



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

**Appeal No. T/2018/44
NCN: [2018] UKUT 442 (AAC)**

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER notified on 6 June 2018.

Before: Mr M R Hemingway: Judge of the Upper Tribunal
Mr G Inch: Member of the Upper Tribunal
Mr L Milliken: Member of the Upper Tribunal

Appellant: Sheraz Asghar

Reference: PD2011890

Attendances: None

Heard at: Field House, Breams Buildings, London EC4A 1DZ

Date of Upper Tribunal Hearing: 27 November 2018

Date of Decision: 13 December 2018

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject matter:

Whether the appellant satisfies the primary occupation requirements contained in section 13(3)(b) of the Public Passenger Vehicles Act 1981.

CASES REFERRED TO:

None

REASONS FOR DECISION

Introduction

1. This is an appeal to the Upper Tribunal brought by Mr Sheraz Asghar from a decision of the Traffic Commissioner made on 23 May 2018 and communicated on 6 June 2018, refusing to grant his application for a restricted public service vehicle operator's licence.

The Background

2. Mr Asghar, in fact, initially applied for a standard national licence rather than a restricted one. His application was received by the Office of the Traffic Commissioner ("OTC") on 22 March 2018. The supporting documentation he sent with it included an undated letter from a person claiming to be the owner of a garage, giving him permission to use that garage as his operating centre. The OTC acknowledged receipt of the application on 26 March 2018 and made further enquiries concerning the qualifications of the proposed transport manager (Mr Asghar himself) and concerning the operating centre. Photographs and site plans of the centre highlighting the parking area, turning area, access/egress points and visibility splays were asked for. That request seems to have caused Mr Asghar to re-evaluate because, shortly afterwards, he indicated to the OTC by way of an email communication that he wished to "downgrade" his application so that he was now seeking only a restricted licence. He provided some photographs of the proposed operating centre. He was then asked for some more information about the operating centre and also some details regarding his main occupation. Such was important because section 13(3)(b)(ii) of the Public Passenger Vehicles Act 1981 ("the 1981 Act") makes it plain that the holder of a restricted licence must have a main occupation which is not the operation of public service vehicles adapted to carry more than eight passengers (Mr Asghar was intending to carry more than eight passengers in an appropriately adapted vehicle). In other words, restricted licences of the sort he was now seeking are intended for operators or proposed operators who want to run a business transporting people as a side-line. Persons not satisfying what we shall call the "main occupation test" are required to apply for a standard national licence which has more rigorous requirements with respect to its obtaining and its subsequent operation.

3. Mr Asghar responded to those queries by reminding the OTC that he had provided a letter from the owner of the garage confirming permission had been given for him to use the garage premises as his operating centre. He also explained that he had commenced employment as "an admin assistant" albeit only "a couple of weeks ago" (the email in which he said that is dated 22 April 2018) and that, in consequence of his only just having commenced that employment, he was not in a position to provide documents such as payslips or a form P60 which the OTC had asked him for. He said that he was employed for thirty hours per week and gave the name of an individual whom he stated would be able to confirm that. He also explained that he had additional employment with a separate organisation as a minibus driver but said that he would be giving up that employment if granted the restricted licence. He provided some confirmatory documentation with respect to that employment.

The Traffic Commissioner's Decision

4. Prior to the decision being taken and in accordance with what we understand to be established administrative practice, the application was considered with a view to the making of a recommendation as to whether it should be granted or refused, by two members of the

OTC's staff. The first staff member to look at the application took the view that there were concerns about Mr Asghar's claimed main occupation and thought his income from that was likely to be below the income he would receive from running his business under the terms of the restricted licence. So, put another way, it was not be a main occupation at all. So, that staff member recommended refusal under section 13(3)(b)(ii) of the 1981 Act. The same staff member also recommended refusal under section 14ZB(a) of the 1981 Act which contains a requirement that any applicant for a restricted licence "is of good repute" as determined in accordance with Paragraph 1 of Schedule 3 to that Act. Paragraph 1 says that in determining whether an individual is of good repute a Traffic Commissioner shall have regard to all relevant evidence and in particular relevant convictions, relevant fixed penalty notices and such other information as the Traffic Commissioner may have as to the applicant's previous conduct. Although refusal was recommended it was also suggested that Mr Asghar should be offered a Public Inquiry (PI). The second staff member to evaluate the application took a largely similar view as to the outcome and, in particular, with respect to the inadequacy of the evidence and information supplied concerning the main occupation test. That staff member did not refer to section 14ZB of the 1981 Act but did make mention of section 14ZC(1)(b), which requires there to be adequate arrangements for securing compliance with the requirements of the law relating to the driving and operation of vehicles proposed to be used under the licence, as an additional basis for refusal. Nothing turns on this for the purposes of this appeal but we wonder whether in fact, the first staff member had simply erroneously referred to section 14ZB rather than section 14ZC due to pressure of work. In any event, when the matter and the recommendations were put to the Traffic Commissioner, he decided that the application should indeed be refused but with no offer of a PI. Pausing there, regulation 6 of the Public Service Vehicles (Operators Licences) Regulations 1995 provides that "a Traffic Commissioner shall not refuse an application for a licence, or grant it other than is requested without giving to the applicant an opportunity to state his case at an inquiry save where the application or the appellant's conduct in relation to it is frivolous or unreasonable".

