

Neutral Citation Number: [2017] UKUT 0220 (AAC)

Appeal No. T/2017/02

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

**IN AN APPEAL FROM THE DECISION OF
Miles Dorrington, DEPUTY TRAFFIC COMMISSIONER for the
NORTH WEST OF ENGLAND TRAFFIC AREA dated 12 December 2016**

Before:

**Her Hon. Judge J Beech, Judge of the Upper Tribunal
Leslie Milliken, Specialist Member of the Upper Tribunal
David Rawsthorn, Specialist Member of the Upper Tribunal**

Appellant:

MOHAMMED AKBAR trading as CHOUDHURY TRANSPORT

Attendances:

For the Appellant: The Appellant requested that the appeal be considered in his absence

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

Date of hearing: 25 April 2017

Date of decision: 2 May 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED

SUBJECT MATTER:- Whether the main occupation requirement for the holding of a restricted PSV licence was met; whether the Deputy Traffic Commissioner was wrong to find that the Appellant did not fulfil the financial standing requirements.

CASES REFERRED TO:- Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695.

REASONS FOR DECISION

1. This is an appeal from the decision of the Deputy Traffic Commissioner for the North West of England Traffic Area (“DTC”) made on 12 December 2016 when he revoked Mr Akbar’s restricted PSV licence authorising one vehicle with effect from 23.59 on 31 December 2016 under ss.17(3)(d) and 14(ZB)(b) of the Public Passenger Vehicles Act 1981(main occupation and financial standing).

Background

2. The factual background to this appeal appears in the public inquiry documentation and the DTC’s decision. We have not however, had the benefit of any of the documentation that Mr Akbar provided to the OTC in the course of correspondence and during the public inquiry hearing apart from two sets of accounts which were included with his appeal notice. The Upper Tribunal has been informed that the documentation which had been in the possession of the OTC had been destroyed. No explanation has been given for how this came about. The unavailability of documentation provided by an operator is unacceptable and systems should be in place to ensure that all documentation is retained for inclusion in any appeal bundle which may be later required. If documentation is produced during the course of a hearing, it should either be copied or the originals retained for the same purpose. The absence of the document does not however prevent this Tribunal from considering Mr Akbar’s appeal on its merits as he himself has produced the two sets of accounts and we have the benefit of a finance calculation included in the bundle which was based upon the bank statements provided to the DTC by Mr Akbar.
3. Mr Akbar was granted a restricted PSV licence authorising one vehicle on 13 November 2012. On 18 April 2016, the Office of the Traffic Commissioner (“OTC”) wrote to Mr Akbar asking for:
 - a) evidence of financial standing (£3,100);
 - b) an explanation of his main occupation along with a breakdown of the days, hours and income of his main occupation along with pay slips covering a three month period; a copy P60 and a tax return;
 - c) details of the type of work he carried out with his PSV vehicle, including a breakdown of the days and hours the vehicle was used, the income earned from the PSV vehicle and the identity of its driver.

Mr Akbar’s undated response, was received on 15 June 2016. It stated:

“... Unfortunately, my accountant still hasn’t got round to providing me with this year’s accounts, as they aren’t ready yet. My accountant has said that he needs some more time to prepare the accounts. As soon as he has done this, I will send it to you straight away. In the meantime, I am sending you my bank statement.”

About my second job, I am still working weekends for another company. Monday to Friday I am driving my own bus and covering the contract until I find a driver. As soon as I find a driver I will then go back to my old job and drive buses for Bubble Travel or whichever company needs my service. I am self employed. However, if the company ever needs my service I will provide them”.

The bank statement referred to by Mr Akbar does not appear in the appeal bundle.

4. In the interim, it would appear that Mr Akbar sent in a copy of accounts for “Choudhury Transport” as the OTC wrote to Mr Akbar on 5 July 2016 referring to them. The only accounts which appeared in the appeal bundle and provided to the Tribunal by Mr Akbar are for the year ending 31 August 2016 and which do not appear to be those referred to in the letter. In any event, the OTC advised Mr Akbar that it appeared from the accounts he had produced that his only income was derived from driving the PSV vehicle. He was required to provide evidence of financial standing in his name and for an explanation of his main occupation with supporting documentation along with a breakdown of the hours he worked. Mr Akbar was warned that regulatory action may be taken if the OTC did not receive a response by 19 July 2016. No response was received.
5. A further letter was sent by the OTC on 17 August 2016 warning Mr Akbar that the TC was considering revocation of his licence and a further deadline of 31 August 2016 was given. Mr Akbar responded by letter received on 31 August 2016 stating that the operation of his PSV vehicle was not his main occupation. The letter stated that according to his accountant, Mr Akbar had earned approximately £5,000 from the operation of the vehicle in the previous six months and that he had already sent accounts covering September 2015 to March 2016. He advised that his main source of income was driving for an average of 20 hours at weekends for Red Rose Travel and he also had rental income from a property in Manchester. He referred to the inclusion of “statements” with his response. They do not appear in the appeal bundle.
6. Mr Akbar was called to a public inquiry which took place on 8 December 2016. An Urdu interpreter was provided to assist Mr Akbar at his request. In the lead up to the hearing, Mr Akbar requested an adjournment of the hearing as his attendance would make it difficult for him to fulfil the school contract that he had for the PSV vehicle. His application was refused.

