

NCN: [2017] UKUT 285 (AAC)

Appeal No. T/2017/03

IN THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR
THE SCOTTISH TRAFFIC AREA (Ms J Aitken)**

Dated: 22 November 2016 (public inquiry: 13 June 2016)

Before:

Mr E. Mitchell

Judge of the Upper Tribunal

Mr A. Guest

Member of the Upper Tribunal

Mr G. Inch

Member of the Upper Tribunal

Appellant:

**A partnership comprised of Mr Ross Munro and Miss
Helen Pettigrew**

Attendances:

Mr McAteer (solicitor), of Beltrami & Co, for the partnership

Heard at:

George House, 126 George Street, Edinburgh

Date of hearing:

9 March 2017 (with subsequent written submissions)

Date of decision:

6 July 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal is allowed. The partnership's application for a licence under the Public Passenger Vehicles Act 1981 is remitted to a traffic commissioner to be selected by the Senior Traffic Commissioner, other than the Scottish Traffic Commissioner, for redetermination.

SUBJECT MATTER:-

Application for standard public service vehicle operator's licence; fairness of proceedings before a traffic commissioner; adequacy of commissioner's reasons

REASONS FOR DECISION

Background

1. A partnership comprised of Mr Ross Munro and Ms Helen Pettigrew applied on 5 November 2015 to the Scottish Traffic Commissioner (hereafter "the Commissioner") for a standard licence under the Public Passenger Vehicles Act 1981 (hereafter "the 1981 Act"). The partnership had the trading name Livingston Travel.
2. We note that, under Scots law, a partnership is a separate legal entity (section 4(2) of the Partnership Act 1890). By contrast, under the law of England and Wales, a partnership does not have a legal existence distinct from that of its members (*Sadler v Whiteman* [1910] 1 K.B. 868).
3. At the hearing before ourselves, we requested written confirmation that Miss Pettigrew, as the other member of the partnership, consented to the bringing of this appeal. Only Mr Munro attended the hearing before the Upper Tribunal. Written confirmation was duly provided.
4. The partnership's application sought authorisation to operate two public service vehicles (PSVs). The application described the operator's proposed operating centre, vehicle maintenance and financing arrangements and gave details of the operator's nominated transport manager. The application also disclosed Ms Pettigrew's conviction for a speeding offence ('SP 50') on 8 February 2014, for which the penalty was a £60 fine and the endorsement of three points on her driving licence, and Mr Munro's convictions for the offence of using a mobile phone while driving, for which the penalty was a £60 fine and three points on his driving licence, and a £100

‘telecoms fine’, for using inappropriate language in a text message, on 10 August 2012.

5. By letter dated 9 May 2016, the Office of the Traffic Commissioner (OTC) wrote to the partnership to inform it that the Commissioner proposed to hold a public inquiry, before deciding whether to grant the partnership’s application, “to discuss the areas of concern and give you the opportunity to demonstrate how you meet the requirements”.

6. The public inquiry call-up ‘brief’ recorded that “a check of the drivers live system shows that in September 2014, Mr Munro was given a verbal warning following a driver conduct event”. Referring to this matter, the partnership’s application had stated that Mr Munro had previously been called to a public inquiry. It went on to give these details:

“to be granted provisional driving entitlement for D/D1 – entitlement was granted after public inquiry. R. Munro was deemed fit and proper after hearing”.

7. The brief also referred to a Traffic Examiner’s report written following observations carried out on 26 and 27 January 2017. The report concluded that on those dates the partnership were operating a service transporting employees of the Atos and Hologic companies in the Livingston area using a vehicle with the registration no. GD03 VMK. That vehicle displayed a “licence disc belonging to Andrew Liddle” (a restricted PSV licence). Registration checks indicated that the partnership purchased the vehicle on 6 September 2014 (and disposed of it on 9 February 2016).

