Neutral Citation Number: [2023] EWHC 2889 (Admin)

Case No: CO/2884/2023; AC-2023-LON-002373

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2023

Before :

MR JUSTICE SWIFT

- -

Between :
THE KING
on the application of

TRANSPORT FOR LONDON	**Claimant**
- and –	
LONDON TRIBUNALS (ENVIRONMENT AND TRAFFIC ADJUDICATORS)	**Defendant**
- and -	**Interested Parties**
(1) COMMERCIAL PLANT SERVICES **(2) MITCHELL PERRY** **(3) RICHARD COOPER JACKSON** **(4) RAJAH MIAH**	

- -
- -

Timothy Corner KC, Andrew Byass (instructed by **Transport for London Legal**) for the **Claimant**
The **Defendant** did not appear and was not represented.
The **First Interested Party** appeared by Karen Bagnell, its Compliance Administration Officer

Hearing date: 26 October 2023

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APPROVED JUDGMENT

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MR JUSTICE SWIFT:

A. Introduction

1. Transport for London challenges two decisions made by the Environment and Traffic Adjudicators. The first is a decision of a panel of adjudicators made on 26 May 2023 ("the adjudicators" and "the adjudicators' decision"). That decision considered appeals against 8 penalty charge notices ("PCNs") brought by 6 motorists and 1 company. The adjudicators adjourned 1 appeal, dismissed 1 appeal, and allowed the remaining 6. The outcomes in 4 of the 6 appeals that were allowed depended on what the adjudicators described as "the core issue", which concerned the meaning and effect of certain provisions in the Civil Enforcement of Road Traffic Contraventions (Approved Devices Charging Guidelines and General Provisions)(England) Regulation 2022 ("the 2022 Regulations"). The second decision was made on 21 July 2023 by Chief Adjudicator Anthony Chan and was a decision on Transport for London's application for a review of the decision made by the adjudicators ("the review decision"). The Chief Adjudicator refused the application for review.

2. The Interested Parties in these proceedings are the 4 appellants whose appeals succeeded before the adjudicators. I have heard submissions for Transport for London made by Timothy Corner KC, and submissions on behalf of Commercial Plant Services Ltd, the First Interested Party. Commercial Plant Services appeared by its Compliance Administration Officer, Karen Bagnell. I allowed her to be assisted by Ivan Murray-Smith as *McKenzie* friend.

3. The "core issue" identified in the 26 May 2023 decision goes to the circumstances in which Transport for London may rely on regulation 10(2) of the 2022 Regulations to serve a PCN by post. Regulation 10(2) is part of a statutory framework that requires some explanation.

4. The parking contraventions relevant for present purposes are specified in traffic orders made by Transport for London in exercise of powers contained in the Road Traffic Regulation Act 1984 ("the 1984 Act"). Provision for civil penalties and the enforcement of those penalties is set out in various sets of Regulations which, for the most part, were made pursuant to the power in section 72 of the Traffic Management Act 2004. By regulation 5 of the 2022 Regulations a penalty charge may be imposed "with respect to a vehicle where that vehicle is involved in a relevant road traffic contravention". A road traffic contravention is defined in 2004 Act and includes a parking contravention (see the 2004 Act at section 73 and Schedule 7, paragraphs 2-3). Notification of a penalty charge takes place by way of a penalty charge notice. Regulation 7 of the 2022 Regulations specifies what may be relied on to prove a parking contravention.

> "**7.— Evidence of contravention**
>
> (1) A penalty charge may only be imposed in respect of a parking contravention on the basis of —
>
> (a) a record produced by an approved device, or
>
> (b) information given by a civil enforcement officer as to conduct observed by that officer."

Regulation 9 of the 2022 Regulations identifies the circumstances in which a "civil enforcement officer" (i.e., a parking warden employed by a relevant enforcement authority such as Transport for London) can give notice of a penalty charge, and how notice of the charge is to be given.

