



NCN: [2022] UKUT 00280 (AAC)  
Appeal No. UA-2022-000246-T

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

**ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER for the EAST of ENGLAND**

Before: M Hemingway: Judge of the Upper Tribunal  
S Booth: Member of the Upper Tribunal  
M Smith: Member of the Upper Tribunal

**Appellant:** Jay's Vehicle Movers Ltd

**Reference No:** OF2045524

**Representation:**

**For the appellant:** Mr J Ulyatt

**Heard at:** Remote hearing administered from the Rolls Building in Central London

**Date of Hearing:** 27 September 2022

**Date of Decision:** 23 October 2022

**DECISION OF THE UPPER TRIBUNAL**

This appeal is allowed. The case is remitted to the Traffic Commissioner for reconsideration.

**Subject matter:** Financial standing

**Cases referred to:** Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695.

## REASONS FOR DECISION

1. This appeal to the Upper Tribunal has been brought by Jay's Vehicle Movers Ltd ("the appellant") in the person of Mr Jay Ulyatt, its director. The appeal is directed towards a decision of the Traffic Commissioner ("the TC") embodied in a letter of 1 February 2022, to refuse its application for a standard international goods vehicles operator's licence.
2. The application was made on 20 May 2021. The appellant indicated it was seeking authority to use one vehicle and one trailer under the terms of the licence it was seeking. The appellant recognised, in making its application, that it was required to show available finance in the sum of £8,000 in order to satisfy the financial standing requirements as contained in section 13A(2)(c) of the Goods Vehicles (Licensing of Operators) Act 1995.
3. The Office of the Traffic Commissioner (OTC) wrote various letters to the appellant seeking evidence concerning its financial standing. Whilst that process was ongoing, a time limited interim licence was granted. However, that expired on 4 December 2021.
4. The OTC indicated to the appellant that it required financial evidence in the name of the appellant covering a consecutive 28-day period and showing an available balance of at least £8,000. Included in the evidence the appellant provided in support of its application was a letter sent to it by HSBC bank, on 17 June 2020 which made reference to an "*arranged overdraft limit of £1,000*". There was also, in relation to the overdraft, a record of transactions issued by the same bank (seemingly on 13 December 2021) which also indicated an overdraft facility in the above amount. The appellant also submitted bank statements in its name, issued by HSBC, covering the period from 10 December 2021 to 5 January 2022. It seems that, separately, the appellant might have provided a further bank statement covering the period from 6 to 9 January 2022. Certainly, a copy was later provided to the Upper Tribunal in support of the appeal.
5. On 12 January 2022 a member of the OTC's staff carried out a financial calculation in order to ascertain the average available funds which had been evidenced by the appellant over a continuous 28-day period. That approach is in line with the content of the Senior Traffic Commissioner: Statutory Document No2: Finance, which constitutes statutory guidance issued under section 4C of the Public Passenger Vehicles Act 1981 (as amended) and provides information as to the way in which the Senior Traffic Commissioner believes that TC's should interpret the law in relation to financial standing. Under Annex 5, there appears a formula for calculating the average balance over a 28-day period. Essentially, that involves taking the latest available closing balance, the balance 27 days prior to that date, and then the best two closing balances during the intervening period. Those 4 balances are then added together and divided by four. The resulting figure is treated as the average balance and represents the final figure for the purposes of the calculation.
6. The calculation carried out by the TC covered the 28 period from 9 December 2021 to 5 January 2022. The average balance for that period using the above methodology and taking account of what was accepted to be an available overdraft facility of £1,000, was £7,057.

7. There are within the bundle of papers provided to the Upper Tribunal for the purposes of this appeal, copies of internal memoranda. Those reveal that on 19 January 2022, therefore shortly after the date the above calculation had been undertaken, an OTC staff member reviewed the financial evidence and issued a recommendation to the effect that the application be refused. Reference was made to the calculation, but the essential point made was that the appellant had failed to provide sufficient financial evidence prior to the expiry of the interim licence. The interim licence, by way of reminder, had expired on 4 December 2021. Correspondence which had been sent to the appellant by the OTC on 19 August 2021 had indicated that financial evidence had to be provided “*by the expiry of any interim granted*”. So, the refusal recommendation was based on the latter failing. On 25 January 2022 another internal recommendation was made to the effect that the licence ought to be refused. That recommendation again referred to the calculation having shown an available balance of only £7,057 over “*a consecutive 28-day period*” and seems to have been based on the inadequacy of the funds as illustrated by the calculation. There is an internal memorandum of the same date indicating that the recommendation to refuse was accepted by the TC. This was said:

“Discretion was exercised so as to allow the applicant to commence operations but on the clear understanding that admissible evidence be supplied in time to allow for substantive grant before the interim expired. It failed to do so and even on the information available, were it admissible, it would not be sufficient to support grant. The application must be refused under section 13A(2)(c)”.

8. On our reading of the above passage, the primary basis for refusal was intended to be a failure to provide financial evidence prior to the expiry of the interim licence with a fallback basis for refusal on the basis that the evidence which was provided, and which related to a period slightly after the expiry of the interim licence, did not show an average available balance of £8,000 for a continuous 28 day period. That reasoning, however, was not entirely reflected in the wording of the subsequently issued decision letter of 1 February 2022. The key paragraph of the letter reads:

“The financial information provided was not acceptable because as it showed insufficient funds for the type of licence applied for over the required period. The evidence provided showed an average of £7,057 whereas the requirement is £8,000. Therefore, you have failed to demonstrate that you meet the requirements of Section 13A (2) (c) of the above Act”.

