



Neutral Citation Number: [2025] EWHC 263 (Admin)

Case No: AC-2024-LON-002170

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2025

Before :

MR JUSTICE FREEDMAN

Between :

THE KING (on the application of Andrew Olins)

Claimant

- and -

LAVENDER HILL MAGISTRATES' COURT

Defendant

- and -

CROWN PROSECUTION SERVICE

Interested Party

Gerard Pitt (instructed by **IBB Law**) for the **Claimant**

There was no appearance of the **Defendant**

Lyndon Harris (instructed by the Crown Prosecution Service itself) for the **Interested Party**

Hearing date: **4 December 2024**

Judgment handed down in draft: **20 January 2025**

Further draft sent to parties: **24 January 2025**

Approved Judgment

This judgment was handed down remotely at 2.00pm on Friday 7 February by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE FREEDMAN:

I Introduction

1. This is an application to compel magistrates to state a case following their refusal to do so on the ground that the request was “frivolous”. It arises following a decision by the Lavender Hill Magistrates Court to convict the Claimant for the offence of holding a mobile phone whilst using it contrary to Regulation 110 of the Road Vehicles (Construction and Use) Regulations 1986 as amended. The case concerns the construction of Regulation 110 and whether it applies to person who has a Bluetooth connection and who takes hold of the phone not to speak into it, but to prevent it from slipping off the passenger seat. The case also concerns the nature of special reasons for not imposing the usual penalties.
2. The introduction is taken from the Claimant’s skeleton argument at paras. 1-9. It read as follows:
 1. “The Claimant appeared at Lavender Hill Magistrates Court on 08th March 2024 to answer a summons alleging that: “On 07/06/2023 at Uxbridge in the Borough of Hillingdon drove a motor vehicle, namely a Smart For Four Index LK16 UHT, on a road, namely Uxbridge Road, when using a hand-held mobile telephone” Contrary to regulation 110(1) of the Road Vehicles (Construction and Use) Regulations 1986 (‘the Regulation’).
 2. The prosecution evidence of the PC Sami El Ayadi was agreed by the Claimant and read pursuant to section 9 of the Criminal Justice Act 1967.
 3. The Claimant gave evidence which is now summarised in the Application to state a case and in more detail in the Statement of Facts under the heading Trial. The relevant parts are that he was driving and was making a phone call to his father using the onboard microphone and speaker connected to his mobile phone by Bluetooth. His phone was sitting along with other personal effects on the front passenger seat. He was forced to apply the brakes and his phone and the other items shot forward and instinctively he caught the mobile phone.
 4. At page 2 of the Certificate of Refusal the Magistrates set out in their reasons that they believed the Claimant’s evidence. The agreed facts therefore are as set out in the Certificate of Refusal.
 5. The Claimant was convicted, and the Magistrates endorsed his license with penalty points, imposed a fine

and ordered him to pay costs – rejecting a submission that they should find special reasons under Section 44(1) of the Road Traffic Offenders Act 1988.

6. On 27 March 2024 the Claimant applied to the Court to state a case. The Claimant identified 9 questions.
7. On 20 May 2024 the Magistrates refused to state a case and provided a certificate pursuant to s.111(5) of the Magistrates Court Act 1980, which dealt with each of those 9 questions and on the material, point stated as follows:

“The law is well established by legal precedent on the points raised by the applicant in the case of *R v Bendt* [2022] EWHC 502 (Admin). In that case, the appellant was using his mobile telephone to change the music he was listening to over the sound system in his car via Bluetooth. This amounted to an “interactive communication” as required by the legislation for the offence to be committed and it was held that he was rightly convicted of the mobile phone offence. Although the reference to “interactive communication” has been removed from regulation 110 (by the Road Vehicles (Construction and Use) (Amendment) (No. 2) Regulations 2022), the principle in *Bendt* that Bluetooth communication between a mobile device and a vehicle constitutes use of the device remains relevant under the revised regulation.”

8. The Claimant then made this application for an order of mandamus in the Magistrates to state a case pursuant to section 111(6) of the Magistrates Court Act 1980.
9. At section 6 paragraph 3 of the Detailed statement of grounds the Claimant advanced that the Defendant had failed to give reasons for their decision in their Certificate of refusal. The Claimant was not granted leave on that ground, and it is not renewed.”

II The Issues

3. The Claimant’s skeleton argument then proceeded to say what were the issues, namely:
 1. “The Magistrates were wrong to determine that the points raised in the Claimant’s application to state a case were frivolous with reference to *R v Bendt* [2022]

EWHC 502 (Admin). In that case the Appellant accepted using his phone in the manner now prohibited by paragraph 6(c)(x) in the amended Regulation. The issue was whether the use of the phone via Bluetooth was a form of “interactive communication function”.

