



NCN: [2020] UKUT 271 (AAC)  
Appeal No. T/2020/11

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

**ON APPEAL from a DECISION of the TRAFFIC COMMISSIONER**

**Before:** Mr M R Hemingway, Judge of the Upper Tribunal

**Appellant:** James Civil Engineering Ltd.

**Reference:** OD2028309

**Decided on the papers:** 2 September 2020

**DECISION OF THE UPPER TRIBUNAL**

This appeal to the Upper Tribunal is dismissed.

**Subject matter:**

Publication of notices of application; financial requirements in relation to restricted licences.

**Cases referred to:**

Bradley Fold Travel Ltd 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 James Civil Engineering Ltd (the appellant), through its director Tommie James, from a decision communicated by letter of 23 December 2019, refusing to grant a goods vehicle operator's restricted licence. With the agreement of the appellant I have decided this appeal without a hearing.

### The relevant legislative framework

2. The relevant statute is the Goods Vehicles (Licensing of Operators) Act 1995 (the 1995 Act). Section 2(1) provides, subject to some narrow exceptions which have no application in this case, that no person shall use a goods vehicle on the road for the carriage of goods, for hire or reward or in connection with any trade or business carried on by him, except under a licence issued under that Act. Such a licence is to be referred to as an "operator's licence". Whilst the usual form of licence sought is a standard licence, section 3(3) provides for the granting of a restricted licence under which a goods vehicle may be used on a road for the carriage of goods for or in connection with any trade or business carried on by the holder of the licence, other than that of carrying goods for hire or reward. Section 8 provides that an application for an operator's licence shall be made to a Traffic Commissioner. Section 11 relevantly (in the context of this appeal) provides as follows:

#### **11. Publication in locality affected of notice of application for licence.**

- (1) Subject to sub-section (3), a traffic commissioner who is dealing with an application for an operator's licence shall refuse the application without considering the merits unless he is satisfied that sub-section (2) has been complied with in respect of each locality affected by the application.
- (2) This sub-section has been complied with in respect of a locality affected by an application if within the period beginning twenty-one days before the date on which the application is made and ending twenty-one days after that date, notice of the application in such form and containing such information as may be prescribed has been published in one or more local newspapers circulating in the locality.
- (3) A traffic commissioner is not required by this section to refuse an application if –
  - (a) he is satisfied as mentioned in sub-section (1), save only that the form or contents of the notice of application as published in any newspaper did not comply with the prescribed requirements, and
  - (b) he is satisfied that no person's interests are likely to have been prejudiced by the failure to comply with those requirements...".

3. Section 13 relevantly (for the purposes of this appeal) provides as follows:

#### **13. Determination of applications for operator's licences**

(1) ...

(2). Subject to sections 11 and 45(2), on an application for a restricted licence a traffic commissioner shall consider –

(a) whether the requirements of subsections of (4) and (5) are satisfied, and

(b) if he thinks fit, whether the requirements of subsection (6) are satisfied.

(3)...

(4)...

(5) For the requirements of this sub-section to be satisfied it must be possible (taking into account the Traffic Commissioner's powers under section 15(3) to issue a licence in terms that differ from those applied for) to issue a licence on the application in relation to which paragraphs (a) to (e) will apply –

(a) ...

(b)...

(c) There are satisfactory facilities and arrangements for maintaining the vehicles used under the licence in a fit and serviceable condition;

(d)...

(e)...

(6) For the requirements of this subsection to be satisfied the provision of such facilities and arrangements as are mentioned in subsection (5)(c) must not be prejudiced by reason of the applicants having insufficient financial resources for that purpose...".

### Background

4. The appellant is a limited company. On 3 November 2019 the Office of the Traffic Commissioner (OTC) received an application for a restricted licence from the appellant. It was intended to operate a single vehicle under the licence sought. As to evidence of its financial position (which had potential relevance given the requirements contained within section 13 of the 1995 Act as set out above) the appellant provided what has been described as a "screenshot" of an image of its online bank account showing a current balance of £6,913.24 and an available balance of £11,897.17 on an unattributable date. As to the need for evidence of an appropriate advertisement (see section 11 of the 1995 Act as set out above) it was indicated that such would be provided later.