The public inquiry hearing

7. Mr Akbar attended the public inquiry and represented himself; he had the assistance of an interpreter who indicated during the course of the hearing that he did not think that his services were required as Mr Akbar was answering the DTC’s questions before they were interpreted for him. Mr Akbar produced two sets of accounts for the year ending 31 August 2016 (which are those produced by Mr Akbar to this Tribunal). One set was entitled “Mr Mohammed Akbar trading as Choudhry Transport” and the second set was entitled “Mr Mohammed Akbar. For Rental and Private Hire Income”.

8. Mr Akbar was referred to the contents of his letters received on 15 June and 31 August 2016 and was asked what he did for a living. He responded "*Firstly is my rental income. And Saturday I work with Red Rose. And this income from Lancashire County Council, so that helps me out as well*". He explained that he had the benefit of a school contract with Lancashire County Council and that he was driving the PSV vehicle for five hours a day and in addition, he undertook his daily walk-round inspections. The contract was to come to an end in July 2018 and whilst he was driving, he paid himself a wage which appeared in the Choudhry Transport accounts as having been paid to a driver, which was him. He was however, looking for a driver to drive the vehicle so that he could return to his "*own job*" with Bubble Transport which represented full time employment and which would be his main occupation once he had returned to it. He did not undertake any other work with the PSV vehicle apart from the school contract work. As for his weekend work with Red Rose Travel, he was paid £8 per hour for shifts of varying lengths on Saturdays and Sundays and in addition he had the rental income previously referred to.
9. The DTC dealt with Mr Akbar's financial standing in a closed session. Mr Akbar confirmed that he had produced bank statements for all three of his bank accounts (they did not appear in the appeal bundle) but these did not show an average of £3,100 over the previous three months as demonstrated by the financial calculation. He could borrow money from his wife or brother but had not produced the requisite statutory declarations or evidence that funds would be available to him. He indicated that some of the rental payments he received from his property were in fact cash payments which were not included in his accounts. The DTC advised that they could not be taken into account unless they appeared in his financial records.
10. The DTC gave an oral decision which was then confirmed in writing in a letter dated 12 December 2016. The DTC found that for at least the previous three months, Mr Akbar had been driving his PSV on school contract work for five hours a day and in addition, he would have been completing his driver checks and other administrative tasks incidental to running the business. He was contracted to Lancashire County Council until July 2018. On a Saturday, Mr Akbar worked for another operator earning £8 per hour. He also received rental income. The DTC compared the incomes declared in the two sets of accounts. Having added to the income total for the PSV operation, the drivers wages which Mr Akbar had said were in fact paid to him, it was clear that the income he received from operating the PSV exceeded the income he obtained from other sources. The DTC was therefore satisfied that Mr Akbar's main occupation was the operation of his PSV. Further, Mr Akbar had failed to establish that he was of the appropriate financial standing. Having been chased for financial evidence, Mr Akbar had provided bank statements covering the previous three months, which showed that the gross average balance in his accounts was far less than that which was required. In the circumstances, the DTC revoked Mr Akbar's licence with effect from 23.59 on 31 December 2016.

The Appeal

11. On 30 December 2016, the Upper Tribunal received a Notice of Appeal which was dated 28 December 2016. The first ground of appeal was that there had been a misunderstanding in relation to the wages figure which appeared in the accounts relating to Mr Akbar's PSV operation. He had not in fact received those wages as he

had paid them to a driver he had hired for 29 weeks. His main occupation was as an employed coach driver with another company and he had in addition his rental income. Excluding the wages element of the accounts relating to his PSV business, his PSV profits were insufficient for him to live on. The second ground of appeal related to financial standing. He had an account with the requisite funds available but unfortunately his “*buses had required quite a bit of work*” and he had been forced to “*dip*” into the account. He had thought that this was the purpose of the account. Mr Akbar asked for more time so that he could apply for a standard PSV licence so that he could continue working for Lancashire County Council.

12. On 5 January 2017, Mr Akbar applied to the DTC for a stay of his decision. In support of that application, Mr Akbar submitted to the DTC a letter from Mr M Manzoor, Company Director of Bubble Travel Limited. This did not support Mr Akbar’s evidence to the DTC that he had been fully employed by that company or that full time employment was available to him in the future once he had employed a driver for the PSV. Rather, the letter advised that Mr Akbar had been a self-employed driver for Bubble Travel Limited for the period 4 January 2016 to 31 January 2016. Both the DTC and the Upper Tribunal refused Mr Akbar’s application for a stay.
13. Mr Akbar’s appeal was listed for hearing on 25 April 2017. When renewing his application for a stay to this Tribunal, Mr Akbar indicated that he would be on holiday on the date of the hearing and he requested that the Tribunal consider his appeal in his absence which we agreed to do.

