



2023UT24

Ref: UTS/AP/23/0002

**DECISION NOTICE OF SHERIFF COLIN DUNIPACE,
JUDGE OF THE UPPER-TIER TRIBUNAL FOR SCOTLAND (GENERAL REGULATORY
CHAMBER)**

IN THE CASE OF

The City of Edinburgh Council Parking Services, C5 Waverley Court, 4 East Market Street,
Edinburgh, EH8 8BG 3PT

Appellant

- and -

Mr Chris Hogan, Barclay Church House, 1 Wright's Houses, Edinburgh, EH10 4HR

Respondent

FTS case reference ED00215-2111

18 August 2023

Decision

The Upper Tribunal refuses the Appeal.

Introduction

1. The City of Edinburgh Council, (hereinafter "the Council") have submitted an Appeal against a decision of the First-tier Tribunal of the General Regulatory Chamber



(hereinafter referred to as ‘the Tribunal’) dated 7 April 2022, allowing the Appeal of Mr Chris Hogan (hereinafter “the Respondent”) against the imposition of a Penalty Charge Notice at 19.22 on 15 June 2021 in Glengyle Terrace, Edinburgh. In support of their Appeal the Appellants have submitted the following documents, namely:

- a. Form UTS-1
- b. Legal Member’s decision
- c. Decision of First-tier Tribunal granting Permission to Appeal

2. By way of background, the Respondent was issued with a Penalty Charge Notice (hereinafter referred to as the ‘PCN’) in relation to a parking contravention involving his vehicle registration number GU13NMA on 15 June 2021. The nature of the contravention was that the Appellant was:

“Parked in a restricted street during the prescribed hours.”

The matter was set down for a telephone hearing on 22 March 2022, at which time the Respondent attended with a representative. It would appear that the Appellants were not present nor were they represented. The Appeal was refused by the Legal Member on that date, and full written reasons for this decision were provided by the Legal Member in their decision of that date.

3. The written reasons given by the Legal Member for the refusal of the Appeal were as follows:

“The Appellant appeals on the statutory ground that the alleged parking contravention did not occur. The Appellant makes representations that the ticketed vehicle was parked on private land owned by Barclay Viewforth Church (‘BVC’). Access to that land is from a roadway where there are double yellow line. Vehicles cross pavement and then drive on to a paved area owned by BVC. The Appellant is an employee of BVC. Ownership of the land is not dispute by the City of Edinburgh Council (‘CEC’). However, the Appellant does dispute



'CEC's' representations that a piece of paved land accessed by travelling over a verge or pavement falls within the statutory definition of a 'road'. If it was, every paved garden would be subject to the parking restriction rules of the road adjacent to it. The car was wholly parked on the BVC owned paved area. On two sides of the area there is the pavement which is over a metre wide and finished in different paving. On the other two sides is the church building itself. The area is not by any stretch of the imagination a 'verge' or 'pavement.' It is also not accepted that this area is a public right of passage as there is a 'No Parking' sign and the church stickers cars parking without permission on its land. Cars have been parked at the location for 30 years or more and any 'PCNs' that have been issued have always been withdrawn by 'CEC.

'CEC' set out their position in the Authority Summary and the supporting documentation which is incorporated herein and referred to in my relevant.

In light of both parties' representations and in accordance with The City of Edinburgh Council (Traffic Regulation; Restrictions on Waiting, Loading, Loading and Unloading, Stopping and Parking Places) Designations and Traffic Regulation Order 2018, I am satisfied that the alleged parking contravention did not occur.

Having heard from the Appellant's representative, examined the documentary and still image evidence incorporated herein, I found the Appellant's evidence credible that the definition of a road under Section 151 of the Roads (Scotland) Act 1984 as "any way (other than a waterway) over which there is a public right of passage (by whatever means and whether subject to a toll or not) and includes the road's verge and any bridge (whether permanent or temporary) over which , or tunnel through which, the road passes; and any reference to a road includes a part thereof" did not apply to the location where the vehicle was parked at the material time and that accordingly, the parking restrictions at the location did not apply from the building line to the middle of the road in this instance.



*In reaching this view, I did not consider that the location constituted a public right of passage because it was not in dispute that this is private land owned by the church and that it is demarcated as such. Furthermore, on the basis I accepted the Appellant's evidence that cars have been parked at the location for many years and the regular practice of 'CEC' has been to withdraw and 'PCN's' issued, I found that, in accordance with the authority of *R v Jockey Club ex parte IAM Racecourses* [1993] 2 All ER 225 as referred to in *Fell v Oxfordshire County Council* (2000 NPAS), the Appellant has a legitimate expectation which he can reasonably expect to continue that 'CEC' would not be able to take enforcement steps such as issuing or pursuing a 'PCN' at this location. "*

4. The Appellant thereafter lodged an application for a Review of that decision in terms of Rule 17(3)(b) of the First-tier Tribunal for Scotland General Regulatory Chamber Parking and Bus Lane Appeals (Rules of Procedure) Regulations 2020 (hereinafter referred to as 'the Rules') on 8 April 2022. This application for Review was refused by the President of the First-tier Tribunal on 4 January 2023. However the reasons for the refusal of the Review are of no relevance to the determination of this present application for Leave to Appeal, given that that this was an excluded decision having regard to the terms of sections 51 and 52 of the Tribunals (Scotland) 2014 Act.

