

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

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE
SCOTTISH TRAFFIC AREA (Ms J Aitken)**

Dated: 2 May 2017

Before:

Marion Caldwell QC	Judge of the Upper Tribunal
Mr. G. Inch	Member of the Upper Tribunal
Mr. J. Robinson	Member of the Upper Tribunal

Appellant:

DAVID IRVING LTD.

Attendance:

For the Appellant: Mr. David Irving, Director, David Irving Ltd.

Heard at: George House, 126 George Street, Edinburgh.

Date of Hearing: 1 September 2017

Date of Decision: 25 October 2017

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject Matter

Application for a standard national public service vehicle operator's licence to operate 4 vehicles; financial standing; distinction between resources of a limited company and the resources of the company's directors or shareholders; additional evidence.

Cases referred to:

T/2013/77 Hughes Bros Construction Ltd.

Ladd v. Marshall [1954] 1WLR 1489

T/2012/17 NCF (Leicester) Ltd

REASONS FOR DECISION

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the Scottish Traffic Area, made on 2 May 2017. In summary, the Traffic Commissioner refused the appellant's application for a public service vehicle operator's licence to operate 4 vehicles on the ground of failure to meet the requirement of financial standing. In addition, the Traffic Commissioner was not satisfied that the applicant had made proper arrangements or understood what was required of an operator to ensure vehicle roadworthiness.

Background

2. The appellant is a limited company incorporated in February 2012. The directors are Mr. David Irving and his wife Mrs. Kathryn Irving. Neither of the directors has any previous experience in the transport industry. Their son, Jaime Irving had previously held an operator's licence which he had surrendered. On 27 July 2016 the appellant submitted an application for a standard national public service vehicle operator's licence to operate 4 vehicles. Jaime Irving was named on the application as the contact to discuss the application.
3. By letter dated 8 November 2016, the Traffic Commissioner informed the appellant that she had decided to convene a public inquiry to consider the application. A call up letter was issued on 21 December 2016 stating that the Traffic Commissioner required to be satisfied that the company (a) had an effective and stable establishment in Great Britain; (b) was of good repute; (c) had the appropriate financial standing; and (d) had satisfactory arrangements to comply with the law regarding the driving and operation of the vehicles. In addition, the Traffic Commissioner was concerned about the appellant's possible connection with another applicant for a standard national licence through association with Jaime Irving. Following the public inquiry, this latter concern was no longer an issue and does not feature in the reasons for the Traffic Commissioner's decision. It will not be referred to further.
4. The public inquiry was due to take place on 3 February 2017. The person nominated as transport manager on the application, Mr. J. Kearney, was unable to attend on that date and so the public inquiry was adjourned and reconvened on 2 May 2017. A few weeks before the public inquiry, the appellant intimated a change in operating centre and maintenance arrangements. Mr. David Irvine, Mr. Jaime Irving and Mr. Kearney attended the public inquiry and gave evidence.

5. Mr. David Irving gave evidence of how David Irving Ltd had been set up to facilitate his work as a quality control engineer in the offshore oil industry. He had ceased that work in the oil industry in September 2016 and wanted the licence to operate buses on school contracts. His son had experience in the industry and had contacts in the industry. He would be relying heavily on his son for the operation of the business. He said he had had some preliminary discussions with the proposed transport manager but there was no contract in place and no remuneration had been agreed. He had agreement with one company that the vehicles could be parked on their premises. Maintenance was to be carried out at other premises by a mechanic, Mr. S. Hardy, who was employed by a different company but who had told Mr. Irving he would be available to service their vehicles. He thought Mr. Hardy had his own tools and there was equipment at the premises where the maintenance was to be carried out. However, he did not know what brake testing equipment there was. Regarding the operating centre and maintenance, his long-term intention was to find premises where the vehicles could be both parked and serviced. The current arrangements had been forced onto them and were temporary.
6. Mr. Kearney gave evidence of his background in the bus industry. He was a PSV driving instructor and now a CPC trainer. Due to personal commitments he now worked part-time. He had been a friend of Jaime Irving for over 30 years. He confirmed that there was no contract in place and no rates agreed with the appellant. He did not know Mr. Hardy or the premises where it was proposed the maintenance would be undertaken, nor did he know where the vehicles were to be kept. He assumed that suitable arrangements would be made and everything would conform to the legal requirements.
7. Mr. Jaime Irving explained that he wanted to get back into the bus industry but he had personal commitments that prevented him from working full-time. He planned to help his father in the new business if the licence was granted and Mr. Kearney would help them with all the legalities. Mr. Kearney had been his first transport manager on his operator's licence. Mr. Hardy would have done the maintenance. He did not know whether Mr. Hardy was a PSV mechanic. The original premises named on the application as operating centre was, he said ideal for parking the vehicles and also for carrying out maintenance. However, they discovered just before the public inquiry that it had been let to other tenants. He therefore found the alternative premises at short notice before the inquiry. No price for the rent of the premises had been agreed.
8. The appellant produced vouching for the requirement of financial standing in the form of a bank statement and credit card statement showing available credit in excess of £20,000. These statements were in the sole name of Mr. David Irving rather than in the name of the applicant, David Irving Ltd.