> "**9.— Penalty charge notices for parking contraventions: service by civil enforcement officers**
>
> …
>
> (2) Where a civil enforcement officer has reason to believe that a penalty charge is payable in respect of a parking contravention otherwise than on a road, the civil enforcement officer may give notification of that charge by—
>
> (a) fixing a penalty charge notice to the vehicle, or
>
> (b) giving a penalty charge notice to the person appearing to the civil enforcement officer to be in charge of the vehicle.
>
> (3) Except as provided for in paragraphs (4) to (6) and regulation 10, notification of a penalty charge in respect of a parking contravention on a road may only be given by a civil enforcement officer by fixing a penalty charge notice to the vehicle."

5. Provisions within regulations 10 and 11 describe circumstances in which an enforcement authority may issue a penalty charge notice other than through an enforcement officer. The material part of regulation 10 is regulation 10(2)(a)(i)

> "**10.— Penalty charge notices for relevant road traffic contraventions: enforcement authority**
>
> …
>
> (2) An enforcement authority may give notification of the penalty charge by serving a penalty charge notice by post where –
>
> (a) on the basis of a record produced by an approved device, the authority has reason to believe a penalty charge is payable with respect to
>
> (i) a regulation 11 parking contravention …"

In this instance, the relevant approved device is a fixed roadside camera. A "regulation 11 parking contravention" includes a parking contravention "… on a road in the

circumstances specified in regulation 11" (see regulation 10(3)) and includes a contravention "… where the relevant vehicle is stationary on a … red route" (see regulation 11(1)(d)). The definition of red route in regulation 11(2) was the focus of the issue before the adjudicators and is also the focus of Transport for London's challenge to the adjudicators' decision:

> ""*red route*" means a road marked in accordance with—
>
> (a) diagram 1018.2 at item 11 or diagram 1017.1 at item 12 in Part 4 of Schedule 7 to the Traffic Signs Regulations, and
>
> (b) the upright sign at Part 1 of Schedule 6 to those Regulations"

6. The diagrams referred to are in the portfolio in Part 4 of Schedule 7 to the Traffic Signs Regulations and General Directions 2016 ("2016 Regulations"). Diagrams 1018.2 and 1017.1 are as follows:

1018.2

1017.1

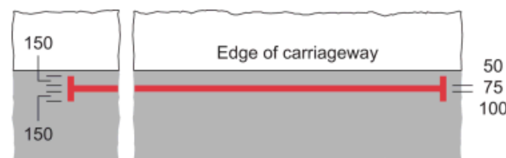
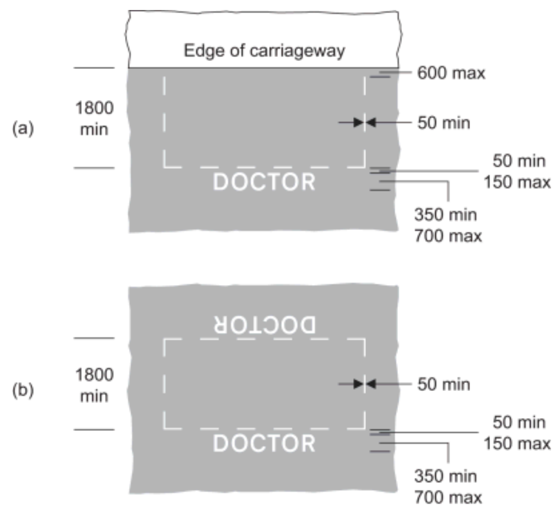


Diagram 1018.2 is a double red line next to the curb. The description in Schedule 7 that goes with this diagram is "Stopping of vehicles prohibited at all times Edge of carriage way". Diagram 1017.1 is a single red line next to the curb. The description going with this diagram is "Stopping of vehicles prohibited for a time that is not continuous throughout the year".

