

Before Adjudicators:
Christopher Rayner
Jane Anderson
Anthony Chan

City of Westminster
-v-
Peter Burness
Appeal number 2110325661

and

City of Westminster
-v-
Pool Motors
Appeal number 2110534297

Date of Review Hearing: 23 May 2012

DECISION

PRELIMINARY ISSUES

NATURE OF HEARING

1. These cases come before us following applications by Mr. Burness and Pool Motors, under Paragraph 12 of the Schedule to the Civil Enforcement of Parking Contraventions (England) Representations and Appeals Regulations 2007 (the 'Appeal Regulations'), for review of the decision of the respective original Adjudicator in each case to refuse the appeal.
2. The City of Westminster (the respondent authority) was represented by Mr. Couser of counsel, Mr Peter Burness was represented by Mr Barrie Segal and Pool Motors (and the driver Mr. Lund) by Mr Nigel Wise. We would like to record our thanks to the representatives for complying with the Directions in this matter and for assisting us to arrive at our decision. The respondent authority collated the 663 pages of evidence and submissions from all parties, together with relevant legal authorities, and produced a paginated bundle for the use of all parties at the Tribunal. This was invaluable.
3. Three Adjudicators heard the Applications. As a body, PATAS Adjudicators have agreed that when issues of particular complexity, or issues that have given rise to conflicting decisions arise in the Tribunal, and there is merit in so doing, they will arrange for hearings to be conducted by a panel of three Adjudicators. Such hearings allow for representation by the parties, a breadth of experience and views to be brought to the issues involved by having more than one Adjudicator and provide guidance for Adjudicators in other cases involving those issues.

4. This panel hearing was arranged because Adjudicators were making what appeared to be inconsistent decisions about camera enforcement appeals and particularly the approval or otherwise of the respondent authority's equipment in that regard. Mr. Wise and Mr. Segal placed reliance in their written and oral submissions on inconsistency between Adjudicators. However, Adjudicators take decisions on evidence placed before them, and it is by no means clear that the evidence placed before them for apparently inconsistent decisions was necessarily the same. There is in any event a substantial number of these cases and in order to assist enforcement authorities, motorists and their advisers, it was felt appropriate to give some guidance as to the issues involved.

5. The Schedule to the Appeals Regulations provides only for a single Adjudicator to hear an appeal. For that reason, the decision that is entered into the Statutory Register will be that of Mr. Rayner. However, the decision does reflect the views of all three Adjudicators on the panel. As with all decisions in the Tribunal, it is not legally binding on other Adjudicators. We express the hope however that Adjudicators, motorists and their advisers, and enforcement authorities will find the decision useful in determining how to deal with individual appeals.

CONSOLIDATION

6. Paragraph 14(1) of the Schedule to the Appeals Regulations provides that where there are pending two or more appeals and at any time it appears to an Adjudicator that (a) some common question of law or fact arises in both or all appeals; or (b) for some other reason it is desirable to make an order under this paragraph, the Adjudicator may order that all of the appeals or those specified in the order shall be considered together and may give such consequential directions as may appear to him to be necessary. We consider that there is a common question in these present cases, where the contravention in each case involves the approval of devices under The Civil Enforcement of Parking Contraventions (Approved Devices) (England) Order 2007 (The "Approved Devices" Order) and consequential issues.

7. We were thus minded to order consolidation and gave all parties an opportunity of making representations against the making of the order, as required by Paragraph 14(2) of the Schedule to the Appeals Regulations. The respondent authority and Mr. Segal on behalf of Mr. Burness supported consolidation; Mr. Wise on behalf of Mr. Lund opposed it. Having considered the representations of the parties we found that there was a common question of law or fact arising in both applications and it was, in all the circumstances, desirable to make such an order to consolidate the proceedings.

INITIAL APPEAL DECISIONS AND REVIEW APPLICATIONS

8. The contravention alleged, as stated on the Penalty Charge Notice (PCN) in each case, is 'Parked in a restricted street during prescribed hours'.

9. Each PCN was served by post under Regulation 10(1)(a) of the Civil Enforcement of Parking Contraventions (England) General Regulations 2007 (the 'General Regulations') on the basis of a record produced by an approved device.

10. Paragraph 12 of the Schedule to the Appeal Regulations provides as follows:
(1) The Adjudicator may, on the application of a party, review-

- (a) any interlocutory decision; or
- (b) any decision to determine that a notice of appeal does not accord with paragraph 2 or to dismiss or allow an appeal, or any decision as to costs, 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 his failure 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 of 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 of or foreseen;
- or
- (vi) the interests of justice require such a review.

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11. Mr. Lund appealed against a postal PCN issued by the respondent authority alleging that he was parked in Charing Cross Road at 20:28 on 23 July 2011. His grounds of appeal, as contained in his appeal notice, reflected the representations that he had made against the PCN to the respondent authority, namely that he was not "parked" but that he had just dropped off a passenger and was relieving himself in a specially designed device before driving off.