The Traffic Commissioner's decision

9. The Traffic Commissioner found that the financial standing requirement for a licence for 4 vehicles was £20,900 and that for a limited company licence the finance needed to be in the name of the limited company. She found that the company did not have such finance. The vouching produced which was in the name of Mr. David Irving was of no assistance. She refused the application on this ground.
10. Further, the Traffic Commissioner was not satisfied that the applicant had made proper arrangements or understood what was required of an operator to ensure vehicle roadworthiness. She found the arrangement for servicing and maintenance and the availability of premises for those purposes to be imprecise. She was also concerned that the proposed transport manager was in ignorance of the arrangements. She was not able to grant a licence on the basis of such arrangements.
11. The application was refused on the grounds that the Traffic Commissioner was not satisfied that the applicant was of good repute, and of appropriate financial standing, and had satisfactory arrangements to comply with the licence undertakings as required by sections 14ZA and 14ZC of the Public Passenger Vehicles Act 1981. We should explain that this was no personal criticism of Mr. Irving or David Irving Limited but that the statutory requirements had not been fulfilled.

Grounds of Appeal

12. In summary, the main grounds of appeal are that:
 - (a) the Traffic Commissioner was wrong in not accepting the personal credit card evidence provided by Mr. David Irving;
 - (b) the Traffic Commissioner was wrong in finding that the arrangements for servicing and maintenance were imprecise; these arrangements had been forced upon them as the original premises proposed had been let out to someone else very shortly before the public inquiry and other arrangements had to be made at short notice. In particular, his son and the transport manager were highly experienced in the industry and Mr. David Irving himself was experienced in safety issues.
 - (c) the Traffic Commissioner was wrong in not allowing his son Jaime Irving to address the maintenance issues.

Appeal before the Upper Tribunal

13. Mr. Irving moved to have additional evidence heard by the Upper Tribunal. He wished to submit further financial vouching in the personal names of himself and his wife. He also wished the tribunal to hear evidence from Jaime Irving about his experience in the transport industry and his competence to run the operation.
14. We considered the vouching produced. As this was not in the name of the company it was not relevant to the issue of the financial standing of the appellant which was the question before the Upper Tribunal. We therefore refused the motion relating to the vouching.
15. Regarding the evidence of his son, Mr. Jaime Irving gave evidence at the public inquiry and outlined his involvement and experience in the bus industry both as a driver and as a PSV licence holder. He also gave evidence of what his involvement would be in his father's business if the licence were granted and about maintenance. At the end of his evidence the Traffic Commissioner asked him if he had anything further to add, to which he said that he did not.
16. The principles for allowing fresh evidence to be heard, and which apply to the Upper Tribunal, are laid down on the case of *Ladd v. Marshall* [1954] 1WLR 1489 where Denning LJ held (at 1491):

To justify the reception of fresh evidence...three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.
17. In the present case, not only could Mr. Jaime Irving's evidence have been available at the public inquiry, it was available in that he did, in fact, give evidence on the issues that the appellant wished to address again. Accordingly, we refused the motion to hear further evidence from Mr. Jaime Irving.
18. We then went on to consider the grounds of appeal.

Financial Standing

19. A standard operator's licence will not be granted unless, among other things, the applicant shows that it is of appropriate financial standing (section 14ZA(2)(c) of the 1981 Act). The burden of proof of this issue rests on the applicant, in this case, David Irving Ltd. The appellant argues that the Traffic Commissioner should have accepted and been satisfied by the credit card evidence produced in the personal name of David Irving. However, when the applicant for an operator's licence is a limited company, money in a bank account held in the name of one of the directors of that company is not "available" to meet the requirement to be of appropriate financial standing because it is not the company's money. A limited company is a distinct legal entity from its shareholders or directors. (*T/2013/77 Hughes Bros Construction Ltd. And T/2012/17 NCF (Leicester) Ltd.*). The same applies to credit cards. Accordingly, the Traffic Commissioner cannot be faulted for refusing the application on this ground. That is sufficient to dispose of this appeal.

Effective and Stable Establishment

20. A licence cannot be granted unless the Traffic Commissioner is satisfied that the applicant has an effective and stable establishment in Great Britain (section 14ZA(2)(a)). This is the address where the operator must keep its core business documents. The premises must allow the operator to conduct its operations effectively and continuously to meet the requirements of the license, including (i) any administration necessary for complying with those requirements and (ii) appropriate technical equipment and facilities for an operating centre (Article 5, Regulation (EC) No 1071/2009). The onus is on the applicant to prove that suitable premises are available at the date the application is considered.
21. It is clear from the transcript of the public inquiry and from the Traffic Commissioner's decision that she carefully considered and explored all the evidence available about the arrangements that had been made by the applicant, and their limitations. The Traffic Commissioner explained why, on the evidence, she was not satisfied that there were sound arrangements in place for vehicle inspections and maintenance. We cannot find any error in law in the Traffic Commissioner's decision regarding the evidence and why she made the findings that she did. On the evidence, she was entitled to reach the conclusions that she did. Nor can we find any error of law in how she applied the statutory requirements.

22. In all the circumstances, the Tribunal concludes that the Traffic Commissioner's decision cannot be impugned. The appeal is dismissed.

Marion Caldwell

MARION CALDWELL QC
Judge of the Upper Tribunal
Date: 25 October 2017