5. On 12 November 2019 the OTC wrote to the appellant requesting evidence of ready access to sufficient resources to support the application. The appellant was told there was a need to evidence the availability of a sum of at least £3,100 during a 28-day period the last date of which should be not more than two months from the date of receipt of the application. An original bank or building society statement coupled with

proof of any overdraft facility in place was asked for. As to the requirement concerning the advertisement, it was said:

“You must provide evidence (in the form of the relevant full page of the newspaper containing the advertisement) as proof of publication that your application has been advertised in the prescribed format in a local newspaper circulating within the vicinity of the nominated operating centre(s) on any date between 13/10/2019 and 03/12/2019”.

6. On 28 November 2019 the OTC wrote to the appellant, once again, in a letter which it described as amounting to “a final attempt to resolve these issues”. Essentially, what was sought was the same evidence as before. It appears that the appellant did make an attempt to provide the evidence though it is not entirely clear to me whether that attempt was made in response to the letter of 11 November 2019 or the letter of 28 November 2019. Be that as it may, what the appellant provided was a document headed “live booking confirmation” which indicated that money had been paid to a publication for an advertisement; a “proof copy of the advertisement”; and some limited evidence of available finance.

7. It might perhaps have been expected that the failure to provide, at that time, the specific evidence requested in the form of the relevant full page of the newspaper bearing the advertisement and a bank statement showing the availability of £3100 and any relevant transactions during the 28-day period specified, might have led to a refusal on that basis. However, the OTC afforded the appellant a further opportunity by sending an email which relevantly stated the following:

“The documentation you have submitted failed to cover the requirements i.e. the bank statements provided did not cover a twenty-eight-day period. Financial evidence must be a complete bank statement covering a full twenty-eight-day period with closing date balances. A summary page cannot be accepted. Furthermore, you have failed to provide evidence of your advertisement published in a circulating newspaper. An extension has been allowed until 20 December 2019 to provide the documentation requested. If at this point the application remains incomplete it will be put forward for refusal due to failure to provide documentation”.

8. The appellant asserts, in grounds of appeal to the Upper Tribunal, that once it received notification that the financial evidence it had sent was insufficient “we immediately sent over a more recent statement showing a month of transactions”. It is also asserted that it was not made clear by the OTC that the evidence concerning the advertisement was insufficient. It is right to say that there is, attached to the grounds of appeal, a bank statement concerning the appellant’s business account which covers the period from 20 November 2019 to 20 December 19 but the file of papers provided by the OTC does not contain a copy of that bank statement. It would appear, therefore, that it was not sent to the OTC, or it was sent but was not received by the OTC or it was sent and was received by the OTC, but was overlooked.

9. On 23 Nov 2019 the OTC wrote to the appellant indicating that a Traffic Commissioner had refused the application “given your failure either to supply the required supporting documentation or offer any explanation as to why you were unable to do so”. The appellant was notified of its right of appeal to the Upper Tribunal.

### The appeal to the Upper Tribunal

10. It is asserted by the appellant that the bank statement evidencing a month of transactions had been provided prior to the date upon which the application was refused. With respect to the advertisement, it is asserted that evidence in the form of the proof copy of the advertisement and the booking of the advertisement with the relevant publication had been provided. It is asserted that it had not been made clear by the OTC that the full page of the newspaper containing the advertisement was required. Complaint was made regarding difficulties in communication which were said to be attributable to the OTC and to the unavailability at material times of the relevant OTC caseworker.

### The role of the Upper Tribunal on an appeal from a decision of a Traffic Commissioner

11. Paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

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

12. So far as matters of fact are concerned, the Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd v Secretary of State for Transport* [2010] EWCA Civ 695. The Court of Appeal applied *Subesh and ors v Secretary of State for the Home Department* [2004] EWCA Civ 56; where Woolf LJ held:

“44. ...The first instance decision is taken to be correct until the contrary is shown...an Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one...The true distinction is between the case where the appeal court might prefer a different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning and the application of the relevant law require it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category”.

13. The above is the approach which I have taken in deciding this appeal.

### My reasoning on the appeal

14. Section 11 of the 1995 Act precludes a consideration as to the merits of an application if its requirements with respect to the publication of a notice of application are not complied with, subject to what is said at section 11(3)(a) above. A specific requirement is for the application to have been published in one or more local newspapers circulating in the locality within a specified period. Whilst the language of section 11 does not dictate provision of the relevant page of the relevant newspaper, such would, on the face of it, provide very good quality and indeed quite possibly the best possible evidence of compliance.

15. The decision letter of 23 December 2019, is, on any view, a somewhat sparse document. Whilst it does indicate that the basis for refusal of the application is a failure to supply required supporting documentation or explain that failure, it does not make it clear whether it was failings concerning the advertisement, failings concerning the financial evidence, or failings concerning both which had led to the adverse decision. Really, that ought to have been specified. But since both had been asked for I conclude that the letter, given all the surrounding circumstances, falls to be construed as a refusal on both bases.

