



NCN: [2022] UKUT 00076 (AAC)
Appeal No.: T/2021/38

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

**IN AN APPEAL FROM THE DECISION OF:
RICHARD TURFITT, TRAFFIC COMMISSIONER FOR THE EAST OF
ENGLAND TRAFFIC AREA
DATED 12th MAY 2021**

Before:

**Elizabeth Ovey, Judge of the Upper Tribunal
Andrew Guest, Specialist Member of the Upper Tribunal
Stuart James, Specialist Member of the Upper Tribunal**

Appellant: PAULA JANE MORRIS t/a MISS BUS

Attendance: No legal representation. Mrs. Morris's husband, Mr. Christopher Morris, attended on her behalf.

Heard at: The Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL

Date of hearing: 13th September 2021

Date of decision: 9th March 2022

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that the appeal be ALLOWED.

SUBJECT MATTER: Contingency Statutory Document; maximum length of period of grace; when funds available

CASES REFERRED TO: *Bradley Fold Travel Limited and Anor v. Secretary of State for Transport* [2010] EWCA Civ 695; *LWB Limited* [2011] UKUT 358 (AAC), T/2011/036; *NCF Leicester Limited* [2012] UKUT 271 (AAC), T/2012/37; *McKee* [2014] UKUT 0254 (AAC) T/2014/08

REASONS FOR DECISION

Introduction

1. This is an unfortunate case which arises as a result of the Covid-19 pandemic which affected the United Kingdom for much of 2020 and 2021 and still continues to affect the country in unpredictable ways. As explained below, included in the vast mass of legislation addressing the consequences of the pandemic was legislation designed to assist the operators of public service vehicles who found difficulty in the conditions of the pandemic in satisfying the requirements applying to them. This appeal concerns that legislation and its application to the Appellant's particular situation.

2. As will appear from what follows, we fully understand the approach taken by Mr. Turfitt, the Senior Traffic Commissioner ("the STC") and are in general agreement with the principles he sets out. We part company with him on one point as to the available powers, where in our view he made a mistake in law.

The facts

3. The Appellant is the holder of a standard national public service vehicle licence, no. PF1098734. The start date was 8th December 2010 and the licence authorised the use of one vehicle. The Appellant runs a minibus business and her husband acts as her transport manager. There is nothing in the papers to suggest any difficulties with the operation until October 2020.

4. Not surprisingly, the Appellant's business was adversely affected by the pandemic and as the time for her second five year renewal approached she very properly telephoned the Office of the Transport Commissioner ("OTC") to explain that she was having difficulties in meeting the financial standing requirement (considered further below). The OTC, also very properly, directed her to the STC's Contingency Statutory Document, commencing on 31st July 2020, which set out, among other things, some changes affecting the operator licence requirements.

5. In the light of that Document, on 28th October 2020 Mr. Morris sent the OTC an email on behalf of his wife explaining the consequences of the pandemic for her business and continuing:

"The only good news is that Paula's orders for next year are improving ... with the hope that these will drastically increase as the country comes out of lockdown and confidence in travel returns. It is with this in mind that I respectfully request a period of grace of Financial Standing, for an initial period of 6 months, as per Article 6 of the Contingency Plans for Statutory Documents, with a review to be held at the end of April 2021. However, the likelihood is that, if the country is still in lockdown, we will need to ask to increase this POG to the current 12 months maximum. Should this prove to be the case, I am sure further guidance and updates will be issued by your office."

6. In response the OTC wrote to the Appellant on 30th October 2020 in the following terms:

“The Traffic Commissioner has agreed your request for a Period of Grace to allow you to operate.

The Traffic Commissioner has requested for (*sic*) to supply bank statements in the name of **Paula Jane Morris** for the months of **January, February and March 2021**. These statements must meet average financial standing of £8,000.

The statements must be sent to us **by 28th April 2021**. Failure to send the relevant information or an update by that date could mean that regulatory action could be taken.

You should complete your upcoming licence continuation with the information that is currently correct.”

It is to be noted that the Traffic Commissioner in question was not the STC, but his colleague Mr. Rooney.