7. The appeals before the adjudicators that are relevant for present purposes all concerned PCNs issued by post where the contravention was evidenced by pictures taken by a roadside camera. Each concerned a parking contravention said to have occurred when the vehicle was parked in a marked parking bay on a red route. As I understand the matter, the adjudicators accepted that each vehicle had been parked in a parking bay at a time or in circumstances in which, under the terms of the relevant Traffic Order, it ought not have been parked. To this extent there was no doubt that a parking contravention had occurred. Rather, the issue was whether it was within the power of Transport for London under regulation 10 of the 2022 Regulations to give notice of the

penalty charge by post, relying on photographic evidence. The appellants contended that Transport for London could not give notification by post because the contraventions had not been "regulation 11 parking contravention" since the parking bays had not been marked in accordance with the regulation 11(2) definition of red route.

8. Each parking bay had been marked in the way required by Diagram 1028.4 in Part 4 of Schedule 7 to the 2016 Regulations.



The marking "doctor" is immaterial for present purposes. It was accepted at the adjudicators' hearing that Diagram 1028.4 is the generic form for any parking bay, not just "doctor only" parking bays (see the adjudicators' decision at paragraph 26). The description provided with this diagram reads as follows:

> "Alternative types of parking bay-
>
> (a) At the edge of the carriageway and situated wholly on either the carriageway or footway; or
>
> (b) In the centre of the carriageway or partly on the carriageway and partly on the footway;
>
> + variant 5 on red route".

Several permitted "variants" are specified. These are all listed in Part 5 of Schedule 7 to the 2016 Regulations, but none is material to any issue in these proceedings.

9. The appellants' submission before the adjudicators was that because the bays were not also marked with either a single or double red line adjacent to the curb, when vehicles were parked in those bays, they were not stationary "on … a red route" for the purposes of regulation 11(1), because the parking bay was not marked so as to comply with the definition of red route in regulation 11(2). It followed, said the appellants, that the

penalty charge said to be payable could not be the subject of notification by post under regulation 10.

B. The challenge to the adjudicators' decision on the appeals

(1) The adjudicators' decision

10. The adjudicators allowed the 4 appeals that turned on the "core issue". Their reasoning on that issue can be summarised as follows. The adjudicators considered what they described as each party's "literal interpretation" of the regulation 11(2) definition of red route. The submission for the appellants was that where a parking contravention occurred in a marked parking space there had to be either a single or double red line and the required "upright sign". The adjudicators were doubtful as to the latter requirement: see the decision at paragraph 35. Transport for London submitted that the two parts of the definition, (a) and (b), were alternatives such that there had to be either the red line or lines on the road or an upright sign.

11. The adjudicators then considered the predecessors to the 2022 Regulations so far as those Regulations had permitted notification of penalty charges by post. Regulations made in 2007 (the Civil Enforcement of Parking Contraventions (England) General Regulations 2007, "the 2007 Regulations") had given general permission to enforcement authorities to notify by post in cases where they had "reason to believe" a penalty charge was payable "on the basis of a record produced by an approved device". An amendment introduced by Regulations made in 2015 removed the general permission and put in its place provisions like those in regulations 10 and 11 of the 2022 Regulations. The definition of red route in 2007 Regulations as amended by the 2015 Regulations was different.

> "*Red route* means a road conveying such red route road markings and signs as authorised and directed by the Secretary of State in exercise of powers conferred on him by sections 64(1) and (2) and 65(2) of the Road Traffic Regulation Act 1984".

But that only reflected the fact that the 2016 Regulations had not yet been made.

12. The 2007 Regulations were amended again by Regulations made in June 2020. At this time the definition of red route was changed to take account of the 2016 Regulations.

> "*Red route* means a road marked in accordance with diagram 1018.2 at item 11 or diagram 1017.1 at item 12 of Part 4 of Schedule 7 to the Traffic Signs Regulations and the upright sign at Part 1 of the Schedule 6 to those Regulations."

