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

Appeal No. T/2019/76
NCN: [2020] UKUT 160 (AAC)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before: Mr M R Hemingway: Judge of the Upper Tribunal

Appellant: Armthorpe Skips Ltd
Reference: OB2027240

Decided on papers: 22 April 2020

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject matter:

Adequacy of reasons.
Financial requirements.

Cases referred to:

Bradley Fold Travel Ltd v Secretary of State for Transport [2010] EWCA Civ 695.
T/2017/7 Michael Hazell (No.2).
T/2013/77 Hughes Bros Construction Ltd2004/383 Blue Arrow.

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal, brought by Armthorpe Skips Ltd (the appellant), through its sole director Leah Cartwright, from a decision communicated by letter of 25 November 2019 and sent on behalf of an unnamed Traffic Commissioner (TC). The decision was described in the letter as being one to refuse to vary the terms of the appellant's Operator's Licence.

2. Most appeals from decisions made by a TC are decided by a Panel comprising a Judge of the Upper Tribunal and two Specialist members. Further, most such appeals are considered at an oral hearing. I have, however, decided this appeal alone and without a hearing. I shall explain why.

3. The standard form which an appellant is asked to use when lodging an appeal to the Upper Tribunal against a decision of a TC (form UT12ENG) does not contain a question asking an appellant whether an oral hearing is sought or whether a decision based on a consideration on the papers and so without a hearing would be preferred. There might possibly be a case for saying that the form should afford an appellant an opportunity to express such a preference. But anyway, rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the Rules) permits the Upper Tribunal to make any decision (which logically must include a decision on an appeal against a decision of a TC) without a hearing other than a decision in immigration judicial review proceedings, so long as it has regard to any view which may have been expressed by a party when deciding how to proceed (rule 34(2)). Further, paragraph 4 of the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal of 19 March 2020 creates a presumption against a hearing where the relevant Rules of Procedure (as here) permit a decision without a hearing and where not holding one would be in accordance with the overriding objective (see rule 2 of the Rules) and would also be in accordance with the rights of the parties under the European Convention on Human Rights. In this case, the appeal had been listed for a hearing but was postponed because of a general stay of cases in the Administrative Appeals Chamber of the Upper Tribunal of 25 March 2020. However, prior to the postponement Ms Cartwright had informed the Upper Tribunal that she did not propose to attend the hearing. There are no other parties to these proceedings apart from the appellant. The matters I am called upon to determine are straightforward. In light of the above I am satisfied that I am not required to hold a hearing, that my not doing so does not offend the rights of the appellant under the ECHR and that not doing so is in accordance with the overriding objective. Put more simply I am satisfied it is fair to decide this appeal on the papers.

4. As to my deciding the appeal alone, there is nothing in the Rules which requires the appeal to be decided by a Panel. On my reading, Practice Direction: Composition of Tribunals in Relation to Matters That Fall to be Decided by the Administrative Appeals Chamber of the Upper Tribunal on or after 26 March 2014, does not require that either and indeed the default position is that a hearing will be before a Judge sitting alone (see paragraph 3). The real issue in this appeal concerns the adequacy of the TC's reasoning. As such, it does not seem to me that there is any need for specialist input. So, I have resolved to decide the appeal alone. There is also Pilot Practice Direction: Panel Composition in the First-tier Tribunal and the Upper Tribunal of 19 March 2020. As to the content of that, it does seem to me that the setting up of

a remote Panel hearing will cause unacceptable delay and that deciding the appeal without a Panel will be in accordance with the overriding objective (see paragraph 6). So, even if I had otherwise thought there should be a Panel hearing I would still have decided the appeal alone because of the applicability of that Practice Direction.

The role of the Upper Tribunal on appeal from a decision of a Traffic Commissioner

5. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

> "… the Upper Tribunal are to have full jurisdiction to hear and determine 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."

6. So far as matters of fact are concerned, the Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd, and Anor v Secretary of State for Transport* [2010] EWCA Civ 695. The Court of Appeal applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56; where Woolf LJ held:

> " 44. … The first instance decision is taken to be correct until the contrary is shown … An appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one … The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning, and the application of the relevant law, require it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category."

7. The Upper Tribunal's powers of disposal on allowing an appeal are found in paragraph 17(2) of Schedule 4. The Tribunal may make "such order as it thinks fit" or remit the matter for "rehearing and determination".