7. It will be no surprise to anyone familiar with the history of the pandemic in this country to learn that the Appellant’s business did not pick up as she had hoped during the first three months of 2021. On 17th April 2021 Mr. Morris sent a further email on behalf of his wife to the OTC, reading:

“The Traffic Commissioner kindly agreed to a 6 month Period of Grace in respect of Financial Standing, with statements to be presented at the end of this month. I am sorry to inform you that my wife’s business has continued to suffer in lockdown, in the same manner as previously reported, and she will not be able to meet the average financial standing of £8,000. The light at the end of the tunnel is the Government’s Roadmap ...

Please apologise on our behalf to the Traffic Commissioner and respectfully request an extension of the Period of Grace until the end of October 2021.”

8. This led to a request from the OTC that the Appellant should respond with bank statements for January, February and March “so that the Traffic Commissioner can make an informed decision” and a statement that a list of forward bookings would help. The Appellant duly responded later that day attaching the requested information, from which it appeared that she had a £6,000 bank overdraft with HSBC, but that her account had been overdrawn throughout the three month period. Her forward bookings for the next year amounted to £7,317.00.

9. In response the OTC wrote as follows on 27th April 2021:

“The Traffic Commissioner has considered your request for an extension to the Period of Grace.

The current period of grace is available until 28/04/2021.

There is no legislation that allows the Traffic Commissioner to extend that period, therefore your request cannot be granted.

Article 13(1) of Regulation (EC) 1071/2009 states that the Traffic Commissioner can allow up to 6 months in order for licence holders to demonstrate the requirement to meet financial standing is satisfied on a permanent basis.

You have until **28/04/2021** to show that you meet financial standing. Failure to show this will mean that the Traffic Commissioner will have no option but to proceed with termination of the licence.

If there is any further evidence you can supply then you need to do so immediately.”

10. It seems that the substance of the decision, which was in fact made on 22nd April 2021, was conveyed to the Appellant and her husband before the letter was written. They then obtained a sum of £8,000 from a close friend of Mr. Morris who had recently inherited a substantial amount and had offered financial assistance to the Appellant some time previously. The offer had not been accepted, because it was thought that it was possible to obtain an extension to the period of grace. The money was paid into the Appellant’s account on 27th April 2021 and no terms for repayment applied to it, although the Appellant’s intention was that it should be repaid at the end of May 2021 from money to be received by her daughter by way of redundancy payment. We understand that repayment has indeed now been made.

11. The effect of the payment was that the Appellant had the necessary amount of £8,000 in her account at the expiration of the period of grace, but of course was not able to show financial standing over the previous three months. The matter was referred back to the STC, but he concluded that he was obliged to revoke the licence on the ground of failure to meet the financial standing requirement. The decision was notified to the Appellant by a letter dated 10th May 2021, which stated:

“I refer to our letter dated 27/04/2021 notifying you that the Traffic Commissioner was considering revoking your public service vehicle operator’s licence.

As you have shown that you have not met **average financial standing** within the 6 month Period of Grace given, the Traffic Commissioner has no option under the above legislation but to revoke your operator’s licence on **6th June 2021 23.45 p.m.** in accordance with the grounds stated in our letter.”

The letter included a notification of the right of appeal to the Upper Tribunal.

The appeal

12. The Appellant notified the OTC of her intention to appeal by an email sent on 16th May 2021 and at the same time applied for a stay of the STC’s decision. The formal notice to appeal is dated 27th May 2021. The grounds of appeal are essentially a narration of events, but the crucial points are as follows:

“... My husband contacted the OTC via email on 28th October, outlining the above and requesting a 6 month period of grace ... he also, having read the Contingency Plans incorrectly, stated that in the event of a continuing lockdown, we would request an extension to the [period of grace] or further guidance.

On 30th October the reply was received ... no comment was made at that time to inform us that an extension would not be available. Plus, in the letter, it requested that the statements be presented by 28th April. It advised that failure to send the information or an update, could mean that regulatory action could be taken. (In the later letter this changed to “The Traffic Commissioner has no option but to revoke your operator’s licence”). ...[*The Appellant’s emphasis*]

At this time we were also offered financial help from friends and family, which we declined, wrongly believing that it would not be necessary...

