



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No: UA-2024-000069-T
[2024] UKUT 447 (AAC)**

TRAFFIC COMMISSIONER APPEALS

**IN AN APPEAL FROM THE DECISION OF:
THE TRAFFIC COMMISSIONER FOR THE EAST OF ENGLAND TRAFFIC AREA
DATED 9th JANUARY 2024**

Before:

**Elizabeth Ovey, Judge of the Upper Tribunal
Richard Fry, Specialist Member of the Upper Tribunal
Sarah Booth, Specialist Member of the Upper Tribunal**

Appellant: UK HIGH LEVEL SCAFFOLDING LIMITED

Attendance : The Appellant was represented by Mr. Emirjan Xhauri

Heard at: The Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL

Date of hearing: 18th September 2024

Date of decision: 4th October 2024

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be DISMISSED.

SUBJECT MATTER: Restricted licence; financial standing; refusal of incomplete application

CASES REFERRED TO: *Bradley Fold Travel Limited and Peter Wright v. Secretary of State for Transport* [2010] EWCA Civ 695; [2011] R.T.R. 13

REASONS FOR DECISION

Preliminary

1. This is an appeal by UK High Level Scaffolding Limited (“the Company”) against the decision of the Traffic Commissioner for the East of England Area (“the TC”) given on 9th January 2024. By that decision the TC refused the Company’s application for a restricted operator’s licence on the ground that the Company had failed to provide financial evidence showing that it had sufficient funds to support the licence as an average available balance and so had failed to meet the requirements of section 13D of the Goods Vehicles (Licensing of Operators) Act 1995 (“the Act”).

2. The Company was represented before the Upper Tribunal by Mr. Emirjan Xhauri, as was envisaged in the case management directions given by Judge Mitchell on 16th May 2024. It appears from those direction that Judge Mitchell understood that Mr. Xhauri was a director of the Company. In fact, as appears from pp.323 to 325 of the appeal bundle, Mr. Xhauri resigned as a director of the Company on 9th December 2020, on which date Ms. Ambra Spahiu was appointed as a director. Also on that date Mr. Xhauri ceased to be a person with significant control and Ms. Spahiu was notified as being such a person. A Mr. Binak Shutti was appointed as a director on 29th November 2022 but resigned on 15th January 2024.

3. Mr. Xhauri was asked about these matters at the hearing. He described himself as the manager and ex director and said that the current director is his partner and they have a three year old child. He said that she was well aware of his attendance at the hearing on behalf of the Company and of what was happening. We accepted that in all the circumstances Mr. Xhauri could represent the Company and we are grateful to him for the points he made in support of the appeal.

The facts

4. On 25th March 2023 the Company made an online application for a restricted goods vehicle operator’s licence. The application stated that correspondence should be addressed marked for the attention of Mr. Xhauri but identified Mr. Shutti as the only relevant individual in the category “people”, the appropriate category for directors. The Company chose the option of uploading both the required newspaper advertisement and the evidence of financial standing at a later date. The Company proposed to operate two vehicles and the required level of finance was shown as £4,800. The application was unsigned.

5. On 28th March 2023 the Office of the Traffic Commissioner (“the OTC”) wrote to the Company stating that the application was incomplete and a full reply was required by 11th April 2023. The outstanding matters were the advertisement, the financial evidence (consisting of bank or building society statements covering a recent 28 day period), a completed and signed application declaration and an explanation of why Ms. Spahiu, who was a director, had not been declared on the

application, accompanied by a signed director declaration form from her. The letter specifically required that the advertisement and financial evidence should be uploaded, while the application declaration should be printed out, signed, dated and returned by post. It appears from the letter that the Company had also applied for a time limited interim licence, since the letter stated that a decision on that application had been deferred to await the response to the letter itself.

6. An application declaration, which has a printing date of 25th March 2023 and was signed and dated with that date by Mr. Shuti, follows the letter dated 28th March 2023 in the appeal bundle. We doubt, however, whether it was received by post by the OTC at that point, since on 12th April 2023 the OTC wrote again to the Company requiring it to provide the information needed to complete the application by 26th April 2023 and stating that if the application then remained incomplete it would be refused. The information then specified was the same as the information referred to in the letter dated 28th March 2023, but a statement that digital copies of the application declaration would not be accepted had been added.