The background

8. The Upper Tribunal has received a file of papers relating to this appeal which has been provided by the Office of the Traffic Commissioner (OTC). There is included in the file what I think is probably a print-out of a form which had been completed online by Ms Cartwright on behalf of the appellant and which, according to an index, was an application for a new Restricted Goods Vehicles Operators Licence made on 24 September 2019. A set of unaudited accounts was provided in support, its being said that the appellant was exempt from audit under section 476 of the Companies Act 2006. It seems to be suggested in the grounds of appeal to the Upper Tribunal that, at some point either at the outset or whilst the application was under consideration, bank statements were submitted as well. Ms Cartwright, in lodging the appellant's appeal to the Upper Tribunal, has provided copies of bank statements spanning the period from 27 February 2019 to 24 May 2019 but it is not apparent from the paperwork in front of me that either copies or originals of those or any other bank statements were actually sent to the OTC as Ms Cartwright seems to assert. It is possible I suppose, that they were not sent due to error, were sent but not received, or were sent and received but subsequently went astray. An internal OTC note contained within the bundle of papers before me is consistent with the bank statements not having been received, whether sent or otherwise.

9. On 25 September 2019 and so only one day after the receipt of the form, the OTC wrote to the appellant (specifically to Ms Cartwright) providing some general information and asking for additional financial information, its being said that the unaudited accounts were not acceptable. It was also said "*The type and size of licence applied for requires a sum of £3,100 to have been available during a 28 day period, the last date of which must not be more than 2 months from the date of receipt of the application*". Then, by way of instruction, this was said *"Please forward* ***original*** *bank or building society statements, the last date of which must not be more than 2 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 overdraft will not be acceptable, only a formal written commitment will suffice."*. A number of further questions were put by the OTC including whether anyone named in the application had ever applied for a licence in the past and why it was that a previous such application appeared not to have been declared.

10. On 4 October 2019 Ms Cartwright wrote to the OTC providing some information which had been asked of her but which was not ultimately relevant to the issues raised by this appeal. That included a brief but uncontroversial explanation for the failure to declare the previous application. On 11 October 2019 the OTC wrote to Ms Cartwright reiterating the previous request for financial evidence. Due to the rather standardised nature of the letter it would not have been apparent to Ms Cartwright, assuming she had by this time sent bank statements, that they had not (assuming they had not) been received. On 13 October 2019 Ms Cartwright sent an e-mail to the OTC fielding a query about vehicles possessed by the appellant and (more significantly for the purposes of this appeal) attaching two loan agreements (it is not clear to me whether she sent originals or copies), one of which was made with Provident and one of which was made with Everyday Loans. The former is dated 30 September 2019. The latter is dated 6 October 2019. Both are headed "*Fixed Sum Loan Agreement regulated by the Consumer Credit Act 1974*". The loan amount for each agreement is stated to be £2,500. Both make provision for repayment of the sums being loaned. The Provident Agreement names Ms Cartwright personally as the "Customer". The Everyday Loans Agreement names Ms Cartwright personally as the "Borrower". Neither contains any reference to Armthorpe Skips Ltd. On 9 November 2019 an internal memorandum was created by a member of the OTC's staff. It is headed "*Refuse application-Section 13A(2)(c)-financial standing*". The salient part of it reads "*The applicant has failed to provide bank statements in the Limited company name and is solely reliant upon cash loans provided by Provident*".

11. On 25 November 2019 a member of the OTC's staff wrote to Ms Cartwright. The letter said that what was described as the appellant's "*application to vary your operator's licence*" had been refused. As to why, this was said by way of explanation "Specifically, we requested financial evidence in the form of original bank statements, credit card statement, building society statements or audited accounts. You did not provide acceptable financial evidence within the deadline". Reference is made to section 13 of The Goods Vehicles (Licensing of Operators) Act 1995, though not to any specific sub-section and it is said that the refusal has been made under that section because of a "*failure to supply the specified supporting documentation*". There is no reference to any other legislative provision.

