IN THE UPPER TRIBUNAL **Appeal No. T/2019/72**
ADMINISTRATIVE APPEALS CHAMBER **NCN: [2020] UKUT 0063 (AAC)**
(TRAFFIC COMMISSIONER APPEALS)

ON APPEAL from the DECISION of the TRAFFIC COMMISSIONER for the WEST OF ENGLAND TRAFFIC AREA made on 10 October 2019

Before:	Mr M Hemingway: Judge of the Upper Tribunal Mr L Milliken: Member of the Upper Tribunal Mr D Rawsthorn: Member of the Upper Tribunal
Appellant:	Cavendish School of English Ltd and Marcus Barber
Reference:	PH2005142
Attendance:	Ms L Newton, Solicitor (Smith Bowyer Clarke, Solicitors)

Heard at:	Field House, Breams Buildings, London EC4A 1DZ
Date of Upper Tribunal Hearing:	13 February 2020
Date of Decision:	25 February 2020

DECISION OF THE UPPER TRIBUNAL

This appeal is allowed to the extent that the order for disqualification under section 28 of the Transport Act 1985 disqualifying the Cavendish School of English Ltd and Marcus Barber for a period of three years is set aside. Further, the case is remitted to the Traffic Commissioner for a re-hearing solely on the issue of those disqualifications.

Subject matter:
Disqualification: fairness.

CASES REFERRED TO:
Saint Mickalos Company Ltd and Michael Timinis [2019] UKUT 0089 (AAC)
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 the Cavendish School of English Ltd ("the Operator") and Marcus Barber, its UK-based statutory director, from a decision of the Traffic Commissioner ("TC") for the West of England Traffic Area made on 10 October 2019 following a public inquiry ("PI") held on that date. The TC revoked the Operator's Restricted Public Service Vehicle Operator's Licence in consequence of findings made under section 17(3)(aa) and 17(3)(d) of the Public Passenger Vehicles Act 1981 with immediate effect and disqualified the Operator and Marcus Barber from holding or obtaining an Operator's licence or being involved in the management, administration or control of the transport operations of an entity holding such a licence in Great Britain, with immediate effect and for a period of three years. We would point out that, in fact, the appeal to the Upper Tribunal was ultimately pursued against the disqualification aspects only.

The background

2. The Cavendish School of English Ltd is, as its name might be taken to suggest, involved in the teaching of English to students from overseas. Marcus Barber is a Director. The Operator previously held a licence (quite possibly a restricted licence) which it surrendered. Its sister business, Cavendish Liner Ltd previously held a standard national licence authorising the use of twelve vehicles, but that was revoked in July 2017. Cavendish School of English Ltd's current licence was granted on 20 February 2018 following a PI. It authorised the use of two vehicles. The restricted licence had been obtained, it appears, so that the Operator would be able to provide transport to students arriving by air at Gatwick and Heathrow airports for the purposes of studying at the Operator's premises in the UK.

3. On 14 July 2019 a police officer had an encounter with the driver of a vehicle operated under the terms of the restricted licence. The driver indicated, when questioned, that he was intending to collect a group of language students in order to take them to Heathrow Airport. It was ascertained that that driver did not hold a Certificate of Professional Competence nor did he have entitlement to drive the vehicle (a minibus) for hire or reward. Further, since he apparently smelled strongly of cannabis, he was arrested and he subsequently failed a drugs test. It also turned out that the MOT on the vehicle had expired on 26 May 2019 though the vehicle had subsequently been covered by a valid MOT certificate from 22 July 2019. That meant, of course, that there was no valid MOT certificate in place at the time of the encounter with the police officer. Concerns were also uncovered regarding the Operator's lack of ability to download a vehicle tachograph or driver card.