7. The appeal bundle then contains:

- 7.1. A copy of the required advertisement (not date-stamped).
- 7.2. TSB bank statements in the name of the Company printed on 13th April 2023 and covering the period 8th to 13th April 2023 (not date-stamped).
- 7.3. A document relating to the addition of Ms. Spahiu as a director for the purposes of the licence the Company was applying for, signed by Ms Spahiu and dated 22nd April 2023 (not date-stamped).
- 7.4. An application declaration also signed by Ms. Spahiu and dated 22nd April 2023 (date-stamped as received by special delivery on 25th April 2023).
- 7.5. A further copy of the application declaration signed by Mr. Shah on 22nd March 2023 (also date-stamped 25th April 2023).

8. We infer that the material mentioned in the previous paragraph represents a substantial attempt by the Company to comply with the terms of the letter dated 12th April 2023, although at the last moment.

9. In the light of that material, the OTC sent the Company a further letter dated 4th May 2023 stating that the TC was prepared to offer the Company a time limited interim licence for a period of 4 months during which the Company could assure the TC that it met the financial standing requirements, given that the statements already provided showed the required figure of £4,800 as a closing balance only. The letter attached the appropriate application form and required a response by 11th May 2023. It also required an explanation of deposits from Mr. Xhauri into the Company's bank account of £1,000 on 11th April 2023 and £5,000 on 13th April 2023.

10. The application for the time limited interim licence included the following:

“I agree that I will upload further financial evidence in the name of UK HIGH LEVEL SCAFFOLDING LTD covering a consecutive 3 month period to the Office of the Traffic Commissioner as soon as it becomes available, and at least 4 weeks prior to the expiry of my interim. The financial evidence I provide must show that [it] has continued to meet the required level of available finance namely, £4,800 throughout the period by reference to an average balance ...”

It further stated that the relevant page should be signed by a director and uploaded. A page signed by Mr. Shuti and dated 8th May 2023 appears in the bundle. Mr. Shuti also signed a written response to the question about Mr. Xhauri’s deposits, stating that they were “to do with a free interest loan offered to the business by Amber’s partner E Xhauri who owns his own restaurant”. The loans were said not to be due to be paid back for at least 12 months.

11. The interim licence was not granted immediately, apparently because there was some difficulty in locating the proposed operating centre, but this was resolved and an interim licence was granted on 31st August 2023. The licence documentation was accompanied by a further letter of the same date from the OTC stating that the licence would expire on 31st December 2023 and reminding the Company of its agreement to provide the necessary financial evidence. That evidence was to be provided by no later than 4th December 2023 and the Company was warned that no reminders would be sent and if it did not provide the information required or the information provided did not meet the requirements the interim licence would expire and the application for a full licence would be refused.

12. The next document in the bundle is the letter dated 9th January 2024 recording the TC’s decision that the application had been refused because the requested documentation had not been received and no explanation had been received.

13. The Company responded by a letter dated 31st January 2024 and date-stamped as received by special delivery on 2nd February 2024, asserting that statements for the months of August, September and October had been sent to the OTC’s address in Leeds on 6th November 2023. It was said that there was no reason not to send the statements, since they showed the required finance, and the documents were included again with the letter. The Company also sent statements for November and December 2023. The TC was requested to reconsider the decision to refuse the application. The statements accompanying the letter were TSB statements printed off on 15th January 2024 and covering the period 8th August 2023 to 15th January 2024 with gaps between 31st August and 5th September, 29th September and 10th October, 31st October and 14th November and 30th November and 12th December

14. In view of the gaps mentioned in the preceding paragraph, the statements do not constitute a 3 month consecutive record at any point. The closing balance at the start of a gap period does not match the opening balance at the end of the period, so

there have clearly been transactions during the gaps.

The appeal

15. Before writing to the OTC on 31st January 2024, on 26th January 2024 the Company had in fact written to the Upper Tribunal appealing against the decision of 9th January 2024. The grounds of appeal were as follows:

“I am writing to appeal the decision to refuse our operator’s license due to the non-receipt of our bank statements that [were sent] to you in August 2023. As it states for the bank statements to be original we thought it was more relevant to send them direct to yourself rather than upload them on to our operators portal. We understand now that you have not received the copies we sent in August 2023, and we sincerely apologise, we were not aware of this until now.”

Attached to the letter were what were described as “the August 2023 bank statements as well as a copy of the most current ones.”

