

NCN: [2018] UKUT 0132 (AAC)

Appeal No. NT/2017/79

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

**ON APPEAL from the DECISION of the HEAD of the TRANSPORT REGULATION
UNIT**

Dated 2 October 2017

Before:

**Kenneth Mullan
Mr L Milliken
Mr J Robinson**

**Judge of the Upper Tribunal
Member of the Upper Tribunal
Member of the Upper Tribunal**

Appellant:

Clanabogan Coal Company Ltd

Attendances:

For the Appellant: Mr Jason McElvey, Sole Director of the Company

For the Respondent: None

Heard at: Tribunal Hearing Centre, Royal Courts of Justice, Belfast.
Date of hearing: 27 March 2018
Date of decision: 16 April 2018

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal be DISMISSED.

SUBJECT MATTER:-

Financial standing; Practice and procedure within the
Department of Infrastructure for Northern Ireland

CASES REFERRED TO:-

NT/2013/52 & 53 Fergal Hughes v DOENI & Perry
McKee Homes Ltd v DOENI; Bradley Fold Travel Ltd &
Peter Wright v Secretary of State for Transport [2010]
EWCA Civ. 695; NT/2016/2 365 NI Group Ltd

REASONS FOR DECISION

Background

1. This is an appeal from the decision of the Head of the Transport Regulation Unit, ("Head of the TRU") to refuse the Appellant's application for a goods vehicles operator's licence.
2. The factual background to this appeal appears from the documents and the Head of the TRU's decision and is as follows:-

- (i) On 14 August 2017 an application for a Standard International Goods Vehicle Operator's Licence with authorisation for four vehicles and one trailer was received in the Department. The application was in the name of the Appellant.
- (ii) In the application form, at section 13, a box was ticked to indicate that the Appellant had read 'Guidance Note 13' and had included relevant financial evidence. At section 18 a further box was ticked to confirm that original relevant financial evidence had been provided.
- (iii) Attached to the application was a copy of a bank statement relating to the Appellant covering the period from 1 June 2017 to 30 June 2017.
- (iv) On 21 August 2017 correspondence was forwarded to the Appellant by the Department in which receipt of the application was acknowledged but which also identified areas in which additional information was required. One such area was evidence that the application met the relevant requirements relating to financial standing. The Appellant was advised to resubmit evidence relating to finance, with the following statement contained in an attachment headed 'Support Documentation Required':

'Please therefore forward **original** or **certified** bank or building society statements covering the 28 day period, the last date of which must not be more than two months from the date of receipt of the application, along with proof of any overdraft facility in place (please ensure date commenced is specified if applicable). An offer of an overdraft will not be acceptable, only a formal written commitment will suffice.

As you were unable to provide financial evidence for the one month immediately preceding your application we are seeking your agreement to provide a full 28 days worth of **original** bank statements covering the month of December 2017 by no later than 30 March 2017 by completing and returning the proforma enclosed at Annex A.

Further guidance on the types of financial documents that are acceptable is contained in the enclosed financial guidance note for operators.'

- (v) It is clear that the reference to 30 March 2017 is an error. The copy of the 'Annex A' which was attached to the correspondence stated the following:

"Operator licence number: ON *****

As you were unable to provide financial evidence for the one month immediately preceding your application we are seeking your agreement to provide a full 28 days worth of **original** bank statements and other financial details (such as overdraft facility agreements or

credit card statements) that show the licence holder has access to the required financial facilities and funds. These details are to be provided by (3 months) and cover the month of (previous month).

Operator name:

Signature:

Position in business:

Date:

Please sign above to confirm that you agree to submit the financial documentation requested.'

(vi) It appears that a further bank statement, covering the period from 30 June 2017 to 1 August 2017, was forwarded to the Department by the Appellant in response to the correspondence of 21 August 2017. In the file of papers which is before us is a copy of a bank statement relating to the Appellant and covering the period from 30 June 2017 to 1 August 2017.

(vii) On 13 September 2017 further correspondence was forwarded from the Department to the Appellant. That correspondence included the following:

'Having reviewed the case I note that the additional documentation listed in the attached annex is required in order to complete the application. **This letter is intended as a final attempt to resolve these issues by correspondence and you must now respond in full by no later than 27/09/17. If on that date the application remains incomplete, it will be refused.** Should this happen, you will have to re-apply for a licence and meet again the application fee plus the cost of placing a fresh advertisement.'