5. The salient part of the letter of 6 June 2018 communicating the decision to Mr Asghar reads as follows:

"I refer to your application for a new Restricted PSV Operator's Licence.

I must now advise you that the Traffic Commissioner has refused your application as you have failed to meet the requirements set out below, in particular, not being able to meet the main occupation criteria.

- Section 14ZC(1)(b) of PPV Act 1981 – Arrangements for driving/operation of vehicles
- Section 13(3)(b) of PPV Act 1981 – Main occupation
- Paragraph 6 of the Public Service Vehicles (Operator's Licences) Regulations 1995".

6. The rest of the letter is given over to a brief explanation of Mr Asghar's right of appeal to the Upper Tribunal.

The Upper Tribunal Proceedings

7. Mr Asghar has exercised his right of appeal. His written grounds of appeal amount to an assertion that whilst he had previously been unable to demonstrate compliance with the main occupation test because of a difficulty in obtaining documentation from his employer, he is able to do so now. With his grounds he has submitted a contract of employment made

between himself and a firm called Priory Financial Solutions and which indicates he is contracted to work thirty hours per week as an administrative assistant for that organisation and has been so contracted since 9 April 2018. Clearly, he wants the Upper Tribunal to consider the contract of employment and to decide, seemingly on the basis of that evidence alone, that he satisfies the main occupation test.

8. The appeal was listed for an oral hearing. However, Mr Asghar did not attend. Indeed, at 12.15pm on 26 November 2018 (the day before the hearing) he telephoned the Upper Tribunal and spoke to a member of the Upper Tribunal's administrative staff. During the course of that conversation he said that he was unwell and did not propose to attend. He also indicated that he was content for the appeal to be dealt with in his absence. He did not seek an adjournment. In the circumstances, and having regard to rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "overriding objective"), we decided to proceed in the absence of Mr Asghar. That is because he had not sought an adjournment despite being informed by the member of the Upper Tribunal's administrative staff that he could seek one if wished, because we were not confident in the circumstances that if we adjourned of our own motion he would attend a reconvened hearing, and because we were satisfied, given the content of the grounds of appeal and the issues raised, we would be able to justly decide the appeal without the need to adjourn.

9. But since there were no other attendees, we received no further submissions or evidence and we have decided the appeal on the basis of the documentation before us.

Our Reasoning

10. The Traffic Commissioner decided not to offer Mr Asghar a PI. So, to cover all the possibilities available on the basis of the wording of Regulation 6 of the Public Service Vehicles (Operator's Licenses) 1995, it must have been thought that Mr Asghar's application was either frivolous or unreasonable or that his conduct in relation to the application had either been frivolous or unreasonable. But that is not anywhere stated in terms. Mr Asghar has not, in appealing to the Upper Tribunal, sought to contend that the decision to refuse to hold a PI was wrong. There is no indication that he has ever asked for one. Perhaps, if he had attended before us, he might have asked to amend his grounds to include such a challenge but as we say, he did not attend. In our view he has not raised this matter on appeal to us and the point is, therefore, not before us.

11. Turning then to the main occupation test, the decision letter of 6 June 2018 did not actually contain what we would characterise as reasoning as to why it had been concluded that he failed to meet it. That letter did not go beyond a list of legal provisions which were considered to be relevant. We shall say a little bit more about that below. But Mr Asghar clearly did realise, from the nature of the enquiries previously put to him and possibly from the reference to section 13(3)(b) of the 1981 Act in the letter communicating the decision, that it had been concluded he did not satisfy that test. He seems to have thought, perhaps understandably, that that was the sole reason why his application had been refused. But in seeking to address the matter all he has really done is sought to demonstrate to us, by way of evidence not produced to the OTC, that he does satisfy that test. He has not actually sought to identify any error in the decision of the Traffic Commissioner and has, in fact, simply invited us to take a different view because of the existence of the new evidence.

