NCN: [2023] UKUT 7 (AAC)
Appeal No. UA-2022-000480-NT

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

ON APPEAL from the DECISION of the DEPARTMENT FOR INFRASTRUCTURE, for Northern Ireland

Before:	Ms L J Clough: Deputy Judge of the Upper Tribunal Mr R Fry: Member of the Upper Tribunal Mr M Smith JP: Member of the Upper Tribunal
Appellant:	Mr Mark McBurney t/a MMB Haulage
Reference No:	ON2021547
Heard at:	Tribunal Hearing Centre, Royal Courts of Justice, Belfast
On:	16 November 2022
Date of Decision under appeal:	4 April 2022

DECISION OF THE UPPER TRIBUNAL

THE APPEAL IS DISMISSED.

Subject matter:

Revocation of operator's licence; Establishment requirement not met

Cases referred to

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695. *Clarke v Edinburgh & District Tramways Co Ltd* [1919] UKHL 303; (1919) SC (HL) 35; 56 SLR 303. 2009/225 *Priority Freight Ltd & Paul Williams*

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by Mr M. McBurney t/a MMB Haulage (hereinafter "the appellant"), from a decision of the Department for Infrastructure ("the DfI") to revoke his Standard National Goods Vehicle Operator's Licence, which was embodied in a letter to the appellant dated 4 April 2022.

The facts

2. On 12 April 2019, the Appellant t/a MMB Haulage was issued with a Standard National Goods Vehicle Operator's Licence authorising the use of one vehicle and one trailer, under the Goods Vehicle (Licensing of Operators) Act (Northern Ireland) 2010 ("the 2010 Act"). The operating centre was listed at Unit 12 Dennison Industrial Estate, Avondale Drive, Ballyclare, BT39 9EB.

3. On 16 February 2022, the Appellant contacted the DfI Central Licensing Office to ensure the address on his licence was correct, at which point it came to the DfI's attention that no vehicle was specified on his licence. That same day, the Central Licensing Office wrote to the Appellant highlighting the fact that there had been no vehicle specified on the licence since it was granted. He was asked to confirm, by 2 March 2022, whether he was going to get access to a vehicle for use under his licence, as it is a legislative requirement for a licence holder to demonstrate that he has a formal arrangement for access to at least one vehicle at all times. He was warned that failure to respond could result in action being taken against his licence. On 20 February 2022, the Appellant wrote back to the DfI indicating that he had not utilised the licence since it was granted due to business decisions and the difficult times created by the COVID-19 pandemic. However, he stated that he was intending to get a vehicle and use the licence thus he asked to retain it.

4. On 11 March 2022, the Central Licensing Office wrote back to the Appellant serving notice under s.26(1) of the 2010 Act, that the Department was considering revoking his licence under s.24(1) of the 2010 Act. This states that a licence holder must have an effective and stable establishment under s.12A(2)(a), but by failing to provide details of access to a vehicle under his licence, he was not meeting this requirement. He was given the opportunity to make written representations for consideration by the Department in respect of this issue by 1 April

2022, and he was offered the opportunity to request a Public Inquiry ("PI") to offer evidence as to why the licence should not be revoked. This letter was emailed to the Appellant who replied by email on 12 March 2022 with a letter making representations. His letter again sought the retention of his licence, reiterating that it was a combination of business decisions and the difficulties caused during the COVID-19 pandemic which caused him not to have gained access to a vehicle.

5. On 4 April 2022, the Central Licensing Office wrote to the Appellant indicating that it had revoked his operator's licence with immediate effect under s.24 of the 2010 Act. The reasons given for this decision were: the Appellant's letters had acknowledged that he had not used his licence since it was granted; he had not provided any timeframe within which he planned to use the licence; there was no vehicle specified on his licence and there had never been one specified since it was granted; there was no period of grace requested in order to gain access to a vehicle and use the licence; and he had not requested a PI to give evidence to support his plea to retain his licence. Consequently, the DfI were of the opinion that he had failed to meet the establishment requirement which must be met in order to have an operator's licence. He was not permitted to operate from 4 April 2022 and was provided with the details on how to appeal the decision if he disagreed with it.

6. On 26 April 2022, the Appellant requested a stay of the decision on the grounds that he had gone to a lot of effort to get the operator's licence and due to circumstances created by the COVID-19 pandemic, he had not been able to use it, but if he was able to keep it, he could get access to a vehicle, use his licence and create employment. He highlighted that he had never abused his licence but simply had not used it. He indicated that he had applied to the Upper Tribunal that same day to appeal the decision.

7. On 29 April 2022, the Head of the Transport Regulation Unit (hereafter "the TRU") refused the application for a stay on the basis that the Appellant had not met the establishment criteria for holding an operator's licence and his chances of making a successful appeal were low. In making this decision, the Head of the Transport Regulation Unit ("the TRU") stated that, "if Mr McBurney does wish to pursue a career in road freight transport he may wish to obtain a vehicle and reapply. I note the readiness he has been [*sic*] to communicate promptly with the Department and this is certainly a positive feature. Any application will be considered

on its own merits" (paragraph 18 of the Head of the TRU's written decision on the issue of a stay, at page 45 of the Appeal Bundle).

