[2019] UKUT 32 (AAC)

IN THE UPPER TRIBUNAL **Appeal No. T/2018/32**
ADMINISTRATIVE APPEALS CHAMBER
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER

Before:	Mr M R Hemingway:	Judge of the Upper Tribunal
	Mr G Inch:	Member of the Upper Tribunal
	Mr M Farmer:	Member of the Upper Tribunal
Appellant:	Atbus Ltd	
Reference:	PK1060272	
Attendances:		
For the Appellant:	Mr T Nesbitt QC	
Heard at:	Field House, Breams Buildings, London EC4A 1DZ	
Date of Upper Tribunal Hearing:	25 October 2018	
Date of Decision:	24 January 2019	

DECISION OF THE UPPER TRIBUNAL

The appeal is allowed. The decision of the Traffic Commissioner to revoke the appellant's operators standard licence is set aside. Further, the case is remitted for rehearing and determination at a Public Inquiry. We do not direct which individual Traffic Commissioner should conduct the Public Inquiry.

Subject matter:

Requirement to give reasons for a decision to revoke; the duty to hold a public inquiry; clarity of the Traffic Commissioner's adjudication process.

Cases referred to:

Bradley Fold Travel Ltd v Secretary of State for Transport [2010] EWCA Civ 695.

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal, brought by Atbus Ltd in response to the Traffic Commissioners decision to revoke its Standard National Public Service Vehicle Operators Licence. The appeal has been brought under section 50(4) of the Public Passenger Vehicles Act 1981 (the 1981 Act). The appeal was considered at an oral hearing at which Atbus was represented by Mr T Nesbitt QC.

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

2. 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."

3. 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."

4. 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

5. Atbus was given its licence, which permitted it to operate 12 vehicles, in July 2006. It provided bus services to members of the public in and around South London. In accordance with legislative requirements (see below) it had in place a suitable transport manager, Mr P Berry, until November 2017. It is said on behalf of Atbus that, at that stage, it had no significant recent adverse compliance history. Insofar as it is relevant and whilst there might have been some limited concerns about vehicle maintenance, there is nothing in the material before us to suggest that that somewhat limited assertion is inaccurate.

6. In November 2017 Mr Berry's son, who was living in Norway, had a serious and tragic accident. Such is not disputed. His injuries were such that Mr Berry decided to end his employment as a transport manager with Atbus and go to provide his support for his son's family in Norway. It does not appear to be apparent, from the paperwork in front of us,

precisely when it was that Mr Berry left his post. But anyway, Atbus had a legal representative at the time ("representative 1") and that representative prepared a letter of 19 December 2017 to be sent to the Office of the Traffic Commissioner ("OTC"). That letter set out the above circumstances in brief but clear terms and explained that Atbus was "currently seeking a replacement transport manager". It was said that once a suitable candidate had been found an application would be made to nominate that person as transport manager and it was acknowledged that, in the prevailing circumstances, Atbus did not meet the requirement of professional competence through not having a transport manager. It was then said, "the Company seeks a direction from the Traffic Commissioner to allow the Company to continue to operate under a period of grace whilst the recruitment process is completed". It was then explained that the recruitment process was unlikely to take more than three months but it was said that if further time was required "a further application will be made". The OTC was asked to confirm receipt of the letter.

7. According to the OTC that letter was never received. If that is so then there is a possible explanation for it. On 30 January 2018 representative 1 sent an e-mail to the OTC with (it appears) a copy of the letter of 19 December 2017 as an attachment. Part of the e-mail read "I would be grateful if you could forward this letter to the relevant caseworker. I had a problem with our case handling software over the Christmas Period and I am not sure if this document was sent". So perhaps it wasn't. Be that as it may, it is claimed by Atbus that it then started to make arrangements to train an in house candidate for the position of transport manager "on the advice of a DVSA Traffic Examiner" though it does not appear any confirmation that such advice was given has subsequently been produced. The e-mail was not responded to in January 2018 (unsurprisingly given the date it was sent) or February 2018.