By 28th April, my husband spoke with the OTC and was advised to get money into the account ASAP to show that we could meet financial standing. Within the hour our friend, whom we had declined in November/December transferred £8,000.00 and my husband emailed the OTC showing the funds at 15.57 on the same day, clearly demonstrating that we could immediately lay our hands on funds. In fact, the offer, dating back to Nov/Dec meant that the monies were available in all months during the [period of grace]...

... my available balance at the end of the 6 month [period of grace] was £9,454.08 ...

I have been honest with the OTC and had the “rug pulled from under me” just as things are starting to pick up. I currently have £9,800 of forward bookings – with the monies in my account I believe that shows that financial standing [is met] ...

These have been unprecedented times and I wish that had been taken into consideration when making this decision ...”

13. The Appellant’s application for a stay was considered by the STC and dismissed on 31st May 2021, essentially on the grounds that the prospects of success were not sufficient. A stay was, however, granted by the Upper Tribunal on 10th June 2021. In granting the stay, Judge Hemingway said:

“2. On a preliminary view and without having seen the Office of the Traffic Commissioners file of papers or hearing oral argument, the prospects of success of this appeal do not seem strong. But there is merit in the point that if an appeal is being pursued, serious consideration ought to be given to the granting of a stay where an appellant’s business is otherwise under threat because if a stay is not granted the right of appeal may be rendered pointless. In this case, there is nothing to suggest the appeal is being pursued simply as an attempt to ‘string things out’, it appears there are no safety concerns, and there does not appear to have been any dishonesty on the part of the appellant.

...

4. The application for a stay is granted. But the appellant, whilst it is entirely a matter for her, might wish to think about taking some specialist advice about how best to advance her current position either with respect to this appeal or with respect to possible alternative courses of action.”

14. We comment at this point that Mr. Morris explained to us at the hearing of the appeal that the Appellant had been told to take the precautionary step of applying for a new licence, to protect her position if the appeal was unsuccessful, and had done so about two months earlier. The Appellant was expecting an official letter to be sent that day. We return to this aspect of the matter later.

15. In his oral submissions Mr. Morris made two principal points, reflecting the grounds of appeal:

- (1) the terms of the letter from the OTC dated 30th October 2020, and in particular the statement that failure to provide the requested bank statement “or an update” by 28th April 2021 “could” lead to regulatory action had led them to believe there was power to grant an extension, as envisaged by his email of 28th October 2020. He explained that it was only later that he became aware that the possibility of granting a 12 month period of grace apparently only applied if there had been a successful financial audit within that period;
- (2) the facts showed that the sum of £8,000 was available to the Appellant at all times and the requirement of financial standing was satisfied.

He also drew to our attention the fact that Section C of the bundle of papers, consisting of OTC submissions to the Traffic Commissioners and their decisions, included a recommendation to the STC made on 6th May 2021 that given the facts set out above the Appellant should be allowed to continue as an operator, although subject to financial review after 6 and 12 months.

16. Both these points require consideration of the statutory financial standing requirement, which we address in principle before turning to the particular case.

The law as to financial standing

17. The starting point is s.14ZA of the Public Passenger Vehicles Act 1981, which sets out the requirements which must be satisfied before a Traffic Commissioner can grant a standard licence. Under s.14ZA(2)(c), an applicant must show:

“appropriate financial standing (as determined in accordance with Article 7 of the 2009 Regulation)”.

S.82(1) defines “the 2009 Regulation” as Regulation (EC) 2009/1071 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 and repealing Council Directive 96/26/EC. Both s.14ZA and the definition of the 2009 Regulation were inserted by the Road Transport Operator Regulations 2011, S.I. 2011 No. 2632.

18. The 2009 Regulation was directly applicable in the United Kingdom before this country left the European Union and accordingly it became part of United Kingdom domestic law on 31st December 2020, as it stood at that date, by virtue of the provisions of s.3 of the European Union (Withdrawal) Act 2018 as amended by the European Union (Withdrawal Agreement) Act 2020. The Regulation appears on the UK legislation website as a Regulation originating in the European Union but now constituting part of United Kingdom domestic law. It has been amended in certain respects by the Licensing of Operators and International Road Haulage (Amendment etc).(EU Exit) Regulations 2019, S.I. 2019 No. 708, but not in any material respect.