2. The Claimant did not use his mobile phone to send any sort of message or command to the car, he did the opposite, using the car’s handsfree system to control the phone.
3. In the Application to state a case the Claimant asked the court to state 9 questions. In their Summary Ground of Opposition at paragraph 9, the Interested Party submits these 9 questions can be reduced to 3 separate topics:

“a) The use of Bluetooth connectivity between the mobile telephone and the car ”

b) The act of holding a mobile telephone during a telephone call

c) Whether the circumstances of the incident were capable of amounting to a ‘special reason’.

4. We submit that properly analysed topics (a) and (b) are not separate topics but part of the single topic of the definition of ‘using’ in paragraph 1 of Regulation 110 of the Road Vehicles Construction and Use Regulations 1986 (‘the Regulation’).
5. It will be submitted that adopting purposive approach to construction, “using” in this context requires some interaction between the driver and the mobile telephone, whereas here the Claimant was using the car’s Bluetooth hands-free system to make a phone call, while incidentally holding the mobile telephone to stop it from slipping.
6. The fact that the car’s Bluetooth hands-free system was communicating with the phone is therefore a (sic) relevant to whether that constitutes “using” the mobile device.
7. It is submitted that holding the phone to prevent it from slipping, does not bring the Claimant within the ambit of the Regulation unless the Claimant also did an action

akin to one listed in paragraph 6(c) of the Regulation such as to start or end the call, illuminate the screen, unlock the device, or access any application.”

III Statutory provisions: Using a mobile telephone

4. Regulation 110 of the Road Vehicles (Construction and Use) Regulations 1986 (SI 1986/1078) provides:

“Mobile telephones

(1) No person shall drive a motor vehicle on a road if he is using—

(a) a hand-held mobile telephone; or

(b) a hand-held device of a kind specified in paragraph (4).

.....

(4) A device referred to in paragraphs (1)(b), (2)(b) and (3)(b) is a device, other than a two-way radio, which is capable of transmitting and receiving data, whether or not those capabilities are enabled.

(5) A person does not contravene a provision of this regulation if, at the time of the alleged contravention—

(a) he is using the telephone or other device to call the police, fire, ambulance or other emergency service on 112 or 999;

(b) he is acting in response to a genuine emergency; and

(c) it is unsafe or impracticable for him to cease driving in order to make the call (....)

...

(6) For the purposes of this regulation—

(a) a mobile telephone or other device is to be treated as hand-held if it is, or must be, held at some point while being used;

(b)....;

(c) in paragraphs (1) to (3) the word “using” includes the following—

- (i) illuminating the screen;
- (ii) checking the time;
- (iii) checking notifications;
- (iv) unlocking the device;
- (v) making, receiving, or rejecting a telephone or internet based call;
- (vi) sending, receiving or uploading oral or written content;
- (vii) sending, receiving or uploading a photo or video;
- (viii) utilising camera, video, or sound recording functionality;
- (ix) drafting any text;
- (x) accessing any stored data such as documents, books, audio files, photos, videos, films, playlists, notes or messages;
- (xi) accessing an application;
- (xii) accessing the internet;

5. Section 41D of the Road Traffic Act 1988 provides:

“Breach of requirements as to control of vehicle, mobile telephones etc.

A person who contravenes or fails to comply with a construction and use requirement—

(a) as to not driving a motor vehicle in a position which does not give proper control or a full view of the road and traffic ahead, or not causing or permitting the driving of a motor vehicle by another person in such a position, or

(b) as to not driving or supervising the driving of a motor vehicle while using a hand-held mobile telephone or other hand-held interactive communication device, or not causing or permitting the driving of a motor vehicle by another person using

such a telephone or other device, is guilty of an offence.”

6. Schedule 2 to the Road Traffic Offenders Act 1988 provides the penalty for such an offence, namely a Level 3 fine (in this case, the vehicle not being a goods vehicle or capable of carrying 8 or more passengers), discretionary disqualification, obligatory endorsement and 6 penalty points (in this case, as the offence was contrary to section 41D(b)).
7. In respect of the history of the provision, the Road Vehicles (Construction and Use) Regulations 1986 were enacted pursuant to Section 41 of the Road Traffic Act 1972. In 2003 Parliament amended the Regulations to add Regulation 110, which referred to the use of mobile telephones. In 2022, the Regulations were amended to reflect functions of a smart phone not necessarily related to the making and receiving of telephone calls which were considered to distract drivers whilst driving. This includes especially the words “while being used” in para. 6(a) and the whole of para. 6(c) with a list of what is included in the word “using”. The prohibition of “using” is no longer by reference to an interactive communication function. References to “interactive communication function” in paragraphs 4 (defining hand-held devices other than mobile phones) and paragraph 6(a) (defining when a mobile phone should be treated as hand-held) were removed.

