



NCN: [2022] UKUT 00096 (AAC)
Appeal No. UA-2021-000019-T

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

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER

Before: M Hemingway: Judge of the Upper Tribunal
A Guest: Member of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal

Appellant: Nico 2014 Limited
Licence Number: OF2043707

Heard at: Birmingham

On: 25 March 2022

Date of Decision: 29 March 2022

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

SUBJECT MATTER

Financial standing
Adequacy of reasons

CASES REFERRED TO

Bradley Fold Travel Ltd. and Another v Secretary of State for Transport [2010]
EWCA Civ 695

Michael Hazell (No 2) [2017] UKUT 221 (AAC)

Wajid Bashir t/a MB Travel [2018] UKUT 0401 (AAC)

Sheraz Asghar [2018] UKUT 0442 (AAC)



REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by Nico 2014 Ltd (effectively by Mr Armands Ozerovs who owns and runs the company and whom we shall now call “the appellant”), from a decision of the Traffic Commissioner for the East of England Traffic Area (“the TC”), embodied in a letter of 18 August 2021 sent by the Office of the Traffic Commissioner (“OTC”) refusing to grant his application for a standard national goods vehicle operator’s licence. The refusal decision was expressed to have been made due to a failure to demonstrate that the requirement contained within section 13A(2)(c) of the Goods Vehicle (Licensing of Operators) Act 1995 to have appropriate financial standing had been met.

2. The appeal was considered at a traditional face-to-face hearing which took place in Birmingham on 25 March 2022. The appellant attended and represented himself. We are grateful to him for presenting his case and answering questions which we put to him.

3. The appellant made the licence application on 5 April 2021 with the intention of using a single vehicle (authority for only one vehicle had been sought) for the purpose of operating a small road haulage business. He correctly (see below) identified a need to show available finance of £8,000 if his application was to succeed. He supported the application with documentary evidence of finance which appeared to show funds and overdraft facilities amounting to approximately £5,000 together with access to credit. But the OTC found that documentation to be unsatisfactory for various reasons, not least because it was not in the name of the appellant company. So, on 19 April 2021, the OTC wrote to ask him to provide financial evidence in the name of Nico 2014 Limited showing ready access to £8,000 for a period of 28 days the last date of such period not being more than two months from the date of receipt of the application. That request was in line with Statutory Guidance No 2 of the Senior Traffic Commissioner given under section 4C of the Public Passenger Vehicles Act 1981 and which also covers financial standing requirements as set out in the Goods Vehicles (Licensing of Operators) Act 1995.

4. The appellant responded by forwarding bank statements in the name of the company, but the OTC did not consider such evidence to be satisfactory either. Although not expressly stated, we assume (and we think it to be a safe assumption) that it was because those bank statements did not evidence an average balance of £8,000 or more during a 28-day period. Indeed, at some points there was a debit balance.

5. On 10 June 2021, the OTC wrote to the appellant once again, in what it described as a “*final attempt*” to resolve matters, notwithstanding that there was

no requirement for it to do so. It asked for further details regarding finance and available credit. As a separate matter it also raised some queries concerning the nomination of a transport manager. It then, in a follow up letter of 12 July 2021, requested a further bank statement. The appellant provided further evidence which included a bank statement for the period from 1 June to 16 July 2021 and which included a credit of £6,000 on 15 July 2021, that sum having been provided by a company called Capital on Tap. Had it not been for that payment of £6,000 the credit balance would not have exceeded £8,000 for any of the period covered by the bank statements and, in fact, there were a number of points at which there was either a debit balance or a negligible credit balance.

6. It is evident from documents disclosed to the Upper Tribunal and subsequently contained within the appeal bundle (so that the appellant has now had sight of them though he would not have done so at the time he appealed) that there were written communications in the form of internal memoranda passing between the TC and caseworkers employed by the OTC concerning the question of financial compliance and other regulatory requirements. Of most significance for the purposes of this appeal is a written recommendation by a caseworker that the application be refused on financial standing grounds and also, it seems, for other reasons linked to professional competence (the transport manager) and the adequacy of arrangements for ensuring rules relating to driving hours will not be breached, and a subsequent note made by a TC. The TC's note reads "*The applicant has provided proof of financial standing but has not been able to show the required amount over a 28 day period. The company thus far appears to be wholly supported by credit facilities. Mr Ozerovs has recently completed his TM CPC but has also stated he drives 55 hours per week on average which is a breach of the driver Work Time Directive. He has mentioned in his explanation of how he has managed his transport needs, that he runs recovery vehicles and works as a mobile mechanic. This was not declared on the TM1 form. For these reasons I recommend that the application is refused*".