That definition was in regulation 9A(7) of the 2007 Regulations. It is word for word the same as the definition now in regulation 11(2) of the 2022 Regulations, albeit not laid out in sub-paragraphs (a) and (b) as it is in the 2022 Regulations.

13. The adjudicators noted that the stated purpose of the amendment made by the 2015 Regulations had been to rein in what was described as "overzealous enforcement" by local authorities. Paragraphs 7.3 to 7.5 of the Explanatory Memorandum for the 2015 Regulations included the following.

> "7.3 Ministers are concerned that this overuse of CCTV has unfair consequences on the public. An individual accused via CCTV misses an initial opportunity to receive discretion; an opportunity that is available to someone who is observed by a Civil Enforcement Officer (CEO). It is also unfair because drivers receive penalty notices in the post weeks later. With no opportunity to examine the parking location as it was at the time of the alleged contravention. Signs may have been obscured or fallen down, and lines could have been hidden – which could change before the driver could return to inspect the location.
>
> 7.4 The Government believes that powers are not being used as originally intended. Statutory guidance requires that "approved devices are used only where enforcement is difficult or sensitive and CEO enforcement is not practical. …
>
> 7.5 These legislative changes are intended to be a proportionate response to this. With local authorities seeming to ignore guidance, Ministers felt something more robust than tightened guidance would be necessary. By requiring a notice to be affixed to the vehicle whilst retaining the possibility of using CCTV and service by post in certain cases (such as contraventions outside schools and along red routes), Ministers consider the right balance will be struck between ensuring safety and traffic flow, whilst ensuring CCTV is not used excessively."

When reaching their conclusion on the meaning of regulation 11(2) of the 2022 Regulations, the adjudicators had in mind whether notification by post of parking contraventions of the type before them was consistent with the sentiment in the Explanatory Note. At paragraph 56 of their decision the adjudicators stated as follows.

> "56. Second, and linked to what was said in the explanatory memorandum to the 2015 Amendment Regulations at paragraph 7.3, a motorist who receives a PCN issued on the basis of evidence produced on an approved device in respect of an alleged contravention of a loading/unloading bay may find it impossible to obtain the necessary evidence, after the event, to discharge the burden of proving loading/unloading. A motorist parked in such a bay who encounters a CEO may, there and then, be able to show the CEO that s/he is loading or unloading or if served with a PCN at the scene, can readily obtain the evidence – perhaps from the persons at the premises at which s/he was loading or unloading – to substantiate that claim in representations. A prime example of this is in Mr Jackson's case in which he might have had the chance to obtain evidence there

> and then from the premises at which he had made the purchase in question. That chance, is to a significant extent, diminished if the PCN is served well after the event on the basis of CCTV footage."

Mr Jackson's case was one of the 4 appeals in which the "core issue" (i.e., the meaning and application of the definition of red route in regulation 11(2)) was the decisive issue. The adjudicators were concerned that enforcement of penalty contraventions of this type in reliance on camera evidence was too prone to error, in that whether a contravention had occurred could depend on matters unlikely to be captured in a photograph. One example arose from the facts of Mr Jackson's case – whether the vehicle was stationary only for the purpose of loading or unloading. Another possible situation the adjudicators referred to was one where commission of the contravention turned on whether the vehicle had the benefit of an exemption such as a disabled person's blue badge. Depending on how the vehicle was parked a camera picture might not pick up a blue badge even when the badge was properly displayed.