IV Authorities relating to vehicle offences

8. In *Director of Public Prosecutions v Barreto* [2019] EWHC 2044 (Admin), the Court considered whether a driver who had used a mobile telephone, held in the hand, to video record the scene of an accident as he drove past it, constituted an offence contrary to regulation 110 and section 41D. The Court held that the legislation then in force did not prohibit the use of the camera function as that did not amount to an interactive communication function.
9. In *R. (Bendt) v Crown Prosecution Service* [2022] EWHC 502 (Admin) the Court considered whether using a hand held mobile telephone, which was being used to play music through the vehicle’s on-board speaker system (connected wirelessly through Bluetooth), to change the music being played, amounted to an “interactive communication” for the purposes of regulation 110. At that time, regulation 110 stated “a mobile telephone or other device is to be treated as hand-held if it is, or must be, held at some point during the course of making or receiving a call or performing any other interactive communication function”; interactive communication function was then defined.
10. In *Bendt*, the Court recognised that in *Director of Public Prosecutions v Barreto* [2019] EWHC 2044 (Admin), the Court stated that regulation 110 did not prohibit every use of a mobile telephone while driving. It was said at [7] in *Bendt*: “Modern mobile telephones have many functions which are internal, and which involve no communication with any other device. Use of such functions does not involve any offence because no “interactive communication” is involved.”

11. On the facts of that case, the Court held at [14]:

“The sound system of a car is a device. A system in a modern car, of the kind being driven by the appellant, often will be, and in this case was, Bluetooth enabled. That means that another Bluetooth enabled device, most commonly a mobile telephone, can communicate with the sound system. The music data on the mobile telephone will be sent to the car sound system via radio waves. That is an interactive communication. The sound system will then convert the radio waves so that the music can be played over the sound system. Here the appellant was using his mobile telephone for such interactive communication with the sound system of his car. Presumably he could have listened to the music by playing it only on the telephone and the sound coming from the speaker within the telephone, and that would have been akin to the position as obtained in Barreto, namely using an internal function of the telephone and no more. But we do not have to reach any conclusion on the point as to whether that would transgress the regulation. The appellant was not simply using an internal function of the telephone. He was using the telephone to communicate with another device and doing so quite deliberately. A Bluetooth connection certainly was not incidental to his use of the telephone. It follows that he was using an "interactive communication function" of his mobile telephone. The communication may or may not have been just one way, but one way communication is entirely sufficient. His telephone interacted with the car’s Bluetooth system (emphasis added)”.

12. The Court therefore held that the driver had ‘used’ the mobile telephone and had committed an offence contrary to regulation 110 and section 41D.
13. Regulation 110 has been amended to remove this language. On 25 March 2022, by The Road Vehicles (Construction and Use) (Amendment) (No. 2) Regulations 2022 (SI 2022/81), regs.1(1) and 3(1)(d), regulation 110 was amended to widen the offence to “using” a handheld mobile telephone as set out above.

V Submissions of the Claimant

14. The Claimant makes two principal submissions, namely that “using” in this context requires some interaction between the driver and the mobile telephone. In the instant case, the Claimant was using the car's Bluetooth hands-free system to make a phone call, while incidentally holding the mobile telephone to stop it from slipping. If Parliament had considered that the holding of a mobile telephone while driving was without more an offence, it would have said so. That is the legislation in the Republic

of Ireland where section 3 of the Road Traffic Act 2006 provides as follows: “*A person shall not while driving a mechanically propelled vehicle in a public place hold a mobile phone.*”