The financial requirements

12. According to section 13(1) of the Goods Vehicles (Licensing of Operators) Act 1995 (the 1995 Act), on an application for a standard licence, a TC must consider whether

requirements contained within section 13A and 13C are met and, if the TC thinks fit, whether the requirement contained in section 13D is met. But on an application for a restricted licence (section 13(2)), a TC must consider whether the requirements of 13B and 13C are met and, again, if the TC thinks fit, whether the requirement in section 13D is met. According to section 13(5), if a TC decides that any of the requirements which have been taken into account under section 13(1) or 13(2) are not met, then the application shall be refused. Otherwise, subject to certain exceptions which do not apply here, the application must be granted. As to applications for variation of a licence, section 17 permits the variation of a licence by a TC and section 17(5)(c) carries across to variations, the financial requirements contained within section 13 set out above.

13. As to standard licences and variations of such licences, section 13A(2)(c) requires an applicant to have appropriate financial standing as determined in accordance with Article 7 of Regulation (EC) 1071/2009. Section 13C (which applies to both standard and restricted licences) demands compliance with a range of requirements including one for the existence of satisfactory arrangements for the maintenance of vehicles (section 13C(4)). Section 13D (again applicable to both types of licence) requires the arrangements in place for maintenance of vehicles in a fit and serviceable condition not to be prejudiced by reason of the applicant having insufficient financial resources for that purpose.

14. By way of reminder, the letter of 25 November 2019 which communicated the TC's decision now under challenge, referred to an application to vary a licence rather than one for a licence. Further, whilst as to legislation it simply referred to section 13 of the Goods Vehicles (Licensing of Operators) Act 1995, the internal memorandum referred to above suggested that the specific provision which had been applied was section 13A(2)(c) which relates to standard licences.

15. The appellant's written grounds of appeal are set out in completed form UT12ENG. There are various attachments including, as noted, copies of bank statements for the period from 27 February 2019 to 24 March 2019 and copies of the two loan agreements. Ms Cartwright, who has drafted the grounds herself, suggests that she did send bank statements to the OTC (presumably the same ones she has provided copies of with the grounds of appeal). She seems to suggest (though not saying so in terms) that the loan agreements contain sufficient evidence that the appellant is compliant with the financial requirements.

My decision and reasoning

16. The financial requirements, as set out above, are there to ensure that an operator has sufficient funds, which are available when needed, to ensure the establishment and proper administration of the business. That encompasses, amongst other things, an ability to keep any vehicles roadworthy and to have in place proper and effective vehicle maintenance arrangements.

17. As noted, there is something of an inconsistency in the documentation before me, concerning the question of whether the OTC regarded itself as dealing with an application for a restricted licence or an application to vary one. The early correspondence issued by it suggested it regarded itself, as at the time of initial consideration, as dealing with an application for a licence as opposed to an application for a variation. The letter of 25 November 2019 which communicated the decision, talked of variation. The actual financial

requirements for each, though, are really in substance the same and Ms Cartwright has not sought to take a point about this. Accordingly, it is not a matter which troubles me.

18. The letter of 25 November 2019 simply mentioned section 13 of the 1995 Act. As is apparent from what I have already said, that section makes reference to requirements which relate only to standard licences (section 13A); requirements which relate only to restricted licences (section 13B); requirements which relate to both (section 13C); and requirements which potentially relate to both (section 13D). So, the simple reference to section 13 which is then largely unexplained, is not wholly satisfactory in terms of the letter's ability to inform the appellant (and the Upper Tribunal) as to why the application has failed. But there is the internal memorandum to which I have referred. What is said in that memorandum supports the proposition that it was being decided that the application failed because the requirements contained within section 13A(2)(c) had not been met. There is a difficulty with that because that sub-section contains a requirement of "appropriate financial standing" which relates only to standard licences. But the licence being sought by the appellant (or possibly the licence in respect of which variation had been sought) was a restricted one.

19. It is not the case that the financial requirements relating to standard licences are exactly mirrored by those relating to restricted licences. As to the latter, there is no "appropriate financial standing" requirement as such, and section 13B which relates only to restricted licences does not itself impose any financial requirements at all. But the requirement at section 13C(4) that there be satisfactory facilities and arrangements for maintaining vehicles used under a licence applies to both types of licence. Clearly there is a need for adequate finance in order to comply. Furthermore, there is the requirement in section 13D which a TC may utilise discretion to apply. But what is ordinarily needed there is an initial decision to apply the criteria contained within that provision before actually applying it. The letter of 25 November 2019 does not say that any of that has been done.

