

Appeal No. T/2016/18

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

**ON APPEAL from the DECISION of
Simon Evans, Deputy Traffic Commissioner
for the North West of England dated 18 April 2016**

Before:

Her Honour Judge J Beech, Judge of the Upper Tribunal
Leslie Milliken, Member of the Upper Tribunal
John Robinson, Member of the Upper Tribunal

Appellant:

Eric Leslie Brown

Attendances:

For the Appellant: Mr Brown requested that the Tribunal consider his appeal in his absence

Heard at: Field House, 15-25 Bream's Buildings, London, EC4A 1DZ

Date of hearing: 23 August 2016

Date of decision: 30 August 2016

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED and the matter be remitted for reconsideration including the offer of a public inquiry

SUBJECT MATTER:- Application for restricted PSV licence; whether Appellant satisfies the main occupation requirements contained in s.13(3)(b) of the 1981 Act.

CASES REFERRED TO:- None

REASONS FOR DECISION

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the North West of England (“DTC”) made on 18 April 2016 when he refused the Appellant’s application (“Mr Brown”) for a restricted PSV operator’s licence under s.13(3)(b) of the Public Passenger Vehicles Act 1981 (“the Act”).

Background

2. The factual background to the appeal appears from the documents and the DTC’s written response to submissions prepared by members of the staff of the Central Licensing Office (“CLU”). By an incomplete application received on 27 October 2015, Mr Brown applied for a restricted PSV operator’s licence authorising one sixteen seat minibus. In the body of the application form, Mr Brown confirmed that he was fully aware of and would comply with, the restrictions under the terms of a restricted licence for the use of vehicles with between nine and sixteen passenger seats, by ticking the appropriate box at section 8b). In response to the request for details of his business or main occupation and how he would comply with those restrictions, he stated:

“I am a carer for my 8yr grandson for whom I have a special guardianship order for since birth. I would probably do about 16 hrs to 20 hrs a week driving. Some week’s not even that”.

As for his operating centre, Mr Brown gave his home address and indicated that there was one parking space at the address. He also listed two fixed penalty notices dated 23 October 2015 within section 14 of the application form. In a covering letter submitted with the application, Mr Brown notified the CLU that the fixed penalty notices had been issued for operating a minibus without an operator’s licence and failing to use a tachograph. The circumstances of the offences were that he was picking up a group of people from Birmingham Airport when he was stopped. He was going to receive payment for his petrol costs and two tickets to a football match. He had not realised that this amounted to “hire and reward”. The police officer advised him that he needed to obtain a restricted operator’s licence and as a result, he was making the application. He described himself as naive and he now wanted to ensure that his future use of the minibus was “legal”. He had also applied for his driver CPC. Also enclosed with the application were a number of bank statements in respect of a joint account held by Mr Brown and his wife.

3. On 19 November 2015, Neil Chivers, a case worker within the CLU wrote to Mr Brown requesting the following information by no later than 3 December 2015:
 - a) A photograph of the operating centre;
 - b) The registration number of the minibus;
 - c) Further financial information as the bank statements submitted did not cover a 28 day period and related to a joint account. A statutory declaration was required from Mrs Brown and evidence of an overdraft facility or other financial evidence;
 - d) A written maintenance contract;
 - e) Clarification of the type of work that Mr Brown intended to undertake with the minibus along with details of the likely hours the minibus was to be operated, the identities of the drivers and the estimated income to be earned;
 - f) Clarification of Mr Brown's main occupation. If minibus driving was to be his main occupation then he was requested to withdraw his application as he could not meet the main occupation criteria;
 - g) The original certificate of initial fitness for the minibus;
 - h) An example of a safety inspection sheet to be used by the maintenance contractor.

The CLU did not receive any response from Mr Brown within the deadline.

4. On 7 January 2016, Mr Chivers wrote again to Mr Brown requesting the outstanding information. Mr Brown was warned in the letter that this was the CLU's final attempt to resolve the issues outstanding with Mr Brown's application and that if he did not provide the information by 21 January 2016, then his application would be refused. Mr Brown was informed that he could contact Mr Chivers directly if he remained uncertain as to what was required.
5. The above letter appears to have "crossed in the post" with one from Mr Brown which is undated (Mr Brown does not put a date on most of his correspondence). The office stamp of receipt indicates that it was opened on 7 January 2016. In the letter, Mr Brown advises that the "DHSS" had told him to write a letter of complaint because the application form for a licence did not make the main occupation restriction clear. He felt that he had wasted the application fee which had come out of his benefits. He wanted a refund of the fee and further advised that his local mayor and MP were "waiting with interest" to see whether Mr Brown was either granted an operator's licence or a refund because the main occupation criteria was "not in the correct format" on the application form.
6. On the 15 January 2016, the CLU received a further undated letter from Mr Brown providing the following information:

- a) The nature of the work to be carried out in the minibus was the provision of transport to his friends to take them to football matches or to the airport. He did not intend to charge for his services save for the cost of petrol. He had been told by a police officer that this amounted to “reward” and that he needed an operator’s licence;
- b) He enclosed his P60 in respect of his pension income. The “DHSS” had helped pay towards Mr Brown gaining his driver’s CPC qualification and they were also helping him to obtain employment;
- c) A maintenance contract was enclosed. A copy of an inspection sheet would be forwarded and Mr Brown would obtain a driver defect reporting book;
- d) Further bank statements were enclosed, showing the existence of an overdraft facility and a statutory declaration sworn by Mrs Brown was also enclosed;
- e) Copies of Mr Brown’s driving licence, CPC qualification, MOT certificate for the vehicle along with confirmation of the registration number were also included.

He did not mention in his letter that he had in fact by this stage, obtained employment with Crowther Distribution Limited earning a little under £98 per week net (as evidenced by two pay slips dated 15 January 2016 and 1 April 2016 submitted to the Tribunal). However, Mr Brown has sent his telephone billing data for the relevant period to the Tribunal and it can be seen that he did make a telephone call to Mr Chivers’ direct number on 25 January 2016. The call lasted for two minutes, fourteen seconds. He made another call on 5 February 2016 to the same number. The call duration was one minute thirty one seconds. He called again on 19 February 2016 and the call duration was one minute nine seconds. He called again on 8 March 2016 and the call lasted two minutes twenty three seconds. There are no attendance notes within the appeal bundle relating to these telephone calls.

7. Mr Chivers prepared his written submission upon Mr Brown’s application on 9 March 2016. His recommendation was as follows:

“From the information that the applicant has provided it appears that he fails to meet the main occupation criteria for holding a restricted operator licence, the applicant is withdrawing a pension and has provided a P60 and pension pay slip to show this, the applicant has specified that he is the carer for his 8 year old grandson but has not provided any evidence to show that this is an occupation in any way or what income he is receiving from this. The applicant has nominated an operating centre which appears to be his residential address, although requested, the applicant has not provided any photo’s of the operating centre showing the entrance, exit and area where the vehicle will be parked. The only photo that could be obtained was one from google maps and I was unable to find the exact property, it is therefore unknown if the operating centre is suitable as there is not off road parking at some of the properties on the street.”

I recommend that this application is refused with the offer of Public Inquiry under the PPV Act, s13(3)(b) and s14 ZC(1)(a), main occupation and operating centre suitability”.

8. On 22 March 2016, the CLU received another letter from Mr Brown enquiring about the status of his application. On 29 March 2016, he called Mr Chivers’ direct line and the call lasted three minutes seventeen seconds. He called again on 6 April 2016 (call duration two minutes six seconds). Then on 9 April 2016, Mr Betts, a team leader within the CLU added his submissions to those of Mr Chivers. He supported Mr Chivers’ recommendation as “guardianship” could not be considered to be a main occupation and the operating centre did not appear to be suitable. He too considered that the best way forward was a refusal with the offer of a public inquiry. He did not consider that it was an appropriate case for a fee refund.

9. On 14 April 2016, the DTC made the following determination:

“I am minded to refuse the application under the frivolous provisions in Regulation 6 as the holding of a hearing is unnecessary (in that sense of therefore it being frivolous) and would serve no purpose, since it is clear that being a special guardian having parental responsibility for a child is not capable of being a main occupation, nor would be receipt of a retirement pension”.

10. The first letter sent out to Mr Brown on 15 April 2016 stated as follows:

“I refer to your application to vary your operator’s licence.

I must now advise you that your application has been refused as you have failed to meet the requirements set out in Section 14 of the above Act”.

The second letter sent to Mr Brown on 18 April 2016 stated as follows:

“I refer to your application to vary your operator’s licence.

I must now advise you that your application has been refused as you have failed to meet the requirements – Public Service Vehicles (Operators Licences) Regulations 1995, Determination of applications – section 6, a traffic commissioner shall not refuse an application for a licence, or grant it other than as requested without giving to the applicant an opportunity to state his case at an inquiry save where the application or the applicant’s conduct in relation to it is frivolous or unreasonable”.

On 18 April 2016, Mr Brown telephoned Mr Chivers again (a call which lasted for three minutes fifty two seconds).

