ground of appeal to be made out.

33. That leaves ground 3. It was that ground which took up all of the time at the oral hearing of this appeal and which has comprised the main battleground between the appellant and the respondent. We have to consider whether the TC approached the question of availability correctly in light of what he had identified as an existing planning dispute concerning the land in which the Operating Centre was to be located.

34. There is previous case law which we think it appropriate to consider.

35. In a decision of the Transport Tribunal in *2003/87 J Hansford* it was said that it was undesirable for a TC to become involved in questions of land law and that a similar view was to be taken "*in relation to planning law'*. In *Subic Solutions Limited* [2010] UKUT 468 (AAC) the Upper Tribunal said that the Act does not allow for the grant of a licence if an Operating Centre is not available and the TC's decision to the effect that the proposed Operating Centre in that case was unavailable in consequence of a lack of evidence of the landlord's "*clear permission*", was upheld. In *2004/202 D Holloway* it was said by the Transport Tribunal, that TC's "*should not be invited or expected to investigate or resolve outstanding questions of property law"*.

36. The above case law supports the view that where there are planning or similar sorts of disputes of substance which are unresolved and which concern the lawfulness or otherwise of the use of a site as an Operating Centre, a TC ought not, absent something exceptional, to seek to adjudicate upon such matters himself/herself. Some of the decisions we have referred to above are, by now, a little dated. But we have not been given any persuasive reason to depart from the logic which underpins those decisions, and we can detect no such reasons for ourselves. Indeed, it seems to us entirely rational and sensible to say that it would be inappropriate to expect a TC to have the necessary planning expertise and experience to enable him or her to properly assess the likely outcome of a planning dispute or to seek to adjudicate upon a dispute of a technical nature as to whether a particular use might be lawful or not. Further, it is of course the case that planning law itself provides a machinery for such disputes to be resolved in the way that, for example, Mr M Clark's own dispute with the local authority was resolved on a previous occasion.

37. The key element of the TC's decision in this case was to the effect that he could not be satisfied, in the circumstances and in light of the dispute and the indication that planning enforcement action would be taken, that the proposed site was available. Given the clear indications emanating from the local authority it was entirely reasonable for the TC to conclude that, had a licence been granted, enforcement action would be taken and that had direct relevance to the question of availability. In truth, as a matter of law, we cannot see that the TC could viably have reached any different conclusion as to availability than that which he did reach. His approach of not seeking to second guess what might have been the outcome of the planning dispute and his approach in saying that such was not a matter for him, was a lawful one. It was also, from a common-sense perspective, in our view, the correct one. We are not able to say, therefore, that the TC made any error of law and we are not able to say that he reached a conclusion that was plainly wrong. That being so, although we can understand why the point has been argued, we reject this ground of appeal.

38. In light of the above, we have no alternative but to dismiss this appeal. We will, however, permit ourselves some brief observations. The evidence did appear to suggest, whilst we appreciate there might be considerations unknown to us or quirks of planning law and practice with which we are not familiar, that the use of the proposed Operating Centre in the way Mr Pedal has indicated it would be used, would not be particularly intrusive and would not necessarily result in any more disruption, journeys, or vehicle movements than are currently

being undertaken at the present time. It is fair to say that we are, therefore, a little surprised at what appears on one view to be an unduly firm approach taken by the local authority with respect to the planning considerations. We imagine, given our decision, some form of planning application might now have to be made by or on behalf of the appellant, and we would express the hope (though we have no reason to think the position would be otherwise) that such an application would be dealt with in a balanced and flexible manner. We stress however, it is not for us to seek to suggest what the outcome of any such application ought to be.

Decision

39. This appeal to the Upper Tribunal is dismissed.

M Hemingway
Judge of the Upper Tribunal

A Guest
Member of the Upper Tribunal

G Roantree
Member of the Upper Tribunal

Authorised for issue on 18 July 2022