6. A Traffic Examiner interviewed Mr Munro under caution on 27 January 2016. The interview transcript indicates that Mr Munro stated:

- Andrew Liddle owned the vehicle in question;
- Acting as a self-employed person, Mr Munro was given weekly payments by Mr Liddle for “driving the bus”. Mr Munro denied being the operator of the minibus;
- The pending partnership application was intended for “school runs” and the business would operate alongside Mr Munro’s existing taxi business;
- he was driving Mr Liddle’s minibus “to keep my driving experience up”;
- he did not own the minibus.

7. On 27 January 2016, a Traffic Examiner also interviewed Mr Liddle. The interview transcript shows that Mr Liddle stated:

- he was the operator of the minibus;
- the minibus was used to fulfil a contract entered into by the 'Seven Seater Company' but that company had been closed down "hence the reason its care of Livingston Travel". [According to Companies House records, the company was dissolved on 11 September 2015];
- he was the owner of the minibus. When the Traffic Examiner asked Mr Liddle to explain why the minibus was registered to Livingston Travel, he responded "it made it easier for the money situation for petrol money, maintenance checks...that kind of thing for [Mr Munro] to look after the contract because I lost interest because of my Dad being unwell";
- payments under the Seven Seater Company contract were made to Mr Munro and he arranged for maintenance, insurance and the vehicle excise licence;
- he thought Mr Munro had been operating the minibus from a date before "he got his driving licence D1 entitlement", that date being "maybe January 2015". Since that date, Mr Liddle had not had anything to do with use of the minibus.

8. A Traffic Examiner interviewed Mr Munro again on 28 January 2016. The transcript of the interview indicates:

- Mr Munro stated payments for the minibus contract went into his bank account and maintenance charges were paid from that account. The arrangement had been going on for about 11 months;
- in response to the question whether Mr Liddle received any of the contract monies, Mr Munro said "not as such there is money in the account though. It will be done at the end of the tax year, whatever profit is left". Mr Munro maintained that Mr Liddle was aware of this arrangement;
- Mr Munro drew the Examiner's attention to a passage from the PSV Operator Licensing Guide: "The payment may be made to the operator, the driver or any representative acting on behalf of the operator";
- Mr Munro conceded that he paid for the minibus but maintained it was owned by Mr Liddle because "it's on his operator disc. It's on the VOSA site";

- Mr Munro said the purpose of the arrangement with Mr Liddle was to give him some industry knowledge “in preparation for the application of my own operator licence”. He ensured all DVSA rules concerning upkeep and maintenance were complied with and “I’s also like to add that I’m extremely sorry and devastated that it looks like I’ve broken the law. It’s not a deliberate act, far from it. I’ve tried to help a friend and gain experience at the same time”.

9. The partnership were represented at the public inquiry by Mr McAteer (who also appeared before the Upper Tribunal).

10. The transcript of the inquiry reveals:

- Mr Liddle did not attend (the inquiry was also convened to consider Mr Liddle’s application for variation of the conditions attached to his restricted licence);

- Mr McAteer questioned the Traffic Examiner who had interviewed Mr Munro and Mr Liddle. The questioning went on for some time but the gist of it was that (i) Mr McAteer put it to the Examiner that, during Mr Munro’s 28 January 2016 interview, the Examiner did not put to Mr Munro an entirely accurate description of Mr Liddle’s interview on the previous day and (ii) Mr Liddle’s concession that Mr Munro was operating the minibus business followed some cajoling on the part of the Examiner when, in reality, the correct identification in law of an operator is a matter of fact and degree over which there may be reasonable differences of opinion;

- Mr Munro said he purchased the minibus and agreed Mr Liddle could use it because he had sold his own vehicle and was struggling financially;

- Miss Pettigrew gave evidence that she had no experience in the transport industry but she was an organised person who would assist with paperwork and marketing.

11. Following the public inquiry, on 11 July 2016 the OTC wrote to Mr McAteer informing him that the Commissioner had ordered a transcript of an earlier driver conduct hearing involving Mr Munro. The transcript and the papers relied on by Mr Munro for that hearing would be supplied to Mr McAteer. The letter ended by stating that the Commissioner would defer making a decision on the partnership’s application until Mr McAteer had seen the transcript and driver conduct papers.

