



NCN: [2021] UKUT 45 (AAC)
Appeal No. T/2020/37

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

Before: M Hemingway: Judge of the Upper Tribunal
D Rawsthorn: Member of the Upper Tribunal
S James: Member of the Upper Tribunal

Appellant: Kast Logistics Limited

Reference: OC2019904

Date of Hearing: 27 January 2021 (remote hearing via Cloud Video Platform)

DECISION OF THE UPPER TRIBUNAL

This appeal to the Upper Tribunal is dismissed.

Cases referred to: *Bradley Fold Travel Ltd and Anor v Secretary of State for Transport* [2010] EWCA Civ 695

**DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

**On Appeal from a Decision of the Traffic Commissioner for The North West of England
Traffic Area**

Decision

This appeal does not succeed. We confirm the decision of the Traffic Commissioner (“TC”) embodied in a letter of 7 May 2020 revoking standard goods vehicle operator’s licence reference OC2019904 belonging to Kast Logistics Ltd (“the appellant”) with effect from that date.

The background circumstances

1. The appellant is a limited company. It was incorporated on 19 March 2010. On 11 January 2019 the Office of the Traffic Commissioner (“OTC”) acknowledged receipt of the appellant’s application for a standard goods vehicle operator’s licence. Further information, in support of the application, was sought. On 6 March 2019 the OTC wrote to the appellant (specifically to its director Steve Newton) stating that a TC had decided to grant an interim licence authorising one vehicle and one trailer, pending the demonstration of sufficient financial standing for three vehicles and three trailers, which is what had originally been sought. On 20 May 2019 the OTC wrote to the appellant stating that the TC was prepared to grant the full as opposed to interim licence if the appellant was prepared to undertake to provide three months original bank statements and other financial evidence demonstrating an ability to meet statutory financial requirements (see below). On this basis a standard goods vehicle operator’s licence for three vehicles and three trailers was granted. However, the appellant subsequently failed to fulfil the undertaking it had given to provide financial evidence. The matter was pursued by the OTC in a letter of 4 October 2019. On 10 October 2019 the appellant sent some evidence of its financial position which consisted primarily of bank statements relating to its business account. Those bank statements covered the period from 1 June 2019 to 30 August 2019 and revealed the business account to be quite frequently overdrawn. That prompted the OTC to enquire as to whether the appellant had an overdraft facility and it asserted, in response, that it did, to a limit of £5000. Then, on 10 February 2020, the appellant entered into a Company Voluntary Agreement (“CVA”). It subsequently provided, on 3 March 2020, further bank statements showing a pattern of the business account being overdrawn with some degree of regularity and, on occasion, by an amount which exceeded the overdraft limit.

2. On 6 April 2020 the OTC wrote to the appellant pointing out, in effect, that a perusal of the financial evidence supplied so far demonstrated that it no longer satisfied the requirement contained within Section 13A(2) of the Goods, Vehicles (Licensing of Operators) Act 1995 to be of appropriate financial standing. It was also pointed out that under section 27(1) of the same Act a TC was required to revoke a licence. The salient part of the letter went on to say:

“In view of the evidence the Traffic Commissioner considers that you no longer satisfy the requirement to be of appropriate financial standing.

In accordance with Section 27(2) of the Act the Traffic Commissioner is serving notice on you that he/she is considering making a direction to revoke your operator’s licence on the grounds detailed above, and to offer you the opportunity to make written representations for the Traffic Commissioner’s consideration. Any representations must be made in writing and be received in this office by **Monday 27 April 2020**.