15. The list in paragraph 6(c) of the Regulations, although not exhaustive, does cover almost every conceivable way in which a mobile phone or like device could be used while driving. All of the examples include the present participle verb, framed in terms of actions which would require the driver to engage with the device. Examples include illuminating the screen, making, receiving, or rejecting a telephone or internet based call. The submission is that the consistent use of the present participle verb shows that the meaning of the word use requires that the driver manually to interact with the device in some way whilst it is in his hand.
16. It therefore follows that the definition of ‘using’ in terms of how the driver interacts with the mobile telephone itself avoids the court entering into any complex technical questions about the connectivity of the device prior to its being held. It focuses the tribunal on the question of why the driver had the device in their hand. In the ordinary case, magistrates would be able to draw a common sense inference from the fact that the driver was holding the phone that they were doing one or more of the actions listed in paragraph 6(c). In the instant case, the driver holding the phone was not doing one or more of the actions listed in paragraph 6(c). There was no connection between the continuation of the call using the car’s Bluetooth hands free system and the instinctive holding of the telephone to prevent its falling onto the floor.
17. The Claimant sought to deploy a dictionary definition of the word “use” in the Oxford English Dictionary as meaning “*to take, hold or deploy [something] as a means of accomplishing [something]*”. In the instant case, the driver was not holding the phone as a means of making or receiving a call, but for a purpose extraneous to the call. There was no nexus between holding the phone and causing the call to be used or made or ended.
18. In short, a driver who instinctively catches the falling phone connected via Bluetooth (whether the phone falls from a holder or a passenger seat) is not using the phone at the point when it is being held.

VI Submissions of the Interested Party (“CPS”)

19. The CPS submits that the Claimant was using a hand-held mobile telephone. Under paragraph 6(a) of regulation 110, there are two alternative routes by which a mobile telephone can become a handheld mobile telephone. This is either that ‘*it is... being held at some point while being used*’, or ‘*it must be, held at some point while being used.*’ During the call, the Claimant was holding the device in his hand.
20. The CPS submits that the device was being used to make a voice call. That is one of the examples of using as defined by paragraph 6(c). The device was connected to the vehicle’s sound system by the Bluetooth connection. Contrary to that submitted on behalf of the Claimant, it would not be natural to say that a person was using a Bluetooth device rather than a mobile phone. According to its natural meaning, the driver would

be using the mobile phone connected to the vehicle sound system by the Bluetooth connection.

21. This accords with the purpose of the offence which is to restrict drivers from being distracted whilst driving because of the obvious dangers. The combination of holding the phone with one hand with the distraction of conducting the call is prohibited. The regulation forbids holding a mobile phone and conducting a call via the mobile phone microphone and speaker. Likewise, it forbids holding a mobile telephone and conducting a telephone call via the vehicle's speaker system.
22. As regards the dictionary definition of the word 'use', that did not assist because the Claimant was at all times using the phone for the purpose of the telephone call.

VII Discussion

23. One of the matters of discussion in the written and oral arguments was whether the Court should consider the question of using first or holding first. In my judgment, there is a single unitary question as to whether the Claimant was using a mobile phone to make a voice call while holding the device in his hand. It is unhelpful to slice this up into sub-issues such as holding first and then using or using first and then holding.
24. By considering the unitary question there can be more focus on issues raised by the Claimant. Those include whether the holding of the device had to be for the purpose of interacting with it. It includes also whether the phone was being used rather than the Bluetooth connectivity system. It includes whether there has to be a connection between the purpose for which the phone was held and the purpose for which the phone was used (if it was used at all).
25. Using the plain meaning of the Regulation, a mobile phone is used whether it is being used through its internal microphone or through the Bluetooth connection. Whatever the transmission system adopted, the use is of the mobile phone. If there was no mobile phone, the Bluetooth connection would not operate. A person might say that they are using Bluetooth, but that means in context that they are using the mobile phone connected to the Bluetooth connection. A person may say that they are handsfree, but they are using the mobile phone through a hands free system whether through an internal microphone or through a Bluetooth connection.
26. This accords with the language used in the case of *Bendt* in the previous wording of Regulation 110 where the Court said: "*He was using the telephone to communicate with another device and doing so quite deliberately. A Bluetooth connection certainly was not incidental to his use of the telephone. It follows that he was using an "interactive communication function" of his mobile telephone.*"
27. As regards the emphasis on behalf of the Claimant of the present participles in Regulation 110(6)(c), this does not limit the meaning of the word "using". The first point to note which is accepted on behalf of the Claimant is that the language of (6)(c) is not exhaustive, but at the outset of the list uses the words "*includes the following*". The second point is that it is accepted by the Claimant that the words "*making, receiving, or rejecting a telephone or internet based call*" are not limited to the start and finish of a call, but include the full duration of the call. The Claimant does not say

that a person who has the call started by a passenger who hands over the phone to be held by the driver until he returns it to the passenger to finish the call might not be guilty of the offence. That is correct whether as a matter of construction paragraph 6(c)(v) or as a matter of construction of paragraph 6(a) on the basis that paragraph 6(c) is not exhaustive.

