



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

**NCN: [2021] UKUT 89 (AAC)
Appeal No. T/2020/43**

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER

Before: M Hemingway: Judge of the Upper Tribunal
A Guest: Member of the Upper Tribunal
L Milliken: Member of the Upper Tribunal

Appellant: R and J Metals Ltd

Reference: OG2031497

Date of Hearing: 11 March 2021 (Remote – by BT MeetMe)

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is dismissed.

CASES REFERRED TO

Bradley Fold Travel Ltd v Secretary of State for Transport [2010] EWCA Civ 695.

REASONS FOR DECISION

1. This is an appeal to the Upper Tribunal brought by R and J Metals Ltd (‘the appellant’) through its director John O’Brien, from a decision of the Traffic Commissioner for Wales (‘the TC’) embodied in a letter of 10 June 2020, refusing to grant the appellant’s application for a restricted goods vehicle operator’s licence.

2. Section 2(1) of the Goods Vehicles (Licencing of Operators) Act 1995 (‘the 1995 Act’) relevantly provides, amongst other things, that no person shall use a goods vehicle on a road for the carriage of goods for or in connection with any trade or business carried on by him except under a licence issued under the terms of that Act. There are, available to those who use goods vehicles on a road for the carriage of goods, standard licences and restricted licences. Section 3 of the 1995 Act relevantly states, at subsection 3(3), that ‘A *restricted licence is an operators licence under which a goods vehicle may be used on the 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*’.

3. Since the appellant is in the business of scrap metal recycling rather than the carriage of goods for hire or reward, it sought a restricted licence. It did so by sending an unsigned application to the office of the Traffic Commissioner ('OTC') in which it indicated it was seeking authorisation, under any licence which may be granted, to operate a total of four vehicles.

4. The application did not contain all of the information which the OTC needed in order to properly consider it. So, on 8 March 2020, the OTC wrote to the appellant (the letter being addressed to Mr O'Brien) requesting further information but, most relevantly for the purposes of this appeal, an aerial view image of the appellant's proposed operating centre with the parking area highlighted; and evidence of finance demonstrating the availability of the sum of £8,200 during a 28 day period the last date of which was not to be more than two months from the date of receipt of the application. The appellant did provide some information in response to that request including bank statements relating to a Santander bank account showing activity between the dates of 11 February 2020 and 21 February 2020. We note, at this stage, that on certain dates covered by that bank statement the amount was below £8,200. We also note that there was no evidence of any overdraft facility and the bank account statements did not specify the holder of the account. Dissatisfied with what had been provided thus far, the OTC wrote to the appellant on 30 March 2020 seeking, essentially, the same information and evidence as before. The OTC told the appellant that a response was required by 13 April 2020.

5. On 15 April 2020, therefore just outside the period which the OTC had given the appellant for its response, an email was sent to the OTC on behalf of the appellant seeking an extension in order to deal with the OTC's request. The appellant did not specify the period of extension sought but did explain that due to the impact of the Coronavirus pandemic it was short staffed and had not been able to find anyone prepared to take the aerial photographs required. The OTC responded by email and stated:

'please provide:

The finances you provided did not show a full consecutive most recent 28 days and they also did not show the FULL limited company name.

Therefore further financial evidence to demonstrate you have ready access to sufficient resources to support your application will be required. The type and size of licence applied for requires a sum of £8200 to have been available during a 28-day period, the last date of which must not be more than two months from the date of receipt of the application.

Please read the finance guidance note enclosed with our previous request for further information:

Please provide an aerial view image of the nominated operating centre with the exact parking area highlights.

Please provide an explanation on how the company has been meeting its transport needs since incorporation in April 2015.

Please provide an explanation as to why when asked you did not declare refused application: **OG2015720/1089974.**

The declaration on your returned application form duly signed and/or dated:

This email is intended as a final attempt to resolve these issues by correspondence and you must now respond in full by no later than 23/04/2020. If on that date the application remains incomplete, it will be refused’.

6. The appellant did not respond to that email. So, on 10 June 2020 the OTC once again wrote to the appellant relevantly stating:

‘The deadline set in my last letter has now expired and I must now advise you that the Traffic Commissioner has refused your application, given that it remains incomplete following your failure either to supply the supporting documentation listed in the annex attached to my last request or offer any explanation as to why you were unable to do so’.

7. There is also, in the documentation before us, what appears to be an internal document prepared by the OTC. It reveals more about the thinking of the TC which led to the refusal. It is relevantly stated:

‘The final letter received no response from the operator and as such an email was sent to request the missing information on 16 April 2020. No response to that final request were received. As the application was unsigned, with no evidence of finances in the correct company name, and no confirmation of the site’s suitability the application was refused. The refusal letter stated that the application was incomplete but unfortunately did not confirm the information that was missing. However, as the application was unsigned and incomplete and responses were not being received there was no other option but to refuse the application’.

8. The appellant, through Mr O’Brien, gave notice of appeal to the Upper Tribunal. The grounds of appeal are as follows:

‘Due to the Coronavirus lockdown we were closed and no staff members were in to complete and answer letters or emails. So therefore, we ran out of time and the deadline passed. So therefore, we are appealing against this and ask can we get more time to complete this. Thank you’.

9. It is, at this stage, worth mentioning some relevant legal provisions which the TC and the OTC will have had in mind in seeking further information from the appellant and, ultimately, refusing its application.