19. The basic requirement of Article 7 is that an operator should at all times be able to meet its financial obligations during the annual accounting year. To do so, its annual accounts must show that every year it has at its disposal capital and reserves totalling the required amount (the sum of £8,000 in the Appellant's case). The Article does, however, allow the competent authority in the relevant Member State, by way of derogation, to accept other means of demonstrating financial standing.

20. In this country advantage has been taken of the derogation and successive STCs have set out in successive versions of Statutory Document No. 2 how the requirement of financial standing is to be satisfied. The current version dates from January 2022 and explains how the law of England and Wales stands following the United Kingdom's withdrawal from the European Union. For present purposes, the guidance in the Statutory Document remains unchanged from the version applicable in 2021.

21. Statutory Document No. 2 is made under s.4C of the Public Passenger Vehicles Act and contains both guidance as to the meaning and operation of the relevant statutory provision and the matters which a commissioner should or should not take into account when exercising any particular function and general directions as to the information which a commissioner must ask to be supplied in connection with the exercise of any particular function.

22. The guidance as to what will satisfy the requirement of financial standing draws heavily on the case law developed in the Transport Tribunal and the Upper Tribunal. Two aspects of it are particularly relevant to this case:

- (1) financial resources relied on must be available to the operator. This means, among other things, that the operator must be able to make an immediate decision to spend money without having first to ask another person to make a transfer: see *LWB Limited* [2011] UKUT 358 (AAC), T/2011/036;
- (2) the fact that the requirement must be satisfied at all times means that a snapshot of the operator's financial affairs showing that funds are in the bank on a particular day is not sufficient: see *NCF Leicester Limited* [2012] UKUT 271 (AAC), T/2012/37. As the Upper Tribunal

went on to say, that does not mean that the required level of finance must be in the bank on 365 days a year, but that where balances fluctuate the Traffic Commissioners will need to consider how quickly they recover to the necessary level. That is why it is the practice of the Traffic Commissioners to ask for three months of financial statements and to look at the average level of financial resources..

23. The general directions concern the approach to be taken by staff acting on behalf of individual commissioners in exercising delegated functions in relation to financial standing and contain detailed provisions as to evidence.

24. It is frequently stated that the purpose of the requirement of financial standing is to ensure that operators are able to maintain vehicles to a proper standard, for the protection of all road users and to prevent unfair competition from operators who might otherwise be tempted to cut corners on maintenance. It is one of a number of requirements specified in Article 3 failure to satisfy which leads to mandatory revocation of the operator's licence, as is provided in Article 13. Article 13 does, however, allow the competent authority, when it has established that such a requirement is not met, to grant the operator a period of grace within which to satisfy the requirement again. In the case of the requirement of financial standing, a period of grace not exceeding six months may be allowed for the operator to demonstrate that the requirement will again be satisfied on a permanent basis.

25. These provisions are reflected in the Public Passenger Vehicles Act 1981. Under s.17(1) a traffic commissioner must revoke a standard licence if the commissioner becomes aware that the requirements of s.14ZA(2) are not satisfied. S.17(1A), however, empowers the commissioner first to serve on the operator a notice specifying a time period (a period of grace) in accordance with Article 13 for the operator to rectify the situation. S.17(1B) provides that if the operator does so within the time limit, the commissioner must not revoke the licence.

26. The effect is that the granting of a period of grace depends upon there first being a finding by a traffic commissioner that the requirement of financial standing is not met. This is recognised in the guidance section of Statutory Document No. 2 at paragraph 26, but there is no discussion of the power to grant a period of grace. The general direction states at paragraph 70:

“A traffic commissioner will require tangible evidence to show that financial standing can be met in the future. A traffic commissioner may rely on a recent financial check as evidence to support the granting of a period of grace. A traffic commissioner retains their discretion in respect of all standard operators. However, if the qualifying circumstances are met, then the Senior Traffic Commissioner has set a starting point of 3 months period of grace. That starting point is intended to allow an extension to the maximum period of 6 months should circumstances require it, taking account of the circumstances of the operator and fairness to other operators who have taken steps to ensure that they comply. There is no authority for members of staff to extend the directions of a traffic commissioner. They are expected to assist all standard operators with regard to financial standing and to advise them of these Directions.”