4. It was in consequence of all of this that the Operator and Marcus Barber were called to a Public Inquiry. The "call-up letter" informed the Operator that it "should identify competent legal or professional help and representation quickly, unless you are confident you do not need it". It set out a range of powers available to a TC including revocation of a licence and it made clear that if revoking a licence a TC "may also **disqualify** the company or any of its directors for a specific period or indefinitely from holding another Operator's Licence, and from being a director of any company which holds such a licence" (emphasis as in the original).

Some relevant legislative provisions in brief

5. Section 17(2) of the Public Passenger Vehicles Act 1981 empowers a TC to revoke a Passenger Service Vehicle Operator's license on any ground specified in sub-section 17(3). The grounds for revocation under that sub-section include the grounds that "any undertaking recorded in the licence has not been fulfilled" (17(3)(aa)); and that in the case of the restricted licence, the holder no longer satisfies the requirements of section 14ZB of the same Act (17(3)(d)). Section 14ZB requires the holder of a restricted licence to be "of good repute". Section 28 of the Transport Act 1985 empowers a TC, when revoking a Public Service Vehicle Operator's licence, to order the former holder to be disqualified.

The Public Inquiry of 10 October 2019

6. Marcus Barber did not attend. It was explained by one Nathan Barber who did attend, that Marcus Barber was "in Germany on business". No postponement had been sought and no adjournment was sought either. In addition to Nathan Barber one Chris Evans was also in attendance for the Operator. There was, however, no legal representation. It is apparent from the transcript of the PI that the TC, very fairly, checked that the Operator and Marcus Barber had not wished to have legal representation. It was confirmed, by Nathan Barber, that such had not been thought to be necessary. Nathan Barber gave evidence in response to questions put to him by the TC as did Chris Evans, albeit much more briefly. The PI was a relatively short one the record showing that it lasted a mere thirty-one minutes. But that might not be thought to be surprising since the issues were narrow ones.

7. It is evident from the transcript that the TC specifically mentioned the possibility of revocation of the licence but did not specifically mention, in terms, the possibility of disqualification. It is also apparent that Nathan Barber indicated he was the operations director and Chris Evans indicated that he was the office director. Evidence given concerned, amongst other things, the Operator's vehicle maintenance procedures, its compliance or otherwise with tachograph requirements, its finances, and the circumstances in which the particular driver involved in the encounter with the police officer came to be driving for the Operator.

The Traffic Commissioner's Decision

8. The Traffic Commissioner, in his written decision of 10 October 2019, recorded that he was making these findings:

> "15. In relation to the ground in Section 17(3)(aa), that the laws relating to the driving and operation of vehicles used under the license would be observed, I make the following findings of fact:
>
> > i. The Operator caused vehicle BD60SRY to be driven by a driver who did not have the correct driving licence entitlement, contrary to Section 84(2) of the Road Traffic Act 1972;
> >
> > ii. BD60SRY was driven by a driver who was not the holder of a Driver Qualification Card, contrary to Regulation 11 of the Vehicle Drivers (Certificates of Professional Competence) Regulations S.I. 2007/605;
> >
> > iii. There was no valid MOT in force between 26 May 2019 and 22 July 2019. The vehicle was in use on 14 July 2019. It is more likely than not

> that the vehicle was used on other days in that period too but the company has no systems that may identify which days that was. Each occasion is an offence under Section 47 of the Road Traffic Act 1988;
>
> iv. Because of the lack of driving entitlement and MOT on 14 July 2019, it is highly likely that any insurance would have been void, contrary to Section 143(1)(b) of the Road Traffic Act 1988;
>
> v. There has been no downloading of the tachograph vehicle unit nor the driver card. Sections 97D and 97E of the Transport Act 1968 specify that failure to download driver cards at least every 28 days and vehicle units every 90 days. Failure to do so is an offence pursuant to Section 97F of the same Act".