12. We have not found it necessary to consider whether or not we should admit the new evidence. We are prevented by our Rules of Procedure from taking into account “any circumstance which did not exist at the time of the determination which is the subject of the appeal”. But here, Mr Asghar asserts that the circumstance of his employment did exist at the time of the decision of the Traffic Commissioner, it is simply that he now has documentary evidence of it to corroborate what was prior to that only his own assertion. But let us suppose we do see fit to admit the contract of employment. To what extent does it assist?

13. Mr Asghar was obliged to demonstrate, in the course of his application, that he met the requirements of the main occupation test. That required much more from him than merely demonstrating that he had some employment. He had, in pursuing his application, provided no detail as to the nature of the work he intended to carry out in his proposed business or any proper and reasoned analysis as to what hours he might have to work in order to secure and keep any business he might obtain. He had not provided any information as to what sort of profit he anticipated the proposed business might generate. Nor had he offered any explanation as to how he would fulfil his obligations for his business whilst working the thirty hours per week he was committed to as an administrative assistant. So, he had not demonstrated that he could realistically fulfil his duties as an employee and his obligations as a businessman in tandem.

14. It is true that, even taking account of what was said in the various memoranda which contained the recommendations of the two OTC staff members and the Traffic Commissioner’s own memorandum to them indicating the terms of his decision, that such reasoning was not stated in those terms. As we have already demonstrated, there was no reasoning in the letter notifying the decision. But it is readily apparent that the Traffic Commissioner had decided that the information provided by Mr Asghar was wholly insufficient to demonstrate that the main occupation test was met. We agree that it was so. For the reasons we have explained, the mere provision of a contract of employment does not alter the position. Accordingly, we find ourselves clearly satisfied that neither the law nor the facts of this case impel us to come to a different view. So, this appeal to the Upper Tribunal fails.

15. Our having concluded that the decision of the Traffic Commissioner was sound with regard to the main occupation test it is not necessary for us to give any consideration to the possible application of section 14ZC(1)(b) of the 1981 Act. But we have to say we are not wholly certain on the basis of our own perusal of the documentation which has been produced for the purposes of this appeal, that we are precisely sure as to why it was thought that Mr Asghar fell foul of that sub-section. We might be able to infer or make an educated guess about it but we do think the reasoning which led to the refusal under section 14ZC ought to have been made clear to Mr Asghar. Indeed, we take the same view with respect to the decision not to hold a PI. We are able to infer, perhaps without very much difficulty at all, that it must have been thought that Mr Asghar’s application was frivolous in the sense that it was self-evidently hopeless without further information which he had not, in fact, troubled himself to provide. That might be right. But whilst the memoranda we have seen talk in terms of whether or not an “offer” of a PI ought to be made, it seems to us that the terms of Regulation 6 demonstrate that, in fact, a potentially unsuccessful applicant has a right to a PI unless certain specific circumstances apply. The use of the term “offer” seems to imply to us (whilst we appreciate we might be being unduly pedantic) a view that such is simply a matter of general discretion. Such though would not be a correct statement of the legal position.

16. Further, and more generally, we have concerns about the communication of decisions via letters that do not contain any actual reasoning. The letter in this case was really no more than a list of legal provisions. We accept that some, perhaps most, unsuccessful applicants who receive such a letter will, if they take the trouble to look up the specified provisions and if they remind themselves of the nature of the enquiries which have been made of them, be able to realise why it is that a decision to refuse has been reached. But it does not seem to us that that will necessarily be so with respect to all applicants or that such an ability should be assumed. We think that it is very important to communicate the reasoning which has led to a particular decision being taken. We accept that in cases where an appeal to the Upper Tribunal is made, memoranda may well then be produced (as here) which will reveal much more regarding the reasoning deployed. But, in a sense, that comes too late. If an unsuccessful applicant has a reasoned written decision, then that unsuccessful applicant will be able to take a properly informed view as to whether to appeal to the Upper Tribunal or not. He will also be able to take a similarly informed view as to what he/she should say in the grounds of appeal. It cannot be right that such an applicant has to appeal in order to find the reasoning which has led to the refusal. But that was the situation which Mr Asghar faced. We completely understand that the OTC has a very difficult task and has to function under very considerable pressure. But nevertheless, we do express the hope that a way may be found to communicate not only the terms of a decision when a licence is refused but the reasoning which underpins it. These sorts of considerations though do not assist Mr Asghar with this appeal. His appeal to the Upper Tribunal is dismissed.

Signed

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

Dated

13 December 2018