28. The submission that there has to be an active step taken as regards the phone call as a result of the language of paragraph 6(c) is rejected. This is inconsistent with the matters accepted in paragraph 27 above. More importantly, it is inconsistent with the broad wording of the statute including the broad words in paragraph 6(a) including that the mobile phone is to be treated as hand-held if it is held at some point while being used.
29. Likewise, there is nothing in the words of the Regulation which requires any connection between the holding of the telephone and the way in which the driver interacts with the mobile telephone itself. It is not significant that the Regulations do not use the same words as in Ireland because the words in the Regulation and, and especially in paragraph 6(a) "*if it is...held at some point while being used*" are themselves clear. The Claimant is seeking to create a limitation which would involve the insertion of words into the Regulation. The precise words to be inserted are not clear: they would have to be considered not just against the facts of the instant case, but a whole range of different potential cases. An insertion of words would create an unjustified and impermissible restriction in the ambit of the Regulation. It is not a natural meaning to insert words to that effect. It is not a necessary implication or consistent with a purposive interpretation. It is common ground that a purpose of the legislation is in the case of a mobile phone to avoid distractions for the motorist by combining one hand off the wheel with communicating with somebody else in a phone call. This is reinforced by the list of other activities in Regulation 110(6)(c) which includes activities which involved user input or obtaining information from the device by looking at it. It is immaterial whether the device is being held to enable or facilitate the use of the device. The Regulation is clear that the only link between the concepts of holding and using is that it has to be held whilst it is being used.
30. The Court has not found assistance from the attempt to deploy a dictionary definition of a word as common as the word 'use'. It has numerous related definitions both in current usage and historically. Above all, its meaning and usage are in large part contextual. Even taken literally, the definition relied upon by the Claimant did not advance the case, but begged the answer to the respective submissions of the parties which did not depend upon a particular dictionary definition.
31. In short, the Court rejects the Claimant's submission that a person who instinctively reaches for and then holds their phone to stop it sliding away would not ordinarily be described without more as using their phone. The driver was using the mobile phone before, during and after the time when they held it. At the point when the driver held it for whatever reason, the driver was then using the phone and holding it at the same time. That is prohibited under the Regulation. It therefore follows that the justices were right to convict the Claimant on the basis that (a) he was using a mobile telephone to conduct a voice call via the vehicle's on board audio equipment, and at the same time, (b) he was holding the mobile telephone in the hand. That constituted an offence, contrary to regulation 110(1) of the Road Vehicles (Construction and Use) Regulations 1986 and section 41D(b) of the Road Traffic Act 1988. For the above reasons, the justices were correct to reach the view which they did.

32. The next question which arises is whether they were entitled in respect of this issue to form the view that it was not necessary to accede to the request of the claimant to make a case stated. The law is that they may do this where the application is ‘frivolous’. The judgment of Lord Bingham CJ in *R v North West Suffolk Mildenhall Magistrates Court ex parte Forest Heath District Council* [1997] EWCA Civ 1575, Lord Bingham stated about the word ‘*frivolous*’ that it meant ‘*futile, misconceived, hopeless or academic*’. That was not a conclusion which will be made often or lightly. He said: “... *there are cases in which justices can properly form an opinion that an application is frivolous. Where they do, it will be very helpful to indicate, however briefly, why they form that opinion.*” That was done by the justices in the instant case in respect of the decision that the offence had been committed.
33. Having had the benefit of the justices’ reasons for finding the request to state a case as ‘frivolous’, the Court is able to come to a considered conclusion. That is that following the refusal to state reasons, it is now frivolous or futile to require magistrates to state a case. The reason for this is that on the facts of this case and for the reasons given, the Claimant was guilty of the offence in that he was using and holding the mobile phone at the same time. The Court has been able to come to this conclusion following the justices having given reasons for its refusal to state a case about the commission of the offence. Although that was in the context of refusing to state a case, the reasons given enable the Court to appreciate in outline what would have occurred if a case had been stated. The reasons given for their view enable the Court to reach the conclusion that it would be ‘*futile, misconceived, hopeless or academic*’ to require them to state a case. The justices were correct to form a view that on the facts of the offence had been committed.
34. It follows that there is no point in asking the justices to state a case because the reasons for the decision are clear. Further, it follows that there is no need to give permission to amend the claim to allow for the quashing of the conviction because the decision of the magistrates that an offence had been committed was correct. It therefore follows that this part of the application is dismissed.

VIII Special reasons

35. The starting point is the findings of the justices. They accepted the Claimant’s evidence that he acted instinctively to grab the phone when it slipped forward and that he held it to prevent it from falling onto the floor. They also found expressly that this provided mitigation. That was in the context of the consideration of special reasons. Despite this, they found that there were no special reasons. In the certificate to refuse to state a case dated 20 May 2024 they said the following:

“We found that in these circumstances there were no facts amounting to special reasons in law. We found that the circumstances of the telephone call do not amount to special reasons but do provide mitigation.”

