

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

**Case No. T/2019/36
NCN: [2019] UKUT 0288 (AAC)**

**ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER FOR THE
NORTH EAST OF ENGLAND TRAFFIC AREA (Mr Tim Blackmore OBE)**

Dated: 21 March 2019

Before:

C.G. Ward	Judge of the Upper Tribunal
Mr. L. Milliken	Member of the Upper Tribunal
Mr. G. Inch	Member of the Upper Tribunal

Appellant: Phillip Liddle

Attendance:

For the Appellant: No attendance or representation

Heard at: Rolls Building, London EC4
Date of Hearing: 5 September 2019
Date of Decision: 18 September 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject Matter

Revocation of licence
Public Passenger Vehicles Act 1981 ("the Act") s.17(2) and (3)(e)
Failure to meet requirement of main occupation in relation to restricted licence

Cases referred to:

T/2017/2 Mohammed Akbar t/a Choudhury Transport
T-2018/27 Allen Transport Limited
Bramley Ferry Supplies Ltd v HMRC [2017] UKUT 214 (TCC)
Ladd v Marshall [1954] EWCA Civ1; [1954] 1WLR 1489

Introduction

1. This is an appeal from the decision of the Traffic Commissioner for the North East of England Traffic Area taken on 17 April and communicated by letter dated 18 April 2019.

Events leading to the Decision

2. On 16 November 2018 the operator applied to vary his Restricted Public Service Vehicle Operator's Licence from one vehicle to two. By letter dated the following day, the office of the Traffic Commissioner informed him of material he needed to provide, which included details of his main occupation and financial evidence. The information was required by no later than 31 October 2018. On 16 November 2018, no response having been received, a detailed reminder was sent, accompanied by a warning that if the application remained incomplete by 30 November 2018, it would be refused. On 22 March 2019 the Traffic Commissioner refused the application to vary the licence, as he was not satisfied as to the "main occupation" requirement, the operator's financial standing or the arrangements for securing compliance with legal requirements: sections 13(3)(b), 14ZB(b), 14ZC (1)(b) ¹ of the Act refer.

The Decision

3. Thereafter, on 27 March 2019, the Traffic Commissioner's office informed the operator that because no response had been received to the letters sent on 17 October and 16 November 2018, the Traffic Commissioner was considering revoking the licence on the ground that the operator no longer met the requirement of main occupation in relation to the restricted licence and that this constituted a material change within s.17(3)(e) of the Act. The operator was given the opportunity to make representations and/or to request that a public inquiry be held. Any response was to be received by 10 April 2019. No response was received and accordingly on 17 April 2019 the Traffic Commissioner decided to revoke the licence for the reason given above.

Relevant legislative provisions and other legal principles

4. By section 13(3) of the Act:

- "A restricted licence authorises the use (whether on national or international operations) of—
- (a) ...
 - (b) public service vehicles not adapted to carry more than sixteen passengers when used—
 - (i) ...
 - (ii) by a person whose main occupation is not the operation of public service vehicles adapted to carry more than eight passengers.

¹ The statutory reference in the letter was in error in referring here to s.14ZB but we consider nothing turns on this as the ground for refusal was clearly and – in all other respects – accurately set out and in any event this is not the decision which is the subject of the present appeal.

By section 17:

“(2) Without prejudice to subsection (1) above, a traffic commissioner may, on any of the grounds specified in subsection (3) below, at any time—

(a) revoke a PSV operator's licence;

...

(3) The grounds for action under subsection (2) above are—

...

(e) that there has been since the licence was granted or varied a material change in any of the circumstances of the holder of the licence which were relevant to the grant or variation of his licence.

...”

5. In *T/2017/2 Mohammed Akbar t/a Choudhury Transport*, this Chamber considered at para 14 the “main occupation” test in section 13(3)(b)(ii) in the following terms:

“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”. ... Each case will of course be fact sensitive.”

6. For the principles applicable to the admission of evidence in the case, see [15] to [17] below.

The appeal to the Upper Tribunal

7. The operator appealed by notice of appeal received on 7 May 2019. In summary, his grounds of appeal were:

Ground 1: he finds reading hard, had misread the letter and thought it was just saying he could not have the variation increasing the permitted number of vehicles to two, rather than that he could no longer have his existing licence for one vehicle;

Ground 2: not all the letters sent to him had been received (he gave details of the numbering complications said to affect his address);

Ground 3: “Finally and importantly my main occupation is the driving full-time of my minibus”. He gave details of his family and financial commitments which he said would be prejudiced by the loss of the licence. He continued:

“I have no other means of income to date, I did try some months ago to change my occupation, however due to circumstances and my children I could not commit.”