9. On our reading of the above passage, the sole stated reason for refusal in that letter issued by the OTC was the failure to demonstrate an available balance of £8,000 throughout the 28-day period which was the subject of the OTC’s calculation.

10. The appellant, through Mr Ulyatt, appealed to the Upper Tribunal. In the grounds of appeal an alternative calculation was put forward based (as became obvious during the hearing of the appeal) upon a slightly different 28-day period. It was suggested that the starting date for the 28-day period should be 12 December 2021 which was the date when £9,000 was paid into the appellant’s business account by the parents of Mr Ulyatt. We would observe at this point that, were it not for that deposit, the available balance would not come anywhere near the required amount whatever the starting date for the calculation.

11. We heard the appeal remotely on 27 September 2022. The appellant was not legally represented but Mr Ulyatt addressed us. He explained his calculation. He said he had taken 12 December 2021 as the appropriate starting date because that was the first date when he had

“*sufficient funds*”. He explained that the sum of £9,000 had been provided to him by his parents because he had “*struggling*” to meet the funding requirements and that the money had been advanced to him on the basis that he would return it, when he could, at some indeterminate point in the future. When asked whether the money had been advanced as a loan or a gift, he indicated a wish to pay his parents back at some point but observed that there was “*no repayment plan*”. However, he did say that if he was able to obtain the licence, the business would then generate profit.

12. The appeal has been brought under section 37 of the Goods Vehicles (Licencing of Operators) Act 1995. In considering and deciding such an appeal the Upper Tribunal is not required to rehear all of the evidence but, instead, has the duty to hear and determine matters of both fact and law on the basis of the material before the TC but without having the benefit of seeing and hearing from witnesses. The Upper Tribunal may not, on an appeal such as this, 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 has power, on an appeal from a TC, to make such order as it thinks fit or to remit the matter to the TC for rehearing and redetermination in any case where it considers that to be appropriate (see paragraph 17 of Schedule 4 to the Transport Act 1985).

13. As indicated, we think that the primary intention of the TC who considered the case in light of the recommendations made by OTC staff, was to refuse the application on the basis that the appellant had failed to provide its financial evidence prior to the expiry of its interim licence. But, as we have explained, we do not think that was communicated to the appellant in the decision letter. What was communicated and what Mr Ulyatt, therefore, responded to when appealing, was simply a decision that on the basis of the financial evidence he had provided, he had not satisfied the £8,000 availability requirement for the necessary period. We have taken the above wording contained in the decision letter as constituting the decision that was made and we have assessed the appeal and its merits, on that basis.

14. We are not wholly sure why the starting date of 9 December 2021 was selected for the purposes of the OTC’s calculations. The bank statements before us appeared to commence from 10 December 2021 but it may be that there was other information before the OTC which enabled it to be certain of the balance as of 9 December 2021. We do not accept Mr Ulyatt’s contention before us to the effect that the commencement date must necessarily be the date when he first happened to meet the requirement to have an available balance in excess of £8,000. We do not see any basis for an appellant to be able to cherry pick the commencement date for a calculation in that way.

15. The calculation was, so far as we can tell, entirely correctly undertaken pursuant to the formula we have set out above. But there are different ways of performing the calculation in order to derive an appropriate figure for the average balance. On a calculation undertaken by us, (leaving aside the pennies), if one takes the closing credit balance on each individual day from 9 December 2021 to 5 January 2022, adds them up, and then divides by 28, that yields a figure, taking into account the £1,000 overdraft facility, of £8,167 as representing the average over that 28-day period. It may be thought surprising that our calculation produces a better result for the appellant because the method used by the OTC, incorporating as it does the two highest balances, might be thought in general terms, to be a quite generous method. But that is the position.

16. We do not seek to quibble with the way in which the TC or the OTC normally undertakes the calculation. Speaking generally, it seems to us to be a straightforward, workable and in most cases fair way of going about things. Additionally, since the formula is set out in the above guidance an operator will be able to understand how the calculation is likely to be undertaken. Thus, it is a transparent process. But there may be cases where it may produce an inaccurate and consequently unfair result. Perhaps because the system is generally fair and transparent and, in our view relatively favourable from a licence holder or licence applicant's perspective, the mode of calculation is (at least in our experience) very rarely challenged in grounds of appeal. But, where it is, it is necessary to consider whether the mode of calculation employed has, in all the circumstances of the case, produced a fair and accurate result. We have concluded that, in this case, it has not. It is for that reason that we have allowed the appeal.

17. We have not, notwithstanding the above, felt able to go on to remake the decision ourselves. That is because we do have some concerns regarding the genuine availability of the £9,000 paid into the appellant's account by Mr Ulyatt's parents. We suspect, had the TC not identified other reasons for refusing the application, that that would have been a matter which would have attracted some scrutiny. We are not making any finding on the point for ourselves and have no particular reason to doubt the truthfulness or accuracy of Mr Ulyatt who impressed us at the oral hearing. But in light of all of the above we have concluded that this matter ought to be returned to the TC for a re-evaluation and to enable all matters which might be relevant to the question of financial standing, including if considered appropriate the failure to provide evidence prior to the expiry of the interim licence, to be considered afresh.

18. This appeal to the Upper Tribunal then is allowed on the basis and to the extent explained above.

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

**M Smith**  
**Member of the Upper Tribunal**

**S Booth**  
**Member of the Upper Tribunal**

**Authorised for issue on 23 October 2022**