IN THE UPPER TRIBUNAL **Appeal No. T/2018/45**
ADMINISTRATIVE APPEALS CHAMBER **NCN: [2019] UKUT 35 (AAC)**
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from a DECISION of a DEPUTY TRAFFIC COMMISSIONER made on 5 July 2018.

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

Appellant:	Ian Francis Hayman
Reference:	OF1075334
Attendances:	None

Heard at:	Field House, Breams Buildings, London EC4A 1DZ
Date of Upper Tribunal Hearing:	27 November 2018
Date of Decision:	16 January 2019

DECISION OF THE UPPER TRIBUNAL

The appeal is dismissed.

Subject matter:
Financial standing: The "stable establishment" requirement.

CASES REFERRED TO:
Bradley Fold Travel Ltd and Anor 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 Mr Ian Hayman ("the appellant") from a decision of a Deputy Traffic Commissioner for the East of England Traffic Area ("the DTC") which she made on 5 July 2018 following a Public Inquiry ("PI") of that date. The decision was given orally after the PI and was then confirmed in writing on 10 July 2018. The DTC decided to revoke the appellant's standard international operator's licence and disqualify him from holding such a licence for a period of twelve months.

The background

2. The appellant was granted the above licence authorising the use of one goods vehicle for the carriage of goods for hire or reward, on 5 February 2008. That grant followed a PI. Attached to the licence was a condition that further evidence of finance be provided within a specified timeframe. That condition was complied with. On 1 August 2013 the Office of the Traffic Commissioner ("OTC") sent what has been referred to as a "minded to revoke" letter to the appellant. It was explained that revocation of the licence was being considered because it appeared on the available information that the appellant no longer satisfied requirements concerning his financial standing. The particular concern stemmed from his having sought to evidence the existence of funds by way of the provision of bank statements in the name of someone other than himself. He responded to the minded to revoke letter by asking for another PI. One was held. By that time another concern had been raised arising from the fact that no vehicle was specified on the licence and that it did not appear that he had access to an appropriate vehicle at all. Both issues were addressed at that PI and the appellant was granted a twenty-eight-day period of grace so as to give him an opportunity to provide a contract demonstrating access to a vehicle. A six-month period of grace was granted to afford him an opportunity to provide financial evidence in his own name. By the end of that six-month period he had provided a bank statement in his own name showing evidence of funds but had not specified a vehicle on the licence or provided satisfactory evidence showing access to such a vehicle. Nevertheless, it was not decided to revoke his licence at that stage.

3. In January 2018 the appellant provided some financial evidence pursuant to ongoing regulatory processes but again, what was provided was not in his name. It was in the name of the same other individual as before. That person is, in fact, the appellant's brother-in-law. So, another minded to revoke letter was sent to him by the OTC on 22 March 2018. The sending of such a letter was entirely explicable because, on the face of it, the financial evidence he had provided in the form of bank statements did not demonstrate that he had the necessary level of finance as required under the terms of his licence as prescribed by law. Rather, it appeared to demonstrate that his brother-in-law would have had the necessary finance had he been running a transport business operating one vehicle. The OTC's letter also raised concerns regarding the requirement to have a "stable establishment" given that it remained the case that no vehicle had been specified on the licence. Once again, the appellant requested a PI.

Relevant legislative provisions in brief

4. Under section 2 of the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act") a person shall not use a goods vehicle on a road for the carriage of goods for hire, reward, or in connection with any trade or business carried on by him/ her, unless that person possesses an operator's licence. Section 13(a) sets out some requirements which an operator must meet not only when a licence is sought but throughout its currency. Included are requirements that such an operator has an effective and stable establishment in Great Britain; is of good repute; and has appropriate financial standing (see section 13A(2)(a), (b) and (c)). Section 27 states that a Traffic Commissioner shall direct that a standard licence be revoked if at any time it appears to him/ her that the licence holder no longer satisfies the requirements of section 13A(2). Section 28 confers a power on the Traffic Commissioner to order that the holder of a licence revoked under section 27 be disqualified either indefinitely or for such period as the Traffic Commissioner sees fit, from holding or obtaining a licence. So, there is a discretion as to whether to disqualify at all and, if so, whether to do so indefinitely or whether to fix a period.

5. There are further provisions of relevance to be found in Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator. As to that and insofar as it might be relevant, Article 5 of the Regulation says that once an authorisation (a licence) is granted an operator shall "have at its disposal one or more vehicles which are registered or otherwise put into circulation in conformity with the legislation of that Member State, whether those vehicles are wholly owned or, for example, held under a hire purchase agreement or a hire or leasing contract". Article 7 says that an operator must demonstrate on the basis of accounts certified by an appropriate professional person, that every year "it has at its disposal capital and reserves totalling at least Eur 9,000 when only one vehicle is used and EUR 5,000 for each additional vehicle used".