5. On 11 January 2023 the Appellant thereafter sought permission to appeal against the original decision of the Legal Member in terms of section 46 of the Tribunals (Scotland) Act 2014, and in terms of Rule 18 of the First-tier Tribunal for Scotland General Regulatory Chamber Parking and Bus Rules of Procedure 2020 (contained in the Schedule of the Chamber Procedure Regulations 2020 (SSI No 98) ("the Procedure Rules"). Albeit this application was erroneously referred to as a request to re-submission of the Review request.

6. The Application for leave to appeal was considered by the President of the First-tier Tribunal on 12 January 2023, at which time leave to appeal was granted. The President of the Tribunal concluded that the grounds of appeal raised an arguable point of law having



regard to the previous cases of *Patrick Doherty v City of Edinburgh Council* [2021] UT8, and *Jonathan Sammeroff v East Renfrewshire Council* [2021]UT40.

7. The terms of section 46(1) the Tribunals (Scotland) Act 2014 (“the 2014 Act”) provide that the Upper Tribunal for Scotland may only hears Appeals in cases where permission to Appeal has been granted either by the First-tier Tribunal or by the Upper Tribunal itself. Permission can only be granted in accordance with section 46(2)(b) of the 2014 Act if the Appellant identifies an arguable error on a point of law in the decision of the First-tier Tribunal which he wishes to Appeal.

8. The Appellants subsequently lodged their appeal on form UTS-1 on 25 January 2023. The Grounds of Appeal as stated thereon were as follows:

“The Appellant considers that the initial decision by the Legal Member on 7 April 2022 failed to adhere to and apply the full extent of the provisions of the Road (Scotland) Act 1984 section 151. In particular, the definition of a road and public right of passage thereon.

It is upon this point of law which the City of Edinburgh Council now refer the case to the Upper Tribunal.”

9. On 28 February 2023 the Respondent’s representative submitted the following representations in response to the Council’s Notice of Appeal:

1. The fact the vehicle was given a ticket while on land owned by Mr Hogan’s employer is not disputed by the appellant (City of Edinburgh Council, ‘CEC’) [confirmed in Adjudicator’s Decision, Page 3, line 2 of para immediately above the heading ‘Conclusion’]

2. CEC argue that the private land is nevertheless part of the road under s151 Roads (Scotland) Act 1984.

3. In response to the argument that it appeared a perverse interpretation of Roads (Scotland) Act 1984 to mean that any road stretched from a roadway, over the adjacent pavement and any privately owned land to the nearest building, CEC relied on there being ‘a public right of passage’ over this land, applying s151.

4. The First Tier Tribunal found that there was no ‘public right of passage’ over the land in question, as a decision of fact. [Adjudicator’s Decision, page 3, paras 1 and 2]. For



information, this is because a series of on pavement bike racks and adjacent parking bays mean the private land can only be accessed from a single point - it cannot be 'driven across'. This arrangement is shown in the photograph which is part of CEC's Review Application letter, dated 8 April 2022, to the First Tier Tribunal, an application which was refused as being 'wholly without merit'. In practice access to the land is only to the right of the litter bin. From the one-way road on the left of the picture there is no room to turn left between the end of the parking bays and the bike rack thence onto the private land. To prevent passage from the sole useable access point, there is a 'no parking sign' and, if that is ignored, notes and stickers are used to deter unauthorised parking. This material was all considered by the First Tier Tribunal in reaching its decision.

5. The First Tier Tribunal also found, in any event, that CEC's previous behaviour established a legitimate expectation that CEC would continue to withdraw Penalty Charge Notices when challenged, as they had in the past. This finding has not been appealed by the council [Adjudicator's Decision, page 3, para 2].

6. No further arguments have been made by CEC in appealing to the Upper Tribunal, I can only assume that they are arguing that, as a matter of law, a roadway extends over pavement and private land to the adjacent building even when there is no public right of passage. This interpretation would mean a ticket could be given to a car parked in a privately owned paved garden or forecourt, an interpretation contrary to common sense and the natural reading of s151 Roads (Scotland) Act 1984.

10. In response the Council reverted in undated correspondence stating:

"The matters raised in items 1, 2, and 3 are those which the Council Upper Tier Review is based upon.

*Item 4 - The term "public right of passage" does not, as appears to be considered by Mr Hogan, relate solely to the movement and access availability of vehicular traffic. The definition, as previously supplied, contains the following
".. any way (other than a waterway) over which there is a public right of passage (by whatever means)"*

The Council has no further comment to make in respect of items 5 and 6. "

Discussion

11. The Parking and Bus Lane jurisdiction was brought within the integrated structure of Scottish Tribunals within the General Regulatory Chamber of the First-tier Tribunal for



Scotland as part of its rolling programme of reform on 1 April 2020. Prior to that date there was no statutory right to seek permission to Appeal decisions of adjudicators to the Upper Tribunal for Scotland. On that date the Adjudicators of the Parking and Bus-Lane Tribunal for Scotland became Legal Members of the General Regulatory Chamber of the First-tier Tribunal for Scotland. In the present application there is a statutory right to seek permission to Appeal to the Upper Tribunal for Scotland in relation to this matter.

