

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

ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the West Midlands Traffic Area

Before: M Hemingway: Judge of the Upper Tribunal
M Smith: Member of the Upper Tribunal
K Pepperell: Member of the Upper Tribunal

Appellant: Brett Pennells
Reference: PD2047917
Heard at: Birmingham Civil Justice Centre
Date of Hearing: 24 June 2022
Date of Decision: 19 July 2022

DECISION OF THE UPPER TRIBUNAL

This appeal is dismissed.

SUBJECT MATTER:

Restricted Licences.

CASES REFERRED TO

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

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Mr Brett Pennells (“the appellant”). The appeal is directed towards a decision of a Traffic Commissioner (“the TC”) made on 4 January 2022 following a public inquiry (“PI”) of the same date but which the appellant did not attend, to refuse his application for a restricted public service vehicle (“PSV”) operator’s licence.
2. The appeal was listed to be heard, by way of a traditional face to face hearing, at Birmingham, on 26th June 2022. However, on 10 June 2022 the appellant sent an email to the Upper Tribunal in which he indicated that he was “*unable to attend on the 24th June due to council contract commitments*” and asked for a postponement. No other detail was offered. On 13 June 2022 Upper Tribunal Judge Hemingway refused the postponement request but indicated a willingness to reconsider if a more detailed and more persuasive application were to be submitted. However, that resulted in the appellant sending a further email, also on 13 June 2022, in which he indicated that he would not be attending the hearing and requested that the Upper Tribunal “*decide in my absence as I am unable to attend*”. The appellant was then notified that the Upper Tribunal would, if it was satisfied it could fairly do so, decide the appeal on 24 June 2022 on the basis of the documentary material available to it.

The Background and The TC’s Decision

3. The appellant operates a small taxi business and trades as “*Lunar Cars*”. On 23 April 2019 he was granted a special restricted licence. On 18 May 2021 he applied for a restricted PSV licence, but that application was refused. On 29 August 2021 he made his current application. In doing so he indicated, amongst other things, that he is a sole trader, and that he intended to use a car park at a Public House called the Clifford Arms as his operating centre (claiming that the owner of the Public House was agreeable to his doing so). He also claimed he anticipated spending some 10 to 15 hours per week undertaking work covered by the licence he was seeking and 35 hours per week in his existing business. The TC decided that the application should be considered at a PI. Accordingly, on 1 December 2021, the Office of the Traffic Commissioner (“OTC”) wrote to the appellant indicating that a PI would be held at Birmingham (a venue convenient for the appellant) on 4 January 2022. It was indicated that the TC felt the need to be satisfied as to a variety of statutory requirements including those relating to what is known as the “*main occupation*” test (see below); good repute; financial standing; the adequacy of the arrangements for the maintenance of vehicles; the adequacy of arrangements for compliance with the law regarding the driving and operation of vehicles; and the appropriateness or suitability of the proposed operating centre. In particular, the letter alerted the appellant to the desirability of evidence in the form of business plans or business forecasts regarding the main occupation test and the current lack of any formal agreement between the appellant and the owner of the Clifford Arms Public House with respect to the proposed use of the car park as an operating centre.

4. The appellant did not provide the sort of documentary evidence which was envisaged in the OTC's letter of 1 December 2021. Nor did he attend the PI of 4 January 2022. Nor, in fact, did he indicate prior to or on the date of the PI, that he would not be attending. Thus, no postponement was sought. He did subsequently assert an inability to attend because he was required to look after his son. Faced with the then unexplained non-attendance coupled with the lack of any documentary evidence of significance, the TC decided to proceed in the appellant's absence and to refuse the application. In a succinct written decision of 4 January 2022 ("the written reasons") the TC indicated that he was refusing the application pursuant to Section 13(3)(b), 14ZB and 14ZC of the Public Passenger Vehicles Act 1981 ("the 1981 Act").

Some Relevant Legislation

5. Section 12 of the 1981 Act indicates that a PSV cannot be used on a road for carrying passengers for hire or reward except under a PSV operator's license and that, in order to have a license, an operator must have an operating centre which is specified in the license.
6. Section 13 of the 1981 Act indicates that a PSV operator's license may be either a standard or a restricted license and indicates that a restricted license authorises the use of public service vehicles not adapted to carry more than 16 passengers when used by a person whose main occupation is not the operation of public service vehicles adapted to carry more than 8 passengers.
7. Section 14ZB of the 1981 Act requires an applicant for a restricted license to be of good repute and to have appropriate financial standing (as determined in accordance with paragraph 2 of schedule 3 to the 1981 Act). Section 14ZC of the 1981 Act requires an applicant for a standard and an applicant for a restricted license to demonstrate that there will be adequate facilities or arrangements for maintaining in a fit and serviceable condition of the vehicles proposed to be used under the license and requires there to be adequate arrangements for securing compliance with the requirements of the law relating to the driving and operation of such vehicles.

