IN THE UPPER TRIBUNAL **Appeal No. UA-2024-000787-NT**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 325 (AAC)**
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from the DECISION of the DEPARTMENT FOR INFRASTRUCTURE, for Northern Ireland

Before:	Ms. L. Joanne Smith: Judge of the Upper Tribunal Mr R. Fry: Member of the Upper Tribunal Mr D. Rawsthorn: Member of the Upper Tribunal
Appellants:	(1) Mr Shaun Gallagher (2) PG Haulage Limited
Reference No:	ON2017993
Heard at:	Tribunal Hearing Centre, Royal Courts of Justice, Belfast
On:	19 September 2024
Date of Decision under Appeal:	20 May 2024

DECISION OF THE UPPER TRIBUNAL

THE APPEAL IS DISMISSED.

Subject matter:

Variation of operator's licence. Variation of operating centre. Availability and suitability.

Cases referred to

Fergal Hughes v DOENI & *Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC NT/2013/52 & 53*; Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695. *Clarke v Edinburgh & District Tramways Co Ltd* [1919] UKHL 303; (1919) SC (HL) 35; 56 SLR 303.

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by Mr Shaun Gallagher ("the Appellant"), on behalf of PG Haulage Limited ("the Appellant company") against a decision of the Department for Infrastructure for Northern Ireland ("the DfI"), dated 20 May 2024. The decision was to refuse an application to vary the operator's licence held by the Appellant company (reference ON2017993).

2. The appeal was considered at an oral hearing, at the Tribunal Hearing Centre within the Royal Courts of Justice, Belfast, on 19 September 2024. The Appellant was in attendance and was accompanied by Mr Martin Gallagher by way of support. He was unrepresented. The Respondent was not represented as is usual for this type of hearing.

Background facts and the decision under appeal

3. The Appellant held an operating licence (reference ON2017993) which authorised one vehicle and had an operating centre at 26 Crossdall Road, Armagh, BT60 3QL. By letter dated 10 November 2023, the Appellant sought a variation of his operating licence to authorise a new operating centre at 215 Culmore Road, Londonderry BT48 8JL. It was also requested that the operating centre be authorised to hold four vehicles and one trailer which required an increase to the authorisation on the licence.

4. The Appellant followed this letter up with an application on the correct form, within which he indicated that he had permission from the site owner to use the premises as an operating centre and to park the requested number of vehicles and trailers. He had advertised the application in his local newspaper, the Derry Journal, on 12 December 2023. He purported to demonstrate financial standing to the value of £21,500 as required. He provided the registration details and plated weights of each of the vehicles

proposed to be included on the licence. His application confirmed the standard undertakings in making the variation application.

5. On 15 January 2024, a Licensing Casework Officer from the DfI Central Licensing Office wrote to the Appellant to inform him that his application was incomplete in five regards. Firstly, the advertisement could not be accepted as it had not been published within the correct 21 day timescale of the application being made. Secondly, he had to supply financial evidence in the name of PG Haulage Limited to demonstrate the company had financial standing to the sum of £21,500. Thirdly, he was asked to account for six large deposits of money on two separate dates in December 2023, which were showing on the financial standing evidence he had already submitted. Fourthly, he was asked to account for the reason why a second company director was not declared on the application. Finally, he was asked to provide an aerial image of the proposed operating centre site to assist the DfI in establishing its suitability for use. He was asked to respond with this information by 29 January 2024 or risk his application being refused. The Appellant provided all the information requested within the time frame allocated.

6. The Driver and Vehicle Agency ("DVA") thereafter received a request from the Transport Regulation Unit ("TRU") on 26 February 2024, to assess the proposed site as had concerns regarding its suitability. The DVA proceeded to conduct an operating centre assessment, including attending the site on an unannounced visit on 20 March 2024. The yard owner, who was on site during the visit, stated that no contract had been signed between he and the Appellant to rent the site. The assessment concluded that the site was capable of accommodating the number and type of vehicles requested but there were other concerns identified.