20. It follows from the above that, strictly speaking, there are inadequacies in the reasoning contained in the decision letter of 25 November 2019. It does not state which sections and sub-sections of the Act have been applied other than an uninformative reference to section 13. It does not state (though it is possible to infer that such a view has been taken) that it has been considered appropriate to exercise discretion under section 13D. It is surely a basic requirement in the context of a need to give adequate or intelligible reasons that a person on the wrong end of a decision (if I can put it like that) is given an indication with a degree of specificity as to which statutory provisions have been applied. It is similarly necessary that some reasoning (albeit concise reasoning is usually entirely permissible) is given as to how, in light of the identified legislative requirements, a decision has been arrived at. The situation is not helped by the reference in the internal memorandum to a sub-section which does not have direct application. In my judgement the content of the letter falls short of what is required and what an unsuccessful applicant is ordinarily entitled to.

21. Having said the above, though, it will not normally be appropriate for the Upper Tribunal to set aside a decision of a TC where a different outcome was not realistically open to that TC. In this case, whilst nothing was said about section 13D, when the appellant was first asked to provide written evidence concerning finance, reference was made to a need to supply evidence as to the availability of £3,100. So, although this was not explained for the benefit of the appellant and really should have been, it must have been the case that the view had been taken that it was appropriate to exercise discretion afforded by section 13(2)(b) to

apply section 13D. Adopting that approach was clearly open to the TC and appropriate even though only one vehicle was intended to be used under the terms of the licence. I cannot see that any other view could have rationally been reached.

22. As to the financial evidence which was provided, I would conclude, insofar as it may be necessary for me to do so, that bank statements were not received by the OTC. I have reached this view because whilst I appreciate that documents can go astray in a busy office, other material which Ms Cartwright sent on behalf of the appellant does not appear to have gone astray. Ms Cartwright has not been specific as to when it was she says the bank statements were sent and has not provided, for example, a copy of a covering letter sent to the OTC referring to bank statements as enclosures. But anyway, the OTC had asked for financial evidence of £3,100 covering a twenty-eight-day period "the last date of which must not be more than 2 months from the date of receipt of the application". Since the application had been made in September 2019, the bank statements which have been provided in the form of copies sent with the appeal to the Upper Tribunal, would not even if they had been received by the OTC, have met that timing request. Further, those statements only show satisfaction of the necessary balance for two days of the period which they cover.

23. As to the Loan Agreements, it is right to say that financial requirements may be met through a range of different types of evidence. Such was made clear in *T/2017/7 Michael Hazell (No 2).* But in *2004/383 Blue Arrow* it was also made clear that financial requirements have to be satisfied by the company where it is a company which is seeking a licence. In *T/2013/77 Hughes Bros Construction Ltd*, it was made clear that where the applicant for a licence is a limited company, it could not be said that money in a bank account held in the name of a director of the company is available to meet the financial requirements because such money does not actually belong to the limited company. It was the case that a limited company is a distinct entity from its directors. Applying those principles to the facts of this case, it seems to me that the Loan Agreements provided evidence of monies available to the director (even if the sole director) rather than to the limited company Operator. Thus, they were not capable of informing as to the ability of the Operator to meet financial requirements.

24. The letter of 25 November 2019 indicated a view had been taken that the appellant had failed to "provide acceptable financial evidence". Though there was no elaboration, that was the only view the TC could have reached for the reasons I have set out above. As such, even though the decision letter of 25 November 2019 did not contain adequate reasons, it is not appropriate for me to set aside that decision on that sole basis (and there is no other basis for my doing so) in circumstances where there was no scope for any other outcome.

25. The appeal to the Upper Tribunal is, for the reasons set out above, dismissed. But it seems to me there would be nothing to prevent the appellant from making a fresh application on the basis of better evidence and/or re-ordered financial arrangements. I detect nothing in the material before me to suggest any wrongdoing on behalf of the appellant or Ms Cartwright nor any reason to think that any further application which might be made ought to be treated with suspicion or with any particular circumspection.

Conclusion

26. This appeal to the Upper Tribunal is dismissed.

M R Hemingway
Judge of the Upper Tribunal
22 April 2020