7. The letter of 18 August 2021, which communicated the decision to the appellant relevantly indicated that the application had been refused on the basis that "*The financial information provided was not acceptable because you failed to establish financial standing. Therefore, you failed to demonstrate that you meet the requirements of Section 13A(2)(c) of the above Act*". The letter offered no further explanation as to why it had been decided that the financial standing requirement had not been met (no reference to the 28 day period nor the perceived to be excessive reliance on credit) nor was anything said about professional competence and the doubted ability to manage compliance with the regulatory regime. But the letter did alert the appellant to the right of appeal. Even though it might well have been the intention of the TC that refusal was to have been based upon all of the concerns identified in his note, we have felt constrained to proceed on the basis that the refusal was on financial grounds only since no other basis for the refusal found its way into the letter communicating the decision.

8. The appellant exercised his right of appeal. In his grounds of appeal, he asserted, in effect, that taking into account credit facilities which had been made available to him he had always had a sum in excess of £8,000 available. At the hearing of his appeal the appellant said much the same. He added that he had other business interests and would be able to move money from an account

belonging to one business to another where necessary. He explained that he had understood that the financial standing requirement was there to ensure that an operator is able to properly repair and maintain vehicles so that they can be utilised safely and he expressed the view that he would be able to repair and maintain the vehicle he proposed to operate under the licence

9. As to the approach which the Upper Tribunal must take on an appeal such as this, paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

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

10. Paragraph 17(3) of that Schedule provides that the Upper Tribunal may not take into consideration any circumstances that did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Another v Secretary of State for Transport* [2010] EWCA Civ 695. It was stated therein that the Upper Tribunal has the duty, on an appeal to it, to determine matters of fact and law on the basis of the material which had been before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to take a different view to that taken by the TC.

11. We have decided that the decision of the TC, as communicated in the letter of 18 August 2021 was not one in respect of which the process of reasoning and the application of the relevant law requires (our underlining) us to take a different view. That is because whilst financial standing may be demonstrated in a variety of ways (see *Michael Hazell (No 2)*: [2017] UKUT 221 (AAC)) such that an inability to demonstrate an average credit balance of £8,000 over a fixed 28 day period is not, of itself, necessarily fatal, the inability of the appellant to do so in this case is indicative of a large degree of precariousness in the company finances; because on the appellant's own account there is a very considerable degree of reliance upon credit facilities which is one of the least reliable means of showing available finance (see *Hazell (No 2)* again); because although the appellant asserted before us an ability to transfer funds from a different business to his haulage business he provided no evidence of this to the TC (nor any corroborative evidence to us even assuming we might have been prepared or able to consider admitting such evidence) and because the overall pattern evidenced by the bank statements the appellant did provide points to a business which is frequently under financed.

12. In light of the above, we have concluded that we must dismiss the appeal.

13. Having said the above and having reached our decision on the appeal, there are some matters with respect to the way the decision of the TC was communicated to the appellant which we think we ought to comment upon.

14. In our view the letter of 18 August 2021 was deficient because, whilst it communicated to the appellant in clear enough terms the result of his application

for a licence, it did not set out any of the reasoning which underpinned that outcome. We make a general observation, and such observations have been made by the Upper Tribunal on previous occasions including in *Wajid Bashir t/a MB Travel* [2018] UKUT 0401 (AAC), in particular at paragraph 12 and *Sheraz Asghar* [2018] UKUT 0442 (AAC) in particular at paragraph 16, that such is not acceptable. We say that because if a prospective appellant is not provided with the reasoning underpinning a decision then he/she is in difficulty in making an informed decision as to whether there might be merit in appealing or not. That might lead to a prospective appellant appealing in circumstances where he/she might otherwise not have done (thus leading to unnecessary administrative functions having to be performed) or to a prospective appellant not appealing in circumstances in which he/she might have done had he realised (if it be the case in any given instance) that the reasoning was at least arguably defective (thus raising the possibility in some cases of a denial of justice). It might lead to a prospective appellant being unable to prepare grounds of appeal which are focused and properly directed towards the TC's reasoning, thus leading to the necessity for later amendment or to arguments being raised at a late stage before the Upper Tribunal. None of that is satisfactory. Accordingly, we would express the hope that, in relation to decisions only expressed by letter (usually the case where there has been no public inquiry) the reasoning underpinning a negative decision will be communicated in that letter. We would also make the point that where, as here, the reasoning is evident from internal memoranda, it should be a relatively easy task to transpose and incorporate that reasoning into a decision letter.

15. If the above seems like harsh criticism of the OTC we do not mean it to be. We understand the difficulties of working in a busy office under pressure. We understand that the OTC might well still be having to cope with the fall-out from the coronavirus pandemic and the huge adverse impact that has had upon administrative processes in many organisations and departments. But the matter is, in our view, of such importance that not pointing it out would represent a failing on our part. In this case there was no injustice or unfairness because the appellant did understand why his application had been refused and was able to put all of his points to the Upper Tribunal on appeal. But that does not detract from the importance of the concern we have identified.

16. The appeal is dismissed.

M R Hemingway
Judge of the Upper Tribunal
Approved for issue on

A Guest
Member of the Upper Tribunal

D Rawsthorn
Member of the Upper Tribunal