



Appeal No. NT/2016/2

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated 11 December 2015

Before:

**Kenneth Mullan
Mr L. Milliken
Mr A. Guest**

**Judge of the Upper Tribunal
Member of the Upper Tribunal
Member of the Upper Tribunal**

Appellant:

365 NI GROUP LIMITED

Attendances:

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

For the Respondent: Ms Jones, BL, instructed by the Departmental Solicitor's Office

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 16 June 2016
Date of decision: 12 August 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

SUBJECT MATTER:-

Financial standing; Practice and procedure within the
Department of Environment for Northern Ireland

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; T/2012/17 NCF (Leicester) Ltd; 34/2000
Solent Travel Ltd; 2009/030 Pilkingtons Accrington Ltd. t/a King Travel

REASONS FOR DECISION

Background

1. This is an appeal from the decision of the Deputy Head of the Transport Regulation Unit, ("Deputy Head of the TRU") to refuse the Appellant's application for a Standard International goods vehicle operator's licence.
2. The factual background to this appeal appears from the documents and the Deputy Head of the TRU's decision and is as follows:-

- (i) On 24 September 2015 an application for a Standard International goods vehicle operator's licence was received in the Department from the Appellant. The application sought authorisation for twenty vehicles and six trailers.
- (ii) 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.
- (iii) In section 18 of the application form the Appellant failed to tick a box to confirm that he had provided original financial evidence in accordance with the declaration in section 13 and Guidance Note 13.
- (iv) On 5 October 2015 correspondence was forwarded by the Department to the Appellant. In this correspondence the Appellant was informed that financial evidence had been requested and that a separate guidance note was attached to the correspondence to assist the Appellant in understanding the background against which the request for financial evidence had been made and to ensure that the evidence to be produced met that requirement.
- (v) In a section headed 'Supporting Documentation Required' the correspondence dated 5 October 2015 went on to state:

'Financial evidence to demonstrate that you have access to sufficient resources to support your application. The type and size of licence applied for requires a sum of **£81,100** 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 statement for account ending 7986. You may wish to consider a financial review being attached to your licence should the Head of the Department deem it appropriate. For this to be considered you must forward an original bank statement showing either an opening or closing balance to the required amount.

As you were unable to provide financial evidence for the one month immediately preceding your application we are seeking your agreement to provide a full 28 days worth of **original** bank statements covering the month of **February 2016** by no later than **31 March 2016** by completing and returning the proforma enclosed at Annex A.

Further guidance on the types of financial documents that are acceptable is contained in the enclosed financial guidance note for operators.'

- (vi) The 'Financial Guidance Note' which was attached to the correspondence dated 5 October 2015 set out the legislative basis for the financial standing requirement and the rates relevant to applications for, *inter alia*, for Standard

International licences. The note also set out the types of evidence which would meet the financial evidence requirement.

- (vii) The acknowledgement in the correspondence dated 5 October 2015 of receipt of a bank statement provides a context for such statements which are in the file of papers which is before the Upper Tribunal. In addition, there is a statement relating to monies which were stated to be owing to the Appellant on outstanding invoices.
- (viii) Further correspondence was sent to the Appellant on 3 November 2015. Reference was made to the correspondence which had been forwarded to the Appellant on 5 October 2015. The Appellant was advised that the additional documentation in support of the licence application remained outstanding. The Appellant was advised that the correspondence was intended as a final attempt to resolve the matter and was informed that he was required to respond in full by no later than 17 November 2015. Included within the 'additional documentation' which was submitted to remain outstanding was the financial evidence which had been referred to in the correspondence dated 5 October 2015 and which is set out in sub-paragraph (v) above.
- (ix) Within the file of papers which is before the Upper Tribunal is a copy of the 'Supporting Documentation Required' document referred to in sub-paragraph (v) above but with annotated replies which appear to have been supplied by the Appellant. In connection with the financial evidence requirement the Appellant has made reference to Annex A which has been signed and dated by him on 4 November 2015. Annex A is in the following format:

'Operator licence number: ON *****

As you were unable to provide financial evidence for the one month immediately preceding your application we are seeking your agreement to provide a full 28 days worth of **original** bank statements and other financial details (such as overdraft facility agreements or credit card statements) that show the licence holder has access to the required financial facilities and funds. These details are to be provided by **31 March 2016** and cover the month of **February 2016**.

Operator name: 365 NI Group Ltd

Signature:

Position in business:

Date:

Please sign above to confirm that you agree to submit the financial documentation requested.'