Furthermore, the Traffic Commissioner in accordance with Section 29(1) offers you the opportunity to request a public inquiry in order to offer further evidence as to why the licence should not be revoked. Any request for a public inquiry is to be made in writing to this office by **Monday 27 April 2020...**”

3. No request for a public inquiry was ever made. On 14 April 2020 a firm of licensed insolvency practitioners wrote to the OTC explaining that it had been appointed in order to re-structure the appellant’s historic liabilities and that, its having done so, the appellant’s

finances were now “*in a more stabilised position to facilitate ongoing trade and to satisfy the requirements of the Operator’s Licence moving forwards*”. It was asserted that an operator’s licence was essential to enable the appellant to continue to trade. On 18 April 2020 the appellant (in the person of Steve Newton) wrote to the OTC and relevantly said:

“Although it would seem we have not had the required compliant amount with reference to OTC’s official figures, I can ensure all concerned parties that our vehicles and trailers have had the relevant maintenance required under the DVSA compliance requirements”.

4. Mr Newton went on to explain, in the same letter, that the appellant had now decided to reduce its number of vehicles from three to two. He made mention of difficulties which had been caused to the business resulting from the coronavirus pandemic. There was some further e-mail communication and the appellant provided the OTC with a document headed “*Client Statement*”.

5. An internal document produced by the OTC for the purposes of this appeal demonstrates that a TC gave consideration to the material provided but, nevertheless, concluded that financial standing had not been shown. Tellingly it was observed that whilst “*every opportunity to provide evidence of financial standing*” had been given, the evidence produced “*does not show the required level of finance for even a single vehicle in accordance with SD2*”. Pausing there, the reference to SD2 is a reference to Statutory Document 2: Finance which is statutory guidance issued by the Senior Traffic Commissioner for Great Britain under section 4C(1) of the Public Passenger Vehicles Act 1981. The purpose of the guidance is to provide information as to the way in which the Senior Traffic Commissioner believes that Traffic Commissioners should interpret the law in relation to the requirements for financial standing. It was also noted in the internal document that the appellant had not requested a public inquiry nor a period of grace and that there was not, in any event, any basis for the granting of a period of grace. It was said that, in light of the content of section 27(1)(a) of the Goods, Vehicles (Licensing of Operators) Act 1995, revocation must follow. The letter of 7 May 2020 confirming revocation was then issued.

The relevant law

7. Section 13A of the Goods, Vehicles (Licensing of Operators) Act 1995 relevantly provides as follows:

13A Requirements for standard licences

- (1) The requirements of this section are set out in sub-sections (2) and (3).
- (2) The first requirement is that the Traffic Commissioner is satisfied that the applicant...
- (c) has appropriate financial standing (as determined in accordance with Article 7 of the 2009 Regulation), ...

8. The reference to the “2009 Regulation” is, in fact, a reference to Regulation EC No 1071/2009 of the European Parliament and of the Council of 21 October 2009. That Regulation makes it clear, amongst other things, that the requirement for appropriate financial standing is an ongoing one and, therefore, not one that simply has to be satisfied at the time a licence is sought.

9. Section 27 of the Goods, Vehicles (Licensing of Operators) Act 1995 relevantly provides:

27. – Revocation of standard licences

- (1) A traffic commissioner shall direct that a standard licence shall be revoked at any time if it appears to him that –
 - (a) the licence-holder no longer satisfies the requirements of section 13A(2), ...

10. The section does go on to require a TC contemplating revocation to give to the licence holder notice in writing that such is being considered. However, that requirement was complied with in the letter sent to the appellant on 6 April 2020.

The appellant’s grounds of appeal

11. Prior to completing form UT12 ENG (the standard form normally used to lodge an appeal to the Upper Tribunal in a case such as this) Steve Newton had written to the Upper Tribunal on behalf of the appellant. In his letter he referred to what he described as “*historical financial issues*” which he explained had arisen as a result of “*expansion and high operating costs*”. He stressed that that had not had an adverse impact upon the appellant’s ability to properly maintain its vehicles nor upon the safety of its operations. He acknowledged that the appellant had entered into a CVA but said that its finances had now been re-structured and its operating costs reduced. In the grounds of appeal contained within form UT12 ENG it was asserted, in effect, that the appellant was now in a better financial position and the Upper Tribunal was invited “*to look at how we have progressed since the initial revocation was issued*”.

