



NCN: [2018] UKUT 432 (AAC)

Appeal No. NT/2018/55

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

**ON APPEAL from the DECISION issued on behalf of the HEAD of the
TRANSPORT REGULATION UNIT
Dated 6 July 2018**

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr John Robinson	Member of the Upper Tribunal
Mr Andrew Guest	Member of the Upper Tribunal

Appellant:

Mr Albert Keenan

Attendances:

For the Appellant: The Appellant was not present and was not represented

For the Respondent:

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 29 November 2018
Date of decision: 18 December 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

SUBJECT MATTER:- Application for restricted licence; sufficiency of evidence concerning financial resources

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd &
Peter Wright v Secretary of State for Transport [2010]
EWCA Civ. 695;

REASONS FOR DECISION

1. This is an appeal from the decision issued on behalf of the Head of the Transport Regulation Unit, ("Head of the TRU") to refuse the Appellant's application for a goods vehicles operator's licence.
2. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-
 - (i) On 11 March 2018 an application for a restricted goods vehicle operator's licence was received in the Department. The application sought authorisation for two vehicles. Attached to the application was a copy of a bank statement for a current account in the joint names of the Appellant and his wife and which covered the period from 2 September 2017 to 29 December 2017.
 - (ii) On 21 March 2018 correspondence was forwarded to the Appellant from the Department in which receipt of the application was acknowledged and which sought additional supporting documentation including the following:

'Financial evidence to demonstrate you have ready access to sufficient resources to support your application. The type and size of licence applied for requires a sum of **£4,800** to have been available during a **28 day period**, the last date of which must not be more than two months from the date of receipt of the application.

I acknowledge receipt of your bank statements from account ending 4955. However, these are more than two months old from the date of receipt of application.

Please therefore forward **original** or **certified** bank or building society statements covering a 28 day period, the last date of which must not be more than two months from the date of receipt of the application, along with proof of any overdraft facility in place (please ensure date commenced is specified if applicable). An offer of an overdraft will not be acceptable, only a formal written commitment will suffice.

Further guidance on the types of financial documents that are acceptable is contained in the enclosed financial guidance note for operators.'
 - (iii) The Appellant did not reply to the correspondence of 21 March 2018. Further correspondence to the same effect was forwarded to the Appellant from the Department on 17 April 2018.
 - (iv) On 24 April 2018 correspondence was received in the Department from the Appellant. To this correspondence the Appellant attached copies of bank statements for a current account in the joint names of the Appellant and his wife and which covered the period from 29 December 2017 to 29 March 2018.
 - (v) On 22 May 2018 correspondence was forwarded to the Appellant from the Department which included the following:

'As you are relying on finances in a joint account to support the application, we require completion of a statutory declaration to confirm that (GK) gives her permission to allow the funds in the account to be used for your business. A template is enclosed and it must be completed in the presence of a Solicitor.

Your response is required by **no later than Tuesday 5 June 2018**. If you fail to submit a satisfactory response by that deadline the application will likely be refused.'

- (vi) The emphasis in the correspondence of 22 May 2018 is that of the Department.
 - (vii) On 6 June 2018 further correspondence was received in the Department from the Appellant in which he stated, *inter alia*, that he was enclosing '... another statement to prove that I have the money to keep my lorry in order.'
 - (viii) Attached to the correspondence received on 6 June 2018 was a copy of a 'Statement Print Service' relating to a bank account. There was no indication of the name of the bank account holder and the account was described as a 'EUR-SAVINGS' account.
 - (ix) There is no record of any relevant contact or correspondence from the Department or the Appellant between the issue of the correspondence from the Department on 22 May 2018 and the issue of a decision letter to the Appellant on 6 July 2018.
3. In the bundle of papers which was before the Upper Tribunal, is a copy of a document which is headed 'Licensing (G) Submission'. It is prefaced with the statement that 'This is an OFFICIAL document and is not for disclosure to any third parties without the specific consent of the Department.' It is clear that this document is from the Department's internal case management system and sets out the various stages of the processing of the application leading to the decision to refuse that application.
4. In the section of the 'Licensing (G) Submission' document which concerned the processing of the application there is a reference to the fact that the Appellant had submitted bank statements relating to a joint bank account in his and his wife's name and that 'no statutory declaration has been received.' In another section there is a statement that the first set of bank statements which had been received from the Appellant, as noted in paragraph 2(i) above were 'too old' and it was conceded that the Caseworker had failed to notice this irregularity and had not requested a statutory declaration. In another section, it was noted that the application remained incomplete as the statutory declaration remained outstanding.
5. Later in the 'Licensing (G) Submission' document, under a note dated 3 May 2018, it is recommended that the Appellant be given a further two weeks to submit the statutory declaration. In a further decision making section of the document, the following entries are made:

'The applicant was given a further ten working days to provide a statutory declaration.

This has not been provided but instead a mini statement from an account has been submitted. However, this account does not show access to sufficient funds and the name of the account holder is not visible.

I therefore recommend the application is refused under the provisions of Section 12(5) as the financial criteria has not been met.

...