8. As a result of this appeal being pursued, documents have been produced for the purposes of the appeal which include some internal memoranda concerning the ways in which the application for a period of grace has been dealt with. As a result, we are able to discern that on 13 February 2018 a member of the OTCs support staff looked at the application and noted that there had been a recent unsatisfactory maintenance investigation and that there was an ongoing investigation into links between various companies involved in the provision of public transport which might include Atbus. Nevertheless, that support staff member made a recommendation that the period of grace be granted. The matter was then looked at by another (perhaps more senior) member of the OTCs support staff who recommended, on 28 February 2018, that a period of grace be given until 30 April 2018. That support staff member did, though, express some concern in that the operator had given little information as to how it was operating without a transport manager in place. Those recommendations were then considered by one of two Traffic Commissioners who have been involved with this case ("TC1"). TC1 clearly had concerns and produced a memorandum of 1 March 2018 in which it was noted that it had not been stated when the transport manager had actually resigned nor had it been explained how transport operations would be managed prior to a new appointment being made. But it was also noted that such information had not actually been sought by the OTC. It is apparent from that memorandum that TC1 considered it appropriate to grant a period of grace of 7 days only to actually appoint a transport manager and so decided.

9. That memorandum, of course, was an internal document. So, the contents were not communicated to Atbus at any stage prior to this appeal to the Upper Tribunal being pursued. But on 16 March 2018 an e-mail was sent to representative 1 which relevantly said this:

> "… The Traffic Commissioner has now considered the period of grace request and unfortunately this has been refused. The operator is therefore to supply details of a new transport manager within 7 days. It would be beneficial if all correspondence can be forwarded to me by e-mail initially and followed up by a hard copy. I can then quickly process the new TM request and submit this to the Traffic Commissioner for consideration."

10. Pausing there, it might be thought on the one hand that giving seven days to supply details of a new transport manager might be unrealistic and unfair. On the other hand though, perhaps it might be argued that in reality Atbus had had plenty of opportunity from at least 19 December 2017 and possibly earlier, to have taken steps to find a new transport manager and had failed to put one in place. It is also worth noting that, by that time, representative 1 had ceased to act for Atbus although it seems to us that, at least at that stage, the OTC may not have been informed. Thereafter, on 22 March 2018 a letter was sent to Atbus by the OTC informing it of the decision. That letter read as follows:

> "I refer to your request for a period of grace in relation to your transport manager situation.
>
> Please be advised that the Traffic Commissioner has not allowed any further period of grace as the licence has already been without a transport manager for 3 months.
>
> The Central Licensing Office received a letter from [representative 1] on 30 January 2018 which was dated 19 December 2017, informing us of your request and due to the time which has now passed the Traffic Commissioner does not feel fit to grant any further time.
>
> [Representative 1] has been informed of the Traffic Commissioner's decision, however has informed the Central Licensing Office that he is no longer dealing with your case.
>
> With the above in mind and the length of time the licence has been without a transport manager, you are now required to nominate a suitably qualified transport manager by way of a TM1 application form and certificate(s) of professional (sic) within 7 days from the date of this letter."

11. Both Mr Nesbitt and representative 2 have asserted, no doubt on instructions from the Director of Atbus Mr R Hill, to whom the letter of 22 March 2018 was sent, that he never received it. At first blush that might seem unlikely given that the letter was correctly addressed. However, we note that at page 29 of the Upper Tribunal's appeal bundle, there is a suggestion in another memorandum that "the standard letter advising the operator of the short PoG" was not sent. That seems likely to be a reference to the letter of 22 March 2018. That memorandum does contain an indication, however, that its author spoke to representative 1 on the telephone to advise the terms of TC1's decision and that representative 1 had said that he would notify Mr Hill accordingly. There is no reason to suppose that that was not done but, on the other hand, there is no clear evidence that it was. But anyway, where it is decided to apply such a tight deadline it is important that the letter informing of the deadline must be sent out.

12. It appears that in early April 2018 Atbus instructed another representative. That is the person we have called and will continue to call "representative 2". That representative sent a quite detailed e-mail to the OTC on 4 April 2018. It is apparent from the content of that e-mail that representative 2 was by that time aware that TC1 had decided the period of grace should expire on 23 March 2018. It may be that representative 2 had discovered that from obtaining the file of papers from representative 1 or from otherwise contacting the OTC. The e-mail sets out, once again, the circumstances in which Mr Berry had had to leave his post. It asserts that a Traffic Examiner had suggested to Mr Hill that consideration ought to be given to appointing a transport manager "from within the company staff" and that three suitable

potential candidates had been identified and had taken the relevant CPC course. It was said that the "outcome of their attendance on this course is anticipated on 20th of this month". It was asserted that Mr Hill was now confident that he would be in a position to appoint a transport manager (his preferred one of the three) by the end of April 2018. It was also explained that Mr Hill had been "seriously ill" had spent some time in hospital and had had to "undergo a number of procedures following his discharge from hospital" and it was suggested that that had hindered or perhaps effectively scuppered any attempts to appoint an external transport manager. It does not seem to us that any evidence has ever been provided as to Mr Hill's illness or as to the nature of the "procedures" referred to but no one has ever sought to suggest that the assertions made about it all are untrue. The e-mail asked for, in effect, an extended period of grace.