7. On 20 May 2024, the Casework Manager of the DfI Central Licensing Office wrote to the Appellant, as director of the applicant company PG Haulage Limited, indicating that the application to vary the operator's license had been refused under s.12(5) of the Goods Vehicles (Licensing of Operators)

Act (Northern Ireland) 2010 ("the Act"), as applied by s.16(6) of the Act, on two grounds:

- *"an assessment of the proposed operating centre at 215 Culmore Road, BT48 8JL by the DVA showed that the site does not meet the requirement of section 12C(5) of the Act. It has been deemed unsuitable because the ground surface is poor and quite muddy in parts. A muddy surface can cause a road safety hazard when driven onto the public highway.*

- *the Department has also determined that the proposed operating centre at 215 Culmore Road, BT48 8JLO is not available to the applicant as required under section 12C(5) of the Act. This is because the DVA reported that whilst enquiries had been made about the operating centre by your company, there was no contract or other agreement in place for the company to use the new site as an operating centre. Whilst the Department would not expect an operator to be paying for a site until approval has been granted unless required to secure the space, an agreement that the site would be available should the application be approved ought to have been sought from the site owner."*

8. It was further stated:

"Refusal of the application does not preclude the company from reapplying to use the same site. Evidence of availability and suitability of the surface at the time of application would be required. The Department would also need to be assured that there are allocated parking spaces for your company's vehicles because it is a shared site, along with evidence that it is clear to other users of the premises that the allocated spaces are solely for your company's use.

9. The letter set out the Appellant's right to appeal to the Upper Tribunal. Instead of reapplying, the Appellant submitted an appeal to the Upper Tribunal to challenge the refusal decision.

The appeal

10. The Appellant lodged an appeal, against the decision of the DfI, with the Upper Tribunal on form UT12NI, which was signed and dated 28 May 2024. The Appellant cited the following grounds of appeal [spelling corrected]:

> *"In response to the 1st point, we are prepared to carry out some ground works to have hard standing from our designated parking spaces to the gateway, but as this is a rented property, we would not be doing those groundworks on the basis of the costs involved if the premises was still deemed unsuitable or if the extension to the licence was refused on other grounds.*
>
> *In response to the 2nd point, while no formal agreement is in place at the moment, we do have a verbal agreement that if our application is successful, we will be given a formal agreement for the use of the premises. Again, in order to have a formal agreement at present would mean paying rent on a premises that a. we are not using yet and b. might not be deemed suitable for the licence."*

The Approach of the Upper Tribunal

11. As to the approach which the Upper Tribunal must take on an appeal such as this, it was said, in the case of *Fergal Hughes v DOENI* & *Perry McKee Homes Ltd v DOENI* [2013] UKUT 618 AAC, NT/2013/52 & 53, at paragraph 8:

"There is a right of appeal to the Upper Tribunal against decisions by the Head of the TRU in the circumstances set out in s. 35 of the 2010 Act. Leave to appeal is not required. At the hearing of an appeal the Tribunal is entitled to hear and determine matters of both fact and law. However, it is important to remember that the appeal is not the equivalent of a Crown Court hearing or an appeal against conviction from a Magistrates Court, where the case, effectively, begins all over again. Instead, an appeal hearing will take the form of a review of the material placed before the Head of the TRU, together with a transcript of any public inquiry, which has taken place. For a detailed explanation of the role of the Tribunal when hearing this type of appeal see paragraphs 34-40 of the decision of the Court of Appeal (Civil Division) in Bradley Fold Travel Ltd & Peter Wright v Secretary of State for Transport [2010] EWCA Civ. 695. Two other points emerge from these paragraphs. First, the Appellant assumes the burden of showing that the decision under appeal is wrong. Second, in order to succeed the Appellant must show that: "the process of reasoning and the application of the relevant law require the Tribunal to adopt a different view". The Tribunal sometimes uses the expression "plainly wrong" as a shorthand description of this test.'

12. At paragraph 4, the Upper Tribunal stated:

"It is apparent that many of the provisions of the 2010 Act and the Regulations made under that Act are in identical terms to provisions found in the Goods Vehicles (Licensing of Operators) Act 1995, ("the 1995 Act"), and in the Regulations made under that Act. The 1995 Act and the Regulations made under it, govern the operation of goods vehicles in Great Britain. The provisional conclusion which we draw, (because the point has not been argued), is that this was a deliberate choice on the part of the Northern Ireland Assembly to ensure that there is a common standard for the operation of goods vehicles throughout the United Kingdom. It follows that decisions on the meaning of a section in

the 1995 Act or a paragraph in the Regulations, made under that Act, are highly relevant to the interpretation of an identical provision in the Northern Ireland legislation and vice versa."