The applicant has not provided the requested statutory declaration after being granted a further ten working days to submit this information.

The letter issued to the applicant requested a statutory declaration from (GK) giving permission for the funds in the jointly held account to be used for the business ...

The applicant submitted a financial mini statement for a savings account but there were no details regarding the account holder's name available on the statement. The funds available within this statement are also insufficient and are dated 23 November 2017.

It is my recommendation that the application is refused ... The failure to supply a declaration from the joint bank account holder or sufficient financial evidence in the applicant's name means that the Department cannot be certain that the applicant can financially support the operational cost of operating a heavy goods vehicle licence.

...

The mini statement submitted does not show the account holder's name(s) and the account number is different to that shown on the joint bank account. This evidence cannot therefore be taken into consideration and in any event the sole balance is insufficient to meet the finance requirements. The date of the statement is 1 June 2018, the date of 23 November 2017 referred to above was the previous statement date.

It is not clear whether the funds in that account are in GBP or Euros as the account name is EUR-SAVINGS. This could also be the same for the joint account as both accounts are held with the Bank of Ireland. If so, this means that the balance in the mini statement would be less if converted to GBP (£3,652.10 at today's exchange rate).

A statutory declaration form was enclosed with our letter of 22 May 2018.

(The Appellant) has been given ample opportunity and guidance to meet the finance requirements, including an extension. First and final letters clearly stated the amount required and finance guidance notes were enclosed.

On the basis of the lack of evidence of available funds or a statutory declaration I agree with the recommendation to refuse the application.

...

It is disappointing after allowing the additional time on the advertisement that he has failed to provide the financial information requested and unfortunately left no other option than to refuse the application.'

6. As was noted above, a decision letter was issued to the Appellant on 6 July 2018. The substantive part of the decision letter was as follows:

'I refer to your application for an operator's licence and to our letters requesting additional supporting documentation.

The deadline set out in our last letter has now expired. Your application has been refused under Section 12(5) of the above Act, given that it remains incomplete. You were granted another opportunity to submit a fully completed statutory declaration and sufficient financial evidence to prove you have access to sufficient funds. The documentation requested has not been received and no explanation was offered as to why you were unable to submit the documentation.'

7. On 29 August 2018 an appeal against the decision dated 6 July 2018 was received in the office of the Administrative Appeals Chamber ('AAC') of the Upper Tribunal. The Appellant set out the following grounds of appeal:

'I wish to appeal the decision by the Department for Infrastructure for not giving me an operator's licence. When they wrote to me and asked for more financial evidence, I simply went into the bank and got a statement from the machine. I knew that I had sufficient funds in my Euro Saver account. I then posted this to them on time. However they are saying my name was not on

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the printout but my account number was. After posting the additional information, a few weeks passed and I thought everything must be okay. No one contacted me to say that this was not sufficient. The branch where I got my statement is a counterless branch, there are only machines inside. If they had told me that I needed to get it stamped by a bank official, I could have taken it to another branch. The problem could have been solved easily if they had phoned me.'

8. The appeal was listed for oral hearing on 29 November 2018. On 28 November 2018, correspondence was received in the office of the UT (AAC) from the Appellant. In this correspondence the Appellant stated:

'I am writing to inform you that I am unable to attend my appeal this week. This is due to the cold wet weather which has increased demands on me this week as I deliver coal and 20 Litre drums of oil. It was always my intention to appear and represent myself.

I have read through the file and paid special attention to pages 41 and 42. I did send in a Euro account mini statement showing I had 4100 which is more than the sterling required. During the course of my application I spoke to ... and informed her that I only had one lorry and not the original two I had applied for. I also informed them that I had parking spaces and went to ... as regards the tacograph.'

9. Following receipt of the further correspondence from the Appellant, the Registrar of the UT (AAC) in Northern Ireland was directed to contact the Appellant to ascertain whether he wished to make a formal request for a postponement of the oral hearing. In response the Appellant indicated that he had made all of the submissions that he wished to make and could not add much more by attending. He repeated that he had significant work commitments and did not wish to be disrespectful to the Upper Tribunal. The Appellant repeated the submissions which he had made in his notice of appeal and asked for these to be taken into account.
10. At the oral hearing, the Respondent was not represented.

The relevant legislative provisions

11. Section 12(2) and (5) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 provides:

12.— “Determination of applications for operators’ licences

(2) On an application for a restricted licence the Department must consider—

(a) whether the requirements of sections 12B and 12C are satisfied; and

(b) if the Department thinks fit, whether the requirement of section 12D is satisfied.

(5) If the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) or (2) above are not satisfied, it must refuse the application.

12. Section 12D of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 provides:

'The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition is not prejudiced by reason of the applicant's having insufficient financial resources for that purpose.'

The proper approach to appeals to the Upper Tribunal

13. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

‘There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However it is important to remember that the appeal is not the equivalent of a Crown Court hearing an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: *“the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view”*. The Tribunal sometimes uses the expression *“plainly wrong”* as a shorthand description of this test.’

14. At paragraph 4, the Upper Tribunal had stated:

‘It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, (“the 1995 Act”), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa.’