27. The first sentence quoted above is supported by reference to *McKee* [2014] UKUT 0254 (AAC) T/2014/08, which contains the following statement at paragraph 7:

“In our view, when considering whether or not to grant a period of grace, Traffic Commissioners will need some tangible evidence, beyond mere hope and aspiration, that granting a period of grace will be worthwhile, and that there are reasonable prospects for a good outcome. Some sort of analysis along these lines will be necessary because, amongst other reasons, Traffic Commissioners have to decide how long to grant. Moreover, as with a stay, there is no point in granting a period of grace if the likely effect is just to put off the evil day when regulatory action will have to be taken”

28. Against this background, it seems to us that the “qualifying circumstances” referred to in paragraph 70 of the general guidance are that (i) there has been a finding that the requirement of financial standing is not met, thus opening the way to consideration of a period of grace and (ii) there is tangible evidence satisfying the *McKee* test. At that point the STC’s starting point of three months comes into play.

29. When the Covid-19 pandemic took hold in Europe, the European Union, of which the United Kingdom was then still a member, responded by, among other things, extending the possible length of the period of grace under Article 13 in connection with failure to meet the requirement of financial standing. This was done by Regulation 2020/698, which provided that where a competent authority established by documents for accounting years covering all or any part of the period 1st March 2020 to 30th September 2020 that an operator did not meet the requirement of financial standing, the period of grace was extended to 12 months. This Regulation also appears on the UK legislation website as a Regulation originating in the European Union but now constituting United Kingdom domestic law.

30. This change was duly reflected in the STC’s Contingency Statutory Document, providing temporary updates to various Statutory Documents, including Statutory Document No. 2. Paragraph 5 refers to Regulation 2020/698 and paragraph 6 reads:

“A traffic commissioner would normally require tangible evidence to show that financial standing can be met in the future but, given the exceptional and short-term circumstances referred to above, the Senior Traffic Commissioner has directed that a traffic commissioner may rely on a previous satisfactory financial check which meets the new prescribed sum, no older than the last 12 months, as evidence to support the granting of a Period of Grace. A traffic commissioner may also accept internet or copy documents, with a check of original documents to be made at a later date. A traffic commissioner retains their discretion in respect of all standard operators. However, if the qualifying circumstances are met between 1 March 2020 and 30 September 2020, then the Senior Traffic Commissioner has set a starting point of 6 months Period of Grace for qualifying operators. That starting point is intended to allow for the traffic commissioner to make an assessment of the impact on road safety

before extending to a maximum period of 12 months, should circumstances require that.”

31. Our understanding of the direction is that when a traffic commissioner is applying the *McKee* test and considering whether there is evidence to support the granting of a period of grace it is possible to rely on a satisfactory financial check which may be up to 12 months old, rather than recent. In addition, paragraph 10 states expressly that where the reasons for the decision that a mandatory requirement is not met are connected to the pandemic, traffic commissioners are entitled to infer that the situation will be time-limited, and that the *McKee* test is therefore met. Paragraph 11 states that traffic commissioners should recognise the exceptional nature of the operating environment and are expected to give serious consideration to the grant of a period of grace to standard operators who require it. Given the terms of Regulation 2020/698 we understand the “qualifying circumstances” referred to in paragraph 6 to be (i) a finding that financial standing was not met by reference to consideration of a period including all or any part of the period 1st March 2020 to 30th September 2020 and (ii) evidence satisfying the *McKee* test as varied. At that point direction relating to the revised six months starting point comes into play.

Application to the present case

32. As already stated, the Appellant applied for a period of grace expressly in reliance on the Contingency Statutory Document to which she had been directed by the OTC and expressly referring to the possibility that an extension would be required if the pandemic persisted. Indeed, it is apparent from Mr. Morris’s email sent on 28th October 2020 that he had read the Contingency Statutory Document and the request was for period equivalent to the starting point in the first instance, with the prospect of an increase to the maximum period if necessary. The letter dated 30th October 2020 informing the Appellant that the traffic commissioner had agreed to her request for a period of grace was from the person with whom she had previously discussed her difficulties. We think that letter is properly to be understood, as it clearly was understood in fact, as the grant of an initial period of grace of six months, with a requirement for the production of financial information by 28th April 2021. Although the letter states that the financial information “must meet average financial standing of £8,000”, it goes on to refer to the provision of an update as an alternative to the provision of such information as a means of avoiding regulatory action.