14. The adjudicators' final conclusion, at paragraphs 60 and 61 of the decision, was as follows.

> "60. The panel finds, having analysed the extensive submissions and materials with which we have been provided, that parking contraventions on a red route enforceable on the basis of a record produced by an approved device are confined, in the context of Regulation 11(2) to those where the vehicle is stationary on a length of road marked with double or single red line markings. There is a material distinction between the definition of a red route for the purposes of the [2016 Regulations] and the definition in Regulation 11(2) governing the circumstances in which camera enforcement of parking contraventions is permissible. That is to say, the contexts are different.
>
> 61. No one suggests that contraventions of red route parking bays marked with the [Diagram 1028.4 marking] are not enforceable at all. They are enforceable but, the panel finds, the meaning of the 2022 Regulations is that they are not enforceable on the basis of a record produced by an approved device. They are enforceable by CEOs and in the event the CEO is unable to effect service of the PCN in the circumstances described in Regulation 9(4) to (6), by post."

In other words, unless the parking contravention on a red route occurred at a place marked with a single or double red line, the contravention is not a "regulation 11 parking contravention".

15. Earlier in their decision, the adjudicators had said the following on the meaning of the definition of red route in regulation 11(2).

> "51. Without the express division into limbs (a) and (b) as is seen in Regulation 11(2) of the 2022 Regulations, one logical reading of the definition in Regulation 9A(7) is as follows:
>
> > *"Red route means a road marked in accordance with:*
> >
> > *[Diagram 1018.2 at item 11 of Part 4 of Schedule 7 to the Traffic Signs Regulations]*
> >
> > *or*
> >
> > *[Diagram 1017.1 at item 12 of Part 4 of Schedule 7 to the Traffic Signs and Regulation and the upright sign at Part 1 of Schedule 6 to those regulations]"*
>
> 52. That is to say, with the parentheses inserted as above, CCTV enforcement is available where the vehicle is stationary on a red route marked either with double red lines (in which case no upright sign is required) or with a single red line (in which an upright sign is also required, to state the restricted hours). That construction of Regulation 9A(7) avoids the unsatisfactory consequences of Mr Murray-Smith's literal approach. It is also, in the Panel's view, consistent with a 'purposive' and common-sense construction. It would follow that if that was the correct interpretation of Regulation 9(A)(7), and if TfL is correct that the definition is simply carried over to the 2022 Regulations, the insertion of the 'limbs' (a) and (b) would be a drafting error, albeit an error primarily of form not substance. The drafting error could be put right if the words of limb (b) were read as if the words 'in the case of diagram 1017.1 at item 12" were put before them'."

The submission for Transport for London to me was that this was the conclusion the adjudicators reached on the meaning of definition red route in regulation 11(2) and was the premise for the adjudicators' final conclusion at paragraphs 60 and 61.

(2) Decision

16. I do not consider the adjudicators' final conclusion is correct. To the extent their final conclusion rested on what is said at paragraphs 51 and 52 of the decision, on the meaning of the regulation 11(2) definition of red route, the conclusion also rested on a false foundation. While the proper effect of the regulation 11(2) definition is open to argument, it certainly does not have the meaning canvassed at paragraph 51 of the decision. The requirements in sub-paragraphs (a) and (b) of the definition are cumulative; to be a red route for this purpose the road must be marked "in accordance with" both requirements. The requirements are not alternatives. That had been the submission made to the adjudicators by Transport for London, a submission the adjudicators were right to reject.

