Upper Tribunal for Scotland

[2022] UT04

Ref: UTS/AP/21/0019

DECISION NOTICE OF SHERIFF COLIN DUNIPACE,

JUDGE OF THE UPPER-TIER TRIBUNAL FOR SCOTLAND (GENERAL REGULATORY CHAMBER)

IN THE CASE OF

Dr Stephen Goodyear, 5 Springdale Park, Bieldside, Aberdeen, AB15 9FB

Appellant

- and –

Highland Council, Council Headquarters, Glenurquhart Road, Inverness, IV3 5NX

Respondent

FtT case reference HC00003-2103

14 February 2022

Decision

The Upper Tribunal grants the Appeal, and sets aside the decision of the First-tier Tribunal.

Introduction

1. Dr Stephen Goodyear, (hereinafter referred to as 'the Appellant') received a Penalty Charge Notice (hereinafter referred to as a 'PCN') on 4 December 2020 in relation to an alleged parking contravention in Lisgarry Court, Portree, Skye at 11.08 on that date. The Appellant submitted an informal appeal against this imposition on 14 December 2020, which appeal was rejected on 15 December 2020. A Notice to Owner was issued by Highland Council, Council Headquarters, Glenurquhart Road, Inverness, IV3 5NX (hereinafter referred to as 'the Council') on 14 January 2021, and the Appellant submitted a formal appeal with detailed representations to the Council on 6 February 2021. The Council issued a Notice of Rejection in respect of these submissions on 10 February 2021. The Appellant subsequently submitted an appeal to the First-tier Tribunal and the matter was considered by a Legal Member of that Tribunal on 17 March 2021. Neither the Appellant nor the Council chose to be represented at that Hearing. Having considered the written representations of the Appellant and the Council, the Legal Member dismissed the appeal. The reasons for the dismissal of the appeal are as fully set out on the written determination of the Legal Member dated 17 March 2021.

2. Thereafter the Appellant sought Permission to Appeal against that decision, on two grounds, namely:

> a) *The Adjudicator erred in law by not taking into account that the signage under dispute was outside the boundary of the car park and therefore did not apply to the bay in which the Applicant parked his vehicle. In their own evidence the Respondent admit that the "safety mesh fencing was erected bordering the car parks." Therefore, as this signage is situated on the other side of the fence, it is outside of the car park and does not apply, regardless of its visibility.*
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> *b) The Adjudicator erred in law in the application of the "reasonable driver" test. The evidence shows that the Respondent was continuing to advertise the availability of long stay parking, yet the only physically available bays were those that ordinarily would have been only for motor homes if the rest of the car park had not been closed. Given the offer of long stay parking and the fact the "Motor homes only" signage was outside the car park, the*

"reasonable driver" could have parked in the bay, which is further evidenced by another motorist parking at the location on the same date.

The application for Permission to Appeal was subsequently considered by a different Legal Member of the First-tier Tribunal and Permission to Appeal was granted on 1 June 2021. Whilst the second Legal Member did not give detailed reasons for granting Permission to Appeal, it was stated that this Legal Member considered that both grounds, which were said to be interconnected, were arguable as points of law.

3. In support of his application for permission to appeal the Appellant has submitted the following requisite documentation, namely:

a. Form UTS-1

b. Adjudicator's decision

c. Decision of First-tier Tribunal allowing Permission to Appeal

Grounds of Appeal

4. The full grounds of appeal as now set out by the Appellant are as follows:

1. The Adjudicator erred in law by not taking into account that the signage under dispute was outside the boundary of the carpark and therefore did not apply to the bay in which SV20XDG was parked. Highland Council admit in their own evidence that the "safety mesh fencing was erected bordering the car parks". Therefore, any signage – like the sign in question – on the other side of the fence is outside the carpark and does not apply, regardless of how easily it can be read.

2. The Adjudicator erred in law in the application of a reasonable driver test. The evidence provided proved that the Highland Council was continuing to advertise the availability of Long Stay parking and yet the only physically available bays were those that ordinarily would have been for motor homes only if the rest of the carpark had not been closed. Given the offer of Long Stay parking and the fact the "Motor homes only" signage was outside the carpark, a "reasonable driver" could have parked in the bay. This is further evidenced by another motorist parking in a similarly marked bay on the same date.

I appreciate that if a driver is uncertain about signage, they should not make assumptions. However, the nature of the signage (including the unambiguous sign offering Long Stay parking for cars), the carpark's temporary configuration and the seemingly deliberate (and indeed common-sense) separation of the sign otherwise precluding the use of the bay by cars was actively misleading to the point I was left with no doubt it was the Highland Council's intention cars should be allowed to park there.

As the First-tier Tribunal found, when I requested permission to appeal, these grounds are both arguable as points of law in accordance with Advocate General for Scotland v Murray Group Holdings Limited (2015) CSIH 77.