36. They added the following:

“We found that the applicant held his mobile device in his hand. We found that in the circumstances no facts amounted to special reasons in law. As we found no special reasons in law, we were not in a position to exercise our discretion not to endorse penalty points.”

37. It is accepted by the parties that the proper test is set out in *Whittall v Kirby* [1947] KB 194; [1946] 2 All ER 552, and *R v Wickens* (1958) 42 Cr App R 236. The summary of Devlin J in the latter case at p.239 is oft cited:

“There are four conditions there laid down which have to be satisfied. The first is that it must be a mitigating or an extenuating circumstance. There is no doubt about that here. The next is that it must not amount in law to a defence to the charge. Equally, that is the case here. The third is that it must be directly connected with the commission of the offence. In our judgment, the circumstances here are directly connected with the commission of the offence. If it had not been for the fact that the appellant was suffering from diabetes, the offence would not have been committed at all, because he had not taken sufficient drink to affect the mind of an ordinary man who was not suffering from that disease. The fourth is that the matter is one which the court ought properly to take into consideration when imposing punishment.”

38. Doing the best from the justices’ refusal to provide a case stated, which of the four conditions was not satisfied? As to the first, the justices stated expressly that there was mitigation. As to the second, the justices stated expressly that there was no defence to the charge. As to the third, the justices have not stated whether or not the circumstances were directly connected with the commission of the offence. This depends on a precise analysis of the circumstances and the commission of the offence. It is submitted by the Claimant that without catching the slipping phone, the offence would not have occurred: see the Claimant’s skeleton argument at para. 57(iii). It is possible that they did find that that was the case, but without an explanation, it is not clear that that is what they found.

39. As for the fourth condition, the justices have not stated expressly whether the slipping of the phone off the passenger seat and the catching of it was a matter which the court ought not properly to take into consideration when imposing punishment. It is submitted by the Claimant, and challenged by the CPS, that this is a factor which the Court ought properly to take into consideration when imposing punishment: see the Claimant’s skeleton argument at para. 59. It is possible that the justices did find that this was not a matter which ought properly to be taken into consideration when assessing punishment.

40. The refusal to state a case in respect of the decision that there were no special reasons is problematic in this case. As the Claimant properly submits, it is “*not really clear what the Magistrates mean by there being no facts amounting to special reasons in law.*”
41. The justices expressed that “*the circumstances of the telephone call do not amount to special reasons but do provide mitigation.*” They did not explain what provided mitigation. Whilst a finding of mitigation and a finding that the fourth condition was not satisfied are not necessarily contradictory, that might depend on the mitigation found to exist and the reason why the fourth condition was found not to be satisfied (if that was the case). Unfortunately, the decision not to state a case and the way in which the refusal is worded have created uncertainty as to what was the basis on which the justices did not find special reasons.
42. The position is more puzzling having regard to the submissions on behalf of the CPS as regards mitigation. At para. 51 of the skeleton argument on their behalf, it is submitted from the “*submissions [of the CPS] as to the proper construction and purpose of regulation 110, [that] the motivation for holding the device is not a matter in mitigation. Using the mobile telephone by holding it to the ear while conducting a telephone call may represent aggravation, but holding it [for] another reason, namely to stop it falling from the seat, is not mitigation, but the absence of aggravation. The offence involves holding the device.*”
43. Whether or not this is correct is uncertain without more. If the justices had not refused to state reasons, then the reasoning as to what was the mitigation might have been understood. Likewise, the reasoning in respect of the fourth condition would not be a matter of attempted inference. With this uncertainty about the nature of the mitigation found by the justices and the apparent finding of the justices that the fourth condition was not satisfied, there is the possibility of a contradiction between these two findings.
44. In the decision in *R v North West Suffolk* above, Lord Bingham CJ went on to say after the part quoted above “*a blunt and unexplained refusal as in this case, may well leave an applicant entirely uncertain as to why the justices regard an application futile, misconceived, hopeless or academic. Such uncertainty is liable to lead to unnecessary litigation and expenditure on costs.*”
45. As stated above, the justices explained their refusal in respect of the offence. They did not explain their refusal as regards special reasons. It is not only an unexplained refusal, but the position is made more quixotic by the reference to there being mitigation. It does leave the position uncertain as to why the justices regarded the application to state a case as regards special reasons as being frivolous.
46. The Court sought assistance from the parties as to law of the application of the fourth condition in *Wickens*. In the context of drink drive offences where a driver drove a car in an emergency, the question was “*what would a sober, reasonable and responsible friend of the defendant present at the time, but himself a non-driver and thus unable to help, have advised in the circumstances: drive or do not drive?*” see *DPP v Bristow* [1998] RTR 100 and *DPP v Heathcote* [2011] EWHC 2536 (Admin). In the instant case, there may have to be some explanation as to how that test applies to a person who has an instinctive reaction to catch the phone as opposed to making a decision to drive a car. Although authorities have been referred to, the decision to refuse to state reasons

is not, for example, by reference to some well-known authority which is decisive of the point relating to the existence or absence of special reasons.