12. The next letter in the Commissioner’s file is undated but refers to the 11 July 2016 letter and states the transcript of a driver conduct hearing “in October 2014” is enclosed together with “related correspondence”. The letter states that Commissioner

has “reminded herself of these matters” and will take them into account. Mr McAteer was invited to request a reconvened public inquiry or to make written submissions.

13. The following papers then appear in the Commissioner’s file:

(a) letter dated 1 October 2014 written to Mr Munro by the OTC. The letter states that, in the light of convictions recorded against Mr Munro (the same convictions disclosed in the partnership application) the Secretary of State had referred to a traffic commissioner “your application for provisional large goods vehicle entitlement”. This letter also referred to a letter dated 24 September 2014 and an email dated 29 September 2014. A copy of the email is in the file but the letter appears not to be;

(b) a letter dated 16 January 2015 written on Mr Munro’s behalf by his MP requesting a decision as soon as possible;

(c) the Commissioner’s letter in response to the MP, dated 12 February 2015, stating that the Commissioner had instructed that Mr Munro be granted “provisional PCV driver licence entitlement”;

(d) the Commissioner’s decision letter dated 12 February 2015 addressed to Mr Munro at 42 Nettlehill Road, the registered office of a taxi company that Mr Munro had been involved with but which was dissolved on 27 December 2013 (letters written to Mr Munro by the OTC in connection with the present application were sent to 62 Gillespie Place). There were no accompanying reasons but the decision letter did state “Following on from the conduct hearing the Traffic Commissioner has asked that I warn you that you have no entitlement to operate passenger carrying vehicles and that Public Service Vehicle Operators licences are not transferable and therefore you cannot buy or rent an operator’s licence from any other party”;

(e) an email dated 10 August 2016 written by Mr McAteer’s firm (Beltrami & Co.) which acknowledges receipt of the transcript of the driver conduct hearing. The letter reiterated the case put on Mr Munro’s behalf at the public inquiry and submitted that new financial evidence supplied showed that the requirement for financial standing was met and, accordingly, there was no need to convene another costly public inquiry.

14. On 22 November 2016, the Commissioner rejected the partnership’s application. The Commissioner’s reasons include the following findings and conclusions:

(a) sometime in 2015, probably February, Mr Liddle ceded operation of his minibus contract to Mr Munro. Mr Munro supplied the minibus and drivers and received and retained the contract payments;

(b) in August 2015 Mr Liddle applied to vary the conditions attached to his restricted licence which was “at odds with any suggestion that Mr Liddle was emotionally hampered...from attending to business matters”;

(c) “I am I no doubt that from at least early 2015 Mr Ross Munro operated the Atos Livingston station contract and that he did it for his own commercial benefit and not as agent or proxy for Mr Liddle”;

(d) despite the warning given in the 12 February 2015 letter (following the driver conduct hearing), “it is now clear that [Mr Munro] and Mr Liddle had made an arrangement whereby Mr Munro had taken over a shuttle run contract which required an operator’s licence and disc and that the disc came from Mr Liddle”. The next paragraph of the reasons read as follows:

“I do not find Mr Munro to be credible or trustworthy to hold an operator’s licence. I am not satisfied that he has repute and therefore the partnership cannot have a licence and the application is refused”;

(e) “I make no adverse findings against Ms Pettigrew. There is no evidence that she was party to the arrangement or instrumental in its inception or continuation...Similarly, I say nothing adverse in relation to Mr Horsburgh [proposed transport manager]. All else being equal he could be transport manager, with an agreed contract between the parties”;

(f) The Commissioner made “some observations on finance” and went on to express puzzlement as to the source of finance relied on by the partnership. The Commissioner ended by stating “I remain to be satisfied on finance”.

