

Appeal No. T/2017/25

**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER (Traffic Commissioner Appeals)**

**ON APPEAL from the DECISION of DEPUTY TRAFFIC COMMISISONER
Mr. Dorrington**

**Date of the Deputy Commissioner's decision: 16 March 2017 (public inquiry: 15
March 2017)**

Traffic Commissioner reference: PI/PC1145973

Before:

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|------------------------|-------------------------------------|
| Mr E. Mitchell | Judge of the Upper Tribunal |
| Mr L. Milliken | Member of the Upper Tribunal |
| Mr D. Rawsthorn | Member of the Upper Tribunal |

Appellant:

Mr K Kapacee (t/a Zara Travel)

Attendances:

Mr Kapacee in person

Heard at: Field House, Bream's Buildings, London
Date of hearing: 25 July 2017
Date of decision: 25 September 2017

DECISION OF THE UPPER TRIBUNAL

IT IS HEREBY ORDERED that this appeal is DISMISSED.

SUBJECT MATTER:-

Application for restricted PSV operator's licence / the 'main occupation' rule

CASES REFERRED TO:-

Bradley Fold Travel Ltd & Anor v Secretary of State for Transport [2010] EWCA Civ 695, [2011] RTR 13

REASONS FOR DECISION

Mr Kapacee's application to the Traffic Commissioner

1. On 26 May 2016, the Office of the Traffic Commissioner (OTC) received Mr Kapacee's application for a restricted public service vehicle (PSV) operator's licence under the Public Passenger Vehicles Act 1981 (PPVA).
2. Mr Kapacee's application indicated that he intended to operate two vehicles adapted to carry nine to sixteen passengers.
3. The application form asked applicants to "give details of your business or main occupation...If you are claiming qualification on the grounds that the operation of these vehicles is not your main occupation please provide further details, including the number of hours worked in your main occupation and how many hours you anticipate working on this transport undertaking should the licence be granted. If your main occupation involves driving, please indicate, on average, how many hours per week you drive". In response, Mr Kapacee wrote:

"I work for Selwyns Travel Ltd...driving a coach 16 hours a week. I plan on getting a driver to do a school run & I do a couple of days so I am in my legal hours and days".
4. By letter dated 16 June 2016, the OTC informed Mr Kapacee that he was required to supply further information relevant to the 'main occupation test'
5. Mr Kapacee replied by letter dated 25 June 2016:

“I work at SELWINGS COACHES and do a 45 hour week. But when I get my licence I am reducing my hours to 20 hours a week. So my income will be £170 and it will be 2 days a week.

When I get my licence I will be purchasing a BUS to do a school contract of 20 hrs week which earns £450 a week and I will employ a driver with a PSV to do this. It will be Monday to Friday”.

6. By letter dated 27 July 2016, the OTC informed Mr Kapacee that further information was required:

“a detailed breakdown of the days and hours that you will work separately on both your main occupation and carrying out PSV work should this application be granted, this should include rest periods and the total income to be earned for both your main occupation and the 2 PSVs”.

7. The OTC did not receive a reply to that letter. By letter dated 31 October 2016, the OTC informed Mr Kapacee that the Traffic Commissioner proposed to refuse his application but that he had the right to request a public inquiry before a final decision was taken. The reasons for the Commissioner’s provisional view of Mr Kapacee’s licence included that the Commissioner was not satisfied the main occupation rule in section 13 of the PPVA would be met. Mr Kapacee duly requested a public inquiry.

8. The public inquiry was held before Deputy Traffic Commissioner Dorrington (“the DTC”) on 15 March 2017. Mr Kapacee attended the inquiry. He was not represented.

9. A friend of Mr Kapacee, Mr Penchali, gave evidence at the inquiry. The DTC was informed that Mr Penchali was a PSV driver. The inquiry transcript includes the following:

“Mr P: I don’t think he actually understood the concept of the contracts...

DTC: How do you know that he did not understand?

Mr P: Because he was actually explaining to me the concept in (*inaudible*) that he was hoping to start off...

DTC: Yes.

Mr P: Rather, he won’t be exactly getting contract immediately, so what will happen is that he’ll be using this work to pay until he gets a contract and then

he will start working in different (*inaudible*) different hours as and if required, to moving off the employment from Selwyns.

DTC: That is what I am getting at.

Mr P: Yes. He –

DTC: As the business increases –

Mr P: Yes. He –

DTC: - there is no point in him paying for a driver –

Mr P: Exactly.

DTC: - when he can do the driving work himself and not have to pay out of his bottom line.

Mr P: He exactly didn't understand the concept of that. He was...When he was...He's been speaking to me over quite a long period because we work together, as such, anyway. Those...Until he gets the business under...he gets the contracts and that, he will not be leaving this Selwyns contract either, because obviously he hasn't got a steady income coming in at that point.

DTC: Yes.

Mr P: But once he gets the contract, he will be moving off the Selwyns contract and maintaining and running the business himself.”