16. The statements which then follow in the appeal bundle are:

- 16.1. A Metro Bank statement from what appears to be the opening of the account on 13th December 2023 to 31st December 2023.
- 16.2. TSB statements printed off on 8th January 2024 for the period 14th to 30th November 2023 and 20th December 2023 to 8th January 2024.
- 16.3. TSB statements printed off on 29th December 2023 for the period 11th to 29th December 2023.
- 16.4. TSB statements printed off on 8th January 2024 for the period 10th to 31st October 2023.
- 16.5. TSB statements printed off on 8th January 2024 for 29th September 2023.

17. Mr. Xhauri on behalf of the Company subsequently, on 18th March 2023, completed a form UT12, the standard form of notice of appeal to the Upper Tribunal against a traffic commissioner’s decision. He did not add anything by way of grounds of appeal, although he did state in Section G (Stay of decision) that the licence was needed for the scaffolding business to move the materials to and fro.

18. The bundle also includes the following statements:

- 18.1. TSB statements printed off on 15th January 2024 for the period 8th to 31st August 2023.
- 18.2. TSB statements printed off on 6th March 2024 for the periods 9th to 31st January 2024 and 6th to 29th February 2024.

- 18.3. Metro Bank statements for the period 1st January to 29th February 2024 and a separate one in a different form for 2nd to 12th January 2024.
- 18.4. TSB statements printed off on 19th December 2023 for 19th December 2023.
- 18.5. TSB statements printed off on 8th January 2024 for the periods 8th August to 28th September 2023 and 6th to 31st July 2023.
- 18.6. TSB statements printed off on 25th September 2023 for the period 3rd to 30th June 2023.
- 18.7. TSB statements printed off on 16th June 2023 for the period 3rd April to 1st May 2023.

19. It is not possible easily to form a view as to the substance of the Company's financial position on this material, but the comments as to gaps in the statements made in paragraph 14 above apply equally here. There is no 3 month consecutive period.

20. In his oral submissions Mr. Xhauri explained that he had been helped by a Mr. Kreshnik Peka and that all the statements had been posted but not received. He told us that Mr. Peka already has an operator's licence and knew more about the process than he did. He was concerned particularly to explain how the statements had been sent on 6th November 2023, as stated in the Company's letter dated 31st January 2024 to the OTC, referred to in paragraph 13 above. It emerged that his evidence was that he had downloaded the statements and sent them in electronic form to Mr. Peka, either by email or WhatsApp, so that Mr. Peka could print them out and send them to the OTC. He offered to provide further copies of bank statements from April 2023 but, for the reason explained in paragraph 25 below, it was our view that that was not necessary. He also produced copies of certificates of posting to the OTC on 24th April 2023 and 1st February 2024 which we did receive. We observe that those dates are consistent with the OTC having received documents by special delivery as mentioned in paragraphs 7 and 13 above. There was no certificate of posting relating to 6th November 2023 and Mr. Xhauri did not produce evidence of his communications with Mr. Peka.

The legal framework

21. Under section 13(2) of the Act, on an application for a restricted licence a traffic commissioner must consider whether the requirements of sections 13B and 13C are satisfied and, if the commissioner thinks fit, whether the requirement of section 13D is satisfied. Under section 13(5), if the traffic commissioner determines that any of the requirements taken into consideration are not satisfied, the commissioner must refuse the application. In the present case, as the decision letter of 9th January 2024 states, the TC considered whether the requirement of section 13D was satisfied and concluded that it was not.

22. Section 13D of the Act reads as follows:

“The requirement of this section is that the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition (see section 13C(4)) is not prejudiced by reason of the applicant's having insufficient financial resources for the purpose.”

23. The Senior Traffic Commissioner's statutory document no. 2: Finance contains guidance to traffic commissioners on applying section 13D and directions as to making assessments. Section 1(2) of the Act requires a traffic commissioner to act under the general directions given by the Senior Traffic Commissioner and to have regard to any guidance given. Paragraph 31, which is part of the section of the statutory document which gives directions, is a direction to traffic commissioners to adopt the financial levels indicated for restricted licences in the table which follows (in paragraph 46) and to check the financial standing of standard and restricted licence holders equally. Paragraph 35 states that there should be checks on the availability of finance unless the applicant can show an alternative arrangement for maintenance. Paragraph 37 explains that the availability of finance is intended to cover emergencies outside some maintenance contracts. The table in paragraph 46 states a requirement of £3,100 for the first vehicle on a restricted licence and £1,700 for each additional vehicle, making the total of £4,800 which applies in the present case.