13. The task of the Upper Tribunal, therefore, when considering an appeal from a decision of the DfI in Northern Ireland, is to review the information which was before the Department along with its decision based on that information. The Upper Tribunal will only allow an appeal if the appellant has shown that "the process of reasoning and the application of the relevant law require the tribunal to take a different view" (*Bradley Fold Travel Limited and Peter Wright* v. *Secretary of State for Transport* [2010] EWCA Civ 695, [2011] R.T.R. 13, at paragraphs 30-40). In essence therefore the approach of the Upper Tribunal is as stated by Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, that an appellate court should only intervene if it is satisfied that the judge (in this case, the decision of the DfI) was "plainly wrong".

Discussion

14. As set out in paragraph 7 above, the DfI refused the Appellant's application to vary his company's operator's licence under s.12(5) of the Act, as applied by s.16(6). Sections 12 and 16 of the Act state, as far as is relevant to this case:

"Determination of applications for operators' licences

12*—(1) On an application for a standard licence the Department must consider—*

(a) whether the requirements of sections 12A and 12C are satisfied; and

(b) if the Department thinks fit, whether the requirement of section 12D is satisfied.

(2) On an application for a restricted licence the Department must consider—

(a) whether the requirements of sections 12B and 12C are satisfied; and

(b) if the Department thinks fit, whether the requirement of section 12D is satisfied.

*(3) Subsections (1) and (2) are subject to section 10 (publication of application), if applicable, and**]** 47(2) (payment of application fee).*

(4) In considering whether any of the requirements of sections 12A to 12D are satisfied, the Department must have regard to any objection duly made under section 11(1)(a) in respect of the application.

(5) If the Department determines that any of the requirements that it has taken into consideration in accordance with subsection (1) or (2) are not satisfied, it must refuse the application.

(6) In any other case the Department must grant the application, unless either of the following provisions applies—

(a)section 13(2) (power to refuse application on environmental grounds);

(b)section 47(2) (power to refuse to proceed until fee is paid).”

“Variation of operators' licences

16—(1) Subject to section 17, on the application of the holder of an operator's licence, the Department may vary the licence by directing—

(a) that additional motor vehicles be specified in the licence or that any maximum number specified in it under section 5 be increased;

(b)…

(c)…

(d)…

(e)…

(f)…

(g) in the case of a heavy goods vehicle that a new place be specified in the licence as an operating centre of the licence-holder, or that any place cease to be so specified;

(h)…

(i)…

(j)…

(k)…

(2) An application for the variation of a licence under this section shall be made in such form and include such declarations and information as may be prescribed.

(3) The Department may require an applicant to furnish such other information as it considers necessary for dealing with the application.
(4)…
(5)…
(6) Where notice of an application is published under subsection (4), the following provisions, namely—
(a) …
(b) …
(c) sections 12 to 12E, and
(d) …
shall, with any necessary modifications and subject to section 18, apply in relation to that application as they apply in relation to an application for an operator's licence of which notice is published under section 9(1).”

15. Section 12C sets out the requirements for a standard and restricted licence, of which s.12C(5) is particularly relevant to this case:

Requirements for standard and restricted licences
12C.*—(1) The requirements of this section are that it must be possible (taking into account the Department’s powers under section 14(3) to issue a licence in terms that differ from those applied for) to issue a licence in relation to which—*
(a)in the case of a light goods vehicle licence, subsections (2) to (4) will apply, or
(b)in the case of a heavy goods vehicle licence, subsections (2) to (6) will apply.
(2) There must be satisfactory arrangements for securing that the following are complied with in the case of vehicles used under the licence—

(a)Article 56 of the Road Traffic (Northern Ireland) Order 1981 (drivers' hours); and

(b)the applicable Community rules, within the meaning of Article 2 of that Order.

(3) There must be satisfactory arrangements for securing that vehicles used under the licence are not overloaded.

(4) There must be satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition.

(5) A heavy goods vehicle licence must specify at least one place in Northern Ireland as an operating centre of the licence-holder, and each place so specified must be available and suitable for use as an operating centre of the licence-holder (disregarding any respect in which it may be unsuitable on environmental grounds).

(6) The capacity of the place specified as an operating centre (if there is only one) or both or all of the places so specified taken together (if there is more than one) must be sufficient to provide an operating centre for all the heavy goods vehicles used under the licence.

(7) In considering whether the requirements of subsections (2) to (4), or (2) to (6), are satisfied, the Department may take into account any undertakings given by the applicant (or procured by the applicant to be given) for the purposes of the application, and may assume that those undertakings will be fulfilled.