47. One can speculate as to the reasons that justices might have concluded that the catching of the phone did not satisfy the third and/or the fourth conditions, but it is not so obvious that there was no need to state a case because it was frivolous in the sense defined above. It is not obvious that the justices were correct in finding that there were no special reasons in the sense of making any challenge 'futile, misconceived, hopeless or academic'. This arises from the lack of reasoning as to the nature of the mitigation. It also arises from the lack of reasoning as to the operation of the third and/or the fourth conditions. The complexity is added to by the submission of the CPS that there was in fact no mitigation. In all these circumstances, the justices ought not to have found that the application to state a case was frivolous in respect of special reasons.
48. It follows that that the justices were wrong in a public law sense in refusing to state a case in that no justices properly directed ought to have come to the conclusion that the application to state a case in respect of the absence of special reasons was frivolous. In these circumstances, the claim for judicial review of the decision to refuse to state a case in respect of the decision not to find special reasons is granted.
49. The next question is what form of relief should be ordered. In these circumstances, it would be appropriate to make a mandatory order requiring the justices to state a case under section 111(6) of the Magistrates Courts Act 1980 for the hearing of a case stated in respect of the decision that there were no special reasons. It is necessary to make such an order unless there is a more appropriate order.
50. A simple order of mandamus to compel the magistrates to state the reasons is not desirable in that it will lead to the case going back to and from between the Magistrates' Court and the High Court. A question arises as to what alternative, if any, should be adopted to ordering that the justices state a case.
51. Both parties have heeded the exhortation in case law not to make an order of mandamus to compel the magistrates to state the reasons if a neater and less expensive route is available. They have had in mind the case of *R v Metropolitan Stipendiary Magistrates, Ex p. Levy* 1997 WL 1106007, referring to the inconvenient result of the case going back to the justices to state a case and then coming back to the High Court to consider the case stated. That was a case where although there was a refusal to state a case, reasons had been given for the refusal to state a case, such as made '*absurdly inconvenient*' an order that the magistrates should be ordered to state a case.
52. In the submission of the CPS, if the court considers that the justices should have stated a case as to special reasons, the proper procedure would be for the court to (a) allow the claim (b) reformulate the proposed questions, (c) exercise the powers of a District Judge (Magistrates court) to state a case, and (d) waive the necessary procedural requirements and hear the substantive appeal by way of case stated.
53. The Court will not adopt the course submitted by the CPS (at paras. 18-20 of the skeleton argument) in the exercise of its discretion, to use the powers of a district judge to state a case and hear the substantive appeal by way of case stated. This is for the following reasons, namely:

- (i) this is not a straightforward exercise in this case about any of the steps, that is to say the matter of judgment at the first stage on the various conditions in *R v Wickens* for deciding whether or not there are special reasons, and the exercise of a discretion if the second stage arises as to penalty.
 - (ii) There are advantages of having this done by a more specialist tribunal (preferably a District Judge (Magistrates Court)) with day to day experience of road traffic matters particularly able to exercise the matter of judgment about special reasons and the exercise of discretion at the second stage if it arises.
 - (iii) In any event, since the first stage and the second stage are so intimately connected, and since it is particularly desirable that the second stage should be remitted (if it arises), it is better that both the first stage and the second stage are both remitted.
54. The submission of the Claimant is that the Court ought to make a finding about the first stage, namely whether or not there are special reasons, leaving it for the Magistrates' Court to decide the second stage, namely how to exercise its discretion as regards penalty. For the reasons given in the preceding paragraph, particularly how closely interconnected the two stages are, it would be undesirable to split those stages so that they are dealt with by different courts.
55. Further, whilst it may be a common course of action in the ordinary run of cases where there was a case stated or where reasons in the refusal to state a case made plain the basis of the decision for the High Court to decide the matter, this is not the case here. Due to the refusal to state a case as regards the decision that there were no special reasons, the Court would be making assessments by reference to the facts of the case without the advantage of a proper case stated by the justices.
56. In this case, there is no reasoning as to why, in respect of the four conditions in *R v Wickens* they were or were not satisfied. There is uncertainty as to which conditions were satisfied and which were not. There is even disagreement from the CPS about the only condition which was expressly treated as satisfied, namely mitigation.
57. The CPS submits that the finding of a special reason is a matter of judgment on the particular facts. This is particularly true at this stage, where there are the uncertainties about the case and the process of stating the case is not a mere formality with a neat point of law. In another case where there was a failure to state a case, it might be appropriate for the judge to cut through the case and take all the steps recommended by the CPS. It is inappropriate in the instant case where the Court would be compelled to make various nuanced judgments even after having stated a case.
58. The matter is to be remitted to the Magistrates Court for determination of penalty. This is to include the determination of whether special reasons exist and whether the discretion not to order the endorsement of the claimants driving licence should be exercised and penalty generally. The redetermination is to be heard by a District Judge (Magistrates' Courts).

