



[2021] UT41

Ref: UTS/AP/20/0028

DECISION OF

Sheriff G Jamieson

**ON AN APPLICATION FOR PERMISSION TO APPEAL RECONSIDERATION
(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)
IN THE CASE OF**

Mr. Jonathan Sammeroff, 1 Broomvale Court, 267 Mearns Road, Glasgow, G77 5LU

Appellant

- and -

East Renfrewshire Council, Eastwood Park, Rouken Glen Road, Giffnock, G46 6UG
per Customer and Business Services,
1st Floor, 18 Albion Street, Glasgow, G1 1LH

Respondent

FtT case reference: ER00028-1912

Paisley 21 July 2021

Decision

This is a reconsideration in terms of rule 3(7) of the Upper Tribunal for Scotland Rules of Procedure 2016 of the Appellant's application for permission to appeal to the Upper Tribunal for Scotland. Both parties elected not to appear at the hearing. The Appellant seeks permission to appeal from the decision of the First-tier Tribunal dated 8 May 2020 refusing his appeal against liability for a penalty charge notice in case reference ER 00028-1912. Sheriff Dunipace, sitting in the Upper



Tribunal, refused the Appellant's initial application for permission to appeal in his Decision sent to the parties on 22 April 202. I have reconsidered that decision. Permission to appeal is refused.

Introduction

The Appellant refers to his affidavit and to dictionary definitions of the concept of "right" in support of his appeal. I quote his affidavit in full. At paragraph 8 he quotes from various definitions of the concept of right. These are accurately quoted from the dictionary definitions he provided to the Upper Tribunal for Scotland. Accordingly, I have no need to repeat those definitions as they are set out in his affidavit. The Appellant requested that I mention and take into account his affidavit in support of his application for this reconsideration. The affidavit is in the following terms:

I, JONATHAN EMANUEL SAMMEROFF, at NEWTON MEARNES, GLASGOW, on the Eighteenth day of January Two Thousand and Twenty- one before me, LYNN KATHRYN WIGHTMAN HERBERT, via video conference which I, LYNN KATHRYN WIGHTMAN HERBERT attended from Eighty-two High Street, Leven, Fife, KY8 4NB COMPEARED: JONATHAN SAMMEROFF, residing at One Broomvale Court, Two Hundred and Sixty- seven Mearns Road, Newton Mearns, Glasgow G77 5LU who being solemnly sworn depones:

1. My full name is Jonathan Emanuel Sammeroff and I live at Flat 1 Broomvale Court, 267 Mearns Road, Newton Mearns, Glasgow, G77 5LU. I am 44 years of age and work as a Multimedia Specialist.
2. The area of land on which my vehicle was parked is, in common with my co-proprietors, my own Property. This is a Civil matter, and as you can see from my emails to East Renfrewshire Council prior to Parking Restrictions coming into force, I did not at any point consent, tacitly or otherwise, to these restrictions on my land.
3. Tribunal Adjudicator Petra Mcfatridge did omit statements and evidence I had provided from her Decision, including but not limited to a significant part of my opening statement, which I had specifically asked and waited for her to write down, and that this fact has been ignored by both the First Tier and the Upper Tribunal.
4. The Tribunal Hearing was conducted via the telephone and was recorded by the Tribunal. I requested a copy of the recording by messaging them through their online system, but was refused. The Tribunal have deleted my message requesting this recording, and their response refusing my request, from their online system.



5. I refuted any and all Assumptions and Presumptions, both in writing prior to, and then during the Hearing. This fact has also been ignored by all Adjudicators and Judges in both Tiers.

6. East Renfrewshire Council asserted that I am subject to Road and Traffic Regulations where I was parked. I rebutted this assertion by presenting my Title Deeds and the Rights contained therein, forming a Perfect Right.

7. East Renfrewshire Council have produced absolutely no evidence to demonstrate that the Road Act, Road Traffic Act, Road Traffic Orders and Designation Orders beneath them, or that the Adoption of a Road, can restrict or limit the Right In Common, Granted by my Title Deeds, in any way whatsoever.

8. A Right is defined as follows:-

1. Blacks Law Dictionary defines a Legal or Civil Right as *"the term given to a right or privilege that if challenged is supported in Court"*.

2. Collins Dictionary defines a Legal Right thusly. *"If you have a right to do or to have something, you are morally or legally entitled to do it or to have it"*.