33. Specifically, there is nothing in the letter to suggest that no extension to the initial period of grace would be possible because the case did not fall within the terms of the Contingency Statutory Document. In our view it conveys the message that the traffic commissioner envisaged a further assessment in April 2021, leaving open the way for an extension of the period of grace if appropriate, no doubt taking into account the *McKee* requirement of tangible evidence again at that stage.

34. Such a decision would *prima facie* have been possible on the basis of Regulation 2020/698 and the Contingency Statutory Document. It follows from the fact that a period of grace was granted that Mr. Rooney made a finding that the Appellant did not satisfy the requirement of financial standing. The evidence on which that finding was based must have been what was said in Mr. Morris’s email of 28th October 2020, which plainly refers to a collapse of business resulting from the

pandemic and so relates at least partly, and in fact probably very largely, to the period 1st March 2020 to 30th September 2020. The fact that the collapse of the business arose from the pandemic entitled Mr. Rooney to infer that the *McKee* test was satisfied, and Mr. Morris did offer some grounds for hoping for a return to what had previously been a viable business. We have not seen evidence of a satisfactory financial check either recently or within the last 12 months, but ultimately, as Statutory Document No. 2 says, the matter is one for the traffic commissioner's discretion.

35. We note that the internal OTC exchanges at page 11 of the bundle are brief and less explicit on their face. Taken in isolation they might suggest that Mr. Rooney granted a once-and-for-all six months period of grace. We think, however, that they are to be read in the light of the fact that express reference was nevertheless made by the Appellant to the Contingency Statutory Document, the correspondence was uploaded and available for consideration and the recommendation and decision were to agree a six month period of grace, albeit with a specific requirement for the provision of evidence of financial standing by reference to the most recent financial statements before 28th April 2021. The terms of the Appellant's request were clear and Mr. Rooney will have been aware of both the terms of Statutory Document No. 2 and the Contingency Statutory Document. That is to say, he will have been aware that the usual starting point for the grant of a period of grace was three months and that it had been extended to six months. There is nothing to point to an intention on his part to depart from the STC's direction as to the starting point.

36. In any event, we do not think that the terms of the internal exchanges could override the terms of the decision as formally conveyed to the Appellant.

37. For those reasons, we proceed on the basis that Mr. Rooney's decision was a proper decision in accordance with the Contingency Statutory Document to grant an initial six months period of grace with the possibility that the period of grace would be extended.

38. Against that background, Mr. Morris's email of 17th April 2021 is entirely understandable. It offered what he thought to be the required update, stated that the financial standing requirement could not currently be met but gave some grounds for hope that the situation might improve as coronavirus restrictions were lifted. When statements were requested "so that the Traffic Commissioner can make an informed decision" they were provided, as was a list of future bookings. In response, however, the Appellant received the letter dated 27th April 2021 referring to Regulation 1071/2009 and stating that there was no legislation which allowed the traffic commissioner to extend the period of grace beyond 28th April 2021.

39. The internal documentation at page 16-17 explains the basis of the decision on 22nd April 2021 which led to the letter of 27th April 2021. The case worker described the decision to be made as one which "lies on whether the operator meets the *McKee* test", asking whether the volume of advanced bookings and hopes that future bookings would increase were sufficient to satisfy the traffic commissioner. The recommendation was based on the fact that the period of grace "condition" was not satisfied.

40. In making his decision, the STC said:

“Mr. Rooney was apparently persuaded to go beyond the starting point described in the Contingency Statutory Document and allowed a full 6 month PoG. The operator seeks to increase this to 12 months having shown only £1,857 [i.e., an average over the past three months of £1,857 available finance]. The submission incorrectly refers to the McKee test, but there is power to extend. I refer to paragraph 4 of Statutory Document No. 2... The average is not enough to support 1 vehicle. I have no discretion but refer to the UT decision in Tacsí Gwynedd as to what must occur upon the expiry of a PoG and the mandatory and continuing requirement is not met.”

