



DECISION OF

SHERIFF GEORGE JAMIESON

ON AN APPEAL IN THE CASE OF

Mr William Laughlan, Flat 1 2, 64 Lynedoch Street, GREENOCK, PA15 4AE

Appellant

- and -

Inverclyde Council, PO Box 597, Northampton, NN4 7XN

Respondent

FtT case reference IC00003-2102

Paisley, 20 December 2022

Decision

The Upper Tribunal for Scotland:

1. Finds the alleged parking contravention occurred albeit there were mitigating circumstances.
2. Refuses the appellant's appeal against the issuing of a Parking Charge Notice (PCN) to him by Inverclyde Council on 27 October 2020 at 12:16 hours in respect of the appellant parking his vehicle in Cardwell Road, Gourock.



Representation in the Appeal before the Upper Tribunal for Scotland

The appellant was self-represented in this appeal.

The respondent was represented by Roisin Dillon, Team Leader of the respondent's Parking Enforcement Unit.

REASONS FOR DECISION

Introduction

[1] By Decision dated 22 July 2021, the adjudicator refused the appellant's appeal against the issuing of a Parking Charge Notice (PCN) issued to him by Inverclyde Council on 27 October 2020 at 12:16 hours in respect of the appellant parking his vehicle in Cardwell Road, Gourock.

[2] By Decision dated 18 August 2021, the First-tier Tribunal for Scotland refused the appellant permission to appeal to the Upper Tribunal for Scotland against the decision of the adjudicator.

[3] By Decision dated 11 February 2022, the Upper Tribunal for Scotland initially refused the appellant permission to appeal to the Upper Tribunal for Scotland against the decision of the adjudicator.

[4] The appellant applied to the Upper Tribunal for Scotland for a reconsideration of that refusal pursuant to rule 3(7) of the Upper Tribunal for Scotland Rules of Procedure 2016.

[5] The reconsideration hearing took place by webex on 20 May 2022.

[6] By Decision dated 23 May 2022, I granted the appellant permission to appeal to the Upper Tribunal for Scotland against the decision of the adjudicator on all three of his grounds of appeal against the decision of the adjudicator. However, I granted permission to appeal only insofar as those grounds of appeal related to grounds of appeal 1 and 2 before the adjudicator.



[7] On 12 September 2022, I held a webex hearing on two preliminary issues pursuant to rule 7(3) (f) of the Upper Tribunal for Scotland Rules of Procedure 2016: the first on further procedure in the event the appeal were allowed; the second on the jurisdiction of the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland in appeals against the issuing of PCNs by parking authorities.

[8] By Order dated 28 November 2022, I ordered *inter alia* that: the appeal be allowed for the reasons in my Decision dated 28 November 2022 which accompanied that Order; the Upper Tribunal for Scotland was to exercise jurisdiction to remake the decision of the adjudicator complained of by the appellant in terms of section 47(2)(a) of the Tribunals (Scotland) Act 2014; neither the First-tier Tribunal for Scotland nor the Upper Tribunal for Scotland had jurisdiction to consider the appeal on the ground that the outsourcing agreement between Inverclyde Council and Open Parking may not have been legal, for the reasons given in my Decision on Jurisdiction dated 28 November 2022 which accompanied that Order; and the two matters remaining before the Upper Tribunal for Scotland be conjoined into a single matter for determination by the Upper Tribunal for Scotland, namely whether parking enforcement in Inverclyde was suspended on the date the PCN was issued by the respondent to the appellant.

[9] The parties subsequently agreed to the Upper Tribunal for Scotland determining this single matter without a hearing in terms of rule 24 of the Upper Tribunal for Scotland Rules of Procedure 2016.

[10] The appellant lodged brief final submissions in connection with this matter which I consider later in this Decision; the respondent did not find it necessary to lodge further submissions.



Factual Background before the Adjudicator

[11] The adjudicator recorded in his Decision dated 22 July 2021 that the appellant was friendly with a man aged 82 at the time the PCN was issued. This individual was housebound. On the day in question, the individual required the appellant's immediate assistance as his heating was not working and he was without heating or hot water. The appellant straight away attended the man's home in Gourrock to fix his boiler. This was a small task which the appellant completed in five minutes. He left the man's flat after a brief period of conversation with him to find the PCN attached to the windscreen of his motor vehicle.

[12] The adjudicator specifically recorded in his Decision dated 22 July 2021 that he did not doubt the veracity of the appellant's purpose for his visit to his friend (which was confirmed by his friend's letter). I formed the same opinion of the appellant's credibility during the two webex hearings before me on 20 May 2022 and 12 September 2022.