- (x) Several items of documentation were attached to the annotated and signed 'Supporting Documentation required' document but that documentation did not include anything further related to the financial evidence requirement.
- (xi) In the file of papers which is before the Upper Tribunal is a lengthy document titled 'New Application Referral'. The document is headed as follows;
- 'OFFICIAL: Not for disclosure to any third parties without the specific consent of the Head or Deputy Head of the Transport Regulation Unit'
- (x) Thereafter the first section of the 'New Application Referral' document appears to be an internal Departmental memorandum from a Caseworker to a

'Team Leader' and the Head of the TRU. The relevant extracts from the first section of the memorandum are as follows:

'FINANCIAL STANDING/PREVIOUS FINANCIAL HISTORY

This application requires financial standing of £81,100.

The applicant has agreed to a financial review. However, although the applicant has submitted a bank statement, the account currently holds no funds.

...

365 NI Group Ltd was incorporated on 17 August 2015. The applicant has provided evidence of a bank account in the name of the limited company. However, the limited company currently holds no funds. The applicant agreed to a financial review and was requested to submit a further statement showing an opening/closing balance to the required funds.

No further evidence has been provided. Therefore, I must recommend the application is refused under section 12(5) of the 2010 NI act as the applicant has failed to meet the requirements of section 12A(1)(c) - sufficient financial standing.'

- (xi) The second section of the 'New Application Referral' document is a recommendation from the 'Senior Team Leader'. The relevant extract from this section is as follows:

'Given that the applicant has failed to provide appropriate financial evidence even after the information required was set out in our final letter, the Department cannot be satisfied that the financial standing requirement has been met and I therefore agree with the recommendation to refuse the application under section 12(5) of the 2010 Act.'

- (xii) Before continuing with the remaining sections of the 'New Application Referral' document it is appropriate to refer to an e-mail exchange which took place within the Department and copies of which are included in the file of papers which is before the Upper Tribunal. In an e-mail dated 30 November 2015, a TRU caseworker forwarded an e-mail to a Senior Team Leader which included the following:

'The recommendation made by ... and you (and me, in fairness) was to refuse the application on the basis that the applicant had failed to satisfy the requirements of Section 12A(1)(c) to be of sufficient financial standing. While I am aware that, as noted in the submission, the applicant has failed to provide requested documentation (opening and closing balance?). DHTRU has asked me why, given that the applicant has agreed to a financial review and provided what is described in OLBS as 'other financial evidence' as an indicator that there is a working bank account, it was still felt that the applicant had failed to satisfy financial standing at this stage.'

- (xiii) In her reply dated 2 December 2015, the Senior Team Leader replied as follows:

'Section 3 of Annex 5 to Practice Guidance No. 02 states the following with respect to finances:

- a. If an applicant for a new licence has provided an opening balance or only the closing balance demonstrates access to sufficient funds the evidence can be accepted provided that a finance condition is accepted which requires the applicant to provide a further set of bank statements covering month 3 from the anniversary of the granting of the licence by the end of month 4. This is required so that the Department can be satisfied that they will meet the financial test required of licence holders and the test at 2 above will be applied.

The first two pages of other financial evidence provided do not show the account holder name, although I note that account number matches that on the statement provided in the name of the company. The third page, whilst there is a suggestion that the account is linked to the director, it is only a copy and it does not confirm that the account is held by the company, nor is there an account number to link it to the company's account. Even taking the other evidence into account it still appears to fall short of the requirements as the company is required to demonstrate access to £81,100 yet the other evidence shows only one balance and that is £68,150 if I read it correctly. The company does not therefore "demonstrate access to sufficient funds" based on the evidence provided.

An alternative would be to grant the application in part for 15 vehicles, which would require finances of £65,500. There are currently only 3 vehicles specified at present, although the company has stated that additional vehicle registrations will follow.

- (xiv) The fourth section of the 'New Application Referral' document is headed 'Deputy Head of TRU's decision'. The relevant extract from this section is as follows:

'There are a number of concerns with this application including:

...

Financial standing

On the basis of the application as it stands it must be refused under Section 12(5) of the Act 2010 as the operator has not demonstrated compliance with Section 12A(2)(c) – financial standing. The one-off balance is £68,150 which is £12,950 short of the required £81,100 required for 20 vehicles. Even if the amount in the account met with the required opening balance there would still be questions surrounding where the finance came from etc.

Therefore, the applicant does not satisfy the Department that he complies with Section 12A(2)(c) as set out above and the licence should be refused.'

- (xv) On 11 December 2015 correspondence was forwarded to the Appellant from the Department. The substantive aspect of this correspondence is as follows:

'I refer to your application for an operator's licence and the supporting documentation that has been submitted with the application.

The Deputy Head of the Department has reviewed the application and I can confirm that your application has been refused under Section 12(5) of the above Act as you have not demonstrated compliance with Section 12A(2)(c) – financial standing. The one-off balance shown in

the submitted verified bank statement of £68,150 is £12,950 short of the required £81,100 that is required for the authorisation for 20 vehicles.'