16. The appellant asserts that it was not made clear until at least very shortly indeed prior to the taking of the actual decision, that evidence in the form of the relevant full page of the newspaper containing the advertisement was required. I appreciate it is easy for people who are busy in business or otherwise, to overlook things from time to time. But that requirement was clearly and explicitly stated in a document attached to the letter of 12 November 2019 and which bore the heading “**SUPPORTED DOCUMENTATION REQUIRED**”. Not only that, but the letter of 28 November 2019 had a similar albeit shorter document attached to it, with a similar clear and specific requirement indicated. The position is, therefore, that specific evidence clearly requested by the OTC on behalf of the Traffic Commissioner was not provided prior to the decision under appeal being taken. Further, there was no explanation before the Traffic Commissioner as to why that was.

17. As indicated, section 11 does not itself require provision of the relevant page of the relevant publication. It is in fact, I think, part of the appellant’s argument that, notwithstanding the failure to provide that, other relevant documentation evidencing the placing of the advertisement had been provided. But the proof of the advertisement and the evidence of the booking of the advertisement and the paying of a fee falls short of demonstrating that the advertisement was actually published in a newspaper at the appropriate time. The evidence asked for which was also arguably the best possible evidence of what the appellant was required to show, had not been produced despite a clear request having been made twice and no explanation for that failure had been offered. So, in my judgement, the Traffic Commissioner was entitled to conclude (and the burden is upon an appellant to show otherwise) that he could not be satisfied, on the material before him, that the requirement of section 11(2) of the 1995 Act had been met even if others might have reached a different view. Certainly, I am unable to conclude that the Traffic Commissioner was plainly wrong in so concluding. There is, of course, section 11(3) to consider. But it seems to me that it can safely be inferred that the Traffic Commissioner’s concern was primarily directed towards whether the advertisement had been published at all rather than whether the form or content of any advertisement which had appeared in the relevant publication did or did not comply with prescribed requirements. So, section 11(3) does not assist. On this basis then, the appeal fails.

18. I have, though, gone on to say something about the financial aspect of the appeal even though it is not now strictly necessary for me to do so and even though what I say does not therefore form a binding part of my decision. But as to that, this was not an application for a standard licence and so the requirement for the appellant to demonstrate “appropriate financial standing” (see section 13(3)(b) of the 1995 Act) did not apply. Nevertheless, there was the requirement to demonstrate that there were satisfactory facilities and arrangements for maintaining the vehicles used under the

licence in a fit and serviceable condition (section 13(5)(c)). Read in isolation the reference to “satisfactory facilities and arrangements” might be regarded as being capable of encompassing the availability of sufficient finance to ensure the fitness and serviceability of vehicles. But the content of section 13(6) militates against that interpretation because it contains a specific requirement, which it seems would otherwise be unnecessary, that the ability to keep the vehicles in the required condition must not be prejudiced by lack of finance. So, it seems to me that a financial requirement is contained at section 13(6) but not at section 13(5)(c). That is of potential importance at least in some cases because of the need under section 13(2)(b) for a Traffic Commissioner to exercise discretion as to whether he/she thinks it fit to consider whether the requirements of 13(6) are satisfied or not. That being so it means that in the context of a decision with respect to the sufficiency of financial resources in an application for a restricted licence, the positive exercise of discretion under 13(6) is an essential component of any decision to refuse such a licence on financial grounds. The explanation for the Traffic Commissioner’s decision as contained in the decision letter was understandably brief because of what was thought to have been (and may correctly have been) the failure to provide a bank statement covering the period which had been specified. But, nevertheless, it does seem to me that an essential component of the decision was not communicated and, perhaps, not even made. That being the case, had this appealed turned solely on finance I would have allowed the appeal and remitted. But there is no question of my doing that since I have already concluded as I have regarding the advertisement.

19. I would wish to make it plain that, notwithstanding my decision to dismiss the appeal, I am not able to detect for myself in the material before me, any reason why a properly made and properly evidenced application for a licence which might be made by this appellant in the future, should not succeed. But that is not at all to pre-judge any decision a Traffic Commissioner might make upon any such application if one is made.

#### Conclusion

20. This Appeal to the Upper Tribunal is dismissed.

**M R Hemingway  
Judge of the Upper Tribunal  
7 September 2020**