41. The obvious difficulty with this is that Mr. Rooney did not go beyond the starting point described in the Contingency Statutory Document; the period he granted was in fact the specified starting point. We think the words “but there is power to extend” in relation to *McKee* probably mean “but that test only applies where there is power to extend”, implying that there was no power in the present case. This would be consistent with the STC’s statement “I have no discretion” and with the reference to paragraph 4 of Statutory Document No. 2, which emphasises that the maximum period of grace under Regulation 1071/2009 is six months. What the decision does not explain is why the extended six month and 12 month periods did not apply.

42. In his decision to refuse a stay made on 31st May 2021 the STC repeats in paragraph 4 that Mr. Rooney allowed the maximum period of grace, i.e., six months. Paragraph 6 refers to the absence of any discretion on the part of the STC and paragraph 7 states that there was no power to extend the period of grace beyond the maximum permitted by the legislation. We note, however, that the STC did exercise his discretion in fixing the date of revocation as 6th June 2021, to give time for a new application to be made.

43. We do not see how the proposition that the STC had no power to extend the period of grace can be correct, given the terms of Regulation 2020/698 and the Contingency Statutory Document. It follows that the STC’s decision was based on a mistake as to the law. As a result of that mistake he simply did not consider whether to exercise his discretion to extend the period of grace. The whole point of having a starting point of half the maximum period of grace is surely so that an assessment can be made as the initial period of grace comes to an end of whether the requirement of financial standing is now satisfied and, if it is not, whether advantage should be taken of the fact that further time is available within the maximum period to extend the period of grace.

44. The test we have to apply in deciding whether to allow an appeal is the test set out by the Court of Appeal in *Bradley Fold Travel Limited and Anor v. Secretary of State for Transport* [2010] EWCA Civ 695, very frequently summarised as being whether the decision below is plainly wrong. Our view of the applicable law means that we inevitably conclude that the STC’s decision was indeed plainly wrong and we deal below with the consequences of having reached that conclusion.

45. This basis for our decision very largely reflects Mr. Morris’s first contention before us. We think that what he told us about the possibility of a 12 month period

being dependent on a successful financial audit within that period must be based on what is said in the Contingency Statutory Document about that being evidence which might meet the *McKee* test. For the reasons we have given, we do not think it is a pre-condition to the granting of a period of grace under Regulation 2009/1071 as amended.

46. If we had reached a different decision on the first contention, we would not have decided that the STC was wrong on the basis of the second contention. Although we understand why the Appellant says that the additional finance was always available to her as a matter of fact, the situation does not satisfy the requirement that the finance should be available without the need to ask anyone else to make a transfer. It seems to us that the requirement that, in effect, the operator should already have control of the finance reflects the starting point of Article 7, that financial standing should be shown by reference to the operator's accounts, and the practicalities of maintaining a system which prevents unfair competition and ensures that necessary maintenance can be undertaken without the risk of an unexpected hitch in obtaining the funds. The case falls squarely within the principle of *LWB Limited*.

The way forward

47. As we said in paragraph 14 above, by the time of the hearing before us the Appellant had applied for a new licence and was expecting to hear the outcome of the application imminently. In those circumstances we thought it appropriate to delay giving our decision for what we expected to be a short period. In the event, it took longer to deal with the application than had been expected. Mr. Morris helpfully kept the Upper Tribunal informed of progress from time to time.

48. On 15th November 2021 the office received an email from Mr. Morris attaching a letter of that date from the OTC explaining that the traffic commissioner proposed to refuse the application for a new licence because, following Judge Hemingway's grant of a stay, the Appellant already had a licence and it is not possible to hold two licences in the same traffic area. Mr. Morris also pointed out that when the Appellant completed the application she had to answer a question asking whether anyone named in the application currently held a licence and if so, whether it would be surrendered. She had correctly answered that she held a licence and it would be surrendered.

49. Following that notification, the Appellant obtained legal advice from Backhouse Jones Limited, a firm with a great deal of experience in this area, and we have been provided with a copy of a letter dated 6th December 2021 from the firm to the OTC setting out their client's position. It was proposed as a pragmatic way forward that the traffic commissioner should confirm a preparedness to grant a new licence to take effect either upon the revocation of the current licence (if the appeal were to fail) or on the surrender of the current licence (if the appeal were to succeed). The Appellant's wish is to continue her business under a new licence.