The grounds of appeal

15. For the partnership, Mr McAteer argues:

(1) at the driver conduct hearing, the Commissioner gave no warning along the lines of those recorded in the letter of 12 February 2015. And the decision letter of 12 February 2005 was not issued to Mr Munro, only to the M.P. who had been assisting him. It follows that Mr Munro had not been put “on warning” that he had no entitlement to operate passenger carrying vehicles nor that PSV licences were non-transferable. Accordingly, the Commissioner’s finding that Mr Munro lacked credibility was flawed;

(2) the Commissioner made no findings of fact to support her conclusion that Mr Munro lacked credibility;

(3) the Commissioner gave inadequate reasons for her finding that Mr Munro lacked credibility.

Conclusions

16. We find that grounds 2 and 3 are made out and allow this appeal. The Commissioner's conclusion that Mr Munro lacked credibility followed a recitation of the evidence but the necessary linkage between the evidence and the conclusion – in the form of relevant findings of fact – was absent. For the same reason, the Commissioner gave inadequate reasons for her finding that Mr Munro was not credible. These were material errors of law.

17. Even if we assume the 12 February 2015 letter was properly issued to Mr Munro:

(a) the evidence, including the 'warning' in the 12 February 2015 letter, does not speak for itself so as to compel the conclusion that Mr Munro was neither credible nor trustworthy. As Mr McAteer pointed out at the hearing, the documentary evidence does not necessarily imply that Mr Munro set out deliberately to circumvent the licensing regime;

(b) a question remained as to whether Mr Munro had made an honest mistake as to the nature of the warning contained in the 12 February 2015 letter. Such a mistake would not, of course, turn an unlicensed operation into a licensed operation but it would bear on the credibility of Mr Munro's evidence and his trustworthiness. This point was not addressed in the Commissioner's reasons.

18. On the evidence, we cannot properly find that the 12 February 2015 letter was not issued to Mr Munro. The letter of 12 February 2015 was addressed to Mr Munro at 42 Nettlehill Road. A previous OTC letter about the driver conduct hearing, dated 1 October 2014, was also addressed to Mr Munro at 42 Nettlehill Road and must have got to him because he attended the subsequent driver conduct hearing. However, his correspondence address has now changed. It seems us to be fair that the OTC should, for the purposes of the remitted determination, check their files in case the 12 February 2015 letter was not sent to the address for correspondence notified by Mr Munro as at that date.

19. We have thought long and hard about how fairly to dispose of this appeal. Mr McAteer made cogent submissions that the Upper Tribunal should itself grant the licence that the Commissioner refused. We were nearly persuaded but, ultimately, decided that the partnership's application should be remitted to a traffic commissioner for reconsideration.

20. The Commissioner made no definite finding as to Mr Horsburgh's suitability to act as the operation's transport manager and left open the question whether the

operation had sufficient financial standing. In our view, in this case these are matters that should be addressed by a traffic commissioner since the commissioners are the body designated by Parliament as normally responsible for making licensing decisions, have a level of day-to-day involvement with the transport sector that the Upper Tribunal does not and may be better placed to decide on the effectiveness of licence conditions where licensing concerns exist but are not sufficient to justify refusing a licence.

21. Had we been minded to take the course proposed by Mr McAteer, we may also have needed to invite the Driver and Vehicle Standards Agency to make further submissions on the application and possibly held a further hearing, adding to the delays experienced by the partnership in determining this application.

22. We order that the Commissioner's decision is set aside and remit the partnership's application for re-determination before a different traffic commissioner. We do not consider it would be fair to remit to the Scottish Traffic Commissioner in the light of her adverse findings about Mr Munro's credibility and trustworthiness. Under paragraph 14 of Schedule 4 to the Transport Act 1985, it falls to the Senior Traffic Commissioner to allocate a commissioner to decide the partnership's application.

23. Since we have set aside the Commissioner's decision, it follows that the traffic commissioner who next deals with the partnership's application must not, in his or her reasoning, take into account the Commissioner's findings of fact and conclusions.

24. Finally, we acknowledge our gratitude to Mr McAteer for his assistance at the hearing. His submissions were measured and sensible and, in our view, he ably represented the partnership without losing sight of the wider public interest factors that must be taken into account in PSV licensing cases.

Mr E. Mitchell, Judge of the Upper Tribunal,

6 July 2017

(signed on original)