

Appeal No. T/2015/70

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER
TRAFFIC COMMISSIONER APPEALS**

**ON APPEAL from the DECISION of Miles Dorrington DEPUTY TRAFFIC
COMMISSIONER for the North East of England
Dated 23 October 2015**

Before:

Kenneth Mullan	Judge of the Upper Tribunal
Mr L. Milliken	Member of the Upper Tribunal
Mr D. Rawsthorn	Member of the Upper Tribunal

Appellant:

Stephen Duncan

Attendances:

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

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ
Date of hearing: 11 March 2016
Date of decision: 29 June 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED

SUBJECT MATTER:- Public service vehicles; main occupation

CASES REFERRED TO:- NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI

REASONS FOR DECISION

The decision under appeal to the Upper Tribunal

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the North East of England dated 23 October 2015.
2. The factual background to this appeal appears from the documents and is as follows:-
 - (i) On 17 November 2014 an application by the Appellant for a Public Service Vehicle Operator's Licence was received in the office of the Traffic Commissioner.
 - (ii) The application sought authorisation for one vehicle.
 - (iii) By way of correspondence dated 7 September 2015 the Appellant was informed that the Traffic Commissioner had reviewed the application and remained to be satisfied that the Appellant met the requirements to hold a licence. Accordingly, the Traffic Commissioner had decided to hold a Public Inquiry.
 - (iv) The Appellant was informed that the main areas of concern which had been raised by the Traffic Commissioner was whether:
 - i. The Appellant met the 'main occupation' or 'business' requirements to operate vehicles between 9 and 16 passenger seats under a restricted licence and
 - ii. The Appellant had satisfactory arrangements to comply with the law regarding the driving and operation of the vehicle.
 - (v) The Public Inquiry took place on 22 October 2015. The Appellant was present.
 - (vi) In evidence the Appellant stated that the vehicle for which he sought authorisation on the licence was a sixteen seat minibus. He had purchased the minibus for £12000 in November 2014 from Hampshire Council where it had been previously used as a school bus. The Appellant confirmed that the livery on the minibus read 'SD taxis Airport runs and Private Hire.' He had a valid motor insurance policy for hire and reward.
 - (vii) The Appellant stated that he owned a piece of agricultural land for which he had planning permission for an agricultural shed, a log cabin, an apartment space and a parking 'pad' for the minibus. The Appellant stated that he was involved in a pheasant breeding business which he described as 'seasonal'. The main activities were between March and June. The Deputy Traffic Commissioner noted from the accounts which had been provided by the Appellant that his business had made a loss in the previous year. The appellant stated that it would continue to make a loss until it was 'up and running.'
 - (viii) The Appellant stated that he had received a number of enquiries concerning the hire of the minibus. He wished to be selective as to the work which he wished to undertake stating that he would not go to a football match or take 'hen' parties. The Appellant was asked why the minibus was '... liveried up for the public at large.' He replied that he needed his telephone number on it. He stated that he would undertake trips to the airport but that while the clientele would be members of the public that would not be the same as football or 'hen'

runs. The majority of people who had made enquiries were people whom he knew.

- (ix) The Appellant was questioned about the maintenance of the vehicle and indicated that he would undertake most of this himself. He stated that he would achieve 34 miles to the gallon with the minibus. He stated that at that stage he was using the vehicle for his personal use. Following a discussion, the Deputy Traffic Commissioner noted that the vehicle had undergone mileage of 9727 since it had been purchased. The Appellant stated that all of this was personal mileage and that he had not been given any money for journeys.
 - (x) The Appellant confirmed that he was going to be the only driver. In addition to airport journeys he would be undertaking bookings for rock concerts, motorbike events and runs for tourist visitors. He would charge £100 for an airport run. He had insured the vehicle for commercial use because he could not get it insured for private use. He stated that he had four motorcycles and a car which he shared with his mother.
 - (xi) The Appellant was asked about the statements which he had made on his application form that he would be using the vehicle at the weekends for five to ten hours per week. He confirmed that this was the case. He was asked why he had purchased a sixteen seater vehicle rather than an eight seater which would be more usual. He stated that it was reasonably cheap and that when he went out to social events there were usually twelve of them.
 - (xii) In summary, the Appellant stated that he was coming to retirement age and that it seemed that the business was an appropriate way of '... making a little bit of pocket money' and that it would operate '... very well with the other side of the job I've got.' It was also a 'sociable' thing to do if he got 'the right people' and he knew most of the people for whom he would take bookings.
 - (xiii) Following a short adjournment the Deputy Traffic Commissioner informed the Appellant that he had checked the relevant database and that the Appellant did not have any entitlement to drive a passenger carrying vehicle for hire and reward.
 - (xiv) The Deputy Traffic Commissioner then delivered an *ex tempore* decision refusing the application giving reasons which were then reduced to writing in the written decision dated 23 October 2015.
3. On 23 October 2015 the Deputy Traffic Commissioner issued a written decision to the following effect:

'Application refused for the following reasons:

The main occupation of (the Appellant) would be the operation of the PCV because (a) (the Appellant) accepted that his pheasant business was seasonal running from February to June each year, (b) it has made a loss and will continue to make a loss, (c) that (the Appellant) would be operating the PCV at weekends, either one or two days per week and other times if available. Therefore the time dedicated to the PCV work and money generated from it would exceed that of the pheasant business.