Upper Tribunal Appeal

11. Mr Brown's grounds of appeal complain about the sufficiency of the advice provided to him about whether further information was required from him in order to progress his application. Whilst he had numerous conversations with a member of the CLU staff, he was not told about the need to send in the payslips demonstrating that he had obtained employment and that he needed to provide further information about the proposed operating centre. His grounds of appeal maintain that between January and April 2016, all that he was told in the numerous telephone calls was that his application was "getting looked at" and that it was too late to submit further evidence. He could easily have remedied the deficiencies in his application (as he has done now by providing wage slips and photographs of a proposed alternative operating centre). He considers that he has done everything he was asked to do and he is very angry about the length of time it has taken for a decision to be made and about the refusal itself. In a further undated letter, Mr Brown maintained that on 8 January 2016, he had written to Mr Chivers to inform him that he had obtained employment and he further maintains that he also sent in photographs of an alternative proposed operating centre at The Roby Hotel Public House.

The Tribunal's determination

12. It is clear that neither Mr Brown nor his "DHSS" advisor, who ever that might have been, had any knowledge of the requirements for obtaining a restricted licence and the restrictions applicable to such licences. A careful reading of the application form along with the guidance which is referred to in the body of the form itself would or should have alerted Mr Brown and his advisor to all of the requirements that he must satisfy in order to be granted a restricted licence. Indeed, he ticked the relevant box to confirm that he understood the requirements. We therefore reject any suggestion that the application form along with the guidance does not make it clear that a restricted licence can only be granted to someone who does not intend to operate vehicles under such a licence as his main occupation.
13. It is also clear that Mr Brown failed to respond to the request for further information sent to him on 19 November 2015 in a timely fashion and then when he did do so on 7 January 2016, the required information was still incomplete. We are however, concerned about what happened thereafter. Mr Brown was in employment (as evidenced by one of the payslips produced to this Tribunal) by at least 15 January 2016 and he was regularly telephoning Mr Chivers' direct line from 25 January 2016. Whilst there is no evidence before this Tribunal to support Mr Brown's assertion that he had written to Mr Chivers to inform him of his newly found employment, we have asked ourselves this question: what was discussed in all of the telephone calls that Mr

Brown made to the CLU? Mr Brown maintains in his submissions to the Tribunal that he had informed Mr Chivers of his employment and had asked what other evidence was required of him. The submission to the DTC was not “signed off” until 9 March 2016. Whilst we do not know what the CLU staff might say about Mr Brown’s assertions concerning the telephone calls, we find it difficult to believe that Mr Brown would not have mentioned his employment during the course of the calls when it was clear that consideration was being given to whether he satisfied the main occupation test. And whilst we repeat that any information provided after 21 January 2016 would have been outside the deadline provided in the letter of 7 January 2016, if the information about newly found employment had been included into the submission that was put before the DTC, it is difficult to see how the DTC could properly have concluded that Mr Brown should be denied his right to attend a public inquiry because his application was either frivolous or unreasonable under regulation 6 of the Public Service Vehicles (Operators’ Licences) Regulations 1995.

14. We are also concerned by the way in which Mr Brown was informed that his application had been refused and the adequacy of the reasons he was given. The first letter dated 15 April 2016, informed Mr Brown that his application to vary his licence had been refused under s.14 of the Act. Of course, he was not applying for a variation of an existing licence and the letter did not inform Mr Brown which particular part of s.14 was relied upon or indeed mention that the refusal had been (presumably) made under s.13(b)(ii) of the Act. In short, this letter could not possibly amount to an adequately reasoned refusal letter. The letter dated 18 April 2016 was no better. The relevant contents of the letter are set out in paragraph 10 above. It again wrongly described Mr Brown’s application as a variation application and it does not make any sense. It may be that the terms of the DTC’s decision set out at the conclusion of the submission did not assist the writer in composing the refusal letter but for whatever reason, the letter does not refer to the statutory requirements which were being relied upon to refuse the application.
15. In all the circumstances, we are satisfied that Mr Brown’s sense of grievance is made out and that there is a perception that he has been denied the opportunity of attending a public inquiry at which he would have been better able to explain his personal position. We repeat that had the DTC been informed that Mr Brown had obtained employment, then he would have stepped back from finding that Mr Brown should be denied a hearing because his application was either frivolous or unreasonable. In the result, we allow this appeal and remit it for reconsideration and for a public inquiry if necessary. Mr Brown will of course have to satisfy the CLU that he remains of appropriate financial standing, that his operating centre is suitable and that his maintenance arrangements are adequate. He should also produce the certificate of initial fitness issued to the vehicle. We have been informed by Mr Brown that he now drives full time for TNT and that in itself may cause

an insurmountable problem for him in relation to driving a minibus under a restricted licence during periods when he should otherwise be taking his minimum daily or weekly rest in order to comply with the drivers' hours rules. That will be something that will have to be addressed in due course and he will have to explain how he can operate the minibus and drive full time for TNT without breaching the relevant rules.

A handwritten signature in black ink, appearing to read "Judge Beech". The signature is written in a cursive, flowing style.

**Her Honour Judge J Beech
30 August 2016**