Law

[13] A person to whom a PCN is issued and who does not pay the penalty charge within 28 days receives a "notice to owner" which allows him to make representations to the parking authority which, if successful, allows the authority to cancel the notice to owner. If those representations are unsuccessful, then the owner may appeal to the First-tier Tribunal for Scotland (previously an adjudicator) against the decision of the parking authority not to accept a ground for cancellation of the notice to owner.



[14] The grounds of cancellation, and therefore the grounds of appeal which may be considered by the First-tier Tribunal for Scotland, are set out in paragraph 2(4) of schedule 6 to the Road Traffic Act 1991.

[15] These grounds of appeal may also be considered by the Upper Tribunal for Scotland in this appeal: section 47(3) (a) of the Tribunals (Scotland) Act 2014 allows this Tribunal, in re-making the decision, to do anything that the First-tier Tribunal could do if it were re-making the decision.

[16] There are six grounds of appeal, (a) – (f), of which ground (b) is the only one being considered in this appeal. For the sake of completeness, the full grounds of appeal as they apply in Inverclyde are:

- a) that the recipient of the PCN: (i) never was the owner of the vehicle in question; (ii) had ceased to be its owner before the date on which the alleged contravention occurred; (iii) became its owner after that date;
- b) that the alleged contravention did not occur;
- c) that the vehicle had been permitted to remain at rest in the parking area by a person who was in control of the vehicle without the consent of the owner;
- d) that the relevant designation order is invalid;
- e) that the recipient is a vehicle-hire firm and: (i) the vehicle in question was at the material time hired from that firm under a vehicle hiring agreement; and (ii) the person hiring it had signed a statement of liability acknowledging his liability in respect of any penalty charge notice fixed to the vehicle during the currency of the hiring agreement; and
- f) that the penalty charge exceeded the amount applicable in the circumstances of the case.



Adjudicator's Decision

[17] The adjudicator's Decision dated 22 July 2021 records that the appellant's vehicle was parked at the locus in breach of the restriction on parking indicated by the double yellow lines on the road: this is not disputed by the appellant.

[18] The appellant does not claim an exemption, for example, because he is a blue badge holder.

[19] The appellant's position has all along been that parking restrictions, of all kinds, were suspended in Inverclyde on 27 October 2020 as a result of the Covid-19 crisis in existence at that time.

[20] The adjudicator's Decision dated 22 July 2021 makes no mention of any submissions or evidence by the respondent about the suspension of parking restrictions in Inverclyde on 27 October 2020 or the extent of any such suspension. The appellant's position before the adjudicator was the suspension related to the PCN issued to him and therefore there was no parking contravention by him.

[21] The adjudicator framed the issue in a different way. He stated in his Decision dated 22 July 2021 that "the issue in dispute" was whether "an appropriate exemption" applied in relation to the appellant parking his vehicle at the locus on 27 October 2020. As the appellant has never claimed such an exemption, I granted permission to the appellant to appeal to the Upper Tribunal for Scotland as arguably the adjudicator had mis-stated the actual issue in dispute between the parties.

[22] The adjudicator stated in his Decision dated 22 July 2021 that the suspension of parking enforcement "was limited to on and off street council parking".



[23] However, I could find no evidential basis for such an assertion in that Decision: it had not featured in the respondent's submissions to the adjudicator as recorded in his Decision dated 22 July 2021. Accordingly, by Decision dated 28 November 2022, I allowed the appeal and quashed the adjudicator's Decision in order to allow the Upper Tribunal for Scotland to consider the evidence in relation to suspension of parking restrictions in Inverclyde on 27 October 2020.

Parties' Submissions and Additional Evidence before the Upper Tribunal for Scotland

[24] The appellant maintained that all parking restrictions in Inverclyde were suspended on 27 October 2020. The respondent submitted that the suspension did not apply on that date to the parking of vehicles on double yellow lines. By Order dated 4 August 2022, I ordered the respondent in terms of rule 7(3) (e) of the Upper Tribunal for Scotland Rules of Procedure 2016 to produce a complete list of minuted decisions of its Environment and Regeneration Committee regarding suspension of parking enforcement in Inverclyde in 2020 - 2021 and the steps taken by the Committee to publicise those decisions.

[25] The appellant, in his final submissions to the Upper Tribunal for Scotland, lodged a copy of his written reply to Inverclyde Council's letter to him dated 3 November 2020 rejecting his representations against the notice to owner issued to him; and its more formal letter to him dated 12 January 2021 constituting a formal notice of rejection under schedule 6 to the Road Traffic Act 1991.