13. A member of the OTC's support staff looked at the application made by representative 2 on 5 April 2018. That staff member has produced a memorandum of 5 April 2018 which contains a recommendation that "the licence is proposed to revoke with the offer of a PI". PI is, of course, an abbreviation for Public Inquiry and it is one which we shall now adopt in this decision. On 5 April 2018 a different member of the OTCs support staff produced another memorandum of that date. That support staff member used language which seemed to suggest that the letter of 22 March 2018 had, indeed, been sent to Atbus despite the above. It was said that since that letter had been sent "no response or contact has been made" which also seems to suggest that that support staff member had not had sight of the e-mail sent by representative 2. Whilst it is not wholly clear to us, it appears that that staff member was supporting the recommendation which had been made by the other staff member. The case was then passed to TC1 who produced a further memorandum and who decided to revoke the licence with effect from 23.45 on Friday 25 May 2018. The memorandum itself is dated 13 May 2018. It makes reference to a failure to comply with the 7 day period mentioned above.

14. Pausing there, it is clear that TC1 had not been told that the letter of 22 March 2018 had not been sent and had not been told of the e-mail of 4 April 2018 from representative 2. It is also clear that it was not considered appropriate to hold a PI though that matter is not specifically addressed, at least in terms, in the memorandum of 13 May 2018.

15. A letter was not immediately sent out to Atbus. But it was realised that there had been some errors and omissions in the information given to TC1 and, in a memorandum of 15 May 2018 prepared by a member of the OTC support staff, all of that was noted. But once again that support staff member recommended that the licence should be or should remain revoked. It appears that TC1 was absent from the office so the matter was dealt with by another Traffic Commissioner whom we shall call "TC2". In a memorandum of 17 May 2018 TC2, whilst expressing some concerns about what were said to be administrative failings, observed that TC1 had already made an adverse finding "that the mandatory and continuing requirement is not met". Atbus was criticised, perhaps not unfairly it seems to us, for not dealing with matters concerning a replacement transport manager more expeditiously. It was stated that the instructions of TC1 should now simply be followed. In other words, it was being confirmed that the decision to revoke had already been made and that that decision should now be implemented. There followed a letter of 30 May 2018 sent by the OTC to Atbus. The letter is brief and we shall set out its content in full. It says this:

> "I refer to our letter dated 22 March 2018 notifying you that failure to respond to that letter would result in the Traffic Commissioner taking possible action against your Public Service Vehicle Operators Licence.
>
> In the absence of a response to this letter the Traffic Commissioner has revoked your operator's licence with effect from **23:45 on Friday 08 June 2018** in accordance with section 17(1)(a) - no longer professionally competent, to allow a period of safe rundown.
>
> Notification of this decision will be placed in the publication 'Notices and Proceedings'. This decision may also be recorded on an electronic national register that can be inspected by the competent authorities of other EU Member States.
>
> **What you must do now**
>
> You must now return the operator's licence and vehicle discs to me at the above address for cancellation, immediately after Friday 08 June 2018. Failure to do this is a criminal offence.
>
> **Right of Appeal**
>
> There is a right of appeal against a Traffic Commissioner's decision. To appeal you should, **within one month from the date of this letter**, apply to:
>
> Upper Tribunal (Transport)
> Administrative Appeal Chamber
> 5th Floor, Rolls Buildings
> 7 Rolls Buildings
> Fetter Lane
> London
> EC4A 1NL …"

