London Tribunals
Environment and Traffic Adjudicators

Case Ref: 2240500622

ANISHA MOOSAFEER

-v-

London Borough of Havering
(the Enforcement Authority)

This is an application by the Appellant for a review of the adjudicator's decision. Mr Morgan represents the Appellant. The Authority was not represented.

Mr. Morgan submits that the adjudicator has erred in determining that the prejudice is relevant when considering whether an appeal should be allowed when the PCN is non-compliant with its statutory requirements.

Mr Morgan had argued before the adjudicator that the PCN had 2 lists of grounds upon which representations may be made. Not only are the grounds not as stated, the two lists do not even match. Mr Morgan suggested that the Authority had rather clumsily imported grounds for representations against parking PCNs into moving traffic PCNs.

The grounds for making representations are stated in Paragraph 1, Schedule 1 to the London Local Authorities and Transport for London Act 2003. The grounds as stated in the PCN are not reproduced in verbatim. This is not Mr Morgan's complaint. He submits that one of the grounds could not as a matter of fact have been available for a moving traffic contravention, and another ground was simply not available as a matter of law. I do not think that I need to determine the point. I am prepared to accept, for the purpose of determining the key issue in this case, that the grounds were not stated correctly.

Was there non-compliance?

Section 4 (8) of the 2003 Act states that a penalty charge notice under this section must-

(a)state-

(i) the grounds on which the council or, as the case may be, Transport for London believe that the penalty charge is payable with respect to the vehicle;

(ii) the amount of the penalty charge which is payable;

(iii) that the penalty charge must be paid before the end of the period of 28 days beginning with the date of the notice;

(iv) that if the penalty charge is paid before the end of the period of 14 days beginning with the date of the notice, the amount of the penalty charge will be reduced by the specified proportion;

(v) that, if the penalty charge is not paid before the end of the 28 day period, an increased charge may be payable;

(vi) the amount of the increased charge;

(vii) the address to which payment of the penalty charge must be sent; and

(viii) *that the person on whom the notice is served may be entitled to make representations under paragraph 1 of Schedule 1 to this Act*; and

(b)specify the form in which any such representations are to be made.

The statutory requirement in (vii) above is that the recipient of the PCN be informed that he has a right to make representations. While the grounds for representations are provided in paragraph 1 of Schedule 1, there is a strong argument that section 4 (8) does not require the grounds to be specified in the PCN.

I am not saying that authorities are prohibited or should be discouraged from reciting the grounds, nor am I saying that authorities at liberty to misrepresent the ground when they are set out in the PCN, but it does not mean that PCNs which do not set out the grounds for making representations correctly are non-compliant. The legislation does not require that the grounds be stated nor does the legislation prohibit the incorrect reference to the grounds. There are therefore no compliance requirements with regards to the grounds. There may be a legal consequence for such PCNs, but whether the PCN should be invalidated or an appeal should be allowed cannot be premised on non-compliance.

Was there a need for prejudice?

The Appellant's case at the representation stage was that she had forgotten that her access permit had expired. Her account did not amount to a ground for representation in either the "statutory" or "PCN" list of grounds. The incorrect statement on the grounds in the PCN could not have prejudiced the Appellant's case.

The "no need for prejudice argument" stems mainly from the decision of the High Court in *R (Barnet) v The Parking Adjudicator (2006) EWHC 2357 (Admin).*

The *Barnet* case concerns a requirement under Section 66 of the Road Traffic Act 1991. The PCN in that case contained the date of the contravention but not the date of the notice. The dispute was whether this rendered the PCN compliant or substantially compliant even though it might not cause prejudice to the recipient.

It seems to me that Mr Morgan and the adjudicators in cases cited by Mr Morgan had not considered that there is in fact a difference between the statutory requirements. In PCNs covered by section 66 of the 1991 Act, the PCN must state the date of the notice. Jackson J's decision in that case should be taken to say that if there is a statutory requirement that something must be specifically included in a PCN, the failure to include it renders the PCN invalid irrespective of a lack of prejudice.

The Court was not asked to consider the *Barnet* decision in the *London Borough of Camden v the parking adjudicator and others, [2011] EWHC 295 (Admin)*, but Burnett J noted (in para 45 and 46) of his decision that a number of cases cited in support of non-compliance were decided before the General Regulations and the Appeals regulations were made in December 2007 and subsequently came into force on 31 Judgment Approved by the court for handing down as were the decisions of the High Court and of the Court of Appeal to which he had referred.

Burnett J said: "In my judgment, in framing the new regulations, the policy maker has heeded the suggestion of Chadwick LJ and made clear the nature and extent of collateral challenges that may be considered by Parking Adjudicators whilst adhering to the principle found in the judgment of Elias J in the Westminster case, that the four corners of their powers are contained within the Appeals Regulations. There are three significant changes between the old powers found in schedule 6 to the 1991 Act and those found in the Appeals Regulations which unequivocally lead to that conclusion."

