



DECISION OF

Sheriff Colin Dunipace

**ON AN APPEAL
IN THE CASE OF**

Mr Ian Lyall

Appellant

- and -

The City of Edinburgh Council,

Respondent

FTS Case reference: ED00268-2311

20 May 2024

Decision

1. The Upper Tribunal refuses the Appeal.

Introduction

2. Mr Ian Lyall (hereinafter “the Appellant”) submitted an Appeal against a decision of the First-tier Tribunal of the General Regulatory Chamber (hereinafter referred to as ‘the Tribunal’) dated 3 December 2023 refusing his appeal against the imposition of a Penalty Charge Notice (hereinafter referred to as the ‘PCN’) at 10.54 on 13 August 2023 in Dunbar Street, Edinburgh. In support of his Appeal the Appellant has submitted the following documents, namely:

- a. Form UTS-1

b. Legal Member's decision dated 3 December 2023

c. Decision of First-tier Tribunal granting Permission to Appeal dated 4 January 2024

3. By way of background, the Appellant was issued with a PCN in relation to a parking contravention involving his motor vehicle registration number SO53RFL on 13 August 2023. The nature of the alleged contravention was that the Appellant was:

"Parked in a restricted street during prescribed hours"

4. Neither the Appellant nor the Council elected to have a telephone or oral hearing and the original appeal was decided by the Legal Member of the Tribunal on the basis of documentary evidence provided and submissions. The original 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 dated 3 December 2023.

5. The written reasons given by the Legal Member for the refusal of the Appeal at paragraphs 8 – 12 were as follows:

"8. The Appellant accepts that the vehicle was parked at the locus at the relevant time and that a PCN was issued in terms of the relevant TRO.

9. There is no dispute over the terms of the relevant Traffic Regulation Order: The City of Edinburgh Council (Traffic Regulation; Restriction, Waiting, Loading and Unloading, Stopping and Parking Places) Designation and Traffic Regulation Order 2018.

10. Whilst the Appellant has stated that the parking contravention did not occur, as he was parked on private land, over which the public have no right of access, I disagree with his position. The fact that he himself was able to effect access and park at the locus shows that the public can access same. The position in which the scooter was parked is directly adjacent to exit doors. Again demonstrating that the public have access to and egress from the building over this area of land. The Appellant has misdirected himself in his analysis of what is considered fairly trite law at this stage. The Council provides an accurate description of the regulations and interpretation of same as they apply in this situation. I accordingly accept the Council position as set out above, which I prefer, on balance, to that of the Appellant. I accept that the road markings/signage are sufficiently clear and legible to convey the restriction to the average motorist. It is for the driver to familiarise

themselves with parking restrictions prior to parking their vehicle and to adhere to the terms of same.

11. I accordingly accept that the vehicle was parked at the locus in contravention of the prohibition. The Appellant's position is not supported by the evidence lodged by him. The evidence lodged by the Council supports a credible alternative to the Appellant's position.

12. The appeal is accordingly dismissed."

6. On 9 December 2023 the Appellant thereafter timeously sought permission to appeal against the original decision 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"). The grounds of appeal were summarised by the presiding Legal Member as:

"(i) An error on a point of law in the decision of the First-tier Tribunal in that the Adjudicator based his decision on whether or not the public have access over the parking locus (Paragraph 10 of Decision). His decision should have been made on whether or not there exists "a public right of passage" over the said locus.

It has been consistently argued that the locus does not fall within the definition of a "road" under Section 151 of the Roads (Scotland) Act 1984 as there is no such public right of passage either across or along it.

(ii) A failure on the part of the First-tier Tribunal to take into account in its decision that the doors off Dunbar Street do not provide general or public access to the privately owned building known as Central Hall where the vehicle was parked immediately adjacent to and within a narrow strip of cobbled ground at the relevant time.

The mere existence of a door in the wall of a building should not be taken as evidence of the public having access and egress from a building. The Adjudicator appears to have concluded without evidence that the building is open to the public and that the public have access and egress through this door."

7. As indicated above, the application for leave to appeal was considered by another Legal Member of the First-tier Tribunal on 4 January 2024, and leave to appeal was allowed.

8. 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 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. The Upper Tribunal therefore can deal only with those aspects of this appeal which have been allowed permission to appeal.

Discussion

9. 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.

10. This appeal is brought by the Appellant under the provisions of section 46 of the Tribunals (Scotland) Act 2014 (“the 2014 Act”) and the procedural rules contained within The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (“the 2016 Regulations”). Permission to appeal was fully granted on 4 January 2024. The FTS case reference allocated is ED00268-2311.

11. 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. Appellant identifies an arguable error on a point of law in the decision of the First-tier Tribunal

Hearing

12. The Appellant requested a full oral hearing in relation to this matter. The Council did not indicate that they wished to participate in such a hearing, and did not submit any further submissions in support of their position. A WebEx Hearing was accordingly fixed for 21 March 2024 and this took place with the Appellant being present.