5. 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. In their response to the Notice of Appeal Letter, the Council have advised that they do not oppose the Appeal and further that they consider that all relevant information in respect of this contravention has already been submitted. The Appellant has not submitted any further information in respect of this appeal and no further submissions have been made by or on his behalf.

6. In determining this matter I have noted that the relevant issue before the First-tier Tribunal related to the sufficiency of the signage at that locus. It appears to be a matter of agreement between the parties that at the relevant time the Appellant was the registered keeper of the subject motor vehicle, and that the applicable legislation is '*The Highland Council (Prohibition and Restriction of Waiting and Loading and Parking Places) (Decriminalised Parking Enforcement and Consolidation) Order 2016*', as well as the '*Road Traffic Regulation Act 1984 Schedules 1 and 4*'.

7. In support of his initial appeal the Appellant had stated his position to be as follows:

I have been advised to appeal on the grounds that the signage in the car park did not meet adequate standards and was misleading to the point that a PCN is not enforceable. On 4 December 2021 signage on Bridge Road showed that Highland Council ("HC") provided free long stay parking for cars in Lisigarry Court. Ongoing construction work meant that the car park had been temporarily reconfigured, with much of it blocked off by security fencing. The bay I parked in, like all the long stay bays that were not fenced off, indicated that motor

homes could also park in it. The bay's markings did not say "motor homes only" or otherwise exclude cars from using it. The only signage that could have ordinarily restricted its use was fenced off – clearly separating it from the bay – in the out-of-use section of the car park. The only other potentially relevant sign was misleading and indicated that additional parking could be found if necessary but seemed to suggest – presumably in error –

that one would have to drive through a stout security fence to access it. HC advertised long stay parking as signed on Bridge Road. The carpark was empty on my arrival and I parked in one of the few available bays appropriate for cars. If it was the intention of HC that these bays were not to be used while the rest of the long stay car park was out of use efforts should have been made to clearly signpost this. As it was, HC advertised that the car park was available for use by cars and no signs within the in-use (i.e., not fenced off) section of the

car park prohibited me from parking a car in the bay I chose. Issuing a PCN in these circumstances is in breach of the Highland Council Parking Policy to be fair (THC DPE Policy Statement 1.10.16), since: • the parking rules were not "explained and communicated" coherently or clearly; • the situation in the car park has manifestly not

been reviewed adequately to ensure that "traffic signs and road markings help motorists" to park; and • HC commits to ensuring that "all lining and signing is clear and unambiguous". On the basis of the grounds above I request that you cancel the PCN".

8. The position of the Council in their written response was to the effect that:

"Lisigarry Court car park consists of car and van parking to the west side and coach and motor home parking to the east. During the winter of 2020 a programme of necessary upgrading of the west car park commenced. This resulted in very few car parking spaces being available. The east side of the car park remained open for Buses, motor homes / camper vans only. Two additional public car parks are available in the village of Portree.

Safety mesh fencing was erected bordering the car parks. Although the Appellant indicates that signage was misleading, the photographic evidence obtained by the Attendant clearly de displaying 'campervan and motor home only' are situated directly in front of where parked. A road legend is also present. Photograph five (page 4) of the additional appeal summary provided by the Appellant is of little relevance as it is a Google street view from June 2011."

9. In the determination of the Legal Member, relevant findings in fact were made to the following effect:

"The Appellant parked his vehicle, SV20 XDG in a parking bay at Lisigarry Court, Portree on 04/12/2020.

A Penalty Charge Notice was properly issued and affixed to said vehicle at 11.08 hours the same day.

The PCN relates to contravention code 23.

The parking bay used by the Appellant is reserved for use by motorhomes and campervans.

There is sufficient visible signage affixed to posts directly at the rear of the bay, and road markings to convey this restriction to any reasonably observant driver.

The fact that the sign post is "behind" Heras fencing would not impact on the meaning or relevance of said signage in relation to the parking bay and no reasonable driver would consider said signage to be somehow "excluded" by the erection or positioning of said fencing, which does not obscure the sign.

The combination of the wording of the road markings and signage is sufficient to clearly set out the relevant parking restriction.

The availability, or otherwise, of other parking for vehicles at the locus is not relevant to consideration of this appeal."

The appeal by the Appellant was accordingly dismissed by the Legal Member.

10. As indicated above, the Appellant subsequently sought Permission to Appeal this decision from the First-tier Tribunal, 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) (hereinafter referred to as 'the Procedure Rules'), and section 46(3) of the Tribunals (Scotland) Act 2014 (hereinafter referred to as 'the 2014 Act'). This application for Permission to Appeal was subsequently considered by a different Legal Member of the First-tier Tribunal on 1 June 2021, and in terms of the aforementioned Rule 18 of the Procedure Rules and section 46(3) of the Tribunals 2014 Act, Permission to Appeal was granted by the Legal Member on both of the grounds advanced.