9. In light of the above the TC concluded that the conditions contained at section 17(3)(aa) of the Public Passenger Vehicles Act 1981 were met. He further found, amongst other things, that preventative maintenance inspections had been sporadic; that driver defect reporting arrangements had not been in place prior to the incident of July 2019; that what had been put forward on behalf of the Operator did not constitute "a description of a competent transport office"; and that the Operator had effectively spurned the opportunity it had been given when being granted a licence after a PI to demonstrate it could "run compliantly and professionally". Indeed, the TC went on to say that the failure to grasp that opportunity constituted a "strong indicator that Cavendish School of English, and those who run it, should not be in transport". He added, and this must have been said in the context of disqualification, that those involved in the business should "have a significant period of reflection before they consider re-entering the industry".

10. The TC then went on to explain why he was disqualifying and why he had selected a period of three years. He said this;

> "…A period of disqualification is in order. In setting it, I have regard to the Senior Traffic Commissioners Statutory Guidance Document No 10 *The principles of decision making and the concept of proportionality.* Paragraph 100 is most helpful. Whilst this is the first regulatory Public Inquiry for this licence, the same actors held PH1128666 which was revoked in 2017. The breadth of failings mean this is a serious case. The guidance indicates a period of three to five years. In settling at the lower end of that period, I weigh in the positive the MOT pass rate".

11. The TC then went on to simply confirm that he was deciding to revoke the licence and to disqualify the Operator and Marcus Barber for a period of three years.

The arguments to the Upper Tribunal

12. Although the written grounds of appeal to the Upper Tribunal had contained a challenge both to the revocation and disqualification aspects of the TC's decision, it was indicated in Ms Newton's skeleton argument prepared for the appeal to the Upper Tribunal and was also confirmed orally before us that, in fact, there was no challenge to the revocation decision nor to any of the TC's factual findings. The challenge was directed only to the TC's decision with respect to disqualification of the Operator and Marcus Barber. The challenge was based on what was said to be unfairness in deciding to disqualify without expressly warning at the PI that such was an action the TC was contemplating. The point was made that, had it been indicated that such

was in contemplation of the TC, there would have been an opportunity, which would have been taken, for those in attendance at the PI to provide relevant information which the TC would then have taken into account with respect to the proportionality of disqualification.

13. It is fair to say, we think, that the above argument rested in large measure upon what the Upper Tribunal had decided in *St Mickalos Company Ltd and Michael Timinis* [2019] UKUT 0089 (AAC). In that case, there had been a PI at which the Operator and director had been legally represented (indeed by a solicitor at a firm well-versed in Traffic Law). Nevertheless, since it had not expressly been indicated at the PI that disqualification was contemplated, the Upper Tribunal had detected unfairness such as to justify the setting aside of the TC's disqualification decisions. The Upper Tribunal, in the *St Mickalos* case, pertinently said this:

> "20. Mr Clarke stated that in the present case the question of disqualification was not addressed by the Traffic Commissioner and she did not expressly invite the appellant's representative to address her on this issue; as she should have done. She should have invited submissions on whether or not there was a need for disqualification at all, if so, what length of disqualification was proportionate and appropriate; and, on the consequences of disqualification.
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> 21. We agree with the general principle set out by Mr Clarke and derived from the authorities to which he referred. If a Traffic Commissioner has disqualification or some other sanction in mind, then it is only right and fair that the Operator should have an opportunity to address her specifically about that before any decision on disqualification or other sanction is made.
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> 22. In the present case, it can be seen that the submissions (pages 243-248) deal mainly with mitigating features and indicia of trust to avoid revocation. The focus of the discussion between the appellant's solicitor and the Traffic Commissioner is impliedly about revocation. Having said that, neither the word "revocation" nor "disqualification" is used at any point during this passage. At times the Traffic Commissioner asks the solicitor where "this ends up" (page 45). She made it clear that she considered the conduct fell into the severe to serious category (pages 245 and 247). She commented that she would have to balance the negative aspects with the good and ask herself whether matters were so bad that this operator should be put out of business; issues relevant to revocation. However, what she did not do was specifically state that in the event she revoked the licence she would then have to consider disqualification and invite submissions on whether or not disqualification was necessary in this case, the consequences should disqualification be imposed, and how long any disqualification should be. When such serious sanctions as revocation and disqualification are under consideration, it is important to be clear so that no-one is in any doubt about what has to be addressed".