10. Shortly after this exchange, the DTC asked Mr Kapacee if he had anything to add to which Mr Kapacee replied “no”.

11. The DTC announced his decision at the end of the inquiry and, at the same time, gave extempore reasons for his decision. Giving adequate extempore reasons is a difficult task calling for no little skill. In our view, the DTC was more than equal to the task. We were impressed by the quality of the DTC's extempore reasons. The reasons included an explanation as to why the DTC accepted Mr Penchali's evidence and why that evidence indicated that the 'main occupation' rule would not be met.

12. The DTC's decision, with written reasons, was formally notified to Mr Kapacee by OTC letter dated 16 March 2017.

Legal Framework

The main occupation rule

13. A restricted PSV licence authorises the use of PSVs not adapted to carry more than eight passengers. Mr Kapacee intended to operate two vehicles, as part of a passenger-carrying business, each of which had between 9 and 16 passenger seats.

14. A restricted PSV licence does not confer absolute authority to use larger PSVs as part of a passenger-carrying business. For vehicles adapted to carry between 9 and 16 passengers, generally the authority conferred by the licence extends to use of only two vehicles “by a person whose main occupation is not the operation of public service vehicles adapted to carry more than eight passengers” (section 13(3)(b)(ii) PPVA).

15. The requirements to be met by an applicant for a restricted licence are set out in sections 14ZB and 14ZC of the PPVA. Section 14ZC(1)(b) requires that the “traffic commissioner is satisfied...that there will be adequate arrangements for securing compliance with the requirements of the law relating to the driving and operation of those vehicles”. Those requirements must include the limited authority conferred by a restricted licence as provided for by section 13(3)(b)(ii) PPVA.

The role of the Upper Tribunal on an appeal from a decision of a traffic commissioner

16. The Upper Tribunal’s jurisdiction was examined by the Court of Appeal in *Bradley Fold Travel Ltd & Anor v Secretary of State for Transport* [2010] EWCA Civ 695, [2011] RTR 13. The Court applied *Subesh & ors v. Secretary of State for the Home Department* [2004] EWCA Civ 56, [2004] INLR 417 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."

17. This is commonly referred to as the ‘plainly wrong’ test.

Proceedings before the Upper Tribunal

18. Mr Kapacee's notice of appeal argued the whole process of applying to a Traffic Commissioner was new to him, he misunderstood the purpose of the inquiry and felt nervous. Mr Kapacee thought the inquiry would be "merely going through my correspondence". There had been a "misunderstanding" (unspecified) and he would like his case reconsidered. And Mr Kapacee's friend, who gave evidence at the inquiry, made an incorrect statement (unspecified) that needed to be noted.

19. Other than that, Mr Kapacee's notice of appeal simply set out his arguments in favour of the grant of a restricted PSV licence but without identifying any deficiency in the DTC's conduct of the inquiry or the reasons for the DTC's decision.

20. Mr Kapacee arrived some two hours late for his hearing before the Upper Tribunal, having been delayed by traffic congestion and difficulties finding a parking space in central London. At the start of the hearing, he confirmed that, despite these travel difficulties, he felt able to present his case to the Upper Tribunal. Mr Kapacee attended with a family member. While she was not a formally appointed representative, we permitted her to assist Mr Kapacee in explaining his case.

21. Mr Kapacee argued that Mr Penchali misunderstood his intentions and, as a result, gave incorrect evidence about his intentions at the public inquiry. Mr Kapacee could not explain why he did not tell the DTC this at the public inquiry.

Conclusion

22. This appeal is dismissed.

23. We are not persuaded the DTC was plainly wrong to accept Mr Penchali's oral evidence and then rely on it in finding that Mr Kapacee had not shown that his proposed passenger-carrying business would be operated in compliance with the 'main occupation' rule. Mr Penchali's evidence about Mr Kapacee's intentions was given spontaneously, accompanied by evidence of a long-standing connection between the two men and not disputed at the inquiry by Mr Kapacee. In fact, we cannot see how the DTC could have refused to accept Mr Penchali's evidence nor can we identify any defect at all in the DTC's reasoning.

24. We do not accept that Mr Kapacee was misled about, or given insufficient advance explanation of, the purpose of the inquiry. The pre-inquiry literature supplied to Mr Kapacee by the OTC did not indicate that the inquiry was merely checking paperwork. Furthermore, if that had been Mr Kapacee's expectation we do not understand why he arranged for Mr Penchali to attend the inquiry and speak – so he must have hoped – in support of the application.

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25. When the DTC gave his extempore reasons, he helpfully explained to Mr Kapacee the steps he could consider taking if he still wished to operate a lawful passenger-carrying business. We would encourage Mr Kapacee to take note of the information provided by the DTC.

26. These reasons are agreed by both of the members of the Upper Tribunal panel that decided Mr Kapacee's appeal.

**Mr E Mitchell, Judge of the Upper Tribunal,
25 September 2017**