The Upper Tribunal’s Determination

14. Dealing first with the issue of main occupation, the definition of the term “occupation” to be found in the Oxford English Dictionary is in our view, a helpful and instructive starting point:

“The state of having one’s time or attention occupied; what a person is engaged in; employment, business; work; toil. .. A particular action or course of action in which a person is engaged, especially habitually; a particular job or profession; a particular pursuit or activity”.

That definition must then be considered in the context of Section 13 of the Public Service Vehicle Act 1981 which sets out the restrictions which an operator must fulfil and continue to fulfil, to be entitled to a restricted rather than a standard PSV licence. By s.13(3) of the 1981 Act the following restrictions must be satisfied:

- (a) The PSV is not adapted to carry more than eight passengers; or
- (b) The PSV is not adapted to carry more than sixteen passengers when used:-
 - (i) Otherwise in the course of a business of carrying passengers; or
 - (ii) By a person whose main occupation is not the operation of PSVs adapted to carry more than eight passengers.

It is clear from those restrictions that Parliament did not intend for restricted PSV licence operators to use their licences to operate vehicles on a commercial basis as their main business, employment or work activity. In order to assess whether a PSV operation is the “main occupation” of an operator, it is obvious that the hours dedicated to the PSV licence along with the income generated from it must be considered together and alongside the hours dedicated and income generated from other “occupations” the operator claims to have. It will of course be for the operator to satisfy the Traffic Commissioner that any particular activity other than PSV operation is an “occupation” from which income is generated and that overall, the PSV operation is not the “main occupation”. For future guidance, we do not consider that activities such as the pursuit of a hobby, charitable work or other activities which do not generate an income can fall within the definition of “occupation”. Neither do we consider that the receipt of investment or other income which does not require the operator to dedicate anything more than a minimal amount of time to it, can be considered to be an “occupation”. Each case will of course be fact sensitive.

15. In this case, Mr Akbar accepted that he was the driver of the vehicle that fulfilled the council contract and that he was the recipient of the wages and the profit from the operation of the vehicle which were set out in the accounts. We reject Mr Akbar’s contention that there was a misunderstanding about that as his evidence was clear. However, he maintained that in addition to those hours worked, he was also driving for Red Rose Travel for up to twenty hours a week over the weekends. No documentary evidence was produced by Mr Akbar to support his contention and he was not asked about it. We note that if Mr Akbar’s evidence was correct on this point, then his compliance with the rules on drivers’ hours would be highly questionable. But in any event, in the absence of any documentary evidence of the hours he worked for Red Rose Travel, the DTC was reliant upon the “bottom line” of the declared income in the accounts. That was far less than the income Mr Akbar received from his PSV operation. As for the income from a rental property, again, there was no evidence about the time that Mr Akbar spent in dealing with the property or the tenants and in the absence of such evidence, the income generated could not be classed as emanating from an “occupation” whether in conjunction with other “occupations” or not. The DTC in fact took the rental income into account in determining the issue of Mr Akbar’s “main occupation”. We are satisfied that he was wrong to do so. That finding does not however, alter the ultimate finding that he made, which we cannot fault, which was that Mr Akbar’s “main occupation” was that of the PSV licence operation.
16. Turning then to the issue of Mr Akbar’s financial standing, Mr Akbar included with the notice of appeal, a Nat West bank statement in his name for the period 18 November 2016 to 20 February 2017 which showed a balance in excess of that required to establish financial standing. Only part of that bank statement was before the DTC as at 8 December 2016 and by reason of paragraph 17(3) of Schedule 4 of the Transport Act 1985 we are precluded from taking into consideration any circumstances which did not exist at the time of the public inquiry on 8 December 2016 and we do not do so. The financial calculation which is included in the bundle takes account of the three sets of bank statements produced by Mr Akbar prior to the public inquiry and the average fell well short of the minimum required of £3,100 although on the day of the public inquiry there was one account which did have a balance in excess of that amount. The use of an average balance over the previous

three months is an established means of calculation used by Traffic Commissioners and it cannot be criticised. In the circumstances, the DTC could not have found that Mr Akbar did meet the financial standing requirement to hold a restricted licence.

17. To conclude, we are satisfied that the DC's decision is not plainly wrong in any respect and that neither the facts or the law applicable in this case should impel the Tribunal to allow this appeal as per the test in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport (2010) EWCA Civ. 695. The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'Judge Beech', written in a cursive style.

Her Honour Judge Beech
2 May 2017