13. 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.

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

15. The grounds of this Appeal are as stated above at paragraph 6. The Appellant had stated in his written submissions that the point of law raised was 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. The Appellant asserted that no parking contravention occurred as his scooter was parked on a narrow strip of cobbles land which did not form part of Dunbar Street, nor was it upon part of a verge or pavement pertaining thereto, meaning that the public had no right of passage over this area. The Appellant also asserted that the absence of a boundary fence did not mean that the area automatically became part of the verge of any adjacent public road, and that it would be a perverse interpretation to determine that a public road could automatically extend from the location of same to the nearest building. There was said to be no public right of passage

over the land upon which the Appellant's scooter was parked, and the cobbles were said to demarcate the extent of the private ownership of the private land, and that there was therefore a reasonable expectation that the area would not be subject to parking restrictions.

16. The Appellant expanded upon his written submissions at the WebEx Hearing stating that his scooter was parked on a narrow strip of pavement. On one side was a church building and on the other side of the pavement was Dunbar Street. He stated that his scooter was not on a pavement or verge or part of Dunbar Street. He stated that the area of cobbles on which his scooter was parked did not fall within the definition of a road as it was not a public right of passage. He pointed out that it was simply a narrow strip of ground which had numerous obstacles. For example it was used for recycling bins by owners of shops and cafes and not the public. It was not a way over which public had access, and indeed the public could not have access as there were no public entrances. It was used for deliveries and potentially as an emergency exit, but it was clear that there was no public right of access. Further the doors which were on Dunbar Street did not afford access to the public. The Appellant made reference to the case of *Morston Whitecroft v Falkirk Council* [2012] CSOH 97 in relation to the nature of roads and indicated that the photographic evidence which was to be submitted by him would show that he had parked on a verge and not on a public passage. The Appellant further pointed out that there were no 'Keep Clear' signs at the locus and also referred to the case of *Brian Hamilton v Dumfries and Galloway* [200] CSIH 13.

17. For the avoidance of doubt the Appellant did subsequently submit the photographic evidence to which he had referred.

18. The position of the Council was that the definition of a Road includes a road verge or pavement, and that a PCN can be issued when a vehicle is parked on such an area. The Council also state that there was a relevant Traffic Regulation Order in force for the area in which the vehicle was parked, and they point out that the local authority have the power to restrict parking on an area where the public have access, even when it is maintained by someone else. The Council state that the public have access to the area in which the Appellants vehicle was parked, and that there were no fences or barriers to stop or obstruct the public from walking on that area, nor was there any signage to forbid the public from using that land.

19. In considering this Appeal I have had regard to the terms of the interpretation section 151 of the Roads (Scotland) Act 1984 which states:

““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;”

20. In considering the foregoing it is important to note that the terms of this 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.”*

21. The case of *Morton Whitecross* mentioned above was also a case which appears to depend very much on its own facts and circumstances, dealing as it did with a requirement to access a public road without crossing private land. It appears to have no practical application in the present case.

22. Having considered the foregoing I am satisfied that the terms of the section make it 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. The public right of passage need not constitute a use from end to end and it need not be part of a continuous journey. In the present case it is clear from the evidence lodged that the area in question is immediately adjacent to the road, and that parking on that area may impede pedestrians by blocking their passage. As pointed out by the Council the fact that the land is private is irrelevant in this regard. There is nothing in existence to prevent

members of the public effecting a passage over this land for whatever reason. There are no impediments to them doing so and indeed no signage indicating that they should not. There is also an adjacent door which indicates that this does constitute a piece of land where people can enter or egress the building. Whilst I appreciate that the Appellant places little store by the existence of this door, it is a reasonable inference to believe that it is there for a purpose, and that is to allow the access and/or egress of persons from that building. By doing so they would be exercising a public right of passage. In these circumstances I am satisfied that the piece of land does constitute a road as defined in the Roads (Scotland) Act 1984, and does constitute a public right of passage to the property in question. I do not understand it to be disputed that the Central Hall referred to 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. The frequency by which that may in fact be done is irrelevant for these purposes. Having determined that the area in question does constitute a road in terms of the statutory definition and having noted that there has been no challenge to the relevant Traffic Regulation Order imposing the parking restrictions, I am satisfied that this appeal must fail.

Conclusion

23. In these circumstances I am satisfied that the Penalty Charge Notice was validly issued and accordingly I refuse the Appeal.

24. Despite this decision, it does remains open to the Appellant to ask the parking authority to look again at the imposition of this PCN and request that it should exercise its discretion not to insist on payment. That is a matter entirely for the parking authority and I make no comment on whether they should do so.

Parties Aggrieved by Decision

25. 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

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Sheriff of South Strathclyde Dumfries and Galloway at Hamilton