12. The terms of section 46(1) the Tribunals (Scotland) Act 2014 (“the 2014 Act”) provide that the Upper Tribunal for Scotland may only hears Appeals in cases where permission to Appeal has been granted either by the First-tier Tribunal or by the Upper Tribunal itself. Permission can only be granted in accordance with section 46(2)(b) of the 2014 Act if the Appellant identifies an arguable error on a point of law in the decision of the First-tier Tribunal

Conclusion

13. The Appellant has requested permission to Appeal to the Upper Tribunal. His application for permission to Appeal is as set out in his completed Form UTS-1 dated 20 February 2023. The procedural history of this appeal, is as above narrated. Neither party has indicated that they wished a full oral hearing in relation to this matter.

14. In terms of the relevant law, Section 46 of the Tribunals (Scotland) Act 2014 (hereinafter referred to as “the 2014 Act”) provides:

46. *Appeal from the Tribunal*

(1) *A decision of the First-tier Tribunal in any matter in a case before the Tribunal may be Appealed to the Upper Tribunal.*



(2) *An Appeal under this section is to be made—*

(a) *by a party in the case,*

(b) *on a point of law only.*

(3) *An Appeal under this section requires the permission of—*

(a) *the First-tier Tribunal, or*

(b) *if the First-tier Tribunal refuses its permission, the Upper Tribunal.*

15. Accordingly from application of the foregoing Section 46 of the 2014 Act, it is apparent that the Council may only Appeal to the Upper Tribunal on a point of law (section 46(2)(b)).

16. The grounds of this application for leave to Appeal the position of the Council are as stated above. The Council state that the point of law that they now raised is to in effect to assert that the decision of the Legal Member failed to adhere to and to apply the full extent of the provisions of the Road (Scotland) Act 1984 section 151.

17. The terms of the interpretation section 151 of the Roads (Scotland) Act 1984 state:

““road” means, subject to subsection (3) below, any way (other than a waterway) over which there is a public right of passage (by whatever means [and whether subject to a toll or not]) and includes the road’s verge, and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes; and any reference to a road includes a part thereof;”

18. In considering the foregoing it is important to note that the terms of the legislation make reference to a ‘public right of passage’ and not a ‘public right of way,’ given that the former involves ‘less exacting considerations, as stated in the case of *Cowie v Strathclyde Regional Council* 8 July 1986 (*Unreported*).’ This definition was further referred to in the case of



Brian Gregory Hamilton v Dumfries and Galloway Council 2006 SCLR 839, wherein it was stated by Lord Kingarth:

“It is clear from Cowie v Strathclyde regional Council that the definition ‘involves less exacting consideration than those which govern the existence of a public right of way over private land’. In that case it was recognised that although there required to be a ‘way’, since it was well known that roads within the meaning off the Act include cul-de-sacs and that some existed to provide access to and egress to private property, at least two of the ways for the acquisition of a public right of way – use from end to end on a continuous journey and public termini – were not involved.”

19. Accordingly it is clear that a public right of passage need not run from one public place to another, and it may provide access to and egress from a private property. In the present case it is clear from the evidence lodged that the area in question does constitute a public right of passage to a church. I do not understand it to be disputed that the church is an area to which the public have access. The ownership of the land is irrelevant, and the Council are entitled to impose parking restrictions on private land. Having done so the restriction apply from the centre of the road to the adjacent building line. I am satisfied therefore that the locus does constitute a road over which there is a public right of passage.

20. At this stage, however I also require to consider the second element of the decision in relation to whether the Respondent had a reasonable expectation that he was entitled to park in the area in which he did as a result of the practice of the Council to withdraw any previous PCNs issue by them. In this regard I have noted that the Legal Member accepted the evidence of the Respondent to the effect that any previous PCNs issued at that locus had been cancelled by the Council. Such action may give rise to a reasonable expectation on the part of the Respondent to believe that no further enforcement action would be taken in relation to parking at that locus, reference in this instance being made to the case of *R v Jockey Club Ex Parte RAM Racecourses Ltd 2 All ER 225*.



21. In the present case the Legal Member has found as a matter of fact that the Council did withdraw previous PCNs issued, a decision which the Legal Member was entitled to reach on the basis of the information before that Tribunal. It is not for this Tribunal to seek to re-visit that decision. In any event I note that the Council do not take issue with that decision and that they have lodged no further representations in that regards. I am satisfied therefore that the Legal Member was entitled to reach the decision reached and as such the original decision should stand, there being no contrary evidence to suggest otherwise. Accordingly on this ground alone the Appeal must fail.

Decision

22. Accordingly this Appeal is refused.

Parties Aggrieved by Decision

23. 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 within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal 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 or what other compelling reason there is for allowing a further appeal to proceed.

Sheriff Colin Dunipace

Sheriff Colin Dunipace

Sheriff of South Strathclyde Dumfries and Galloway at Hamilton