

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

T/2017/018

Appellant: **DAVIS HAULAGE GROUP LIMITED**
On Appeal From: **Traffic Commissioner for the East of England**
Reference: **OF 1145931**
Decision Date: **28th February 2017**
Appeal to UTAAC: **27th March 2017**
UTAAC Hearing: **4th October 2017**

**DECISION OF THE UPPER TRIBUNAL
ON AN APPEAL AGAINST THE TRAFFIC COMMISSIONER**

Upper Tribunal Judge H. Levenson

100.1 (Traffic Commissioner Appeals: Application: Withdrawal).

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
ON AN APPEAL AGAINST THE TRAFFIC COMMISSIONER FOR THE
EAST OF ENGLAND**

Decision

1. **This appeal succeeds.** I set aside the decision of the Traffic Commissioner (“the Commissioner”) given on 28th February 2017 under reference **OF 1145931** as having been made in error of law. By that decision the Commissioner refused the application of the appellant for a goods vehicle operator’s licence. The application to the Commissioner for that licence was withdrawn, and the withdrawal is to be treated as having been, and remained, effective. For the purposes of any connected future application for such a licence the Commissioner may, of course have regard to the evidence that was available in connection with the application for a licence in this case, but may not have regard to the contents of the decision made by the Commissioner in this case.

Hearing

2. I held an oral hearing of this appeal at Field House (London) on 4th October 2017. The appellant was represented by James Backhouse solicitor of Backhouse Jones Ltd. There were no other parties to the appeal.

3. The Secretary of State for Transport had been invited to apply to become a party but on 25th July 2017 had declined to do so on the basis that the Department of Transport could not assist the Upper Tribunal with the decision on whether the Commissioner had jurisdiction to make the decision that was made. That is a disappointing approach to take in relation to legislation for which the Secretary of State is responsible.

The Relevant Provisions

4. The Goods Vehicle (Licensing of Operators) 1995 (as amended) is the principal legislation in relation to applications and grants of goods vehicle operators’ licences and related matters. The following provisions are particularly relevant in the present case (references are to section numbers):

16(3) If the holder of an operator’s licence requests a traffic commissioner to terminate it at any time, he or another commissioner must, subject to subsection (4) [consideration of revocation etc pending], comply with the request.

24(1) On an application for an operator’s licence (a “full” licence) a traffic commissioner may, if the applicant so requests, issue to him an interim licence.

24(2) An interim licence is an operator’s licence that (subject its revocation or other termination under any provision of this Act or any other statutory

provision) will continue in force until it terminates under subsection (4), (5) or (6).

Subsection (4) relates to a full licence coming into force. Subsection (5) relates to the position where the Upper Tribunal orders the issue of a full licence and provides that the interim licence shall terminate:

- (a) On the date on which the full licence issued in pursuance of the order comes into force, or
- (b) at the time at which the application is withdrawn or treated as withdrawn by virtue of section 45(3).

Subsection (6) provides that in any other case the interim licence shall terminate when the application is finally disposed of or such earlier date as the applicant may specify in writing.

5. Section 37 creates the right of appeal:

37(1) An applicant for, or for the variation of, an operator's licence may appeal to the Upper Tribunal against the refusal of the application or (as the case may be) against the terms of the licence or of the variation.

It should be noted that for the purposes of the right of appeal under section 37 "operator's licence" does not include an interim licence issued under section 24.

6. It should also be noted that although sections 24(5)(b), 24(9)(b) and 45(3) (which relates to fees) refer to an application having been withdrawn or treated as withdrawn, there is no specific provision in the Act providing for withdrawal. However, it must be the case that the power or ability to withdraw an application is within the contemplation of the legislation.