Analysis

15. In section 13 of the application form the Appellant ticked a box to indicate that he had read ‘Guidance Note 13’ and had included relevant financial evidence. Further, in section 18 of the application form the Appellant ticked a box to confirm that he had provided original financial evidence in accordance with the declaration in section 13 and ‘Guidance Note 13’.
16. In paragraphs 25 to 28 of its decision in *NT/2016/2 365 NI Group Ltd*, the Upper Tribunal stated the following:

‘25. We have already noted that Guidance Note 13 – Financial evidence’ is part of the Departmental document ‘GV(NI) 79: Application Form Guidance Notes.’ This document is readily accessible through the Department’s website. Paragraph 13a of the document reads as follows:

'The Department must be satisfied that you have sufficient financial resources to maintain your vehicles and run your business. This requirement is not reduced in the case of contract or lease hire vehicles whose maintenance is included in the hire charge. The financial standing requirement for operators is a continuing and mandatory requirement that must be kept up to date. Existing operators will be liable to demonstrate the increased pound sterling rate whenever their licences are considered by or on behalf of the Department, either at the five year review stage or where the Department considers an operator's licence for any other reason. The Department will assess the evidence you send in against the current financial levels, which change on an annual basis based on the rate of exchange for the Euro as at 1 October each year and shall have effect from 1 January of the following calendar year. Details of the current financial levels can be found at Annex B of the application. **You should ensure that you have sufficient financial evidence to show that you meet the current levels for the type of licence and number of vehicles you are applying to operate.** If you are applying for a margin for future expansion, you must ensure that you can show access to sufficient funds for all the vehicles you are applying for, not just the ones you wish to operate straight away.

All applicants must provide financial evidence so the DfI can assess this requirement, as follows.'

26. The emphasis in paragraph 13a is the Department's own. Pausing there, it is our view that the explanation given in paragraph 13a could not be more comprehensive or intelligible. The significance of the financial standing requirement is highlighted. There is an explanation of how the Department calculated the appropriate rates. The guidance emphasises, by formatting in bold text, the requirement for an applicant to ensure that he/she has sufficient financial evidence to demonstrate compliance with the current levels for the type and number of vehicle specified on the application.
27. Guidance Note 13 goes on to provide details of types of evidence which could be provided to demonstrate compliance with the financial standing requirement. One type of evidence is 'bank statements' and the Guidance Note says the following about this potential source:

'You should provide original bank or building society statements covering the last 28 days, the last date of which must not be more than 2 months from the date of receipt of the application. If original bank statements are not available, for instance if you have an online only account, then you may provide printouts that have been signed and stamped by the bank as verification that they show a true reflection of your account. Any such printouts must contain the account holder's name and account number, the name of the bank, and all transactions taking place within the 28 day period.'
28. Once again the guidance could not be more unambiguous.'

17. We are also of the view that the Appellant was given practical advice and guidance concerning the irregularities with his application in that (i) the financial evidence which he had supplied with the application did not cover the prescribed period for which such evidence was needed and (ii) that the further financial evidence which was subsequently received and which did cover the prescribed period, required the completion of a statutory declaration from his wife as the evidence related to a bank account in joint names. Further, the Appellant was provided with a statutory declaration template and was informed that it needed to be completed in the presence of a solicitor.
18. As was noted above, the Appellant's response was to fail to act on the assistance and direction which he had been given but to add further complications by forwarding a 'mini-statement' relating to a different bank account which itself was deficient in not having the name of the bank account holder and being ambiguous as to whether it was a sterling or Euro account. Finally, because there were other matters outstanding in connection with the application the Appellant was given additional time to ensure that all aspects of the application were in order. We have difficulty in understanding why the Appellant, having been given the information required to rectify anomalies in the application and sufficient opportunity and time to provide the information required, failed to take decisive action. In this regard, the refusal of the application was due to his own failures and omissions.
19. As was noted above, in his notice of appeal, the Appellant has submitted that there were sufficient funds in his 'EUR-SAVINGS' account to satisfy the financial evidence requirement. He added that in discussions with a Caseworker from the Department he had indicated that he was seeking authorisation for one vehicle alone and not the two which had been specified in the original application. We would note the following in respect of this submission. There is no evidence before us that there was ever a formal application to vary the number of vehicles for which authorisation was required. Indeed, the Departmental Case Notes in the bundle (pages 46 and 47) contain references to several telephone conversations with the Appellant, none of which related to reducing the vehicle authorisation. Accordingly, the funding requirement in connection with the application remained that which was specified to the Appellant in the correspondence to him from the Department of 21 March 2018. As such, and even accepting that the relevant account was a Euro account, the funds contained in that account as of the dates set out in the 'mini-statement' remained insufficient. Further, we cannot ignore the fact that the name(s) of the account holder(s) remains unclear.
20. For these reasons we are satisfied that the decision issued on behalf of the Head of the TRU was not wrong and is confirmed. The appeal is, accordingly, dismissed.



**Kenneth Mullan, Judge of the Upper Tribunal,
18 December 2018**