17. Nor is it correct that the requirement at sub-paragraph (b) for signage can be construed as applying to one but not the other of the two alternative requirements within sub-paragraph (a). The starting point for the adjudicators' apparent conclusion that this was so, was that there was an error in the definition in regulation 11(2) of the 2022 Regulations because the drafting rested on a misunderstanding of the meaning of its predecessor in the 2007 Regulations, as amended (i.e., regulation 9A(7) in the 2007 Regulations, set out above at paragraph 12). That rested on the view that the definition as stated in regulation 9A(7) of the 2007 Regulations had distinguished between roads with double red lines (Diagram 1018.2 at paragraph 6 above) and roads with single red lines (Diagram 1017.1, also at paragraph 6 above), and only applied the requirement for a sign to the latter and not the former. That view is wrong and would itself depend on an argument that the definition inserted into the 2007 Regulations itself contained a drafting error insofar as it had omitted a comma (after the words "diagram 1018.2 at item 11"). There is no reason to think that the definition inserted into the 2007 Regulations should be understood in this way. It should be understood as enacted: i.e. that the signage requirement applied regardless of whether the road was marked with a double red line or a single red line. There is nothing inherently illogical or obviously wrong with the position that the signage requirement should apply regardless of whether the red line was single red line or a double red line. Since that is so, the suggestion that the definition of red route in regulation 11(2) of the 2022 Regulations itself contained an error, or for that matter perpetuated some previous error in the Regulations as they were in force from June 2020, is baseless. The court can only be concerned with obvious drafting errors in the sense explained by Lord Nicholls in his speech in *Inco Europe Ltd v First Choice Distribution* [2000] 1WLR 586 at page 592 C-H. There is no such error in the definition of red route, whether one looks at the definition put into the 2007 Regulations with effect from June 2020, or the definition at regulation 11(2) of the 2022 Regulations. It follows that the correct conclusion is that the definition of red route requires that both condition (a) and condition (b) are met.

18. This, however, leaves open the question raised by Transport for London's challenge to the adjudicators' decision. The definition of red route requires that the "road" be "marked in accordance with" the requirements in sub-paragraphs (a) and (b). Is a road still marked "in accordance with" the requirement for either a single or double red line if the road also includes parking bays marked in accordance with the requirements for parking bays in Part 4 of Schedule 7 to the 2016 Regulations? I consider the answer is yes. A road is marked "in accordance with" diagrams 1018.2 and 1017.1 in Part 4 of Schedule 7 to the 2016 Regulations notwithstanding that it includes parking spaces marked in accordance with diagram 1028.4 in the same Part of the same Schedule. There is nothing on the face of the 2022 Regulations that tells against this conclusion. Nor do I consider there is any particular reason why only some rather than all parking contraventions occurring on a red route should be capable on enforcement through the provision made by regulation 10 of the 2022 Regulations. The practical point relied on by the adjudicators that contraventions arising from the use of marked parking bays might be less obviously proved by camera evidence than, for example, the contravention when a vehicle parks on a red route where there is no parking bay, is a good practical point. However, that practical point more logically bears upon the requirement in regulation 10(2)(a), i.e., the requirement that Transport for London as enforcement authority must have the required "reason to believe that a parking charge is payable". It is perfectly possible that in some instances photographic evidence will not be sufficient to provide the required reason to believe, precisely because of the

possibility that the vehicle may be parked within the bay in circumstances permitted by the relevant traffic order. Therefore, I do not consider that the practical point determines the proper meaning of the regulation 11(2) definition. The better view is that the inclusion within the category of regulation 11 parking contraventions of contraventions occurring when a vehicle is stationary on a red route is intended, in principle, to include all such contraventions not just some of them, and that the regulation 10(2)(a) issue of whether the photograph is sufficient to provide the required reason to believe will fall to be decided by the enforcement authority, case by case.

19. The further advantage of the conclusion I have reached is that it better suits the ordinary meaning of the phrase "in accordance with" by permitting the meaning of the condition requiring compliance with diagrams 1018.2 and 1017.1 to be determined taking account of the provisions in Part 4 of Schedule 7 to the 2016 Regulations, in the round. Considering the provisions of that Schedule generally, a red route marked with either single or double red lines and containing parking bays marked in accordance with Diagram 1028.4 would be properly marked as required by the Schedule. Since that is so, it would be a strange (and strained) reading of the regulation 11(2) definition of red route that concluded that a red route, properly so marked, was nevertheless not marked "in accordance with" diagrams 1018.2 and 1017.1. The submission made by Commercial Plant Services Ltd is that this conclusion is tantamount to reading words into sub-paragraph (a) of the regulation 11(2) definition to include a reference to Diagram 1028.4. There is a sense in which that can be said to be correct, but that is no more than the consequence of giving proper value to the words "in accordance with" and appropriate weight to the fact that the Diagrams 1018.2 and 1017.1 do not exist in isolation but are parts of a scheme of requirements within Part 4 of Schedule 7 to the 2016 Regulations.