8. In his application for suspension of the effect of the Traffic Commissioner’s decision he wrote:

“My minibus is my living I cannot earn any money without it. I am worried immensely about bills and food for my family. I am having sleepless nights.”

9. On 31st May the Upper Tribunal received a letter from the operator, indicating:

“I would like to clarify that the restricted licence that I held over previous years did not give me my main income. I have worked offshore for many years. I recently was wanting the minibus work to be my occupation as a change in family circumstances became an obstacle, however this circumstance was resolved more quickly than anticipated and my contract that I have as my main occupation in the wind industry is still now and in the future my main income.”

He wrote that he had invoices and bank statements to prove it and enclosed statements from Yorkshire Bank covering the period 30 November 2018 (p61) to 31 December 2018 (p54); 1 January 2019 (p59) to 1 Feb (p60); 1 Feb (p57) to 1 March (p58); and 1 April (p53) to 1 May 2019. The statement for the period 1 March to 31 March was incomplete, only the period from 18 March appearing (p55). The account was held with Yorkshire Bank in the name of O... Ltd and sent to the operator’s address. On 19 December, 17 January and 15 February a substantial payment was

received from a business “W...”; the relevant part of the statement is missing for March; there is no such payment recorded during April.

10. The appeal was listed for hearing on 5 September 2019. No response was initially received from the operator to the notice of hearing and on 27 August an Upper Tribunal clerk sent a follow-up enquiry. This was received back on 4 September endorsed that “Mr Philip Liddle unfortunately will not be attending the hearing due to work commitments offshore.”

11. The panel considered r.31 of the Upper Tribunal’s rules and concluded that it was in the interests of justice to proceed in the absence of the operator. He had not applied for a postponement. It was incumbent on him to anticipate that the Upper Tribunal would need to be persuaded that the fresh evidence should be admitted at all. If it were to be admitted, if he chose to provide, via his grounds of appeal and the letter received on 31 May two versions apparently incompatible with each other and then chose not to attend to explain the matter or to send a legal or other representative to do so, that was a decision for him. The panel was disinclined to adjourn proceedings on its own initiative; considerable public funds had been expended in convening and preparing for the hearing and the information that the operator would not be attending had only been received at the last minute. The detriment to the operator was limited: the ground of revocation was not one which reflected adversely on his repute and there would be nothing to stop him making a fresh application for a restricted licence (albeit there would be a relatively modest additional cost) and providing more compelling evidence of his circumstances.

12. The panel considered whether it was able to reach a fair decision on the appeal in the absence of the operator. It concluded that it was. The Upper Tribunal could reach its own view, applying established principles as to whether the fresh evidence should be admitted. If it were to decide in favour of doing so, though the evidence being put forward might be thought internally inconsistent, there was no doubt what was being said. Whilst it had identified of its own motion a concern about the matter raised at [14] below, the attendance of the operator was not required to enable the panel to pursue it.

13. Looking at the reasons canvassed in paras 10 to 12 in the round, the panel concluded that it was in the interests of justice to proceed.

14. The panel wished to satisfy itself that the matter under challenge had in fact been decided upon by the Traffic Commissioner and not merely handled by a member of his staff as a matter of administrative process. There was no evidence of the former in the bundle before the panel. A phone call by an Upper Tribunal clerk to the Traffic Commissioner’s office did not yield a satisfactory result. Consequently, the panel issued an Order under rule 16 of the Upper Tribunal’s rules of procedure requiring the Traffic Commissioner to produce any evidence in his possession showing that he had, in fact, authorised the decision. The Traffic Commissioner provided the evidence sought very promptly and to the satisfaction of the panel.

15. Both what was said in the Notice of Appeal and the content of the letter of 31 May were, of course, new evidence that had not been before the Traffic Commissioner. The correct approach to new evidence in this jurisdiction is to apply

the rule in *Ladd v Marshall* [1954] EWCA Civ1; [1954] 1WLR 1489 as a guideline to inform the panel's discretion. In summary, the requirements are:

(i) The evidence which it is sought to have admitted must be evidence which could not have been obtained, with reasonable diligence, for use at the first instance hearing².

(ii) It must be evidence such that, if given, it would probably have had an important influence on the result of the case, though it does not have to be shown that it would have been decisive.

(iii) It must be evidence which is apparently credible though not necessarily incontrovertible.

16. The applicability of the rule in *Ladd v Marshall* in this jurisdiction has been emphasised in T-2015/36 *W. Martin Oliver Partnership*. An application to the Court of Appeal for permission to appeal against the Upper Tribunal's ruling on the issue was considered by Flaux LJ to be "unarguably hopeless and totally without merit".