14. Ms Newton argued that this case was similar to that of *St Mickalos* in that, here, there had also been a lack of indication as to contemplated disqualification. Indeed, it was argued, that the TC's failure was more egregious in this case given the lack of legal representation. It was explained that, had the TC invited submissions as to the consequences of the imposition of any disqualifications, it would have been explained that disqualification might lead to both the Operator and Marcus Barber being removed from membership of a number of UK and overseas regulatory organisations registers and that, if that happened (as we understand it) such would impact adversely upon the ability of overseas students to obtain leave to enter the United

Kingdom for the purposes of study at the Cavendish School of English Ltd such that its existence would be under threat. Ms Newton explained to us that matters were, in effect, on hold as to that, pending the outcome of these proceedings. She urged us, in those circumstances, to allow the appeal to the extent that the disqualification orders be set aside and to remit for all of that to be reconsidered afresh by a TC. Indeed, that had been the outcome in the *St Mickalos* case. She suggested that we were bound by the decision in the *St Mickalos* case or that, at least, there was no basis upon which it could viably be distinguished.

Our approach to this appeal

15. 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 fact) for the purpose of the exercise of any of their functions under an enactment relating to transport".

16. 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 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, required it to adopt a different view. The burden which an appellant assumes is to show that the case falls within this latter category".

We have taken the above into account.

Our decision on the appeal

17. We have considered disqualification only. That is the only thing we have been asked to consider and then only with respect to procedural fairness.

18. We appreciate, on one reading, the decision in the *St Mickalos* case might be taken as amounting to a statement of inflexible principle that, where a PI is held, where no mention of disqualification is made by the presiding TC, and where the TC subsequently decides to disqualify, unfairness will always result and such unfairness will always justify the setting aside of a disqualification decision and, at least, remittal. But we think, if the Upper Tribunal had intended to go that far in the *St Mickalos* case, it would have made it absolutely and abundantly clear that it was doing so. For our part, we can contemplate circumstances where a lack of warning of contemplated disqualification at a PI might not necessarily lead to a finding of unfairness. That might be so, for example, where the issue of disqualification is highlighted in a call-up letter and where lawyers acting for a subsequently disqualified Operator or subsequently disqualified individual have already submitted written argument in advance of a PI addressing issues surrounding disqualification. We can contemplate circumstances where a finding of

procedural unfairness might not justify the setting aside of a disqualification decision. Such might be the case where, for example, on the facts, nothing of any force could have been said if representations as to disqualification had been invited or where all of what could have been said had already been said in the context of the revocation aspect. So, we do not consider the *St Mickalos* case to go quite so far as Ms Newton argued it did and we do not regard ourselves as being bound to set aside simply because of what was said in that decision.

19. Further, we do note that, in the instant case, the call-up letter did expressly refer to disqualification. A considered decision not to take legal advice (which might well have led to advice being given as to the need to address disqualification issues) had been taken and a perhaps on one view rather cavalier decision had been taken by the Operator's statutory director Marcus Barber not to attend the PI in person. But we also accept that, as a matter of fact, disqualification was not raised at the PI, that the Operator and Marcus Barber were not as a matter of fact legally represented and that (importantly) there was something pertinent, which had the question been asked, those attending the PI could have said which might have had relevance to the TC's assessment as to the proportionality of disqualification either with respect to the decision to disqualify at all or with respect to the setting of an appropriate period.

20. In light of the above we have concluded that, in the circumstances of this case, there was unwitting unfairness such that the disqualifications of the Operator and the statutory director should be set aside. We have, further, decided to remit for a re-hearing only on the issue of disqualification.

Signed

M Hemingway
Judge of the Upper Tribunal

Dated: **25 February 2020**