Findings in Fact

[26] In terms of section 47(3)(a) of the Tribunals (Scotland) Act 2014, I make following findings in fact:



1. On 27 October 2020 at 12:16 hours, the respondent issued a Parking Charge Notice (PCN) to the appellant in respect of the appellant parking his vehicle on double yellow lines in Cardwell Road, Gourock.
2. The appellant did so as he was responding to an emergency in respect of his 82 year old friend who was housebound and whose heating was not working.
3. The appellant's friend was consequently without heating or hot water. He required the appellant's immediate assistance.
4. The appellant straight away attended at his friend's flat in Gourock to fix his friend's boiler.
5. This was a small task which the appellant completed in five minutes.
6. The appellant left his friend's flat after a brief period of conversation with his friend to find the PCN attached to the windscreen of his motor vehicle.
7. The suspension of parking restrictions in Inverclyde on 27 October 2020 did not extend to parking on double yellow lines on that date.
8. On 3 November 2020, the respondent issued a notice to owner to the appellant.
9. By letter dated 21 December 2020, the appellant sent representations to the respondent against the PCN issued to him on 27 October 2020.
10. On 12 January 2021, the respondent issued the appellant with a formal notice of rejection of his representations against the PCN issued to him on 27 October 2020.

[27] Findings in fact 1 – 6 are based on the factual findings made by the adjudicator.



[28] Finding in fact 7, the suspension of parking restrictions in Inverclyde on 27 October 2020 did not extend to parking on double yellow lines on that date, is supported by information produced by the respondent in response to my Order for such information dated 4 August 2022.

[29] The most helpful documents are, first, an internal email from Scott Allen, Corporate Director of Environment, Regeneration and Resources dated 2 September 2020 informing his colleagues that “parking on double and single yellow lines...will be enforced from Monday 14 September 2020”.

[30] This is also supported by an article on page 2 of the *Greenock Telegraph* dated Monday 7 September 2020, headed: “*Date revealed for return of parking rules*”, the opening paragraph of which states: “yellow line parking rules will soon be enforced once again from next Monday”.

[31] A minute of the meeting of the Policy & Resources Committee on Tuesday 11 August 2020 refers to any resumption of enforcement of no-waiting restrictions being preceded by a “public communications campaign” (Entry 273, Decision (3)).

[32] I found it difficult to discern the full history of the non-enforcement of parking restrictions in Inverclyde in the period March 2020 – October 2020 from the committee minutes produced to me, but the foregoing information implies a general suspension of parking enforcement in Inverclyde until 14 September 2020 when the Council decided to resume enforcement of parking restrictions on double and single yellow lines.

[33] I am therefore satisfied on the balance of probabilities that there was no suspension of parking enforcement on double yellow lines in Inverclyde on 27 October 2020.



[34] Findings in fact 8, 9 and 10 are supported by the documents produced by the appellant to the Upper Tribunal for Scotland referred to in paragraph [25] above.

Delegation of Functions

[35] The appellant disputes that Inverclyde Council itself considered his representations against the notice to owner issued to him: he believes this function may have been unlawfully delegated to Open Parking, a factual averment denied by the respondent. In his final submissions to the Upper Tribunal for Scotland, the appellant submitted that neither the respondent nor Open Parking have ever answered his question which official of Inverclyde Council made the decision to reject his representations against the notice to owner issued to him. However, this is not an issue which this Tribunal can further consider, standing my Decision on Jurisdiction dated 28 November 2022, as this potential procedural impropriety is not a ground of appeal which either the First-tier Tribunal for Scotland nor the Upper Tribunal for Scotland may consider in an appeal under schedule 6 to the Road Traffic Act 1991.

Mitigating Circumstances

[36] A statutory tribunal is limited to the jurisdiction conferred on it by the enactment under which it is established. Accordingly, in *R (Westminster City Council) v Parking Adjudicator* [2002] EWHC Admin 1007; [2003] RTR 1, Elias J. held that a parking adjudicator had no jurisdiction to allow an appeal under schedule 6 to the Road Traffic Act 1991 on the ground of mitigating circumstances as such a ground was not listed in paragraph 2(4) of the schedule.



[37] The grounds on which an enforcement authority in England or Wales, and on appeal therefrom, a parking adjudicator, may cancel a notice to owner are now set out in regulations made under sections 80 and 89 of the Traffic Management Act 2004.