59. As to the form of order in order to give effect to the foregoing:
- (i) The parties are both content to adopt the facts found by the justices to the extent that they are set out in the refusal to state a case.
 - (ii) The matter would then be remitted for the new Bench to determine the first stage of whether there were special reasons in which they should be directed to consider each of the four conditions in *R v Wickens* and giving reasons for their decision. If they find special reasons, they should be directed to deal with the second stage about the exercise of their discretion as to penalty.
 - (iii) The order should refuse the claim in respect of the conviction but should allow it on the special reasons point to the extent that it is to be remitted to the Magistrates Court for a re-determination both as to the availability of special reasons as a matter of law and on the application of the law to the instant facts.
60. The case ought to be remitted but there are a number of points to make about remitting the case, some of which apparent from the above, but it is useful to list them at this stage of the judgment.
61. First, there is no reason why the case need be remitted to the original justices. It is not simply the case that it might be difficult to arrange for the case to be constituted as such. It is also so long ago that the advantage of having them reconsider them is reduced by time. There is reason to say that the matter ought to go before a different bench in view of the criticisms of aspects of the section about special reasons made both by the defence and prosecution, which might be difficult for lay magistrates to consider.
62. Second, if the case goes to a differently constituted bench, then it would be helpful for the matter to go before a District Judge (Magistrates Courts) in view of the points of law involved.
63. Third, in remitting special reasons to the newly composed bench, they ought to decide about the application of the four conditions in *R v Wickens* to the instant case. They ought to consider in respect of the four conditions in fact and in law whether each of them are satisfied on the facts of the case, and to identify condition by condition the reasons why they are or are not satisfied.
64. In the event only that special reasons are found, which may or not be the case, then it will be necessary for the District Judge to consider the law relating to whether or not to exercise the discretion to impose a lesser punishment and particularly to exercise a discretion about not imposing penalty points or the level of fine currently imposed.
65. Fourth, it must be emphasised, if it is not already obvious, that the Court has not expressed its own views in respect of whether or not there are special reasons either in fact or in law. This is not a case where I have considered it appropriate to steer the justices in a particular direction or another. It should not be thought that the fact that the application for judicial review is being allowed that this Court would have upheld or disagreed with the view of the justices that there were no special reasons.

IX Conclusion

66. For all these reasons, the application for judicial review is refused in respect of the decision to refuse to state a case in respect of the conviction itself. The justices were entitled to find that the Applicant had committed the essential ingredients of the offence under section 41D of the Road Traffic Act 1988 and Regulation 110 of the Road Vehicles (Construction and Use) Regulations 1986 as amended from time to time and in particular in 2022. They were entitled to find that the request to state a case in respect of conviction was frivolous as defined by Lord Bingham in *R v North West Suffolk* above whether because of the application of the law to the facts of the case or the reasons given for not stating a case in respect of conviction. Having set them out, as they did, it would be futile for the matter to be remitted to justices to state a case in respect of conviction.
67. The same does not apply to the extent set out above in respect of the decision to refuse to state a case as regards the finding that there were no special reasons. The application for judicial review is well based in that the justices ought to have stated reasons for their decision not to state a case in respect of there being no special reasons, and unlike the decision about conviction, there is uncertainty as to the basis of the decision on absence of special reasons.
68. The Court accepts the pragmatic approach of the parties to adopting a procedure which gives rise to a less inconvenient result of the case going back to the justices to state a case and then coming back to the High Court to consider the case stated. The particular procedure to be adopted has been discussed above. The parties are asked to draw up a form of order to reflect the above.
69. Finally, the Court expresses thanks to both Counsel for their conspicuous ability and assistance to the Court which is greatly valued.