17. Nonetheless, the Upper Tribunal's rules 5 and 15, which bear on the evidence to be considered by the Upper Tribunal, have to be applied in the light of the overriding objective in rule 2(2) of enabling the Upper Tribunal to deal with cases fairly and justly. That includes avoiding unnecessary formality and seeking flexibility in the proceedings and ensuring, so far as practicable, that the parties are able to participate fully in the proceedings. T-2018/27 *Allen Transport Ltd* contains a careful review of the authorities which it is not necessary to repeat here. In *Bramley Ferry Supplies Ltd v HMRC* [2017] UKUT 214 (TCC) the Upper Tribunal said:

"22. Given the rather different context of the Upper Tribunal Rules, we accept the points raised by Mr Bedenham that we should not apply the criteria in *Ladd v. Marshall* as strict rules in the exercise of our discretion as to whether to admit new evidence. The principle governing the exercise our discretion under Rule 15(2) must be that we should deal with cases fairly and justly in accordance with the overriding objective. That requires us to take into account all of the circumstances of the case.

23. That having been said, the *Ladd v Marshall* criteria are not irrelevant. We agree with the Tribunal in *Reed Employment* that the *Ladd v. Marshall* criteria are of "persuasive authority as to how to give effect to the overriding objective": see *Reed Employment* [97]. The *Ladd v. Marshall* criteria should therefore be borne in mind when exercising our discretion under Rule 15(2)(a): see *Reed Employment* [100]. So whilst we take into account the fact the stay has been granted and that there is a possibility for HMRC to respond to the introduction of new evidence, we also have regard to the fact that the first of the criteria in *Ladd v Marshall* is not fulfilled."

18. To the extent that the rule in *Ladd v Marshall* does apply, the operator faces considerable difficulty in relation both to the evidence contained within his notice of

² In the present case , there was no hearing ,but a decision on the papers.

appeal and the subsequent evidence in his letter of 31 May. However, in the present case, unlike in the classic case for consideration of *Ladd v Marshall*, there has been no hearing at all – albeit the operator had the opportunity – but failed – to ask for one. Nonetheless, so far as placing his evidence before the Traffic Commissioner when the decision fell to be taken is concerned, the only reason given why it was not was that the operator misunderstood what the letter of 27 March 2019 was addressing. However, that did not mean that the operator could not have obtained the evidence with reasonable diligence – the matters relied upon were all within his own knowledge and the documents supplied within his own control. He therefore would fail to meet the first *Ladd v Marshall* criterion. We consider that he would also fail to meet the third, as, in the absence of any attempt to explain how the two instalments of his evidence can be reconciled, each lacks apparent credibility because of its apparent inconsistency with the other (explored more fully below). However, while refusal to admit the evidence might well be justified on the principles set out above, we prefer in the exercise of our discretion to decide the case on the basis of all the evidence that is available to us. Whilst we do not need to (and cannot) make findings as to them, we bear in mind the matters raised by Grounds 1 and 2 in arriving at that preference.

19. If one admits the evidence as a matter of discretion and in the interests of applying the overriding objective, the appeal still fails. To say on 26 April that

“Finally and importantly my main occupation is the driving full time of my minibus....I have no other means of income to date”

is unequivocal, as his statement in an application for a stay (dated 1 May 2019) that

“my minibus is my living I cannot earn any money without it. I am worried immensely about bills and food for my family. I am having sleepless nights.”

20. We find the evidence about O...Ltd only of limited support to the operator. While there are clearly links of some sort between O Ltd and the operator (in that he receives the company’s bank statements), we have been offered no evidence of the shareholding or Board membership. Whilst we accept that the payments received in December 2018 and January and February 2019 from W are consistent with being regular payments from a customer under a contract for services, we have no corroboration that it was the operator personally who performed the contract as opposed to (if he had an interest in the company at all) being a passive investor.

21. Nor can we accept the operator’s assertion that:

“I have worked offshore for many years. I recently was wanting the minibus work to be my main occupation as a change in family circumstances became an obstacle, however my circumstance was resolved much more quickly than anticipated and my contract that I have as my main occupation in the wind industry is still now and in the future my main income.”

22. This is suggesting that a change from the wind industry had been in contemplation as the result of family circumstances. However, in his grounds of

appeal, explaining how badly he needed to drive the minibus as his sole means of support, he explained that

“I did try some months ago to change my occupation, however due to circumstances and my children I could not commit.”

This therefore was speaking of a change from main minibus driving (possibly, though not necessarily, to the wind industry.)

23. If we admit all the evidence from the operator, we find it inconsistent and thoroughly unreliable. If the competing versions can be reconciled, he has not attempted to do so. He has therefore not succeeded in establishing that he has a main occupation other than that of operating the minibus and accordingly his appeal is dismissed.

C.G.Ward
Judge of the Upper Tribunal
Date: 18 September 2019