I could not find, on the balance of probabilities, that (the Appellant) would have had his PCV livery in the manner it is if he only wanted to take bookings from friends or friend of friends. To me the livery was clearly designed to

attract work from the public at large. It therefore followed that (the Appellant) anticipated growing the client base beyond the current level of work he had told me about. This re-affirmed my finding regarding (the Appellant's) main occupation.

The Appellant would be the only driver. He told me that no-one else would drive the PCV for hire and reward. On inspection of (the Appellant's) CPC card in the Public Inquiry I only saw that he had a driver CPC for goods vehicles. Upon asking the driving licence case worker to check (the appellant's) entitlement on the DVLA database it was confirmed that he does not hold the necessary driver CPC to drive any form of PCV for hire and reward.

To employ a driver, in order to allow this PCV to be driven for hire and reward, if the application was granted would again re-affirm my finding regarding (the appellant's) main occupation.

Since the main occupation test was not satisfied the application is refused.'

4. The Appellant was notified of the written decision by way of correspondence dated 23 October 2015.

The appeal to the Upper Tribunal

5. On 16 November 2015 an appeal to the Upper Tribunal was received in the office of the Upper Tribunal.
6. The Appellant has set out the following Grounds of Appeal:

I appeal this decision on the grounds that:

I am currently setting up another business to coincide with the running of the minibus, which is why I only require a part-time licence and not full. In order to get both projects up and running I require some form of income, which would come from savings and the income generated from the part-time work with the minibus hire. The second business is currently not running at a profit is in the early stages, and not yet fully operational. When it is, it would take up the majority of my midweek capacity to keep it running. I therefore intended to run the minibus on weekends or evenings up to my allowance. The tachograph installed would endorse the mileage being done, but the traffic commissioner dismissed this on the grounds that I do not have full profit-making accounts for the pheasant farm business, and that I intend to run the minibus over my part-time allowance.

The traffic commissioner pulled up the livery displayed on the bus as designed to attract work from the general public. This delivery is simply the name of the firm and phone number with a picture of my motor cycle (even making comment on my appearance and the fact that I am a motorcycle enthusiast). Even running this as a part-time business surely it is in my own interest to display my name and number on the vehicle as does any other PCV operator. My main client base is intended to be family and friends in my village but in the event that I don't have this work the bus still needs to make a living up to my allowed part-time hours.

He stated that I was not in possession of a driver CPC qualification to drive a PCV vehicle, this is not the case I hold the qualification enabling me to drive any PCV. He deduced from this that I would be needing to employ a driver for this purpose. I have no intention of employing anyone or insuring my vehicle for the use of anyone but myself, as I have applied only for a part-time licence there is no way I could afford our wish to pay for a driver.

My main aims as outlined in my initial application was to set up on land belonging to myself, a pheasant rearing business and a part-time minibus service. Although the pheasant business is seasonal it will still require maintenance off season, I therefore intend to make up my living with the minibus hire and run the two operations together. It may be that one of them makes more profit at certain times of the year but they are both intended to be part-time making up a living wage for myself. I have taken great pride in my bus making sure that it is clean and presentable for public use and I feel that it is perfectly within my right to advertise my name and number as do all other hire businesses.

Up to now it has taken me a year to get to this stage, I have made a big outlay on this venture buying the vehicle, tachograph, tests and other various measures to comply with the law, I feel totally aggrieved that I have lost all of this money and time with not any income from the business to cover it. I feel that the traffic commissioner has made assumptions as to my intentions even though I have laid out my plans. In an age where we are being told to get out to work I feel that every obstacle is being put in my way to avoid me getting on with making an honest living. I would be very grateful if you could treat this application is intended to make a living from two part-time occupations.'

7. The appellant forwarded an e-mail to the office of the Upper Tribunal to indicate that he would not be attending the oral hearing of the appeal 'due to the very high costs of travel.'