7. The issue was considered by the Transport Tribunal (most of the jurisdiction of which has been subsumed into the jurisdiction of the Upper Tribunal) in its 2002 decision in Alcaline Limited (8/2000). In that case an application for a licence was considered at a public inquiry which opened on 24th July 2001 but which was adjourned until 20th December 2001. On 18th December 2001 the applicant's solicitors gave written notice that it was intended to withdraw the application. The Commissioner took the view that the application was before him and that a decision should be made. He refused the application. The Transport Tribunal allowed the appeal and set aside the decision of the Commissioner. It said (paragraph 6):

6. We are of the view that in the normal course of events a clearly expressed intention conveyed to the appropriate person that an application for an operator's licence is withdrawn prior to a public inquiry being convened should be treated as effective and final in relation to the Traffic Commissioner's jurisdiction to consider such an application. We are further of the view that in the normal course of events, a clearly expressed intention to withdraw conveyed following the opening of the public inquiry whether expressed during the course of the hearing or following an adjournment of the

public inquiry should also be treated as effective and final in relation to the Traffic Commissioner's jurisdiction. However, we are further satisfied that in some limited circumstances, where a Traffic Commissioner has opened a public inquiry and has heard evidence, he will be entitled to proceed to a determination following a clearly expressed intention to withdraw if it is in the public interest to do so. By way of example, there may be circumstances in which it would be appropriate to proceed to a determination when the withdrawal is made at an advanced stage in the proceedings to avoid adverse findings being made against the applicant. Without attempting to be definitive, we have in mind circumstances in which a Traffic Commissioner has heard evidence of such matters as tax evasion, forgery with intent to deceive the Traffic Commissioner, manipulation of the licensing system which would go to the issue of the applicant's good repute or financial standing. We stress that such action will only be justified if it is in the public interest for a determination to be made.

8. This approach was followed in the case of Pritchard (688/2008). As a matter of law I am not bound by those decisions but I agree with the approach set out, which seeks to balance the interest of the applicant and the public interest. I add that the rules of natural justice and fair procedure require that if the Commissioner is minded not to accept the withdrawal he should give some intimation of that and invite the parties to make representations before finally deciding whether to accept the withdrawal. Any decision not to accept a withdrawal must be explained.

Background

9. There is a great deal of documentary background in this case and it is clear that several aspects of the application caused the Commissioner a deal of concern. However, I only set out as much detail as is necessary to put my decision in context.

10. On 23rd May 2016 the appellant limited company applied for a standard international goods vehicle operator's licence for 50 vehicles and 100 trailers. This was in anticipation of taking over the business and assets of another limited company which was about to become insolvent. On 29th June 2016 an interim licence was granted and at some stage the insolvent company's licence was revoked. On 13th September 2016 the Commissioner decided to hold a public inquiry in connection with the appellant's application but this decision was fairly quickly suspended and then it was reversed. On 21st February 2017, first by telephone and then by e mail, the appellant company informed the Commissioners' office that it had ceased to trade at midnight and wished to withdraw its application. This automatically terminated the interim licence although, as a back up, the appellant made arrangements to surrender it.

11. On 28th February 2017 the Office of the Traffic Commissioner issued a formal decision letter. This letter noted the withdrawal request but made no further comment on it and simply went on to state that the Commissioner had refused the application because of concerns with repute, financial standing, professional competence and maintenance arrangements.

12. On 28th March 2017 the appellant company appealed to the Upper Tribunal against that decision of the Commissioner and on 21st August 2017 I directed that there be an oral hearing of the appeal before a judge sitting alone, reserving the right to reconvene with members should it become necessary to consider factual findings and merits. The hearing took place on 4th October 2017.

Conclusions

13. Mr Backhouse argued that the withdrawal should have been treated as effective and that therefore the decision of the Commissioner was made without jurisdiction. (I prefer to speak in terms of error of law). I raised the issue of whether the Upper Tribunal had jurisdiction in those circumstances but I accept that, even if made without jurisdiction, the decision of the Commissioner was not a nullity but was valid until set aside. There was a refusal of a licence and that was a decision in respect of which section 37 created a right of appeal to the Upper Tribunal.

14. In relation to the withdrawal, the Commissioner made no explicit decision whether to accept it but merely noted the existence of the notification withdrawal and then proceeded to ignore it. He did not explain his reason for ignoring (or not accepting) the withdrawal, nor did he give the appellant any opportunity to be heard on the issue of whether the withdrawal should be treated as effective. This approach means that the final decision on the licence was made in error of law and must be set aside. I refer to the decision and orders in paragraph 1 above.

15. For the above reasons this appeal succeeds.

H. Levenson
Judge of the Upper Tribunal
5th October 2017