The Grounds of Appeal to The Upper Tribunal

8. The appellant has provided relatively brief written grounds of appeal. On our reading, what he has to say amounts to a contention that the "*main occupation*" test will be met; that the owner of the Clifford Arms Public House has allocated him free parking spaces; and that he is a sole trader (he mentioned that because the TC seemed to think his business undertaking might be a partnership).

Our Approach on an Appeal such as this

9. The Upper Tribunal, in an appeal such as this, has the function of hearing and deciding on all matters whether of fact or law. But it may not take into consideration any circumstances which 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 & Anor v Secretary of State for Transport* [2010] EWCA Civ 695. It was explained 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 before the TC but without the benefit of seeing and hearing from witnesses. It was further explained 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 adopt a different view to that taken by the TC.

Our reasoning on the Appeal

10. The TC's decision to proceed with the PI in light of the then unexplained absence of the appellant has not subsequently been criticised by the appellant and does not form part of his grounds of appeal to us. Anyway, it seems to us it was perfectly in order for him to so proceed and we detect no unfairness in his doing so.
11. Mr Pennells was not before us either. We have set out the background to that above. We asked ourselves whether we should proceed or should adjourn. We decided to proceed. That is because the application for a postponement was unadorned by detail; because Mr Pennells had effectively consented, indeed invited us to go ahead without him; because the issues we had to decide were relatively straightforward and readily identifiable from the paperwork in our possession; and because, putting everything together, we were satisfied it was just and proportionate to do so.
12. The difficulty for the appellant in this appeal relates to the paucity of corroborative evidence he has supplied to the TC and the paucity of the argument he has supplied to the Upper Tribunal, regarding his licence application and his subsequent appeal.
13. The TC's decision amounted to what might be regarded as a blanket refusal with respect to all of the applicable licensing requirements which had been in issue. For us to uphold the TC's decision we do not have to be satisfied that all of the TC's various bases for refusal were sound. But if the appellant is to succeed, he must demonstrate that none of them were.
14. We shall, first of all, consider the situation with respect to the operating centre. It is true that in this particular context the regulatory regime regarding public passenger service vehicle licensing is less demanding than that which applies in the goods vehicle regulatory regime. Nevertheless, in light of the content of Section 12 of the 1981 Act, there does have to be one. The appellant has asserted, in effect, that set spaces shall be made available to him in the car park of the Clifford Arms. But despite it being obvious that there was a need for him to provide some evidence as to all of that, he has provided no evidence emanating from the owner of the Clifford Arms indicating consent. Still less has he supplied a formal written agreement between the two of them. The PI call-up letter had alerted him to the need to provide some relevant evidence as to the operating centre. Although the TC, in his written reasons, did not specifically refer to section 12 of the 1981 Act, it is clear from what he had to say that one basis for refusal was the lack of such evidence regarding the proposed operating centre and its availability to the appellant. In these circumstances we are not able to conclude that the TC erred in law or was otherwise plainly wrong in his decision to refuse the licence application. Indeed, given the paucity of the evidence provided, we would suggest that that aspect of the TC's decision was, in reality, inevitable. On that basis alone, therefore, the appellant's appeal must fail.

15. In light of the above, it is not now necessary for us say very much more (or strictly speaking anything more) about any of the other bases for refusal. But we shall say something albeit we will be brief. The appellant had similarly produced no documentary evidence regarding his assertions that the main occupation requirement would be met. We accept that it is sometimes difficult for an operator to know what sort of evidence might demonstrate the satisfaction of that particular test. But the appellant had, again, been given clear guidance in the PI call-up letter and had not provided any evidence at all. An appellant wanting to demonstrate satisfaction of that requirement must do something more than nothing. Accordingly, once again, we conclude that refusal on this basis was inevitable and that the TC was certainly not in error of law or plainly wrong.
16. As to the other bases for refusal we would simply say, with respect to the good repute issue, that we are not able to detect, for ourselves, anything in the material before us which calls into question the appellant's good repute as opposed to, perhaps, his ability and competence to gather evidence and present a viable case. We make that observation so that it may be considered in the event of the appellant making a fresh application for a PSV licence at some point in the future.

Decision

17. This appeal to the Upper Tribunal is dismissed.

**M R Hemingway
Judge of the Upper Tribunal**

**M Smith
Member of the Upper Tribunal**

**K Pepperrell
Member of the Upper Tribunal**

**Authorised for issue on 19 July
2022**