



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. T/2018/75
[2019] UKUT 0117 (AAC)**

(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of a DEPUTY TRAFFIC COMMISSIONER for the SOUTH EASTERN AND METROPOLITAN TRAFFIC AREA MADE ON 25 OCTOBER 2018

Before: Mr M R Hemingway: Judge of the Upper Tribunal
Mr M Farmer: Member of the Upper Tribunal
Mr L Milliken: Member of the Upper Tribunal

Appellant: P Elsagood Transport Services Ltd

Reference: OK201916

Attendances:

For the Appellant: Mr S Clarke (Counsel)

Heard at: Field House, Breems Buildings, London EC4A 1DZ

Date of Upper Tribunal Hearing: 12 March 2019

Date of Decision: 4 April 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject matter: Good repute: Relevance of previous convictions.

Cases referred to:

Bradley Fold Travel Ltd and Anor v Secretary of State for Transport [2010] EWCA Civ 695
Magill v Porter [2001] UKHL 67 (13 December 2001)
Locabail v Bayfield Properties Ltd [2000] EWCA Civ 3004
Aspey Trucks Ltd [2010] UKUT 367 (AAC)

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by P Elsagood Transport Services Ltd (“the operator”) from a decision of a Deputy Traffic Commissioner (“DTC”) made on 25 October 2018 following a Public Inquiry (“PI”) held on 18 October 2018. The DTC refused the operator’s application for a standard international operator’s licence authorising four vehicles and four trailers. He did so under the provisions contained at section 13A(2)(b) and Schedule 3 to the Goods Vehicles (Licensing of Operators) Act 1995 (“the 1995 Act”). In other words, he refused the application because he did not think the operator through its sole director Peter Desmond Elsagood was of good repute.
2. We held an oral hearing of the appeal which Mr Elsagood attended. He was represented by Mr C. Clarke of Counsel, to whom we are grateful.

The background

3. On a date in either 1991 or 1992, Mr Elsagood was convicted of theft of a lorry trailer loaded with mushrooms. On 10 May 1999 Mr Elsagood was the subject of a Bankruptcy Order from which he was discharged on 10 May 2002. On a date in 2002 he was granted an interim operator’s license which was subsequently revoked. On 17 February 2003 he was sentenced to a term of fourteen years imprisonment having been convicted of conspiracy to import Class A drugs. The DTC noted in his decision of 25 October 2018 that extracts from media reports had indicated that the offence involved the use of a lorry fitted with a false air tank; that the Class A drugs were heroin and cocaine; that the drugs found had a street value of £850,000; and that the sentencing judge had observed that at least two separate trips had been made in the lorry. Pausing there, and without wishing to unnecessarily state the obvious, it is apparent that of the above historical matters, the conviction for conspiracy to import Class A drugs, particularly bearing in mind that it involved the use of an adapted lorry, is by a very considerable distance indeed the most concerning one in the context of an application for an operator’s license. But it is also right to point out that Mr Elsagood was released from the custodial term of his sentence in October of 2009, that the full term of the sentence expired on 16 February 2017, and that there is no evidence of his having committed any further offences nor, indeed, any reason to suspect that he has done so.
4. The operator, through Mr Elsagood, applied for the above licence. Much though not all of the above history was disclosed. The theft of the trailer was not disclosed but that offence is now spent. The holding of the previous licence was not disclosed either. But the bankruptcy was disclosed as was the drugs conviction. As a matter separate to the operator’s application for the licence, a Traffic Commissioner (“TC”) held a conjoined PI on 6 June 2018 involving a number of other operators to which it was thought Mr Elsagood might be connected in some way. Mr Elsagood attended that PI as a witness having previously been an employee of a company which was said to be linked to various other companies which were the subject of the PI. The conjoined PI had been called because there was a suggestion that a company had been offering to sub-contract work without possessing an appropriate licence. There was also a concern that licence discs being used by one or more of the companies related to operators whose licences had been revoked. The TC, in making her decisions as a result of the conjoined PI, had observed of Mr Elsagood, who we stress was only a witness before her, that she had “placed limited weight on his evidence”. She observed of him “he has his own agenda for saying what he did”. The PI relating to P Elsagood Transport Services Ltd had originally been

listed before that TC but, on the basis of an application made by Mr Elsagood's solicitor, she had decided to recuse herself. So, the matter was relisted before the DTC.