16. That was the first letter issued by the OTC which informed Atbus of any right of appeal. Its receipt was quickly followed by an e-mail sent to OTC by representative 2. In that e-mail the TC was invited to consider rescinding the revocation upon receipt of notification of appointment of a transport manager. To explain it was said that Atbus would be appointing a Mr S Hughes as transport manager shortly. Relevant documentation concerning Mr Hughes and his qualifications and suitability was subsequently provided. On 6 June 2018 representative 2 wrote to the OTC reiterating points previously made and asking, in effect, for a reconsideration. Representative 2 then followed that up with an e-mail of 8 June 2018 in which it was suggested that either TC1 or TC2 (we are not clear which) had erred through failing to hold a PI; had failed to produce a reasoned decision as to revocation; and had reached an outcome which was disproportionate. The letter also contained a request (so far as we can see for the first time) that a PI be held pursuant to section 17(4) of the 1981 Act. In a sense that might be thought to be the wrong way round because the legislation clearly envisages a public inquiry taking place before not after an appealable decision has been made.

17. All of the above led to TC1 preparing a detailed document headed "Traffic Commissioner's decision", which is dated 10 June 2018 and which was issued to the parties on 11 June 2018. It is said under that heading:

> "The decision of 17 May 2018 to withdraw the Operator's authorisation to engage in the occupation of road transport operator and revoke Licence PK1060272 stands. I do extend the revocation date to 23.45 on 28 June 2018 to enable an orderly winddown and any appeal process to be commenced."

18. Part of the main body of the decision is then given over to a setting out of the relevant history. It is also noted, as to the proposed transport manager Mr Hughes, that his good repute

remained in question "as a result of his work for BETC Ltd.". BETC is another company which has Mr Hill as its Director. After noting that this follows:

> " 11. A period of grace is a discretion not a right. The absence of a period of grace means a mandatory requirement is not met. 'When considering whether or not to grant a period of grace TCs are entitled to look for some tangible evidence, beyond mere hope or aspiration, that granting a period of grace will be worthwhile, and that there are reasonable prospects for a good outcome."
>
> 2014/08 Duncan (Operator and Mary McKee (Transport Manager) (paragraph 7)
>
> 12. In the same way, it is not for a Traffic Commissioner to offer a public inquiry. Section 17(4) is clear that a TC should not take action IF a hearing is requested (sic). Between 19 December and 6 June 2018, no hearing was requested. The decision to revoke was first made on 13 May 2018 and confirmed on 17 May 2018. It is trite for an Operator to complain on 7 June 2018 that a TC has not offered a hearing. The hearing should have been requested before the 19 March 2018, if the mandatory requirement was not to be remedied in time. On 19 December 2017, the Operator said that if it needed an extension of the period of grace beyond that date it would apply. It did not even do that. Albany Waste makes it clear that the onus is on the Operator to achieve compliance within the period of grace. Article 13 of Regulation (EC) 1071/2009 is unequivocal but otherwise action 'shall be taken'.
>
> 13. This Operator's approach since 19 December 2017 has failed to treat the cited authorities and STC Guidance and Directions - all of which the Operator has been deemed knowledge of (as per 2012/030 MGM Haulage and Recycling Ltd) with the seriousness required. The law is there to ensure road safety and fair competition and this operator has barely given lip service the requirements. I am not prepared to offer a hearing now.
>
> 14. For completeness, I attach marked "Annex B" an extract of the final Team Leader recommendation and my final decision in relation to BETC Ltd, as it demonstrates a similarly lackadaisical approach by Mr Hill to a period of grace until the revocation decision is made. **This is attached for the benefit of the parties and any appeal - they are not to be published elsewhere -** at no time since 19 December 2017 has Mr Oliver [that is representative 1] cited Mr Hill's ill-health as a reason for any delay in terms of action by the Operator or his ability to take instructions …"

19. A copy of that decision was sent to Atbus by a letter of 11 June 2016. That letter also contained the information about a right of appeal to the Upper Tribunal as had the previous letter.

20. Atbus exercised its right of appeal but it is also worth noting that it asked the TC to grant a stay. Such was refused in a most detailed and careful decision made by TC2 on 26 June 2018. The application for a stay was renewed with the Upper Tribunal which refused it on 12 July 2018.

21. It will be apparent, from the above, that this case has had something of a tortuous history. We make no criticism of anyone because of that. We simply state it as a fact.

The relevant regulatory legislation

22. Section 14 ZA of the 1981 Act contains the requirement for a standard public service vehicle licence. The "first requirement" in section 14ZA(2) is in fact a set of conditions, including that:

> "(b) The operator is professionally competent (as determined in accordance with paragraphs 3, 4 and 6 of Schedule 3)."