3. The Legal Dictionary defines a Right as *"a power, privilege, demand, or claim possessed by a particular person by virtue of law, for example when a person owns a home and property, he has the right to possess and enjoy it free from the interference of others"* - and - *"that quality in a person by which he can do certain actions, or possess certain things which belong to him by virtue of some title. In this sense, we use it when we say that a man has a right to his estate"* - and - *"if a man demands his property, which is withheld from him, the right that supports his demand is a perfect one; because the thing demanded is, or may be fixed and determinate"* - and - *"Civil Rights are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property"* - and - *"Rights are also divided into legal and equitable. The former are those where the party has the legal title to a thing, and in that case, his remedy for an infringement of it, is by an action in a court of law"*.

Since the Appellant relies on the concept of perfect right, I quote the definition in full from the Legal Dictionary:

"Rights are perfect and imperfect. When the things we have a right to possess or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the things or actions are vague and indeterminate, the right is an imperfect one."

Grounds of appeal



The Appellant submitted the following grounds of appeal. I have changed references from the first to the third person singular

- (i) Tribunal Adjudicator Petra McFatridge did omit statements and evidence the Appellant had provided from her Decision, including but not limited to a significant part of the Appellant's opening statement, which the Appellant had specifically asked and waited for her to write down.
- (ii) The Appellant refuted any and all Assumptions and Presumptions, both in writing prior to, and then during the Hearing. This fact has also been ignored by the First Tier Tribunal.
- (iii) East Renfrewshire Council asserted that the Appellant is subject to Road and Traffic Regulations where he was parked. The Appellant rebutted this assertion by presenting his Title Deeds and the Rights contained therein, forming a Perfect Right. After rebutting their assertion, parties find themselves at the point where the scales are balanced again, specifically back at the point at which the burden of proof rests with the party who would fail if no evidence were adduced on either side. And East Renfrewshire Council produced no further evidence:
- (iv) East Renfrewshire Council have produced absolutely no evidence to demonstrate that the Road Act, Road Traffic Act, Road Traffic Orders and Designation Orders beneath them, or that the Adoption of a Road, can restrict or limit the Right In Common, Granted by his Title Deeds, in any way whatsoever. Under the Balance Of Probabilities, East Renfrewshire Council have put no weight on their side of the scales, because in civil cases in Scotland, "ei qui affirmat 'non ei qui negat, incumbit probatio" – on he who asserts, not he who denies is the obligation to prove.

Discussion

This reconsideration is not an appeal against Sheriff Dunipace's Decision. The Appellant has highlighted certain criticisms of that Decision. I have read those criticisms solely for the purpose of identifying whether there is any new material relevant to the grounds of appeal. In my opinion, there is no new material for consideration by the Upper Tribunal for Scotland. The Appellant does, however, stress a number of points fundamental to his appeal which he submits Sheriff Dunipace misunderstood. For example, he reaffirms that as the Council are asserting that the relevant Traffic Legislation, Regulations, and Orders can restrict or limit his "Right In Common", the burden is upon them to produce evidence that demonstrates this. Again, they have produced absolutely none. For the removal of doubt about the concept of "perfect right", he proposed that the Tribunal looked this up for themselves. His position was that he has yet to see any evidence that his "Right In Common" can be restricted or limited by the relevant Traffic Legislation, Regulations, and Orders. To simply state that they can be restricted or limited, in the absence of any evidence to demonstrate this, is a baseless assertion, and on he who asserts is the obligation to prove. If it is an Assumption and/or a Presumption, he has refuted it in both cases. Finally, no further definitions of "Right" and "Right In Common" have been presented to or by the Tribunal, except for those the Appellant has put forward himself. The definitions are clear and unambiguous.

An appeal to the Upper Tribunal for Scotland from a decision of the First-tier Tribunal may only be made on a point of law. The Upper Tribunal for Scotland may only grant permission to appeal if satisfied that there are arguable grounds for the appeal.



I have looked up the definition of “perfect right” at the Appellant’s invitation.

I now consider the Appellant’s four grounds of appeal:

- (i) Neither his affidavit, grounds of appeal or criticisms of Sheriff Dunipace’s Decision inform me of the content of his opening statement or any other material omitted by the First-tier Tribunal in considering the appeal. This ground of appeal is therefore not arguable.
- (ii) Neither his affidavit, grounds of appeal or criticisms of Sheriff Dunipace’s Decision inform me exactly how he rebutted any and all Assumptions and Presumptions, both in writing prior to, and then during the Hearing, or even what he means by this. This ground of appeal is therefore not arguable.
- (iii) The Appellant submits he rebutted the assertion by East Renfrewshire Council that the Appellant is subject to Road and Traffic Regulations where he was parked. He submits he rebutted this assertion by presenting his Title Deeds and the Rights contained therein, forming a Perfect Right.