[38] The grounds are similar to those in Scotland under paragraph 2(4) of schedule 6 to the Road Traffic Act 1991. The grounds include the contravention not having occurred, but in addition, in provisions not applicable in Scotland, the adjudicator has power in England or in Wales, on refusing an appeal on the statutory grounds of appeal, to issue a recommendation to the enforcement authority to cancel the notice to owner “if satisfied that there are compelling reasons why, in the particular circumstances of the case, the notice to owner should be cancelled”.

[39] While this recommendation is not binding on an enforcement authority, the making of the recommendation triggers a duty on the enforcement authority to consider afresh the cancellation of the notice to owner taking full account of any observations by the adjudicator; and to notify the appellant as to whether or not it accepts the recommendation within a 35 day period, failing which it is required to cancel the notice to owner.

[40] See regulations 7(5) - (10), Civil Enforcement of Road Traffic Contraventions (Representation and Appeals) (Wales) Regulations 2013 (SI 2013/359) and regulations 7(8) – (13), Civil Enforcement of Road Traffic Contraventions (Representations and Appeals) (England) Regulations 2022 (SI 2022/576 for these provisions.

[41] The legal position in Scotland remains as described by Elias J in *R (Westminster City Council) v Parking Adjudicator*. At paragraph 22 of his judgment, Elias J commented on the different types of representation that might be made to an enforcement authority:



“In short, there are two distinct categories of representation. First, there are the statutory representations which, if successful, oblige the authority to cancel the notice to owner and impose no penalty. There are then other representations which may cause the authority to choose not to exercise its discretion to pursue or enforce payment, but which do not oblige it to do so. No doubt in a very exceptional case that discretion could be challenged by way of judicial review if there were grounds for saying that it had been unlawfully exercised. However, the statutory power of the adjudicator is limited to the consideration of the matters which are statutorily set out in paragraph 2. It is only those matters which he can consider, and only those in respect of which he can issue directions. Accordingly, the wider mitigating or extenuating factors which may affect the exercise of the authority's discretion when deciding whether or not to collect parking fines are not issues which the adjudicator can consider. They simply fall outside his province: his powers are limited by the statutory provisions.

[42] Thus, even if a notice to owner is not cancelled under the statutory grounds by the parking authority or, on appeal, by the First-tier Tribunal for Scotland or the Upper Tribunal for Scotland, the parking authority in Scotland retains discretion as to whether or not to insist upon or enforce a PCN; it has full discretion to cancel a notice to owner where there are mitigating circumstances (*R (Westminster City Council) v Parking Adjudicator*, paragraph 20; Department of Transport and Welsh Office, *Guidance on Decriminalised Parking Enforcement Outside London*, 1995, paragraph 14.18).

[43] The latter document advises local authorities to:



“...consider such cases on their merits. In order to ensure consistency of treatment local authorities should establish their own guidelines for dealing with such cases, balancing the need to show flexibility in dealing with exceptional cases against the need to enforce parking controls firmly in the wider public interest”.

Observations on Mitigating Circumstances

[44] The appellant was of the opinion that “under no circumstances” does the respondent consider mitigating circumstances.

[45] The respondent’s position was that it did consider mitigating circumstances.

[46] However, when pressed on this, Ms Dillon claimed the appellant had not attended an emergency situation. She contrasted what happened in this case with what, in her opinion, was truly an emergency, such as the appellant’s friend having suffered a fall.

[47] This is an artificial distinction, since the appellant was in fact attending an emergency situation for his friend who required to have his boiler fixed in order to heat his house and have a supply of hot water.

[48] Although this Tribunal cannot make a recommendation to the respondent about this case, as might happen in England or in Wales, there is nothing in law to prevent the appellant inviting the respondent to reconsider its exercise of discretion on cancelling the PCN and notice to owner on the basis of the findings in fact made by this Tribunal.

[49] The respondent in turn must apply an open-minded and fair approach to the exercise of its discretion in this matter, balancing the need for flexibility in the face of the mitigating circumstances in this case against the need to enforce parking controls.



Further Appeal

[50] A party to this case who is aggrieved by this Decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal for Scotland within 30 days of the date on which this Decision was sent to that party. Any such request for permission must be in writing and must: (a) identify the Decision of the Upper Tribunal for Scotland to which it relates; (b) identify the alleged error or errors of law in the Decision; and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised by a second appeal or what other compelling reason there is that shows the appeal should be allowed to proceed.

George Jamieson
Sheriff of North Strathclyde
Judge of the Upper Tribunal for Scotland