50. No further information has been received since and we are unaware whether or not the traffic commissioner agreed to that pragmatic solution. It seems to us to have been a very sensible proposal in what has become an awkward situation, but it is not

for us to seek to interfere in the application process. We therefore simply record the position and turn to consider what consequences flow from our decision.

51. Our powers are set out in paragraph 17 of Schedule 4 to the Transport Act 1985, which provides:

“(1) 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....

(2) On an appeal from any determination of a traffic commissioner other than an excluded determination, the Upper Tribunal is to have power-

(a) to make such order as it thinks fit; or

(b) to remit the matter to -

(i) the traffic commissioner who made the decision against which the appeal is brought; or

(ii) as the case may be, such other traffic commissioner as may be required by the senior traffic commissioner to deal with the appeal,

for rehearing and determination by the commissioner in any case where the tribunal considers it appropriate

and any such order is binding on the commissioner.

(3) The Upper Tribunal may not on any such appeal take into consideration any circumstances which did not exist at the time of the determination which is the subject of the appeal.”

52. The Public Passenger Vehicles Act 1981 is an enactment relating to transport and the determination of the STC was not an excluded determination (the class of which is set out in paragraph 17(4)).

53. As we have said, the effect of our decision is that the STC did not consider whether or not to exercise his discretion to extend the period of grace because he took the view that he had no power to do so. In many cases following a mistaken failure to exercise a discretion, the appropriate course is likely to be to refer the matter back to the traffic commissioner so that the discretion can be exercised.

54. The circumstances of the present case are, however, exceptional. As the Appellant pointed out, the practical effect of the requirement to provide evidence of financial standing by reference to the three months immediately preceding 28th April 2021 was to require her to provide evidence of her business during the three months in which the third lockdown resulting from the pandemic was in full force. This could not have been foreseen by Mr. Rooney when he granted the initial six month period of grace.

55. As that period came to an end, the Appellant had the possibility of seeking an extension to the period of grace or seeking to address the lack of financial standing in another way, such as by securing additional finance (a course envisaged in paragraph 69 of Statutory Document No. 2). Understandably, in our view, she chose to apply for an extension to the period of grace. Regulation 2020/698 had been passed as a response to the pandemic and it was the pandemic which was the cause of her continuing lack of financial standing. When it became apparent that an extension was not forthcoming, she obtained additional finance which gave her funds of the necessary amount. We fully understand that to be able to satisfy the requirement on a snapshot basis is not sufficient, bearing in mind that the financial standing requirement has to be satisfied on a permanent basis, but we think that the combination of the injection of funds, the fact that the business had continued and the Appellant had managed to obtain some, although not many, advance bookings, combined with the expected gradual relaxation of the coronavirus restrictions justified an extension of the period of grace. Such an extension would have served the purpose of the extended time limits resulting from Regulation 2020/698. We note in this context the comment of the case worker in the message at p.17 of the bundle that the Appellant could probably meet average financial standing if she applied for a new licence.

56. For those reasons we take the view that in those exceptional circumstances the STC ought to have decided that he had power to extend the period of grace and ought to have done so. We therefore set aside his decision revoking the Appellant's licence.

57. We have no doubt that a further review of the Appellant's financial standing would have taken place no later than October 2021 if the STC had decided to extend the period of grace. We have therefore considered whether that should be reflected in any way in the order we make. Pragmatically, however, it is clear that the Appellant's financial standing has been considered further in connection with her application for a new licence, and in any event it seems she intends to surrender the current licence if she is assured that a new licence will be granted. We therefore take the view that no useful purpose would be served by our doing anything other than setting aside the STC's decision.

58. For completeness we add that if we had decided that the period of grace could not be extended and that the STC's decision was right, we would also have been of the view that the circumstances in which the licence came to be revoked were such as not to give rise to any loss of repute on the part of the Appellant.

59. Finally, we apologise for the delay in producing this decision, which results from Judge Ovey's other professional commitments at the point when the position on the new application became clear.

(signed on the original)

E. Ovey
Judge of the Upper Tribunal
9th March 2022