He further submits that after rebutting this assertion, parties find themselves at the point where the scales are balanced again, specifically back at the point at which the burden of proof rests with the party who would fail if no evidence were adduced on either side.

The Appellant’s parking rights on the subjects are not in dispute. Little is gained by referring to this as a perfect right. This appears to be a concept imported from English law. The Appellant simply has in Scots law a right to parking constituted by his title deeds.

The Appellant then puts forward two propositions, neither of which accurately reflect the law.

First, there is no concept of an absolute right of property if that is what he takes from having a perfect right.

“Ownership and possession of property is frequently subject to controlling limitations and restrictions. It is trite that rights only exist in a legal context which controls the scope. In general, the limits and restrictions applying to property rights exist as a “given” in the sense that a particular right—e.g. ownership of a motor vehicle—is necessarily subject to whatever controls and limits the law applies and, of course, this is open to revision.” (Gloag and Henderson, *The Law of Scotland*, 14th edition, paragraph 30-01.)

The right of property is a right to enjoy and dispose of a thing (including land or rights over land) at one’s pleasure (Erskine, *Principles of the Law of Scotland*, Book II, Title I, Section 1), but is subject to restrictions imposed by law and paction which restrain the way in which a person may exercise those rights (Erskine, *Institute of the Laws of Scotland*, Book II, Title I, Section 1).



Secondly, the existence of such restraints imposed by primary statute law is not a matter of fact which requires to be proved before a court or tribunal. A different rule applies to subordinate legislation as hereafter noted.

A court or tribunal is entitled to take judicial notice of primary enactments such as, in this case, the Road Traffic Regulation Act 1984 and the Roads (Scotland) Act 1984: Interpretation Act 1978, section 3.

The law did impose a burden on the local authority to prove the existence of the Traffic Order: *Donnelly v Carmichael* 1995 JC 215, but in this case the local authority lodged a copy of the Order. The First-tier tribunal was entitled to rely on that production and to find proved the existence of the Order and to rely on the terms of the Order in reaching its decision.

The legal regime for parking referred to in the Decision of the First-tier Tribunal was therefore capable of restricting the Appellant's rights of property set out in his title deeds. The First-tier tribunal was entitled to reach that conclusion. This ground of appeal is therefore not arguable.

- (iv) The Appellant submits that East Renfrewshire Council have produced absolutely no evidence to demonstrate that the Road Act, Road Traffic Act, Road Traffic Orders and Designation Orders beneath them, or that the Adoption of a Road, can restrict or limit the Right In Common, Granted by his Title Deeds, in any way whatsoever. Under the Balance Of Probabilities, East Renfrewshire Council have put no weight on their side of the scales, because in civil cases in Scotland, "ei qui affirmat non ei qui negat, incumbit probatio" – on he who asserts, not he who denies is the obligation to prove. The only burden of proof that existed on East Renfrewshire Council was in relation to the road traffic order and the road being public. For the reasons I have explained in relation to ground of appeal (iii), the local authority discharged that burden of proof as to the existence and effect of the traffic order. The First-tier Tribunal was entitled to take judicial notice of the primary legislation and to find proved that the road was public. Taken together, the First-tier Tribunal was entitled to conclude that the various legal instruments constituted a legal regime that restricted or limited the Appellant's property right. This ground of appeal is therefore not arguable.

Conclusion

The grounds for this appeal are misconceived. The Appellant submits that the Council must prove that the relevant Traffic Legislation, Regulations, and Orders can restrict or limit his "Right In Common", and that they have failed to discharge that burden. The Appellant wants to see any evidence that his "Right In Common" can be restricted or limited by the relevant Traffic Legislation, Regulations, and Orders. The First-tier Tribunal was entitled to take judicial notice of the primary legislation and to find proved the existence of the Traffic Order. The First-tier Tribunal was thereafter entitled to find that the legal regime as a whole restricted or limited the Appellant's use of his right of property. The law allows for restrictions and limitations of all kinds on the exercise of rights of property. The relevant Traffic Legislation, Regulations, and Orders referred to in the Decision of the First-tier Tribunal were capable in law of restricting or limiting the



Appellant's rights of property. The First-tier Tribunal was entitled to reach the conclusion that they had that effect in this case. The grounds of appeal are therefore not arguable. Permission to appeal is accordingly refused.