Relevant legislative provisions in brief

5. Under section 2 of the 1995 Act, a person shall not use a goods vehicle on the road for the carriage of goods for hire, reward, or in connection with any trade or business carried on by him/ her, unless that person possesses an operator's licence. Section 13A sets out some requirements which an operator must meet when a licence is sought. Included is a requirement that such an operator is of good repute (see section 13A(2)(b)). Schedule 3 to the 1995 Act says with respect to good repute that in determining whether a company is of good repute, a Traffic Commissioner shall have regard to all the material evidence including, in particular, any relevant convictions of the company or any of its officers, servants or agents; and any other information possessed as to the previous conduct of any of its officers, servants or agents or any of its directors, in whatever capacity, if that conduct appears to him to relate to the company's fitness to hold a license.

The public inquiry and the Deputy Traffic Commissioner's decision

6. As already noted, the relevant PI before the DTC took place on 18 October 2018. Mr Elsagood, as the operator's sole director, was in attendance. So too was the operator's proposed transport manager. Both were represented by one Mr Tinkler. The DTC heard oral evidence from Mr Elsagood and from the proposed transport manager.

7. In his written reasons of 25 October 2018, the DTC set out the relevant background involving the relevant history of Mr Elsagood and the conjoined PI and his involvement in it. He then briefly summarised what occurred in the PI of 18 October 2018. Having done that he went on to explain why he had decided not to grant the license. He relevantly said this:

"10. In making my decision I have had particular regard to the case of *Aspey Trucks Ltd* [2010] UKUT 367 (AAC). In that case the applicant had a previous conviction for conspiracy to supply drugs resulting in an eleven-year prison sentence. The sentence had been imposed twelve years before the application was made and there were other relevant circumstances including a conviction for driving with excess alcohol which led to the applicant driving whilst disqualified when committing the drugs offence.

11. The Upper Tribunal stated that the approach that should be taken when considering repute on application is as follows:

"In a case such as this, the Deputy Traffic Commissioner was not looking at putting someone out of business. Rather, he was deciding whether or not to give his official seal of approval to a person seeking to join an industry where those licensed to operate on a Standard National or Standard International basis must, by virtue of S. 13 (3), prove upon entry to it that they are of good repute. In this respect, Traffic Commissioners are the gatekeepers to the industry – and the public, other operators, and customers and competitors alike, all expect that those permitted to join the industry will not blemish or undermine its good name, or abuse the privileges that it bestows. What does "repute" mean if it does not refer to the reasonable opinions of other properly interested right thinking people, be they members of the public or law-abiding participants in the industry?"

12. With this guidance in mind I clearly have a discretion and need to conduct a balancing exercise between positive and negative factors to find whether Mr Elsagood has proved on the balance of probabilities that he is of good repute.

13. On the positive side Mr Elsagood has neither been convicted of any offence since release from prison in 2009 nor has he been recalled whilst on license from the custodial sentence. I have also noted the

documentation that was submitted with the application to demonstrate the intention to operate in a compliant manner. I also record that Mr Hodgins presented as a mature and reputable individual whom I believe would act in the way he set out if appointed.

14. The most compounding feature on the negative side of the balance sheet is the previous conviction from 2003 for conspiracy to supply drugs. This resulted in a fourteen-year prison sentence and whilst much was made of the fact that Mr Elsagood was released from prison in 2009 I remind myself that in fact the sentence was not concluded until 2017 as the remainder of the total term was served in the community. It was also the case that the offence involved the illegal use of a heavy goods vehicle specially adapted to carry the drugs and it appears that at the time Mr Elsagood had either been granted an interim licence or was operating before the licence came into effect – either scenario has negative connotations. The conviction from 1991 is now spent and I attach little weight to it but it nevertheless shows an earlier propensity for dishonesty and once again involved the use of a goods vehicle. I also attach very little weight in the balance to the bankruptcy from 1999 other than to note that it happened.