The application for a review

3. On 28 December 2015 the Appellant forwarded an e-mail to the Department in which he stated:

'As discussed I am greatly concerned at the refusal of the Operator's Licence as per your letter dated 11 December 2015. I would like this decision to be reviewed please. I am currently in the process of lodging an appeal with the upper tribunal but would like to have this decision firstly stayed and reviewed before that stage.

In your correspondence with me both by letter and email you had asked for additional information. This information was supplied as we believed was requested. I forwarded a number of details and items to your office by email and by post and followed up with a number of calls to ensure that you had all the required details. As stated in the calls I wanted to be 100% certain that nothing was outstanding. You assured me that nothing was outstanding and asked me to give 10 to 25 days for a decision to be made. After that period I again phoned and was advised that the case would be reviewed by the head of department due to the speeding points that I had attained in a private capacity a number of years ago. On a subsequent call I was told that it had indeed been referred for consideration due to the speeding points and to give the process a further 10 to 15 days. I then phoned after this period and was speaking to a colleague of yours who advised that the case had been referred to the TRU for review. He provided a telephone number in the TRU for me to contact. I contacted the TRU and gave my details and was advised they would phone back. I never received a call.

I then received your letter of the 11th advising that the application had been refused as the financial standing was £12,950 short. This as you are aware took me quite by surprise and I therefore rang you on receipt of the letter to question why this was as I had agreed to the financial review and had been assured on a number of occasions that everything was in place, and that I would have to submit the financial review by the date specified on your letter which was by the end of March. You advised on the phone that this was refused as an original bank statement had not been sent showing an opening or closing balance to the required amount. As discussed neither the letter nor the email stated a date for this to take place and it was raised in relation to the financial review which was for the month of February 2016. In addition to this as previously stated I was assured that I had no further detail to provide until the review was required and as also stated I had rang on several occasions to check that everything to date had been supplied which I had been assured that everything was in place.

If I had been advised that this was a requirement I would have forwarded the detail, hence the reason for my numerous calls. I also could have availed of a number of other options but feel that this has been denied to me.'

4. Returning to the 'New Application Referral' document, the final section is headed 'Head of TRU's Decision'. The relevant parts of this section are as follows:

'I have considered the submission.

356 NI Group has sought a review of the decision in respect of this application. Section 34(10) provides that the Department may review a decision if it is satisfied that a procedural requirement has not been complied with.

...

In his email of 28 Dec 15 the applicant states that he was led to believe in a telephone call that all documents had been supplied. I can find no record of such clarification in a telephone call. However in all letters from the Department it states that financial standing has not been demonstrated and that for a financial review to be considered an original bank statement showing either an opening or closing balance to the required amount must be forwarded. A date for receipt of documentation was clearly stated in all letters.

I have therefore considered the procedural aspects of this application process. I am satisfied that there have been no procedural requirements that have not been complied with in respect of this application. The applicant should be informed that a review of the decision will not be undertaken as the Department is not satisfied that there were any procedural errors made in coming to the decision.

...

The applicant has sought a stay of the decision.

Section 28(2) provides for consideration of requests for a 'stay' of a decision. However this relates to decision made under Sections 23(1), (2) of (5), 24(1) or 25(1) or (3). This decision was made under Section 12(5) and therefore, the Department has no vires to consider a request for a stay.'

5. On 15 January 2016 correspondence was forwarded from the Department to the Appellant which included the following:

'I refer to your email dated 28 December 2015 that had been sent requesting a review of the decision that had been made to refuse your application and a stay of the decision pending an appeal to be made to the Transport [*sic*] tribunal.

The Department has carefully considered the content of your email and has decided to refuse your request of a stay of the decision. Whilst Section 26(2) of the above Act provides for consideration of requests for a 'stay' of a decision, this relates to decision made under Sections 23(1), (2) of (5), 24(1) or 25(1) or (3). As the decision to refuse your application was made under Section 12(5) the Department cannot consider a request for a stay of the decision under the above legislation.

With regards to your request for a review of the decision that has been made to refuse your application for an operator's licence, the Department is satisfied that there have been no procedural requirements that have not been complied with in respect of this application. You are therefore informed that a review of the decision

will not be undertaken as the Department is not satisfied that there were any procedural errors made in coming to the decision.

The appeal to the Upper Tribunal

6. On 8 January 2016 an appeal was received in the office of the Administrative Appeals Chamber (AAC) of the Upper Tribunal

7. The Appellant set out the following grounds of appeal:

- (i) When a request for additional information was received, part of the request was for a financial review of accounts to be taken for February. This was agreed, signed and sent to the caseworker. As part of that letter an opening or closing balance of account was also required. There was no date given for this and it was requested along with the financial review requirement dated for Feb 2016. It was therefore reasonably believed that this was for the February period that was highlighted.