The appeal hearing.

12. The Upper Tribunal held an oral hearing of the appeal. That was, with consent, a remote hearing using Cloud Video Platform. Mr Newton participated on behalf of the appellant and we are satisfied that he was able to make all the points remotely which he would have been able to make had there been a traditional face-to-face hearing.

13. At the hearing Mr Newton very frankly (though not necessarily helpfully to the appellant’s case) suggested that the TC’s decision had been “*absolutely correct*” at the time it had been made. He acknowledged that some wrong decisions had been taken with respect to the way in which the business had been run and that adverse financial consequences had ensued. But he stressed that the appellant was now in a much better position than it had been. He opined, notwithstanding the earlier apparent concession, that the TC’s decision had been “*harsh*”. He suggested that the TC might, rather than deciding to revoke, have simply given the appellant some form of notification of the need to rectify matters with a review taking place some six months after any such notice had been given. In response to questions put to him Mr Newton made clear that no application for a stay of the effect of the TC’s decision had ever been made. He had thought, initially and erroneously, that the revocation would not take effect whilst an appeal to the Upper Tribunal was proceeding but a member of the Upper Tribunal’s administrative staff had “*put me right on that*”. He acknowledged that at the time of the CVA, Her Majesty’s Revenue and Customs had been the appellant’s major creditor.

The approach of the Upper Tribunal on an appeal to it

14. 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”.

15. Paragraph 17(3) of that Schedule 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. That is a mandatory provision which affords the Upper Tribunal no discretion. 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. It was explained in the judgment of the Court of Appeal 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 rests on an appellant to show, in order for an appeal to succeed, 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.

Our reasoning on the appeal

16. It is not asserted on behalf of the appellant that the evidence which had been placed before the TC demonstrated that the financial standing requirement had been met as at the time of revocation. On our perusal of the documentary evidence we accept that the TC was correct in deciding that that requirement was not met. That being so, we conclude that the TC was right to take the decision to revoke the licence and, in the absence of a request for a public inquiry or a request for a period of grace, we are unable to see what other course of action might have been rationally open to the TC.

17. Mr Newton on behalf of the appellant invited us, notwithstanding his apparent concession referred to above to the effect that the TC had made the correct decision on the material then available, to reach an outcome on the appeal which would enable the appellant to continue to trade. He wished us to overturn the revocation. In seeking to persuade us to do that he relied upon what he explained were improvements to the appellant’s structure and finances which had resulted from the CVA and from the use of different business practices. But the difficulty is that the approach he urges upon us runs up against the restriction of the Upper Tribunal’s powers as contained in paragraph 17(3) to Schedule 4 to the Transport Act 1985 as set out above. It is not open to us to take into account the new circumstances Mr Newton draws our attention to when deciding whether to allow or dismiss this appeal. That being so, and since nothing else was seriously argued on behalf of the appellant, we must dismiss the appeal. We reiterate our view that the TC really had no viable alternative other than to make the decision which was made.

18. It may be (though this is not a matter for us) that the appellant might, through Mr Newton, wish to pursue a fresh application for an operator’s licence. We do not see anything in the material before us which would actually preclude the granting of such a licence though we imagine any such application might be subject to considerable scrutiny and its merits might end up being considered at a public inquiry. We also suspect that the appellant and Mr Newton might benefit, if such a course of action is to be pursued, from the taking of some

professional advice. We say that because it does appear that Mr Newton himself had initially misunderstood the implications of the revocation of the licence to the extent that he had thought, absent a stay, the appellant could continue to operate its vehicles as if the licence had not been revoked pending until ultimate determination of the appeal by the Upper Tribunal. We do accept, having heard from him, that he made a genuine mistake about that but perhaps the fact that he did make such a mistake is indicative of the desirability of such advice being taken. But that too is not a matter for us.

Conclusion

19. This appeal to the Upper Tribunal is dismissed.

M Hemingway
Judge of the Upper Tribunal
Dated: 1 March 2021