15. Deciding the relevance of Mr Elsagood's involvement with "MPS Enterprises" on his repute presents a difficulty in that I did not hear the previous cases and can only rely on the transcript of the evidence and the written decision of the Traffic Commissioner together with the evidence Mr Elsagood gave to me. However even with those limitations it is possible to draw some conclusions. It is apparent from the evidence that Mr Elsagood was instrumental in setting up the initial discussion which led to the "sub-contracting" arrangement. There was conflicting evidence as to how knowledgeable or how involved Mr Elsagood was but the Commissioner in her written decision said that she "placed limited weight on his evidence". Within the context of that finding in the written decision I take that to mean that she doubted the veracity of what he had said in evidence because she goes on to say that "he has his own agenda for saying what he did". I also note from the transcript that the Commissioner asked Mr Elsagood on a number of occasions, whether when he was a driver for MPS Enterprises, he took note of the names on the licence discs displayed on vehicles. His answers to those questions were not consistent in that he said he had done so at one time when MPS discs were shown but had not done later when the discs belonged to other companies. My conclusion in relation to this aspect of the case is to find that Mr Elsagood's involvement with MPS Enterprises is an additional negative feature in the balance. The fact that the Traffic Commissioner believed his evidence lacked veracity, the fact that he had not made the necessary checks as to the validity of licence discs as a driver and the apparent lack of enquiry by him as to the legitimacy of the arrangements he was promoting to customers all count against him particularly, when he had been the holder of an operator's licence previously, and it appears was intending to make a further application in due course.

16. Taking all these factors, both negative and positive into account I am not satisfied that the applicant company has the repute required under Section 13A(2)(b) and Schedule 3 of the Goods Vehicles (Licensing Operators) Act 1995 as a result of the negative matters detailed above in relation to director Peter Elsagood and refuse this application accordingly".

8. So, the operator was unsuccessful before the DTC.

The appeal to the Upper Tribunal

9. The operator exercised its right of appeal to the Upper Tribunal. The written grounds of appeal were relatively terse. It simply being asserted that the DTC had taken into account matters that he ought not to have taken into account and had not considered what were said to be "persuasive case authorities". It was indicated that a detailed submission would follow. It does not appear that it did but that is unproblematic given that Mr Clarke has set out, clearly and fully, what the operator's case on appeal is. He has done that by way of his helpful oral submissions and through the provision of an equally helpful skeleton argument.

10. Mr Clarke does not dispute the factual accuracy of the above history nor, when it was put to him at the oral hearing, that the conviction for the drugs offence is, from his client's perspective, significantly unhelpful. He agreed that it was one of the worst convictions a person seeking an operator's licence could have. But he says that the DTC should not have taken into account, in the

balancing exercise which he conducted, matters relating to Mr Elsagood's appearance before the PI of 6 June 2018. Indeed he says none of the material relating to that PI should have been before the DTC. In summary, he develops his argument in this way: Mr Elsagood had appeared as a witness before the TC on 6 June 2018. She had formed an adverse view with respect to his veracity. The PI which has led to this appeal was, initially, listed before the TC. Mr Elsagood's solicitor invited her to recuse herself and she did so. So, the PI was adjourned and eventually came before the DTC. Had the TC conducted the PI herself, a fair minded and informed observer would have thought there was a real possibility of bias. When the case was effectively transferred from the TC to the DTC, the papers relating to the PI of 6 June 2018 were also transferred. They should not have been. That is because as a result of them being so transferred, the same fair minded and informed observer would conclude that there would be a real possibility of the DTC similarly being biased. So, the only fair way of proceeding would have been for the DTC to have heard and considered the case without having access to the material relating to the earlier PI.

11. Mr Clarke was careful to make it clear that he was not alleging actual bias on the part of the DTC. His concern was with what might be described as perceived bias or apparent bias. He had in mind, in that context, what had been said in *Magill v Porter* [2001] UKHL 67. But apparent bias was, he argued, of itself sufficient to justify the Upper Tribunal setting aside the decision of the DTC. Mr Clarke invited us to allow the appeal on that basis and to remit whilst directing that the TC or DTC who would ultimately then decide the case after another PI, would not have access to the material relating to either of the two PIs which had gone before.

Why we have decided to dismiss this appeal

12. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

“The Upper Tribunal are to have full jurisdiction to hear and determine all matters (whether of law or of fact) for the purpose of the exercise of any of their functions under an enactment relating to transport”.

13. In this case Mr Clarke in his skeleton argument and oral submissions raises only the matters of law set out above. In his skeleton argument he makes it plain that from the perspective of the operator the question of apparent or implied bias is, as he puts it “the sole issue in this appeal”.

14. In our view Mr Clarke has elided two different issues and arguments. One of those issues relates to perceived or apparent bias and the other relates to the admissibility or otherwise of the TC's findings concerning Mr Elsagood and the written material about that generated by the PI held by the TC with respect to the decision taken by the DTC.