I phoned after sending the additional information on a number of occasions to ask if any further detailed was required bar the actual February financial review data that was requested by the end of March 2016. As I stated to the caseworker I was calling as I wanted to ensure 100% that all relevant detail was provided by me. I was assured that everything was in place and asked to contact them again in 10 to 15 days for an update.

Had I been informed that this was an immediate request I could have complied by sending further accounts with additional balance, or I could have forwarded an invoice agreement or guarantees etc. I was provided no such opportunity as I was advised that no further information was required. I was advised that the case was being referred to the case workers superiors solely due to speeding points I attained in a private capacity.

- (ii) There was no thought or contact made to reduce the number of applied vehicles to comply with the requirement. The application could have been reduced by four and this would have allowed a grant of licence. As I had no further communication of any issue this could not be discussed or raised, nor was there an opportunity to utilise other options that were available to me.

I am of the belief that I complied with all the requested steps laid out by the Department. There was no further contact before the Department arbitrarily decided to refuse the application on a shortfall of finance, in circumstances where I believed that a financial review was going to take place in February 2016. As already stated the Department could have either reduced the number of vehicles or attached conditions or at least reverted to the company to give us the opportunity to follow or discuss a number of options.'

8. An oral hearing of the appeal took place on 16 June 2016. The Appellant was not in attendance and was not represented. On 3 June 2016 e-mail correspondence was received in the office of the UT (AAC) from the Appellant's former representatives in which it was indicated that they no longer represented the Appellant and would not be doing so at the oral hearing of the appeal.

9. During the course of the oral hearing we were informed that the Appellant had made a further application for a goods vehicle operator's licence which may be

the reason why he had decided not to pursue the appeal by attending the oral hearing. Nonetheless there has been no explanation for his absence. We were satisfied that that the Appellant had been notified of the date, time and venue of the oral hearing. In these circumstances we concluded that it was in the interests of justice to proceed in his absence there being no good reason not to proceed (rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

10. In advance of the oral hearing we were supplied with a Skeleton Argument prepared by Ms Fee BL on behalf of the Department for which we were grateful. Responding to the appellant's grounds of appeal, Ms Fee noted that in section 13 of his application form the appellant had declared that he had read the Department's 'Guidance Note 13'. Pausing there, what is actually being referred to by Ms Fee is 'Guidance Note 13 – Financial evidence' which is part of the Departmental document 'GV(NI) 79: Application Form Guidance Notes.' Ms Fee submitted:

'This guidance note includes the requirement for submission of 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 which must be submitted with the application. It does however outline the discretion that, if a new business does not have statements for 28 days, an opening balance meeting the requirements can be accepted, but that it may be the subject of a requirement to submit further evidence within a specified period after the date of grant.'

11. We return to the relevance of 'Guidance Note 13' below. Ms Fee made reference to the correspondence which had been forwarded to the Appellant on 5 October 2015. In connection with this correspondence, Ms Fee submitted:

'In the attachment to the letter, entitled 'Supporting Documentation Required' the Respondent clearly advised the applicant that the requirement included 'financial evidence to demonstrate you have ready access to sufficient resources to support your application' that being access to £81,100 during a 28 day period the last date of which must not be more than 2 months from, 24 September 2015, i.e. the date of receipt of the application.

The attachment also acknowledged that whilst a bank statement for account ending 7986 was provided, it showed access to insufficient funds. It advised the applicant that he might wish for a financial review being attached to his licence but that for this to be considered he must forward a bank statement showing either an opening or closing balance to the required amount.

12. Ms Fee submitted that the net effect of 'Guidance Note 13', the correspondence dated 5 October 2015 and the attachments to that correspondence, was that it was made 'abundantly clear' to the applicant that on an application an applicant must demonstrate access to the required financial resources. Further:

'...There is a discretion, when the company is new and therefore may not be able to demonstrate access to the resources over the full 28 day period, that if an opening or closing balance can be demonstrated to the required amount prior to the application being determined then the Respondent can consider attaching a financial review to the licence. The Respondent submits that a review cannot be attached to the licence, as the application must fail if the applicant has not

demonstrated at least the appropriate balance within the account prior to the application being determined.'

13. Ms Fee also submitted that Appellant's agreement to a 'financial review' to be 'attached' to the licence was separate to the statutory requirement to provide evidence of appropriate finance by 19 October 2015. She noted that further correspondence was forwarded to the Appellant on 3 November 2015. As was noted above in this correspondence the Appellant was advised that certain information remained outstanding and that he needed to forward it to the Department. He was also advised that that the correspondence was intended as a final attempt to resolve the matter and was informed that he was required to respond in full by no later than 17 November 2015. Included within the 'additional documentation' which was submitted to remain outstanding was the financial evidence which had been referred to in the correspondence dated 5 October 2015. She submitted:

'The attachment to that letter also clearly set out the supporting documentation required i.e. financial evidence to demonstrate sufficient resources to support your application. As previously the attachment further advised that as the statements showed access to insufficient funds the Department could consider a financial review but that statements to demonstrate either an opening or closing balance and the review would require bank statements covering the month of February 2016, which were to be forwarded by no later than 31st March 2016.