(8) In considering whether subsection (5) will apply in relation to a heavy goods vehicle licence, the Department may take into account any conditions that could be attached to the licence under section 20(1)(a) (conditions of licences) and may assume that any conditions so attached will not be contravened.

(9) In considering whether subsection (5) or (6) will apply in relation to a heavy goods vehicle licence, the Department may take into account whether any proposed operating centre of the applicant would be used—

(a)as an operating centre of the holders of other heavy goods vehicle licences as well as an operating centre of the applicant; or

(b)by the applicant or by other persons for purposes other than keeping heavy goods vehicles used under the licence.

16. The Appellant had applied to vary the operating centre named on the operator's licence, and had applied to increase the vehicle authorisation (see s.16(1)(a) and (g)). While no mention was made of the outcome of the request to increase authorisation, the DfI refused the application to vary the operating centre on the basis that it was deemed both unsuitable and unavailable (see the detailed reasons outlined at paragraph 7 above which triggers both elements of s.12C(5)).

17. In the letter stating that the application had been refused, the DfI advised the Appellant that he could re-apply and explained, in basic terms, what the was needed to do so. The letter also set out his right of appeal. It was open to the Appellant to either re-apply or to appeal to the Upper Tribunal. He chose the latter.

18. At the appeal hearing, the Appellant explained that he had a business in the Republic of Ireland with a number of vehicles and an office from which to manage the operation. He sought to undertake work in mainland UK hence he decided to increase the authorisation on his licence and to locate a more convenient operating centre which would also house the additional vehicles. After the DfI had refused his variation application, the Appellant was unsure whether to renew it, but he had subsequently formed the view that his original decision to vary his operating centre was the correct one. It was highlighted by the panel at the hearing that the DfI had indicated what was required from him to pursue the application. It was explained that the Upper Tribunal were not in a position to grant or refuse the variation application but rather to determine whether the DfI's decision to refuse the application was, in the circumstances, "plainly wrong".

19. It is an agreed fact that the ground surface within the proposed operating centre site needed to have work done to avoid a safety issue by the HGV vehicles bringing mud and debris onto the public road when moving onto

and off the site. The Appellant expressed his desire, at the hearing as well as on the appeal form, to have this safety issue corrected but felt he could not do the required ground works as he was not the owner of the site. Additionally, without the prior approval of his application by the DfI, it was potentially a waste of time and money.

20. Equally, it is an agreed fact that the Appellant does not have a formal agreement in place with the site owner that he may rent the site for the purposes of an operating centre. He explained at the hearing that he had verbally agreed use of the site with the owner. However, the DfI could not be assured of the availability of the site without something in writing from the owner, hence it could not, in law, approve the application (see s.12C(5)). While the DfI had acknowledged that the Appellant need not have signed a formal agreement in place in advance of approval of the site, the Appellant

had not been made aware of what might have satisfied the DfI. For example, a letter from the site owner to confirm the arrangement pending the approval of the application, may have been sufficient for the application to proceed.

Conclusion

21. We find that the DfI was not "plainly wrong" in refusing the variation application. The Appellant had not satisfied the DfI that the proposed operating centre site was suitable or available as required under s.12C(5). However, by simply refusing the application, the Appellant was left with a lack of understanding of how to satisfy the requirements when he was not the owner of the site. Instead of creating this stalemate situation, it was within the powers of the DfI to, for example, make an interim grant of the application on the conditions that the surface of the site was made safe, that parking spaces were allocated for the proposed vehicles, and that a written agreement was put in place between the site owner and the Appellant to

confirm it was available for his use (see ss.12(7) and (8) of the Act which permits such a course of action). This would have better informed the Appellant, who has clearly been keen to comply, on how to meet the regulatory requirements for the variation of operating centre, while also providing the DfI with some assurance that if the conditions were not met, the application could still ultimately be refused. Such a course of action would have facilitated better cooperation and communication between the Appellant and the DfI to put the variation in place. It would have also avoided the delay that has been caused by the appeal process, which was a legitimate course of action for the Appellant to take.

22. It is only fair to say that we would have responded differently in the circumstances of this application, but that is not the test to be applied on appeal. The refusal of the application was within the remit of options available to the DfI and we cannot therefore say that it was plainly wrong. For these reasons, the appeal is dismissed.

Ms L Joanne Smith
Judge of the Upper Tribunal

Mr R Fry
Member of the Upper Tribunal

Mr D Rawsthorn
Member of the Upper Tribunal

Authorised for issue on
9 October 2024