15. As to perceived or actual bias the TC did recuse herself, as asked, so that she played no part in the proceedings relating to P Elsagood Transport Services Ltd. As Mr Clarke says, she did not (or at least it is not apparent from the paperwork in front of us that she did) give reasons as to why she decided to recuse herself. We do not say it was necessary for her to have done so. It seems to us that it would not go too far to suggest that, very probably indeed, she decided to recuse herself because she thought, given that she had reached an adverse view with respect to Mr Elsagood's credibility, there might be a perception of bias despite the fact that there would be no actual bias. We strongly suspect that that was the basis upon which the application to her to recuse herself was made.

16. It may well be, that from the point of view of caution and appearances, the TC was absolutely right to do as she did. Indeed, that is the view we unhesitatingly take. We do note in passing, though, in *Locabail (UK) Ltd. v Bayfield* [2000] EWCA Civ 3004, it was said at paragraph 25 of the judgement that:

“...The mere fact that a Judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection...”.

17. A Traffic Commissioner is not a judge but is performing a quasi-judicial function. It might well be that because Traffic Commissioners are not judges different considerations apply. The above passage does expressly relate to judges. We also think in general terms that, where faced with such a situation, a Traffic Commissioner ought to take the cautious approach as this TC did. But it might have been possible to argue that had the TC decided not to recuse herself that decision would not have been rendered unlawful solely on that basis. In any event, because she did take what we think was the sensible course in all the circumstances, the matter is not before us.

18. We do not see, though, how it can persuasively be contended that a fair minded and informed observer would think that the DTC might be biased. We note the relevant legal test to which we are referred by Mr Clarke in his skeleton argument following what was said in *Magill v Porter* [2001] UKHL 67 and followed by the Upper Tribunal in *T/2014/72 Ian Russell Nicholas t/a Wigan Container Services v Secretary of State for Transport* to the effect that:

“The question is what the fair minded and informed observer would have thought, and whether his conclusion would have been that there was a real possibility of bias”.

19. We have concluded that whilst such an observer might have thought there was a real possibility of bias had the TC dealt with the PI herself, such an observer would not have concluded there was a real possibility of bias on the part of the DTC. There is, quite simply, no rational basis for any such perception. To state the obvious, the DTC and the TC are different decision makers. It was not the DTC who had concluded that Mr Elsagood had not given wholly truthful or credible evidence. The DTC was clearly in a position to make up his own mind independently as to the issues before him and such would have been the perception.

20. Mr Clarke says, as we understand it, that the risk of perceived or apparent bias stems from the DTC having before him the transcript of the PI which had been held by the TC and her written decision in which she had commented upon the veracity of Mr Elsagood’s evidence as set out above. So, in effect, it is said that the risk of apparent bias was transferred, with that material, from the TC to the DTC. But that documentation was simply evidence. We can see no reason why it should have been excluded. It was evidence which had relevance to the issues the DTC was called upon to decide with respect to repute. It was evidence of Mr Elsagood, whose repute was the issue in the case before the DTC, having relatively recently given less than wholly honest evidence at a PI. It was, therefore, perfectly proper for the DTC to have it before him and to consider it. Further, he also had the opportunity of hearing from Mr Elsagood himself and of reaching his own view as to what was said by him and on his behalf. Any perception of bias that there might have been was removed when the TC recused herself and any such perception was not restored simply through the fact of the DTC looking at relevant evidence from an earlier PI. We would also observe in passing, insofar as it might be thought to be relevant, that it does not appear that any application was made to the DTC to recuse himself as a consequence of his having seen the above material. But we do not rely upon that for our decision.

21. That, then, disposes of the only argument which was canvassed by or on behalf of the operator and Mr Elsagood. We would wish to add, though, that in our view the DTC’s written reasons are a model of clarity and conciseness and demonstrate that he had proper regard to all of the issues before him. He carried out an appropriate balancing exercise which is evident from the passage from his

written reasons which we have set out above, and he identified all of the matters which could realistically have been identified as weighing in the operator and Mr Elsagood's favour. He was entitled to take account of Mr Elsagood's evidence and the TC's view of it at the previous PI and, similarly, he was, entitled to accord significant weight to the conviction for the drugs offences, particularly in the context of the offender now seeking a licence to operate large commercial vehicles. It seems to us that given the nature of the conviction and its obvious relevance to the appropriateness or otherwise of the granting of a licence, that the DTC would have been perfectly justified in refusing to grant it even irrespective of the TC's findings stemming from the earlier PI.

22. For the above reasons this appeal fails.

Conclusion

This appeal to the Upper tribunal is dismissed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated 4 April 2019