Similarly the Respondent submits that the applicant's submission of the agreement to a financial review to be attached to the licence was therefore separate to the statutory requirement to provide evidence of appropriate finance by 17th November 2015.'

14. Ms Fee noted that while the Appellant had provided a signed agreement to a financial review and had supplied some responses to other matters, he had not submitted the relevant financial documentation and, accordingly, the application remained incomplete.
15. Ms Fee submitted the requirement to demonstrate financial standing prior to the determination of the application and the date by which such information had to be provided had been 'clearly stated' in all of that correspondence to the Appellant. When the relevant information had not been provided the Department had no discretion and was required to refuse the application.
16. Ms Fee noted that in his request for a review and 'stay' of the decision to refuse the application the Appellant had forwarded a 'Statutory Declaration' demonstrating a guarantee for £18000. In connection with this Ms Fee submitted:

'... the Respondent declined to accept the Statutory Declaration. The Respondent submits that it is a fundamental principle of company law that every company is a separate legal entity and that in the case of a limited company the funds must be held within the company. The Upper Tribunal consideration of the availability of finance in JJ Adam Haulage (1992/D4) applies and the Respondent further submits that a statutory declaration in an individual's name is not appropriate for a

limited company as finance is not readily available in those circumstances.'

17. Finally Ms Fee addressed the Appellant's submission that the Department had given no consideration to allowing the application but for a reduced number of vehicles. In connection with this issue she submitted:

'The Respondent submits that the principle contained within para 10 of *T/2012.17 NCF (Leicester) Ltd* as set out below, whilst pertaining to existing licences, should also apply to applications.

10. We turn to the submission that the Deputy Traffic Commissioner should have considered alternative solutions to the problem of financial standing. The suggestion seems to be that the Deputy Traffic Commissioner should have curtailed the licence by a sufficient number of vehicles to enable the requirement of appropriate financial standing to be met. We reject that suggestion. In our view it was for the Appellant and not the Deputy Traffic Commissioner to take the initiative in relation to the number of vehicles that were authorised and then for the Appellant to show that enough money was available to meet the requirement for the reduced number of vehicles. In order to explain why this is the case we need to restate some of the fundamental principles, which apply to the requirement to be of appropriate financial standing.

The Respondent submits that it is not for the Department to seek the applicant's amendment to the application where the requirement for financial standing has not been satisfied but that it is for the operator to specify the number of vehicles required and to produce the evidence of appropriate available finance. The onus is upon the operator to amend an application if they cannot adduce evidence of sufficient resources and the Department would consider such amendment in the final determination of the application.'

18. During the course of the oral hearing Ms Jones expanded on the submissions which had been made by Ms Fee in the Skeleton Argument. She submitted that what Ms Fee had referred to as a 'financial review' was an undertaking to which the Appellant had to give his consent. Ms Jones also provided constructive and helpful submissions on the issue of the rigour of the Department's decision-making and the notification of the decision to the Appellant.

The relevant legislative provisions

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

12.— "Determination of applications for operators' licences

(1) On an application for a standard licence the Department must consider—

- (a) whether the requirements of sections 12A and 12C are satisfied;
- (b) if the Department thinks fit, whether the requirement of section 12D is satisfied.

- (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.
- (3) Subsections (1) and (2) are subject to sections 10 (publication of application) and 47(2) (payment of application fee).
- (4) In considering whether any of the requirements of sections 12A to 12D are satisfied, the Department must have regard to any objection duly made under section 11(1)(a) in respect of the application.
- (5) If the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) or (2) are not satisfied, it must refuse the application.
- (6) In any other case the Department must grant the application, unless either of the following provisions applies—
- (a) section 13(2) (power to refuse application on environmental grounds);
 - (b) section 47(2) (power to refuse to proceed until fee is paid).'

20. Section 2A(2)(c) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 provides:

‘12A.— Requirements for standard licences

- (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—
- ...
- (c) has appropriate financial standing (as determined in accordance with regulations and Article 7 of the 2009 Regulation);’

The proper approach to appeals to the Upper Tribunal

21. 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.’