The Public Inquiry and the Deputy Traffic Commissioner's decision

6. The appellant attended the PI and represented himself. The DTC asked him a number of questions concerning the financial evidence he had provided, the lack of a vehicle and the seeming lack of access to one. Though the appellant had by the date of the PI provided financial evidence in his own name, she decided that money had historically been moved between his account and that of his brother-in-law. She concluded this had been done to enable him to attempt to artificially demonstrate compliance with the requirements of the period of grace as imposed at the previous PI (the 2013 one). She decided, despite his protestations to the contrary, that he had acted knowingly and deliberately in that regard. She decided that, in any event, the financial evidence he had now provided in his own name was insufficient to meet the mandatory requirement of £7950 (access to only £7439 had been demonstrated). She decided he had not been wholly truthful in his communications with the OTC regarding finance and that that was relevant to the question of his repute, observing "trust is one of the foundation stones of operator licensing". She then decided that although the appellant had offered some documentary evidence regarding the claimed availability of a vehicle, such was not persuasive in demonstrating actual access to one and that his oral

evidence on the matter had been "inconsistent and unconvincing". She concluded that he had failed to demonstrate compliance with the mandatory requirements concerning financial standing, good repute and (in the context of the lack of availability of a vehicle) stable and effective establishment under section 13A(2) of the 1995 Act. Although she did not expressly say so it is clear that her decision to revoke was then made under section 27(1) of the 1995 Act in consequence of the requirements of section 13A(2) no longer being satisfied. As to the proportionality of revocation, the DTC noted in favour of the appellant that there had been no history with respect to maintenance concerns though, as she sensibly pointed out, that was probably at least partly attributable to his not having had a vehicle in recent years. She attached weight to the previous failure to comply with the terms of a period of grace (see above), the history of moving money around between the appellant's own account and that of his brother-in-law, his having knowingly and deliberately done that, and what she found to be his lack of cooperation with the regulatory processes. So, she concluded that revocation was the proper course and was a proportionate one. She then, in the light of the above history and considerations, went on to consider disqualification and said that based upon the appellant's "disregard for the operator licence regime I consider that it is just and proportionate to disqualify him for a period of one year".

The appellant's grounds of appeal to the Upper Tribunal

7. The appellant exercised his right of appeal to the Upper Tribunal. In doing so he made it clear that he was not contesting the decision to revoke. He was only taking issue with the decision on disqualification. He asserted that the DTC had refused to view some bank statements he had offered, that the OTC had lost some documentation he had provided with respect to the availability of a vehicle and that the decision to disqualify him "was unjust and rather harsh". He added (though we do not know how he knew this) that even the DTC's own clerk had thought the decision to be harsh.

The appellant's non- attendance

8. Though the appeal was listed for an oral hearing the appellant did not attend. In answering a standard questionnaire asking about his intentions which he had sent to the Upper Tribunal shortly prior to the hearing date he said he would not attend and would not be represented. He explained that he had not realised that the hearing was going to be held in London and asserted "I can't get there". He also said that he works all day and could not get time off work. He did not invite the Upper Tribunal to consider postponing the scheduled hearing and making arrangements for the case to be heard elsewhere.

Why we have decided to dismiss this appeal

9. 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".

10. The Upper Tribunal's jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd. and Anor v Secretary of State for Transport* [2010] EWCA Civ 695. The court 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".

11. Part of the rationale for the above was that the material before what is now the Upper Tribunal will consist only of the documents placed before a Traffic Commissioner and the transcript of the evidence; the Upper Tribunal will not have the advantage of hearing the parties and any witness giving evidence so as to enable it to assess credibility both from the words spoken and also the manner in which the evidence was given.

12. Given the appellant's non-attendance and the explanation he had offered for it, we considered whether we ought to adjourn the proceedings and direct that there should be a hearing closer to where the appellant resides. However, we were not persuaded that a London hearing represented a problem of any significance for the appellant given that he has an address in Peterborough. There are good transport links between Peterborough and London and if the appellant does not wish to use public transport it seems quite obvious, given the nature of this case, that he can drive. We noted the assertion that he is not able to get time off work but no explanation had been given to us as to what efforts, if any, he had made to do so. In any event and as already noted, he had not asked for a postponement or for a re-listing closer to where he lives. In the circumstances we doubted whether, even if we did adjourn and have the matter relisted elsewhere, the situation with respect to attendance would be any different. In the circumstances we considered the fair and appropriate course of action was to proceed and to decide the appeal on the basis of the paperwork in front of us.

13. We then reminded ourselves that the appellant was not seeking to pursue matters in this appeal with respect to the decision to revoke his licence. So, we focused upon the disqualification issue and the contention that the decision to disqualify and/ or the period of it "was harsh" or perhaps as a lawyer might say, disproportionate.

14. As to that, it is clear from the terms of the DTC's decision that she had concluded that the appellant had knowingly sought to mislead by having money moved from his brother-in-law's account to his own account in the past. It is also clear that she had concluded that in denying that was so he had sought to mislead her. The appellant has not, in his written grounds of appeal or elsewhere, taken issue with those findings. As the DTC correctly pointed out, trust is as she put it "one of the foundation stones of operator licensing".

15. The appellant has done nothing to demonstrate, in this appeal to the Upper Tribunal, that the DTC was wrong in her conclusion to the effect that he could not be trusted in the

context of compliance with the terms of the licensing regime. Although he has asserted that the disqualification (he might mean the disqualification itself or the period of it) was harsh he has said nothing to suggest that, against the above background including his dishonesty at the PI, it was. In our judgment the DTC approached matters correctly. She did not disqualify as a form of reflex action simply because the licence had been revoked. She reached a separate decision as to each as was required of her. Both the decision to disqualify itself and the decision as to the period were in our view entirely appropriate given the background described above and set out by her in her decision. There is no misdirection or misapplication of the law and no procedural unfairness. As to other considerations, there is nothing in the material before us or in any argument put to us which impels us to reach a different conclusion.

Conclusion

16. This appeal to the Upper Tribunal is dismissed.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated **16 January 2019**