24. The directions go on to consider types of evidence. Paragraph 52 provides that where bank or building society accounts are relied on, original statements must be provided for 28 days. It expressly permits the uploading of electronic copies where the application is made digitally, although authenticated statements may subsequently be required, as described in paragraph 54. Paragraph 56 explains that if the applicant does not have statements for the 28 day period, a traffic commissioner may accept the balance shown but is likely to require further financial evidence within a specified period, and reference is made to Annex 5. Annex 5 refers in paragraph 3 to the possibility of a time limited interim licence, such as was granted in the present case, and paragraph 4 goes on to deal with the effect of a finance undertaking to provide a further set of bank statements to cover a 3 month period. It contains directions for assessing the average balance from such evidence, and those directions will not reliably work if there are gaps in the period covered by the statements, in particular if those gaps exceed 10 days.

25. The Act makes clear in section 13 that it is for a traffic commissioner to consider whether the requirements which have to be satisfied are indeed satisfied. It is well established that the task of the Upper Tribunal when considering an appeal from a decision of a traffic commissioner is to review the material before the commissioner, and 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”, as explained in *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. This is sometimes summarised as requiring the Upper Tribunal to conclude that the traffic commissioner was plainly wrong. In the present

case, that means that it would not help the Company to produce to us evidence showing that as a matter of fact the Company satisfied the financial standing requirement during the period August to December 2023 or that it continues to satisfy it. We have to consider whether there is something wrong with the TC's decision on the basis of the material the TC had.

Discussion

26. Given the legal framework we have set out, it is clear that the TC was acting in accordance with the Act and the relevant directions in the statutory document in granting a time limited interim licence and requiring the Company to provide further evidence of financial standing in the form of 3 months of consecutive bank statements. It is also clear that in fact the Company did not do so in accordance with the requirement imposed when the time limited interim licence was granted, because no statements were received by the OTC between 31st August and 31st December 2023.

27. The consequence was that the TC could not be satisfied that the requirement of section 13D, which was properly under consideration, was met. In turn, the TC was then required to refuse the application.

28. The period of time allowed to the Company to produce the required evidence was a proper period of time and the conditions on which the time limited interim licence was granted were clearly explained. Despite that being the case, on the Company's own explanation to us what was done was unsatisfactory for the following reasons:

- 28.1. The Company was specifically told to upload the information (and apparently did so when providing its initial financial information), but chose instead to send it by post.
- 28.2. The process adopted involved Mr. Xhauri obtaining the electronic information, so it was available for him to upload even if he wished to be doubly certain by sending it also by post, but he did not do so.
- 28.3. There is no obvious reason for the involvement of Mr. Peka in this mechanical task and no obvious reason why on this occasion the precaution of obtaining a certificate of posting was not sent.
- 28.4. The information was required by 4th December 2023 at the latest. On the Company's case it was submitted nearly 4 weeks earlier and so by mid-December 2023 the TC might be expected to have had time to make the decision. There is no evidence that the Company made any attempt to follow up what is said was the submission of the bank statements to check that they had arrived or to check whether the grant of the full licence was to be expected before the interim licence expired.

29. As we have said, the material we have seen does not cover a consecutive 3 month period and so would not in any case have been satisfactory for the purpose for which it was required. We note, however, that the material before us shows a variety

of bank statements printed off at a variety of dates, but none of those dates is 6th November 2023. It follows that we do not have before us copies of the physical statements which the Company says was sent. That is unfortunate for the Company in one way, since such copies would have supported the case that the statements were indeed sent, but means that we cannot exclude the possibility that the statements said to have been sent were yet other statements which did cover a consecutive 3 month period.

30. In those circumstances, we do not make it a ground of our decision that the statements said to have been sent would not have shown financial standing in any event. The basis of our decision is that, assuming without finding as a fact that the statements were sent by Mr. Peka, it is not disputed that they were never received. The Company did not check the position and at best simply assumed that there was no difficulty although by the time the decision letter was sent the interim licence had expired and the Company had had no notification from the OTC of the grant of a full licence. As the Company had been given a proper opportunity to satisfy the TC that the requirement of section 13D was met but had failed to do so, the TC was required to refuse the application. In our view, the decision was not plainly wrong, but plainly a correct application of the legislation and directions from the Senior Traffic Commissioner.

31. For the reasons given above, we dismiss the appeal.

E. Ovey
Judge of the Upper Tribunal

(authorised for issue on 4th October 2024)