23. For "professional competence", Schedule 3 links a company's professional competence to that of its transport manager: "a company satisfies the requirement as to professional competence if, and as long as it has a transport manager … who … is of good repute and professionally competent".

24. The "second requirement" in section 14ZA(3) concerns the operator's transport manager. The relevant conditions include that the operator "has designated a transport manager in accordance with Article 4 of the 2009 Regulation".

25. The above requirements apply on an application for a standard licence. They also form mandatory grounds for revocation of an existing licence (section 17). A Traffic Commissioner must revoke in two cases (section 17(1)). First, if it appears to a Commissioner that the requirements of section 14ZA(2) are no longer satisfied. In other words, revocation is required if any conditions within the "first requirement" are not satisfied. The second case is where it appears to a Commissioner that a designated transport manager "no longer satisfies" the conditions within the "second requirement" of section 14ZA(3). However, provision is made for a "period of grace" which has, of course, been of importance in the context of this particular appeal.

26. As to public inquiries, section 17(4) provides:

> " (4) A Traffic Commissioner shall not take any action under subsection (1) or (2) above in respect of any licence without first holding an inquiry if the holder of the licence requests that an inquiry be held."

27. So, the duty to hold such an inquiry is linked to there being a request for one (obviously a request before a relevant decision to revoke is taken) but the legislation does not otherwise preclude a Traffic Commissioner from holding a PI.

28. The above reference to "the 2009 Regulation" is to Regulation EC (No. 1071) [2009] of the European Parliament and of the Counsel "establishing common rules concerning the conditions to be complied with to pursue the occupation of good transport operator". The Regulation has direct effect. Recital 12 of the Recitals to the Regulation explains it will be appropriate for national authorities to take suitable measures in particular in the most serious cases by suspending or withdrawing authorisations (in effect licences) or declaring as unsuitable transport managers who are repeatedly negligent or who act in bad faith. But it is said such action "must be proceeded by due consideration of the measure with respect to the proportionality principle" and that "an undertaking should, however, be warned in advance and should have a reasonable period of time within which to rectify the situation". Article 3 imposes a requirement that operators have professional competence. Article 4 makes provision for the appointment of a transport manager to fulfil the requirement of professional competence. Article 13 provides authority for the exercise of the power to revoke or suspend a licence but says:

> " 1. Where a competent authority establishes that an undertaking runs the risk of no longer fulfilling the requirements laid down in Article 3, it shall notify the undertaking thereof. Where a competent authority establishes that one or more of those requirements is no longer satisfied, it may set one of the following time limits for the undertaking to rectify the situation:
>
> (a) a time limit not exceeding six months, which may be extended by three months in the event of the death or physical incapacity of the transport manager, for the recruitment

> of a replacement transport manager where the transport manager no longer satisfies the requirement as to good repute or professional competence; …
>
> 3. If the competent authority establishes that the undertaking no longer satisfies one or more of the requirements laid down in Article 3, it shall suspend or withdraw the authorisation to engage in the occupation of road transport operator within the time limits referred to in paragraph 1 of this Article."

29. Article 15 says that negative decisions taken by competent national authorities including decisions to withdraw a pre-existing authorisation "shall state the reasons on which they are based".

The grounds of appeal to the Upper Tribunal

30. There are six of them. Whilst we paraphrase, summarise and truncate, they are essentially as follows:

" Ground 1 - Atbus was not given any or sufficient notice that revocation of the licence was being considered prior to a decision to revoke being taken. Such notice was required given the content of Article 13(1) of EC Regulation 1071/2009 and section 17 of the 1981 Act.

Ground 2 - Atbus was not given sufficient opportunity to rectify the absence of a transport manager before a decision to revoke the licence was taken. As to that, the letter of 22 March 2018 notifying Atbus of the time in which a new transport manager needed to be appointed was not received but the period of seven days given in the letter was, in any event, unreasonably short.

Ground 3 - No or insufficient regard was had to relevant matters when making decisions with respect to revocation and the length of any period of grace. Such relevant matters included that the difficulty with the transport manager had arisen because of a serious accident; that the director of that bus (Mr R Hill) had been in hospital during the relevant period; and that Atbus had given an indication that it was (by the end of April 2018) to make a suitable appointment.

Ground 4 - It was wrong and an error of law not to provide Atbus with an opportunity to have its case considered at a public inquiry. There was an obligation to afford such an opportunity stemming from the wording of section 17(4) of the 1981 Act.