20. Lastly on this point, the conclusion I have reached is consistent with the general obligation on authorities such as Transport for London on the positioning of road signs. By section 64 of the Road Traffic Regulation Act 1984 a "traffic sign" includes "any line or mark on a road for conveying … [a] restriction or prohibition". Thus, a single or double red line is a traffic sign. Regulation 18 of the Local Authority's Traffic Orders (Procedure)(England and Wales) Regulations 1996 (made pursuant to powers in the 1984 Act) requires an authority which has made a traffic order to place at or near the road.

> "… such signs in such positions as [the authority considers] requisite for securing that adequate information as to the effect of the order is made available to persons using the road."

This informs the content of the obligation to mark single or double red lines. It further supports the conclusion that when there is a parking bay marked in accordance with Diagram 1028.4 on a red route the road is nonetheless marked "in accordance with" the requirement for a single or double red line.

21. For these reasons, Transport for London's challenge to the adjudicators' decision succeeds. The parking contraventions in issue in the 4 appeals were ones in respect of which Transport for London was permitted under the 2022 Regulations to give notice of the penalty charge by post. The contraventions in issue were "regulation 11 parking contraventions" because by parking in the parking bays on the occasions in question,

the vehicles were stationary on a red route within the definition in regulation 11(2) of the 2022 Regulations.

C. The Chief Adjudicator's decision on the review application

22. Paragraph 12 of Schedule 1 to the Civil Enforcement of Road Traffic Contraventions (Representations and Appeals)(England) Regulations 2022 ("the Appeals Regulations") permits an adjudicator, on the application of a party, to review a decision to allow or dismiss an appeal (among other matters). The grounds on which a review may be undertaken are set out in paragraph 12(2)(b).

> "**12.— Review of adjudicator's decision**
>
> (1) The adjudicator may, on the application of a party, review—
>
> …
>
> (b) any decision … to dismiss or allow an appeal … on one or more of the following grounds—
>
> (i) the decision was wrongly made as the result of an administrative error;
>
> (ii) the adjudicator was wrong to reject the notice of appeal;
>
> (iii) a party who failed to appear or be represented at a hearing had good and sufficient reason for failing to appear;
>
> (iv) where the decision was made after a hearing, new evidence has become available since the conclusion of the hearing, the existence of which could not reasonably have been known or foreseen;
>
> (v) where the decision was made without a hearing, new evidence has become available since the decision was made, the existence of which could not reasonably have been known or foreseen;
>
> (vi) the interests of justice require such a review."

23. In this instance, Transport for London sought a review of the adjudicators' decision on the "interests of justice" ground. The gist of the application was that the adjudicators had reached the wrong conclusion on the meaning of the regulation 11(2) definition of red route, and ought to have dismissed the appeals before them. The application was considered by the Chief Adjudicator. He refused the review application. The Chief Adjudicator expressed concern that it appeared that the application to review was in substance an appeal against the adjudicators' decision. He referred to *R(Malik) v Manchester Crown Court* [2008] EMLR 19. There, a Divisional Court had considered a challenge by way of judicial review to a production order made in the Crown Court.

The Chief Adjudicator referred to paragraph 31 of the Divisional Court's judgment, given by Dyson LJ.

> "31. Before we come to the grounds of challenge, we need to emphasise two preliminary points. The first is that these are judicial review proceedings. This is not an appeal. The decision of the judge cannot be quashed unless he erred in law in one or more of the respects in which a decision can be impugned on public law grounds. We recognise, however, that this court is a public authority which must itself comply with the Convention. We bear this in mind when we consider the Convention issues that arise in this case."