(viii) Attached to the correspondence dated 13 September 2017 was a further 'Supporting Documentation Required' attachment which included the following:

'Financial evidence to demonstrate you have ready access to sufficient resources to support your application. The type and size of licence applied for requires a sum £20,900 to have been available for a 28 day period, the last date of which must not be more than two months from the date of receipt of the application.

Your most recently submitted bank statements relating to bank account number ending 8092 cover 5 July to 1 August 2017 and show an average balance of £12,896 and a closing balance of £75.

Please submit further original bank statements from account number ending 8092 which cover 1 August 2017 onwards.

If these statements do not demonstrate appropriate financial standing with an average balance, then you must ensure that the most recent closing balance is not less than £20,900. You must also confirm your agreement to provide a full 28 days worth of **original** bank statements covering the month of December 2017 by no later than 31 January 2018 by completing and returning the proforma enclosed at Annex A.

Further guidance on the types of financial documents that are acceptable is contained in the enclosed financial guidance note for operators.'

- (ix) The copy of the 'Annex A' which was attached to the correspondence was in a similar format to that noted in sub-paragraph (v) above except that there is a reference to the return of the relevant financial evidence by 31 January 2018.
- (x) Attached to the correspondence dated 13 September 2017 was a copy of a document headed 'Financial Guidance Note for Operators'.
- (xi) On 20 September 2017 e-mail correspondence was received from the Appellant in which it was stated:
 'Annex A signed and attached, we will provide relevant bank statements by 31st Jan 2018 showing the right financial capability.'
- (xii) Attached to the e-mail correspondence of 20 September 2017 was a signed copy of Annex A.
- (xiii) On 2 October 2017 the decision was made to refuse the licence application.

The appeal to the Upper Tribunal

3. In the notice of appeal, the Appellant set out the following grounds of appeal:
 'We were requested to sign and return Annex A. The requested was dated 13/9/17 and sent by [JM] NI caseworker. It was, and is, our understanding that the request allowed us more than one month to provide the required financial information. We therefore query our application being turned down on financial grounds.'
4. As was noted above, Mr Jason McKelvey, Sole Director of the Appellant attended the oral hearing of the appeal. Mr McKelvey gave oral evidence in a candid and straightforward manner. When the reasons for the decision of the Head of the TRU were explained to the him, he conceded that he had been given misleading advice by a Transport Manager during the course of the application process and noted that the appropriate way forward for him was to make a further licence application.

The relevant legislative provisions

5. Section 12 of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 provides:

12.— "Determination of applications for operators' licences

- (1) On an application for a standard licence the Department must consider—
 - (a) whether the requirements of sections 12A and 12C are satisfied;
 - (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 sections 10 (publication of application) 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).’

6. Section 2A(2)(c) of the Goods Vehicles (Licensing of Operators) Act (Northern Ireland) 2010 provides:

‘12A.— Requirements for standard licences

(1) The requirements of this section are set out in subsections (2) and (3).

(2) The first requirement is that the Department is satisfied that the applicant—

...

(c) has appropriate financial standing (as determined in accordance with regulations and Article 7 of the 2009 Regulation);’

The proper approach to appeals to the Upper Tribunal

7. In NT/2013/52 & 53 Fergal Hughes v DOENI & Perry McKee Homes Ltd v DOENI, Upper Tribunal said the following, at paragraph 8 of its decision, on the proper approach on appeal to the Upper Tribunal:

‘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 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.’

8. At paragraph 4, the Upper Tribunal had 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.’

Analysis

9. As was noted above, in section 13 of the application form Mr McKelvey ticked a box to indicate that he had read ‘Guidance Note 13’ and had included relevant financial evidence. Further, in section 18 of the application form the Appellant failed to tick a box to confirm that he had provided original financial evidence in accordance with the declaration in section 13 and ‘Guidance Note 13’.
10. In paragraphs 25 to 31 of its decision in *NT/2016/2 365 NI Group Ltd*, the Upper Tribunal stated the following:
25. We have already noted that Guidance Note 13 – Financial evidence’ is part of the Departmental document ‘GV(NI) 79: Application Form Guidance Notes.’ This document is readily accessible through the Department’s website. Paragraph 13a of the document reads as follows:

‘The Department must be satisfied that you have sufficient financial resources to maintain your vehicles and run your business. This requirement is not reduced in the case of contract or lease hire vehicles whose maintenance is included in the hire charge. The financial standing requirement for operators is a continuing and mandatory requirement that must be kept up to date. Existing operators will be liable to demonstrate the increased pound sterling rate whenever their licences are considered by or on behalf of the Department, either at the five year review stage or where the Department considers an operator’s licence for any other reason. The Department will assess the evidence you send in against the current financial levels, which change on an annual basis based on the rate of exchange for the Euro as at 1 October each year and shall have effect from 1 January of the following calendar year. Details of the current financial levels can be found at Annex B of the application. **You should ensure that you have sufficient financial evidence to show that you meet the current levels for the type of licence and number of vehicles you are applying to operate.** If you are applying for a margin for future expansion, you must ensure that you can show access to sufficient funds for all the vehicles you are applying for, not just the ones you wish to operate straight away.

All applicants must provide financial evidence so the DfI can assess this requirement, as follows.'

26. The emphasis in paragraph 13a is the Department's own. Pausing there, it is our view that the explanation given in paragraph 13a could not be more comprehensive or intelligible. The significance of the financial standing requirement is highlighted. There is an explanation of how the Department calculated the appropriate rates. The guidance emphasises, by formatting in bold text, the requirement for an applicant to ensure that he/she has sufficient financial evidence to demonstrate compliance with the current levels for the type and number of vehicle specified on the application.
27. Guidance Note 13 goes on to provide details types of evidence which could be provided to demonstrate compliance with the financial standing requirement. One type of evidence is 'bank statements' and the Guidance Note says the following about this potential source:
- 'You should provide original bank or building society statements covering the last 28 days, the last date of which must not be more than 2 months from the date of receipt of the application. If original bank statements are not available, for instance if you have an online only account, then you may provide printouts that have been signed and stamped by the bank as verification that they show a true reflection of your account. Any such printouts must contain the account holder's name and account number, the name of the bank, and all transactions taking place within the 28 day period.'
28. Once again the guidance could not be more unambiguous. Finally, and of significance in this case, the Guidance Note goes on to state:
- 'If the applicant has a new business and thus does not have statements for 28 days, an opening balance meeting the requirement may be accepted, with an explanation regarding the source of funds but it may be the subject of a requirement to submit further financial evidence within a specified period after the date of grant (likely to be 6 to 12 months) to provide the operator with an opportunity to then supply three months of evidence.'
29. Set out in the plainest of terms, this advice makes it clear that in the case of an applicant with a new business, where there are no bank statements for the relevant twenty-eight day period, **an opening balance meeting the requirement might be accepted**. What is significant about this is that (i) any such applicant (new business and no relevant bank statements) would still have to demonstrate an opening balance which met the financial standing requirement and (ii) even if such an opening balance could be demonstrated there was no requirement to accept it. More likely, any acceptance would be subject to a requirement to submit further financial evidence within a specified period after the date of the grant.
30. We have also noted that the Annex B of document 'GV(NI) 79: Application Form Guidance Notes' sets out details of the present financial levels required for a licence. Annex B provides a straightforward 'ready-reckoner' for calculating the levels of finance required to meet the financial standing requirement.