One must therefore question whether *Barnet* is still good law after the commencement of the Traffic Management Act 2004 is arguable and I shall return to it. In this case, there is no requirement in Section 4 or elsewhere in the 2003 Act to recite in verbatim the grounds for representations. It is not analogous with the *Barnet* case.

Even if I were to accept, for argument's sake, that there had been some form of "non-compliance," Mr Morgan has two further hurdles to get over.

What is the consequence of a non-compliance?

In *Glasgow City Council v Upper Tribunal for Scotland [2025] CSIH 2XA38/24*, the Court of Session considered an appeal by the city council against the Upper Tribunal's decision that a failure to serve a PCN by recorded delivery as required by the Interpretation and Legislative Reform (Scotland) Act 2010 (and therefore not validly served) enabled the Upper Tribunal to allow the motorist's appeal.

The Court was of the opinion that where the legislation does not provide expressly for what the legal consequences of a failure are to be, difficult questions can then arise:

- Can strict compliance with the requirement be overlooked in some circumstances and, if so, how are such circumstances to be identified?

- Is non-compliance fatal to the lawful exercise of the power - always or only sometimes?

- Does it matter that the failure to comply has made no practical difference to the interests of the person affected by the exercise of the power?

The focus is not compliance or the degree of compliance, but the consequence of non-compliance.

The Court noted that in *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd [2024] 3 WLR 601*, the Supreme Court held that "Substantial compliance" begs the question of what purpose was supposed to be served by the rule and expresses a conclusion arising from the relevant analysis, rather than stating a test in itself."

The Court of Session was of the opinion that the first question the Court should ask is whether examination of the purpose of the procedural rule, which has admittedly been breached in the present case, shows that Parliament intended that the rule should operate strictly, as a bright-line rule. The Court said:

"It is unrealistic to suppose that Parliament, having resolved to tackle an issue of such importance through legislation to promote low emission zones, would have wished that objective to be undermined by an insistence on strict compliance with a procedural rule in circumstances where there has been substantial observance of it and no detriment whatsoever to the interests of the particular motorist. In terms of the flexible approach approved in Soneji and endorsed in A1 Properties there have been no meaningful consequences of non-compliance so far as Mr Hamilton is concerned. That being so, it is most improbable that Parliament would have intended the outcome to be total invalidity."

In the instant case, Parliament has clearly intended that local authorities should have penal powers to regulate traffic movement and provides an enforcement regime. A key aspect of the regime is that the owner of a vehicle subject of a PCN should have a right to make representations and a right to appeal to the adjudicator if the representations failed. The grounds for representations reflects Parliament's intention to decide what reasons that Authorities are obliged to consider. I do not see the list of grounds as something to regulate and discipline an authority. If anything, it is there to restrict the ambit of representations, which the Appellant in this case had simply ignored and went ahead when none of the statutory grounds or the grounds stated by the Authority would have applied in any event.

This case and the cases cited in approval suggest that the *Barnet* case, where the focus is on a breach rather than the consequence, may no longer be good law.

I do not consider that Parliament had intended that the mis-statement of the grounds nullify the instant PCN.

The power of the adjudicator

Even if the PCN was non-compliant and that the non-compliance could have been prejudicial, I do not think that Mr Morgan's submission that the appeal should have been allowed is sustainable.

In the *Camden* case, the Authority had sought to demand a surcharge if motorists wish to pay the penalty by credit card. Adjudicators have allowed appeals on the basis of a procedural impropriety, or that the amount demanded exceeded the amount prescribed by the legislation, or that it was simply legally "unacceptable".

The High Court considered that even if the imposition of the surcharge was ultra vires so that the whole process was in some way "infected with illegality":

"The levying of a 1.3% administration fee for payment by credit card was assumed for the purposes of the appeals to the Parking Adjudicators as being ultra vires. However, it does not provide a further independent basis for allowing the appeals on the broad ground of 'collateral challenge'. That is because, whilst I accept that it provided a basis for allowing the appeals in these cases because the penalty charge exceeded the amount applicable and also because of procedural impropriety as defined by the Appeals Regulations, this broad public law failing (conceded only for the sake of argument) does not fall within any grounds upon which a Parking Adjudicator may allow an appeal."

The High Court noted that in framing the new (post Traffic Management Act 2004) regulations, which provides specifically procedural impropriety as a ground for allowing an appeal, and which gives the adjudicator a power to make recommendations where there are compelling reasons to do so, the policy maker has made clear the nature and extent of collateral challenges that may be considered by parking adjudicators are contained within the Appeals Regulations.