Ground 5 - Atbus was entitled to a reasoned decision as to revocation and was not given one.

Ground 6 - The decision to revoke the licence was disproportionate.

The oral hearing of the appeal

31. The appellant was represented, before us, by Mr Nesbitt QC. Essentially, he pursued the various arguments which had been set out in the written grounds and in a skeleton argument of 24 October 2018 which ploughed the same furrow. Although he maintained all of the grounds in his submissions to us, he gave particular prominence in those submissions and in his skeleton argument to Ground 4 (the failure to hold a PI). That is because his view was, as he put it in the skeleton argument that that ground was "probably the most obvious of all the failings".

Our decision and reasoning

32. It will be noted that we have taken some time to set out the background to this case. We do not seek to apportion blame but we have done that because, in our view, there have been a number of failings and difficulties with respect to the decision-making process. To pick some out, it seems that the decision taken by TC1 on 1 March 2018 was not communicated by letter to Atbus. It seems that the decision of 13 May 2018 was made in ignorance of the fact that the letter of 22 March 2018 had not been sent and in ignorance of the points made in the email of 4 April 2018 from representative 2. The letter of 30 May 2018 communicating the decision of 17 May 2018 (if that is to be characterised as a decision rather than a clarification of a previous decision) relied upon the content of the letter of 22 March 2018 which had not been sent. The OTC produced two letters giving a right of appeal to Atbus in relation to what might be characterised as two separate decisions though the position of TC2 is, we think, that the letter of 30 May 2018 (one of those letters setting out appeal rights) was only a clarification of an earlier decision rather than an appealable decision itself. It is against that background that we have decided to order that all the decisions taken with respect to Atbus concerning the transport manager situation, periods of grace and revocation, be set aside. We have also decided to remit for rehearing of all issues at a PI and then redetermination at or after that PI. That will effectively mean starting afresh which we think is now the obvious, fairest and most appropriate course.

33. But we must explain our basis for doing the above. We start by disagreeing with Mr Nesbitt as to one of the main planks of his argument. He asserts in his skeleton argument, and he sought to maintain this at the hearing, that "the law is completely clear that before a licence can be revoked for want of professional competence there is an obligation to hold a public inquiry". He says that that is so based on natural justice principles but also a result of the wording of section 17(4) of the Public Passenger Vehicles Act 1991. However, as already noted, section 17(4) only compels the holding of a PI where one is requested. In this case, whilst the decision-making history is quite confused and confusing, we cannot see that any request for a PI had been made prior to its being decided that the licence would be revoked. We are not, for example, able to construe anything in the e-mail sent on behalf of the appellant by Mr Culshaw on 4 April 2018, as constituting a request for a PI. Mr Nesbitt, before us, acknowledged that section 17(4), on a strict reading only compelled the holding of a PI where revocation was being considered, where one had been asked for. He argued, though, that in fact it was the regular or perhaps as we understand him, the almost invariable practice of Traffic Commissioners to hold a PI where revocation is contemplated and that that meant the duty was or had become an absolute one even absent a request for a PI.

34. According to the letter of 30 May 2018 an appealable decision had been made to revoke the licence and it was communicated on that date. As we say, no request for a PI had been made prior to that date. But Mr Nesbitt, as we understand it, also argues that in any event, even if we do not agree with him (which we do not) that there is an actual duty to always hold a PI in revocation cases absent a request for one, principles of natural justice will sometimes dictate that one should be held. It is our judgment that this was clearly such a case. The appellant had operated his business for some time. There had been no clear evidence of concerns likely to justify revocation other than the transport manager issue. The steps which the appellant had taken to appoint a new transport manager could not realistically be regarded as free from potential criticism but some steps, at least, had been taken. Revocation is undoubtedly a serious step to take. There was the possibility that relevant evidence would emerge during the course of the PI and/or that relevant arguments of a factual or legal nature would have been put. We have concluded, therefore, that in this case the circumstances and matters of fairness dictated that a PI ought to have been held.

What happens next?

35. There will, therefore, be a PI hearing before a TC. That will afford Atbus an opportunity, perhaps through Mr Nesbitt, to advance whatever arguments as to fact and law it may wish to. In the meantime, a consequence of our decision is that the licence is not revoked.

Conclusion

36. This appeal to the Upper Tribunal is allowed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated **24 January 2019**