The appeal

8. The appellant lodged an appeal with the Upper Tribunal on an official appeal form signed and dated on 5 April 2022. In his grounds of appeal, the appellant stated:

> *"I am appealing to keep my operator's licence as I have not used if of yet but I do plan to use it in the near future.*
> *The reasons I have not used it is due to business decisions, I was issued the licence in 2019, with the pandemic and other factors during hard times I have not got to use it of yet.*
> *I had put a lot of effort into obtaining the licence to start with as I was planning to make use of it, I still am.*
> *I do believe that with this licence I could gain or provide employment in the near future, I can only ask in all sincerity that this will be taken into consideration and I will be allowed to keep the licence.*
> *My licence is only for one vehicle, I have never abused the license or any of the like, I do understand that I could re apply for a new license, but with already having this one been granted I only hope I will be allowed to keep it, as without it I do believe it would stop me from gaining or creating employment in the future, again I hope this will all be taken into consideration and also in the interest of time efficiency I can keep this license."*

9. The Appellant did not renew his application for a stay of the DfI's decision to revoke his operator's license. The appeal was heard in the Tribunal Hearing Centre at the Royal Courts of Justice in Belfast on 16 November 2022. The Appellant was present at the hearing and was unrepresented.

The appeal decision

10. As to the approach which the Upper Tribunal must take on an appeal such as this, it was said, in the case of *Fergal Hughes v DOENI* & *Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC, NT/2013/52 & 53, at paragraph 8:

> *"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 or 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.'*

11. At paragraph 4, the Upper Tribunal 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."

12. The task of the Upper Tribunal, therefore, when considering an appeal from a decision of the DfI in Northern Ireland, is to review the information which was before the Department along with its decision based on that information. The Upper Tribunal will only allow an appeal if the appellant has shown that "the process of reasoning and the application of the relevant law require the tribunal to take a different view" (*Bradley Fold Travel Limited and Peter Wright* v. *Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, at paragraphs 30-40). In essence therefore the approach of the Upper Tribunal is as stated by Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, that an appellate court should only intervene if it is satisfied that the judge (in this case, the decision of the Central Licensing Office of the DfI) was "plainly wrong".

Discussion

13. Section 12A of the 2010 Act provides for the requirements to be met in order to hold a Standard Operator's Licence. The first requirement is set out in s.12A(2)(a) as follows:

> ***Requirements for standard licences***
> ***12A.****—(1) The requirements of this section are set out in subsections (2) and (3).*
> *(2) The first requirement is that the Department is satisfied that the applicant—*
> *(a)has an effective and stable establishment in Northern Ireland (as determined in such manner as may be prescribed)…*

The requirements to satisfy the requirement of having an "effective and stable establishment" are set out in Regulation 4A of the Goods Vehicles (Qualifications of Operators) Regulations (Northern Ireland) 2012. One such requirement is that the operator "has access to one or more goods vehicles that are authorised to be used under the person's operator's licence" (Regulation 4A(2)(b)). Where one of the requirements for the holding of an operator's licence is not met, s.24 of the 2010 Act provides that the licence may be revoked:

14. The Appellant attended his appeal hearing and made submissions in support of his case. He explained that he is a self-employed joiner by trade and had applied for an operator's licence in order to take on some haulage work for additional income. His family have been in the business for many years. The haulage business was to supplement his joinery income with a view to it potentially taking over as his main income stream. He applied for his licence but owing to the consistency of his joinery work and then the difficulties that came along with the COVID-19 pandemic, he did not obtain access to a lorry to make a start with the haulage work. Prior to the appeal hearing, he had spoken to his uncle (in the business) who had offered him a lorry if his licence was to be retained. This information had not been put to the DfI when it made its decision. He submitted that he was genuine about his intention to get a lorry and use his licence and asked once again that his licence was retained.

15. While we have every sympathy with the Appellant as to his reasons for not making use of his licence sooner, we cannot fault the decision of the DfI in this case. It is a fact that his licence was granted in April 2019 and the licence had not been used since it was granted. The Appellant had not had access to a vehicle and had taken no positive steps towards gaining access to one even when he was warned that failure to make use of it could result in the licence being revoked (see letters from the Central Licensing Office dated 16 February 2022 and 11 March 2022). As was stated in the case of 2009/225 *Priority Freight Ltd & Paul Williams* "actions speak louder than words" and had positive actions been taken after the warnings, even if they had not resulted in immediate access to a vehicle, the DfI may have been able to take a different view on this matter but unfortunately the regulations are clear. There must be access to a vehicle in order to hold an operator's licence and the Appellant's failure to do this means that the regulatory requirements were not being met. Consequently, the Central Licensing Office within the DfI had no choice but to revoke the Appellant's operator's licence. Unfortunately for the Appellant, the hands of the UT are also tied in this regard. The decision of the DfI to revoke this licence is not "plainly wrong" and the decision must stand.

16. As an aside, we note the positive comments of the Head of the TRU at the conclusion of his stay decision (paragraph 18), suggesting that the Appellant may wish re-apply for a licence, his ability to be communicative and cooperative with the DfI being a positive point in his favour. With this comment, we agree. The Appellant presented as a genuine man with

goals that had not come to fruition for reasons beyond his control, and we hope that he will consider re-applying in order to achieve them.

L J Clough
Judge of the Upper Tribunal

R Fry
Member of the Upper Tribunal

M Smith JP
Member of the Upper Tribunal

Authorised for issue on 2 January 2023