22. 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

23. We begin with consideration of the Appellant’s submission that a request for a financial review to take place in February and March 2016 had been agreed to by his completion and signing of the relevant section of the ‘Supporting Documentation Required’ on 4 November 2015 and that, accordingly, he had thought that he had nothing further to do in relation to the application.
24. We start by analysing the application form which was signed by the Appellant on 15 September 2015. As was noted above, 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. Despite the latter declaration, in section 18 of the application form the Appellant failed to tick a box to confirm that he had provided original financial evidence in accordance with the declaration in section 13 and ‘Guidance Note 13’.
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 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. Finally, and of significance in this case, the Guidance Note goes on to state:

'If the applicant has a new business and thus does not have statements for 28 days, an opening balance meeting the requirement may be accepted, with an explanation regarding the source of funds but it may be the subject of a requirement to submit further financial evidence within a specified period after the date of grant (likely to be 6 to 12 months) to provide the operator with an opportunity to then supply three months of evidence.'

29. Set out in the plainest of terms, this advice makes it clear that in the case of an applicant with a new business, where there are no bank statements for the

relevant twenty-eight day period, **an opening balance meeting the requirement might be accepted**. What is significant about this is that (i) any such applicant (new business and no relevant bank statements) would still have to demonstrate an opening balance which met the financial standing requirement and (ii) even if such an opening balance could be demonstrated there was no requirement to accept it. More likely, any acceptance would be subject to a requirement to submit further financial evidence within a specified period after the date of the grant.

30. We have also noted that the Annex B of document 'GV(NI) 79: Application Form Guidance Notes' sets out details of the present financial levels required for a licence. Annex B provides a straightforward 'ready-reckoner' for calculating the levels of finance required to meet the financial standing requirement.
31. Returning to the application form completed by the Applicant, it is our view that his declaration that he had read 'Guidance Note 13', prior to completing and forwarding his application, meant that he was under unambiguous notice of the significance of the financial standing requirement, how the Department calculated the appropriate rates, what the current rates were and the requirement for him to ensure that he had sufficient financial evidence to demonstrate compliance with the current levels for the type and number of vehicle specified on the application. Further he could take from the guidance offered advice that as a new business applicant who might not have bank statements for the relevant twenty-eight day period he could provide an opening balance meeting the financial standing requirement which might be accepted by the department but in which case would be likely to be subject to a requirement to submit further financial evidence.
32. We have noted that the Appellant failed to tick a box to confirm that he had provided original financial evidence in accordance with the declaration in section 13 and 'Guidance Note 13'. Nonetheless certain information from the Appellant's bank did reach the Department. Bank statements are included in the file of papers which is before us. It is clear that the Department had certain concerns about the source of the funds in the bank account (the internal e-mail of 2 December 2015, noted in paragraph 2(xiii) above refers). Nonetheless, it is clear that the Department had formed the view that even if this source could be accepted it did not demonstrate that there were adequate funds to meet the financial standing requirement. It was this which led to the correspondence of 5 October 2015.
33. As was noted above, attached to the correspondence of 5 October 2015 was a document called 'Supporting Documentation Required'. In this document the Appellant was advised that the type and size of the licence for which he had applied required a sum of £81,100 to have been available for a twenty-eight day period. It was noted that the Appellant had submitted a bank statement but that it did not demonstrate that there were adequate funds to meet the financial standing requirement. A document, akin to Annex B of document 'GV(NI) 79: Application Form Guidance Notes' was attached.
34. The Appellant was then advised:

'You may wish to consider a financial review being attached to your licence should the Head of the Department deem it appropriate. For

this to be considered you must forward an original bank statement showing either an opening or closing balance to the required amount.

35. We accept that the statement that in order for the appellant to consider the attachment of a 'financial review' (referred to by Ms Jones in the oral hearing as an undertaking) to his licence he was required ('must') forward an original bank statement showing either an opening or closing balance to the required amount, is unambiguous. Nonetheless that statement was followed, immediately, by the following statement:

'As you were unable to provide financial evidence for the one month immediately preceding your application we are seeking your agreement to provide a full 28 days worth of original bank statements covering the month of February 2016 by no later than 31 March 2016 by completing and returning the proforma enclosed at Annex A.'

36. We pause for the moment to note that while the Appellant did attend to certain other aspects of the information and supporting documentation which remained outstanding, he did not either provide an original bank statement showing either an opening or closing balance to the required amount or return a signed proforma to trigger the possibility of a financial review. That led to the correspondence of 3 November 2015.
37. The correspondence of 3 November 2015, and the documents which were attached to it, were parallel to those of 5 October 2015 save that the covering correspondence alerted the Appellant to the fact that it was intended as a final attempt to resolve the issues outstanding on his application. This time the Appellant did act returning the 'Supporting Documentation Required' document with annotated replies which appear to have been supplied by the Appellant. In connection with the financial evidence requirement the Appellant has made reference to Annex A which has been signed and dated by him on 4 November 2015.
38. We are of the view that there is a degree of tension or discord between the guidance which is given in document 'GV(NI) 79: Application Form Guidance Notes' to applicants with a new business where there are no bank statements for the relevant twenty-eight day period concerning the possibility and what the Appellant in the instant case was told in the correspondence (and attachments) of 5 October 2015 and 3 November 2015. It is arguable that when read together, the statements referred to in paragraphs 34 and 35 are incompatible. On the one hand there is a statement that for the possibility of a financial review to be considered the appellant was obliged to forward an original bank statement showing either an opening or closing balance to the required amount. On the other hand he is then informed that as he has been unable to provide financial evidence for the one month immediately preceding his application, the Department was seeking his consent to provide original bank statements for a further period.
39. Is the Appellant entitled to rely on the potential ambiguity in the statements which were made as a ground for not confirming the decision that his application for a goods vehicle operator's licence must fail? The answer is that he cannot. As was noted in paragraphs 26 to 30 above, the advice given in 'Guidance Note 13 – Financial evidence' could not be more clear and unambiguous. We repeat that his declaration that he had read 'Guidance Note 13', prior to completing and forwarding his application, meant that he was