The Chief Adjudicator then went on to say this:

> "I therefore find that the approach in *Malik* sets out the boundary of the adjudicator's power to review under the Appeal Regulations. The test is not whether the reviewing adjudicator agrees with the first instance determination so that they can substitute their own decision. The test is whether the first instance decision can be impugned because the original adjudicator was not entitled to reach the determination."

The Chief Adjudicator's conclusion was that the adjudicators had been entitled to reach the conclusion they had: i.e., there had been no public law error. The Chief Adjudicator further concluded that he would, in any event and as a matter of discretion, refuse the review application because Transport for London had been aware of the core issue (on the regulation 11(2) definition and the extent of the power to give notice of a penalty charge by post under regulation 10 of the 2022 Regulations) since the time of appeals heard by adjudicators as long before as July 2022, but had not in the words of the Chief Adjudicator "engaged" with appeals on that issue. The Chief Adjudicator's overall conclusion was this.

> "I do not find that the interests of justice require a review for two reasons. First, I am satisfied that the panel was as a matter of law entitled to reach its determination. Secondly, TfL has not acted in the interest of justice to bring a resolution of the core issue with due expediency."

The focus of Transport for London's challenge is the first of these grounds.

24. I agree that the Chief Adjudicator was right to refuse the application for review, but I do not agree with the reasons he gave for his decision.

25. The formulation of the provisions for review in paragraph 12 of Schedule 1 to the Appeal Regulations is not unique to proceedings before the adjudicators: for example, very similar provisions formed part of the Employment Tribunals (Constitution and

Rules of Procedure) Regulations 2001 which used to govern proceedings before Employment Tribunals and included a power to review decisions when the interests of justice required. In jurisdictions from which an appeal is available (the Employment Tribunal being one example), the consistent approach to the power to review in the interests of justice is that while that phrase can cover a wide range of circumstances it is clearly understood that the principle of finality means that this power is not to be used as a substitute for an appeal. For example, in *Trimble v Super Travel Ltd.* [1982] ICR 440 Browne-Wilkinson J (at the time, the President of the Employment Appeal Tribunal) said, at page 442 F – H.

> "We do not think that it is appropriate for an industrial tribunal to review their decision simply because it is said there was an error of law on its face. It the matter has been ventilated and properly argued, then error of law of that kind fall to be corrected by this appeal tribunal. If, on the other hand, due to an oversight or to some procedural occurrence one or other party can with substance say that he has not had a fair opportunity to present his argument on a point of substance, then that is a procedural shortcoming in the proceedings before the tribunal which, in our view, can be correctly dealt with by a review under rule 10 of schedule 1 to the Industrial Tribunal (Rules of Procedure) Regulations 1980, however important the point of law or fact may be. In essence, the review procedure enables errors occurring in the course of the proceedings to be corrected but would not normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in the light of all relevant argument."

26. That same principle of finality means that the Chief Adjudicator was wrong to conclude that a review on the interests of justice ground could consider the legality of an adjudicator's decision applying the principles relevant on an application for judicial review. Properly understood, paragraph 12 of Schedule 1 to the Appeal Regulations provides no such jurisdiction. Decisions of adjudicators are susceptible to judicial review. If the losing party wishes to challenge a decision on the basis it was wrong in law the correct route is by application for judicial review to this court, not an application under paragraph 12 for a review on the interests of justice ground.

27. In this case the Chief Adjudicator ought to have refused Transport for London's application for review under paragraph 12 because the interests of justice ground for review does not permit review on the basis that the decision in question was wrong in law. Transport for London's challenge to the Chief Adjudicator's decision on the review application therefore fails.

D. Disposal

28. The application for judicial review of the adjudicators' decision of 26 May 2023 is allowed with the consequence that the decision allowing the appeals of the 4 interested parties are quashed and will be replaced by a decision dismissing each of those appeals.

The application for judicial review directed to the decision of the Chief Adjudicator made on 21 July 2023 is refused.