10. Section 13 of the 1995 Act provides that on an application for a restricted licence a TC must consider whether the requirements contained at Section 13B and 13C are met. Further, it is provided that a TC may, if he/she thinks fit, consider whether the requirement contained at Section 13D is met. Section 13B is not, in fact, relevant with respect to this appeal. Section 13C includes a requirement (See 13C(4)) that ‘*There must be satisfactory facilities and arrangements for maintaining vehicles used under the licence in a fit and serviceable condition*’. There is a requirement at Section 13C(5) that the licence holder’s operating centre be ‘*suitable for use as an operating centre of the licence holder*’. There is a requirement at Section 13C(6) that the capacity of the place specified as the operating centre ‘*must be sufficient to provide an operating centre for all the vehicles used under the licence*’. Section 13D contains a requirement that ‘*the provision of the facilities and arrangements for maintaining the vehicles in a fit and serviceable condition... is not prejudiced by reason of the applicants having insufficient financial resources for that purpose*’. Regulation 4 of the Goods Vehicles (Licencing of Operators) Regulations 1995 provides under the heading ‘*manner of making applications*’ that an application must be made on a form supplied by a TC and must be signed. (see regulation 4(b)).

11. As to the approach which the Upper Tribunal is required to take when dealing with an appeal from a decision of a TC, paragraph 17(1) of Schedule 4 to the Transport Act 1985 provides:

‘The Upper Tribunal are to have full jurisdiction to hear and determine on 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. Paragraph 17(3) of Schedule 4 provides that the Upper Tribunal may not take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal. The Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd and Another v Secretary of State for Transport* [2010] EWCA Civ 695. It was stated that the Upper Tribunal has the duty, on an appeal to it, to determine matters of fact and law on the basis of the material before the TC but without the benefit of seeing and hearing from witnesses. It was further stated that the burden lies on an appellant to show, in order to succeed on appeal, that the process of reasoning and the application of the relevant law requires the Upper Tribunal to adopt a different view to that taken by a TC.

13. The appellant’s appeal was heard remotely via BT Meet Me. There was no legal representation but Mr O’Brien participated and spoke for the appellant. In addition to what had been said in the relatively brief written grounds of appeal Mr O’Brien, in making submissions and responding to questions put to him by the Upper Tribunal, said that disruption had been caused to the appellant due to the Coronavirus pandemic and the lockdown. There was a period of at least six weeks when nobody had entered the business premises. Mr O’Brien had very regrettably suffered more than one family bereavement and other difficult family circumstances. The licence application was the first such application he had ever been involved with. He had not been able to find anyone to take the necessary aerial photographs. He had been trying to be compliant. He accepted that the appellant company had a responsibility to deal with its correspondence. He is not himself good with ‘*the computer work*’.

14. We are satisfied Mr O’Brien was able to and did make the same points during the remote hearing that he would have made had there been a traditional face to face hearing of the appeal. We are satisfied that it was fair and appropriate to hold a remote hearing of the appeal. We now turn to our reasoning on the appeal.

15. The decision letter of 10 June 2020 was not very detailed. But, in our judgement, the outcome of the application and indeed the outcome of this appeal was inevitable. We are sympathetic to difficulties caused to operators by the impact of the Coronavirus pandemic. But the fact remains that inadequate information was provided when the application for the licence was made (which was before any lockdown provisions came into force) and subsequent requests did not lead to the eliciting of the further information which was required.

16. With respect to the above statutory requirements concerning the proposed operating centre, the absence of the aerial photographs requested coupled with what was, in truth, a complete absence of any other information of substance regarding it, meant that the TC had no choice but to refuse the application on that basis. We accept that the letter of 10 June 2020 did not specify the statutory requirements concerning the operating centre as being a ground for refusal but it is clear that that was in the mind of the TC given the content of the internal document referred to above. It is also clear given the previous history of requests for the aerial

photograph that the appellant, through its officers and particularly Mr O'Brien, would have been aware of a need to provide relevant information and to provide the photograph which had been specifically sought. On that basis alone, this appeal to the Upper Tribunal must fail.

17. As to finance and its linkage with an operator's ability to maintain vehicles, the evidence of finance which was provided fell significantly short of that which was asked for. In particular, the bank statements provided did not show the identity of the account holder and did not, therefore, properly evidence availability of any level of finance at all. We accept that, with respect to section 13D of the 1995 Act, no conscious decision taken by the TC to apply the provisions of that section was communicated to the appellant in the decision letter of 10 June 2020 or elsewhere. But in our view the internal document is indicative of the fact that such was considered and, in the face of the financial evidence being essentially valueless because of the lack of any indication as to the account holder, we do uphold the TC's decision with respect to finance. That, then, is another stand-alone basis as to why this appeal fails.

18. Finally, there was the requirement for the application to be signed. It does not appear that any attempt to submit a signed application has ever been made. The requirement for a relevant declaration contained within the licence application form to be signed was brought to the appellant's attention in an annex to the letter of 8 March 2020. Nothing was done about it. We would, therefore, once again, uphold the decision of the TC on this basis too.

19. We note, as mentioned earlier, that the appellant has had some particularly difficult family circumstances to contend with. We genuinely sympathise with him as to that. We would not preclude the possibility that, if he were to make a fresh application for the licence, he would succeed. But it does occur to us that it would be necessary, in any future application, for him to satisfactorily address his failure to declare a previous refusal of an application. Of course, it is entirely a matter for Mr O'Brien whether the appellant is to make a fresh application and we express no view as to whether any such application, if made, should or should not succeed.

M R Hemingway
Judge of the Upper Tribunal
Dated: 9 April 2021