31. Returning to the application form completed by the Applicant, it is our view that his declaration that he had read 'Guidance Note 13', prior to completing and forwarding his application, meant that he was under unambiguous notice of the significance of the financial standing requirement, how the Department calculated the appropriate rates, what the current rates were and the requirement for him to ensure that he had sufficient financial evidence to demonstrate compliance with the current levels for the type and number of vehicles specified on the application. Further he could take from the guidance offered advice that as a new business applicant who might not have bank statements for the relevant twenty-eight day period he could provide an opening balance meeting the financial standing requirement which might be accepted by the Department but in which case would be likely to be subject to a requirement to submit further financial evidence.'
11. All of those principles are relevant to the present appeal. So too are the conclusions reached by the Upper Tribunal in paragraph 31. While the Appellant did provide a bank statement for a period of one month with his application and a further bank statement for a period of a further month in response to the correspondence of 21 August 2017, he did not act at all in response to the final correspondence dated 13 September 2017. His submission in connection with that omission is that he thought that he had a longer period – probably until 31 January 2018 – to provide the requested financial evidence.
12. In paragraphs 38 to 39 of its decision in *NT/2016/2 365 NI Group Ltd*, the Upper Tribunal stated the following:
- '39. We are of the view that there is a degree of tension or discord between the guidance which is given in document 'GV(NI) 79: Application Form Guidance Notes' to applicants with a new business where there are no bank statements for the relevant twenty-eight day period concerning the possibility and what the Appellant in the instant case was told in the correspondence (and attachments) of 5 October 2015 and 3 November 2015. It is arguable that when read together, the statements referred to in paragraphs 34 and 35 are incompatible. On the one hand there is a statement that for the possibility of a financial review to be considered the appellant was obliged to forward an original bank statement showing either an opening or closing balance to the required amount. On the other hand he is then informed that as he has been unable to provide financial evidence for the one month immediately preceding his application, the Department was seeking his consent to provide original bank statements for a further period.
40. Is the Appellant entitled to rely on the potential ambiguity in the statements which were made as a ground for not confirming the decision that his application for a goods vehicle operator's licence must fail? The answer is that he cannot. As was noted in paragraphs 26 to 30 above, the advice given in 'Guidance Note 13 – Financial evidence' could not be more clear and unambiguous. We repeat that his declaration that he had read 'Guidance Note 13', prior to completing and forwarding his application, meant that he was under unambiguous notice of the significance of the financial standing

requirement, how the Department calculated the appropriate rates, what the current rates were and the requirement for him to ensure that he had sufficient financial evidence to demonstrate compliance with the current levels for the type and number of vehicles specified on the application. Further he could take from the guidance offered advice that as a new business applicant who might not have bank statements for the relevant twenty-eight day period he could provide an opening balance meeting the financial standing requirement which might be accepted by the Department but in which case would be likely to be subject to a requirement to submit further financial evidence.'

13. Once again those principles are relevant in the instant case. It is abundantly clear that on the basis of the evidence provided by the Appellant that he could not provide an opening or closing balance meeting the financial standing requirement. To that extent, therefore, the decision of the Head of the TRU was not wrong and is confirmed. The appeal is, accordingly, dismissed.

Some further matters arising

14. In paragraph 14 its decision in *NT/2016/2 365 NI Group Ltd*, the Upper Tribunal stated the following:

'We are of the view, however, that the Department should revise the statements concerning financial evidence which are made in the 'Supporting Documentation Required', particularly as to how the potential for a financial review might be triggered, so that they more properly reflect the unambiguous guidance which is given in 'Guidance Note 13 – Financial evidence'.

15. The date of the decision in *NT/2016/2 365 NI Group Ltd* was 12 August 2016. It is clear that in the period since the Department has taken no action at all in light of the guidance provided by the Upper Tribunal. In *NT/2016/2 365 NI Group Ltd* and in the instant case the ambiguity in the relevant documentation has made no difference to the validity of the decision-making. In the absence of appropriate revisions, that might not always be the case.
16. Since the Upper Tribunal took over jurisdiction to hear and determine appeals against decisions of what is now the Department for Infrastructure, comment has been made at regular intervals on the quality of decision-making in the TRU. We have noted several aspects of the decision-making and associated paperwork in the present case which are problematic. We give two examples.
17. The first is in the 'Supporting Documentation Required' document which was attached to the correspondence from the Department to the Appellant dated 21 August 2017. In that document the Appellant is advised that the financial evidence provided by him for a 'five vehicle authority' was insufficient and the Appellant is advised that an average sum of £25,250 was required. The application was for authority for four vehicles not five. Accordingly, the cited average sum is incorrect.
18. The second is in the 'Financial Guidance Note for Operators' which was attached to the correspondence from the Department to the Appellant dated 13 September 2017. The rates cited in paragraph 5 of that document are also erroneous and do not reflect the correct rates which were included in the parallel guidance note sent with the correspondence dated 21 August 2017.

19. While these errors were not material to the validity of the decision-making in this case they are reflective of a degree of inattention to detail within the TRU. Errors such as these may, however, impair the legitimacy of a future decision.

A handwritten signature in black ink, reading "Kenneth Mullan". The signature is written in a cursive style and is placed on a light grey rectangular background.

**Kenneth Mullan, Judge of the Upper Tribunal,
16 April 2018**