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, the index contravention was alleged to have occurred on 4 December 2020 which follows the integration of the Parking and Bus Lane Tribunal into the General Regulatory Chamber. Accordingly, and given that the Appellant's appeal was considered by the Legal Member of the First-tier Tribunal and the determination was issued on 22 July 2021, there does exist 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 hear appeals in cases where Permission to Appeal has been granted either by the First-tier Tribunal or by the Upper Tribunal itself. Permission will only be granted in accordance with section 46(2) (b) of the 2014 Act if the Appellant has identified an arguable error on a point of law in the decision of the First-tier Tribunal which he wishes to appeal. It is noted that in the present appeal that Permission to Appeal has been granted by the First-tier Tribunal.

Conclusion

13. The Appellant has been granted Permission to Appeal to the Upper Tribunal in terms of section 46 (3) (a) of the 2014 Act. The question at this stage is whether the appellant has established the point of law in question in terms of Section 47(1) of the 2014 Act.

14. As a starting point it is helpful to note that the Council do not oppose this appeal, having confirmed same in writing and having lodged no further submissions to support the original determination of the First-tier Tribunal. Notwithstanding that concession on their part, I do not consider that this is the end of the matter, and that I still require to be satisfied

that the appeal should be allowed on the point of law raised by the Appellant. In that regard I have noted that I should have regard to determining whether the original Tribunal has made:

(i) an error of general law, such as the content of the law applied;

(ii) an error in the application of the law to the facts;

(iii) making findings for which there is no evidence or which is inconsistent with the evidence and contradictory of it; and

(iv) a fundamental error in approach to the case: for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations, or by arriving at a decision that no reasonable tribunal could properly reach (see Advocate General for Scotland v Murray Group Holdings 2016 SC 201 at paras 42 to 43).

15. In the present appeal the position of the Appellant is as stated at paragraph 4 above. Essentially his position is two-fold. The first submission is to the effect that the Legal Member erred in law by not taking account of the fact that the signage in question was outside the boundary of the carpark and therefore did not apply to the bay in which his vehicle was parked. The Appellant submits that Highland Council have admitted in their own evidence that the "safety mesh fencing was erected bordering the car parks". Therefore, it is submitted that any such signage was on the other side of a dividing fence, and as such it would be reasonable to assume that its efficacy was in respect only of the area in which it is situated, that is on the other side of the fence. Accordingly it would be assumed that the signage had no effect within the areas of the car park not bounded by the fence. Secondly it is submitted that the Legal Member erred in law in the application of the 'reasonable driver' test. This latter submission relates to the evidence that Highland Council continued to advertise the availability of Long Stay parking, at a time when the only bays available were those ordinarily used for motor homes, and that in conjunction with the fact that Long Stay parking was being offered and the fact the "Motor Homes only" signage was outside the carpark, meant that a "reasonable driver" would have parked in the bay. I consider that both of these elements can be considered together.

16. In considering these elements I have noted that the position of the Appellant is not disputed by the Council. I have also noted that the relevant finding in fact by the Legal Member at first instance makes reference to the fact that there was said to be sufficient visible signage affixed to posts directly at the rear of the bay, and road markings to convey this restriction to any reasonably observant driver. The Legal member then goes on to state that:

"The fact that the sign post is "behind" Heras fencing would not impact on the meaning or relevance of said signage in relation to the parking bay and no reasonable driver would consider said signage to be somehow "excluded" by the erection or positioning of said fencing, which does not obscure the sign.

The combination of the wording of the road markings and signage is sufficient to clearly set out the relevant parking restriction."

In this regard I am satisfied that the submissions of the Appellant have some validity. The erection of fencing would have the effect of delineating different areas of the car park in question. It would not have been an unreasonable assumption that the restrictions mentioned on the signage applied only in respect of that area contained within that delineation. Had the Council wished that the restrictions applied within two distinct and separate areas of the car park, then this should have been made apparent and additional signage, whether of a temporary nature or otherwise, should have been erected. In the circumstances as narrated the approach adopted by the Appellant does not appear to have been unreasonable. Accordingly I am unable to agree with the finding in fact by the Legal Member to the effect that the existence of signage behind fencing would have been of no significance so long as the signage can be read. In these circumstances I am satisfied that there has been an error of law and as such the appeal should succeed, and the original decision of the Legal Member is quashed.

17. Having reached this decision, I have considered the appropriate disposal in terms of Section 47(2) of the 2014 Act. Given the concession of the Council to the effect that they do not oppose the appeal, I am satisfied that it would be unnecessary and inappropriate to remit the case to the First-tier Tribunal. Accordingly the appeal is allowed and the Penalty is quashed.

Notice to Parties

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.