The relevant legislative background

8. Section 13(3) of the Public Passengers Vehicles act 1981 ('the 1981 Act) provides:

- '(3) A restricted licence authorises the use (whether on national or international operations) of—
 - (a) public service vehicles not adapted to carry more than eight passengers; and
 - (b) public service vehicles not adapted to carry more than sixteen passengers when used—
 - (i) otherwise than in the course of a business of carrying passengers; or
 - (ii) by a person whose main occupation is not the operation of public service vehicles adapted to carry more than eight passengers.'

9. Section 14ZC(1)(B) of the 1981 act provides:

- '(1) The requirement of this section is that the traffic commissioner is satisfied—
 - (a) that there will be adequate facilities or arrangements for maintaining in a fit and serviceable condition the vehicles proposed to be used under the licence; and
 - (b) that there will be adequate arrangements for securing compliance with the requirements of the law relating to the driving and operation of those vehicles.'

Our analysis

10. We have no hesitation in upholding the decisions of the Deputy Traffic Commissioner.

11. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, the 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.’
12. The Upper Tribunal In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI was considering an appeal to the Upper Tribunal against a decision of the Head of the Traffic Regulation Unit under the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010. There is no doubt, however, that the principles set out by the Upper Tribunal in paragraph 8, are derived from parallel appeals, such as the one in the instant case, where the appeal is against a decision of a Traffic Commissioner under the Goods vehicles (Licensing of Operators) Act 1995 and Regulations made under that Act – see paragraph 4 of NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI.
13. We have not been satisfied that on the basis of the submissions which have been made by the appellant that it could be said that the decision of the Deputy Traffic Commissioner in the instant case was ‘plainly wrong’.
14. We have undertaken a detailed analysis of the Deputy Traffic Commissioner’s assessment of the relevant evidence and his findings based on that assessment. We are satisfied that the Deputy Traffic Commissioner undertook a rigorous and rational assessment of all of the evidence before him. He gave a sufficient explanation of his assessment of the evidence, explaining why he took the particular view of the evidence which he did. Any conflict in the evidence before the Deputy Traffic Commissioner has been clearly resolved and explained. The Deputy Traffic Commissioner made sufficient findings, relevant to his decision, all of which are wholly sustainable on the evidence, and all of which are supported by relevant evidence. None of the Deputy Traffic Commissioner’s findings are irrational, perverse or immaterial. All issues raised by the application, either expressly or apparent from the evidence were fully examined by the Deputy Traffic Commissioner.
15. The Deputy Traffic Commissioner’s application of the applicable legal rules and principles was wholly accurate and cannot be faulted.

16. Read as a whole, the Deputy Traffic Commissioner's decision provides a detailed explanation of the basis on which he arrived at his conclusions on the issues before it.
17. The grounds which the appellant seeks to advance are parallel to those which were before the Deputy Traffic Commissioner. The appellant seeks to make further submission on factual issues, particularly in connection with the 'main occupation' test, the relationship and balance between his two businesses and the manner in which he would operate his minibus hire. Those issues have already been determined in a wholly satisfactory manner by the Deputy Traffic Commissioner. It is axiomatic that an appeal to the Upper Tribunal should not be permitted to become a re-hearing or further assessment of the evidence, when that assessment has already been fully and thoroughly undertaken.
18. We have noted that the Appellant has submitted that the Deputy Traffic Commissioner had:

'... stated that I was not in possession of a driver CPC qualification to drive a PCV vehicle, this is not the case I hold the qualification enabling me to drive any PCV.'
19. During the course of the Public Inquiry the Appellant had sought to counter the concerns of the Deputy Traffic Commissioner concerning the extent of his authorisation. Attached to the notice of appeal was a photocopy of his Driver Qualification Card. We note the date of issue of the card was 29 October 2015 which was one week after the date of the Public Inquiry. We cannot be certain as to the details which were on the card which was produced during the course of the Public Inquiry itself. What is clear, however, is that the Appellant holds an entitlement to drive a passenger carrying vehicle up to and including sixteen seats and not, as he submits, any PCV. In any event, the substance of the Deputy Traffic Commissioner's decision was centred on the 'main occupation' test and the relationship and balance between the Appellant's two businesses.
20. We have also noted that the Appellant has submitted that the one of the grounds on which the Deputy Traffic Commissioner dismissed his application was that he did not have '... full profit making accounts for the pheasant farm business.' The Deputy Traffic Commissioner based his decision on an assessment of the evidence which was before him which included a profit and loss account for the period from 1 November 2014 to 5 April 2015, which had been provided by the Appellant and which had been prepared by his accountants.
21. For the reasons which we have set out above, the appeal is dismissed with immediate effect.

Disposal

22. The decision of the Deputy Traffic Commissioner dated 23 October 2015 is confirmed in all respects.



**Kenneth Mullan, Judge of the Upper Tribunal,
29 June 2016**