At paragraph 52 of the decision, the High Court said:

"The restatement and reformulation of the powers of Parking Adjudicators in the Appeals Regulations show public law issues do fall to be considered in the appeals process but only in so far as the regulations themselves allow it. There is no independent roving commission to identify public law failings with consequent power to allow appeals outside the relevant regulations."

The *Barnet* case had not been discussed in the *Camden* case but I think that the latter certainly added a "so what" question to non-compliance (irrespective of whether it was prejudicial). Adjudicators need to ask whether the non-compliance amounts to a statutory ground of appeal. It is for this reason that I query again whether Barnet is still authoritative when a collateral challenge is made.

Mr Morgan was not able to pinpoint a ground of appeal which would cover the non-compliance in this case. He had drawn my attention to a case in which the adjudicator found that it was unfair to the motorist. I do not find unfairness in this case but even if there was unfairness, adjudicators need to heed what is said in paragraph 52 in the *Camden* case.

I accept that there is an argument that one cannot read the *Camden* ruling into moving traffic cases because moving traffic cases do not have the benefit of a "defence" of procedural impropriety so the four corners of the adjudicator's power (see paragraph 46 of the *Camden* decision) remain to be beyond the statutory grounds of appeal. I do not accept that this argument applies in this case.

My research also revealed an argument that the result of a successful collateral challenge is that the PCN is unenforceable so any penalty demanded exceeded the amount applicable (which is a statutory ground of appeal).

This point was dealt with in paragraph 43 of the *Camden* decision, by reference to the decision in *R (Westminster City Council) v Parking Adjudicator [2002] EWHC 1007 Admin; [2003] R.T.R. 1*. The applicable is the amount as prescribed by legislation. The Adjudicator may not allow an appeal by altering that amount to nil because he concluded that it would not be right, in the circumstances of the contravention or the personal characteristics of the motorist, to make the appellant pay. Therefore, the amount demanded did not exceed the amount applicable.

For the above reasons, I do not find that the adjudicator's refusal to allow the appeal to be in error. I refuse the application.

The delayed submission of grounds of appeal

I need to comment on the approach taken by Mr Morgan in this case.

The Appellant made formal representation on 27 September 2024. The substance of her representations was that she had forgotten that her access permit had expired. These representations were rejected.

On 6 November 2024, Mr Morgan representing the Appellant submitted an appeal. He said that he would be filing submissions upon receipt of the council's evidence pack.

The appeal was scheduled to be heard on 9 December 2024. On 13 November 2024, Mr Morgan asked for the matter to be re-scheduled. The new date was 19 December 2024. Mr Morgan made a substantive submission on 12 December 2024.

This practice of delaying the service of a substantive case seems to be gaining popularity among representatives who appear in this Tribunal.

The conduct of litigation in courts in England and Wales is guided by an overriding objective which underpins the entire Civil Procedure Rules framework and the Criminal Procedure Rules. The primary purpose of the overriding objective is to ensure that cases are dealt with justly and at proportionate cost.

While this Tribunal is not bound by either sets of the Rules, there is absolutely no justification as to why parties and the Tribunal should not conduct proceedings in line with the overriding objective.

When a Notice of Appeal is served by the Tribunal on the enforcing authority, the Authority must respond with the service of an evidence pack which will normally include its submissions against points raised in the representations and the Notice of Appeal. The Notice of Appeal in this case prevents the Authority from doing anything but to respond to the representations. When the Appellant serves a more substantive case, the Authority will have to re-visit its case in case a further response is required.

In this and some other cases, the situation is made worse by a party making a point which was never raised at the representations stage or in the Notgice of Appeal. The authority is obliged not just to re-visit its case, but to address the new (often lengthy) arguments, and often at short notice.

In some cases, one can understand readily an Appellant making further submissions after the Authority has served its evidence pack. This does not arise in this case. Apart from the copy of the PCN, the original of which was with the Appellant, the evidence pack had nothing to do with Mr Morgan's argument. Nothing prevented him from setting out his case fairly and squarely when he prepared the Notice of Appeal.

This delay on the service of the Appellant's case obliges the respondent authority to prepare their case twice. The informal approach in this Tribunal is not carte blanche for Appellants and their representatives to cause unnecessary work to the Authority in direct contradiction to the overriding objective. I dare say that if an authority having served its evidence pack, then chose to make further and lengthy submissions without any justification, there would be an uproar and a clamour for the appeal to be allowed for this reason alone. Appellant do not have a special privilege to behave differently. Adjudicators will bear in mind their power to award costs if a party 's conduct in making or resisting an appeal was wholly unreasonable, irrespective of the outcome of an appeal.

Anthony Chan

Adjudicator

21st February 2025