under unambiguous notice of the significance of the financial standing requirement, how the Department calculated the appropriate rates, what the current rates were and the requirement for him to ensure that he had sufficient financial evidence to demonstrate compliance with the current levels for the type and number of vehicles specified on the application. Further he could take from the guidance offered advice that as a new business applicant who might not have bank statements for the relevant twenty-eight day period he could provide an opening balance meeting the financial standing requirement which might be accepted by the department but in which case would be likely to be subject to a requirement to submit further financial evidence.

40. We note that the Appellant did not act on the guidance which was given in 'Guidance Note 13 – Financial evidence' and did not, initially, supply evidence of finances sufficient to demonstrate compliance with the then levels for the type and number of vehicles specified on the application. We acknowledge that he did provide certain financial information but it should have been clear to him that the funds available in the relevant bank account were insufficient to meet the requirement. We note that the Appellant failed to act on the correspondence of 5 October 2015. He did act on the correspondence of 3 November 2015 but only to sign and return the proforma relating to the potential for financial review. He ignored the necessity to provide an opening or closing balance meeting the financial standing requirement which he was informed was necessary to trigger the financial review. We have noted that in his notice of appeal he has acknowledged that the correspondence (although not specified but in all probability that of 3 November 2015) that there was a requirement for the provision of an opening or closing balance meeting the relevant financial standing requirement.
41. Accordingly we reject this ground of appeal. We are of the view, however, that the Department should revise the statements concerning financial evidence which are made in the 'Supporting Documentation Required', particularly as to how the potential for a financial review might be triggered, so that they more properly reflect the unambiguous guidance which is given in 'Guidance Note 13 – Financial evidence'.
42. We turn to the Appellant's second substantive ground of appeal which was that consideration should have been given by the Department to the granting of a licence but for a reduced number of vehicles, reflective of the finance which was declared to be available. In connection with this ground we accept the response provided for by Ms Fee in her Skeleton Argument, as set out in paragraph 17 above, and expanded upon by Ms Jones.
43. It is for the operator not the Traffic Commissioner to specify the number of vehicles for which authority is requested. If the operator is unable to satisfy the requirement for financial standing in relation to that number it is for the operator to decide whether to ask for a reduction in the number authorised. It is not for the Traffic Commissioner to curtail the licence to a number for which the operator can demonstrate financial standing. That principle derives from paragraph 10 of the decision of the Upper Tribunal in T/2012/17 NCF (Leicester) Ltd. Although that case concerned an extant licence we see no reason why the principle should not also be applied in connection with licence applications.
44. Finally we turn to an issue which was not raised by the Appellant but we wished to address in line with our inquisitorial role. The issue concerned the

rigour and form of decision-making within the Department and the notification of the decision to the Appellant.

45. In its decision in 34/2000 Solent Travel Ltd, the then Transport Tribunal stated the following, at paragraph 11 of its decision:

'We have already commented on the absence of documents and information in the appeal bundle. We believe that it may be helpful if we say rather more on this topic. One of the main functions of the Tribunal is to review the way in which the Traffic Commissioner reached the decision in question. We consider that it is essential, if the Tribunal's function is to be discharged properly and fairly and if justice is to be seen to be done, that the Tribunal should have before it all the material which was before the Traffic Commissioner at the time that the decision in question was taken. Finally we wish to add the following general points:-

- (i) It is normally desirable that every appeal bundle should include a copy of the application for the current operator's licence, any earlier application, if relevant and any application for a variation if relevant. These documents provide a quick and easy way to obtain basic but important information about the operator and the operating centre. No application was included in the present appeal bundle.
- (ii) Every appeal bundle should contain a complete set of correspondence between the Traffic Area Office and the Appellant relating to the matters giving rise to the appeal. In the present case as we have pointed out the enclosure sent with the letter of 7th January 2000 was omitted as was the copy of that letter sent on 7th February 2000.
- (iii) The correspondence in the present case refers to a telephone call on 3rd March 2000. The indication from Mr. Duckworth was that Mr. Donald asserted that there was more than one call. Where possible, (and we accept that it may not always be possible), a note should be made of telephone calls with operators. Without such a note it is likely to be very difficult to resolve any dispute as to the content of the call or whether it did in fact take place. Where there is such a note of a call, relevant to the matters giving rise to the decision from which there is an appeal, it should be included in the appeal bundle.
- (iv) Every appeal bundle should contain a record of the decision from which there is an appeal. In the great majority of cases this presents no problem because there will either be a transcript of the Traffic Commissioner's oral decision or a copy of a reserved decision. This case falls into a different category because it was a decision made in chambers. The appeal bundle contains no document of any description on which the decision is recorded. In our view this is simply not acceptable. Both the Tribunal and the operator are entitled to know (a) who made the decision in question, (b) on what ground the decision was made and (c) the reason for concluding that the ground was made out. Experience of chambers decisions taken in

other Traffic Areas suggests that this information can be adequately provided in a very few sentences. In our view nothing less will enable the Tribunal to be satisfied that the Traffic Commissioner has correctly identified the issue(s) and has correctly applied the appropriate test.'

46. In a further decision, 2009/030 Pilkingtons Accrington Ltd. t/a King Travel, the Tribunal stated, at paragraph 5:

'The Traffic Commissioner clearly felt that the Minute dated 16 January 2008, (see paragraph 2(iii) above), ought not to have been disclosed to Mr. Cunningham. In the absence of any other document from which the reason (or lack of reason) for the refusal of the application to cancel the services at short notice can be determined we disagree with that view. In our view the Appellants were entitled to know the basis on which the application was refused and they were entitled to know whether or not the correct test had been applied. In the absence of a reasoned decision or a fully reasoned letter giving the grounds for refusal, (neither of which was provided), it seems to us that disclosure of the underlying documentation was essential. How else could the correctness of the decision be challenged? How else could the Tribunal give reasons for saying either that the decision was wrong or that it was correct?'

47. During the course of the oral hearing, Ms Jones confirmed to us that the Appellant was notified of the decision of the Deputy Head of the TRU by way of correspondence dated 11 December 2015. The substantive parts of that correspondence are as follows:

'I refer to your application for an operator's licence and the supporting documentation that has been submitted with the application.

The Deputy Head of the Department has reviewed the application and I can confirm that your application has been refused under section 12(5) of the above act as you have not demonstrated compliance with section 12A(2)(c) – financial standing. The one-off balance shown in the submitted verified bank statement of £68,150 is £12,950 short of the required £81,100 that is required for the authorisation for 20 vehicles.'

48. Ms Jones also confirmed that the decision of the Deputy Head of the TRU was made on 7 December 2015 and that a record of that decision is to be found in the relevant section of the 'New Application Referral' document as referred to in paragraph 2(xiv) above. It is, of course, the case that the Appellant did not receive a copy of the decision of the Deputy Head of the TRU dated 7 December 2015 as it was contained in an internal Departmental document headed 'Not for disclosure to any third parties without the specific consent of the Head or Deputy Head of the Transport Regulations Unit.'
49. We are just about satisfied that the correspondence dated 11 December 2015 is sufficient to convey to the Appellant the legal and evidential basis of the adverse decision which was made in connection with his application for a goods vehicle operator's licence. The correspondence did not address, however, an issue which was to become of significance for the Appellant namely why a financial review was not triggered when he had consented to

such a review. That issue was addressed in the internal e-mail correspondence and in the section of the 'New Application Referral' document as it dealt with the Appellant's application for a review and a stay. It is possible that had an explanation of these aspects of the decision-making process been explained to the Appellant in a more discrete decision notice or in the covering correspondence then the requirement for the Appellant to turn to the Upper Tribunal might have been abrogated. We would encourage the Head and Deputy Head of the TRU to give consideration to the requirements for rigorous decision-making as set out in the jurisprudence of the Transport and Upper Tribunals and implement the relevant principles into practice.

50. Nonetheless, while we would wish the Department to take cognisance of these additional comments, they make no difference to our decision. For the reasons which are set out above the appeal must be dismissed.

Decision of the Upper Tribunal

51. The decision of the Deputy Head of the TRU was not wrong and is confirmed. The Appellant, in his application for a goods vehicle operator's licence, did not provide evidence of financial resources sufficient to demonstrate compliance with the then levels for the type and number of vehicles specified on the application. In addition, the Appellant ignored the necessity to provide an opening or closing balance meeting the financial standing requirement which he was informed was necessary to trigger a financial review.
52. The appeal is, accordingly, dismissed.



**Kenneth Mullan, Judge of the Upper Tribunal,
12 August 2016**