12. At the initial hearing of the appeal Mr. Wise attended to represent Mr. Lund. Mr. Wise formally abandoned all previous grounds of Mr. Lund's appeal and presented a bundle of documents running to 150 pages raising new issues on Mr. Lund's behalf. The Adjudicator, Mr. Teper, adjourned the appeal to enable the respondent authority to respond to Mr. Wise's representations. On 17 February 2012 Mr. Teper refused the appeal.

13. On 5 March 2012 Mr. Wise applied for a review of Mr. Teper's decision. Mr. Wise submitted a 20 page document in support of his application. As it impacts on a separate issue in this appeal, (the role and status of representatives in this Tribunal), we note Mr. Wise used personal and intemperate expressions about Mr. Teper in that application. We return to that matter later, but at this stage we note that such language is disrespectful and inappropriate in a judicial setting.

14. Mr. Wise's application for review relies on two grounds in Paragraph 12(1)(b) of the Schedule to the Appeals Regulations, namely 12(1)(b)(iv) and 12(1)(b)(vi). Mr. Wise relies on a letter from Mr. Brian Etheridge, Managing Director, Motoring Services, Department of Transport, dated 1 February 2012 in support of the "new evidence" ground in Paragraph 12(1)(b)(iv). This letter is written by way of response to Mr. Wise. Mr. Etheridge identifies as one of Mr. Wise's concerns that, "... it is difficult to ascertain that the camera devices and supporting systems in operation are the ones certified by VCA", to which Mr. Etheridge responds, "In the event of a disputed penalty, the remedy for any difference in the equipment certified and the equipment in application rests in the appeals process." Mr. Etheridge goes on to state in that letter, "We will convene a technical working party to look at these issues".

15. Mr Wise submits that this letter is subsequent to Mr. Teper's decision in Pool Motors and constitutes new evidence. Further, he submits that the letter casts doubt on a decision in another appeal, Watkins v Westminster PATAS case number 2110430892, where Mr. Teper had

concluded that the device that the respondent authority used for camera enforcement was correctly certified and that he would rely on the certificate provided. Mr. Wise submitted further written submissions in support of this ground of appeal on 24 May 2012 after the hearing had concluded. That is clearly inappropriate, and again we return to this matter later in the decision.

16. We do not find that Mr. Wise has established a ground for review under Paragraph 12(1)(b)(iv). Mr. Etheridge's letter is not new evidence. The letter could have been easily elicited from Mr. Etheridge prior to the hearing before Mr. Teper, which Mr. Wise acknowledged. It is therefore not "new evidence the existence of which could not reasonably have been known of or foreseen" as required by Paragraph 12(1)(a)(iv). Mr. Etheridge's views are also not relevant. It is an opinion from a member of the Department of Transport about a judicial function, which is not binding upon us.

17. Mr. Wise's second ground for review is under Paragraph 12(1)(b)(vi) in the Schedule to the Appeal Regulations, namely that a review is required, "in the interests of justice". The usual standard for requiring such a review is that an Adjudicator has come to a decision at which no Adjudicator could reasonably arrive, either because of a mistake of law, or because of an unsustainable finding of fact. Mr. Wise readily acknowledged in his submissions to us that the decision that Mr. Teper came to was not irrational, and was one that he was entitled to reach. With that concession the Tribunal would not normally entertain a review application and that would be an end to Mr. Wise's application.

18. However, in the particular circumstances of this case we decided that we would hear Mr. Wise's submissions to ascertain whether they raised any issue of law or fact that would fall within Paragraph 12(1)(b)(vi), or would be relevant to the other review application. Those submissions are considered below, but they raised no sustainable ground that would require us to review Mr. Teper's decision. We reject Mr. Wise's submissions. We therefore dismiss his application for a review of this decision.

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19. In this review application, Mr. Segal seeks to rely on Paragraph 12(1)(b)(i) in the Schedule to the Appeal Regulations. He explains that on the day that Adjudicator Miss Brennan dealt with this appeal he was present at the hearing centre but the reception staff did not notify him when the case was being heard, even though he had told them that he was representing Mr. Burness. Mr. Segal submits that he was unable to make representations on behalf of Mr. Burness so that there had been an administrative error resulting in the decision being wrongly made. We accept there was an administrative error in not alerting Mr. Segal to the hearing, and that Mr. Segal should have the opportunity to put his case fully. We do therefore allow this review application. The effect of allowing the review application is to set aside the original decision and so to rehear Mr. Burness' appeal.

THE DEVICE APPROVAL PROCESS

20. It is central to the submissions of Mr. Wise and Mr. Segal that the Tribunal should have power to question the approval of certified devices. For that reason, we look in some detail at the legislative framework for this process.

21. The starting point for camera enforcement for parking contraventions is section 72 of The Traffic Management Act 2004 (the "2004 Act"). In so far as it is relevant that reads,

- (1) The appropriate national authority may make provision by regulations for or in connection with (a) the imposition of penalty charges in respect of road traffic contraventions
- (4) The regulations may include provision prohibiting the imposition of a penalty charge except on the basis of - (a) a record produced by an approved device.

22. Section 89 of the 2004 Act states,

- (1) Regulations and Orders under this Part may make provision for Greater London different from that made for the rest of England....
- (3) Regulations and orders under this Part may contain incidental, consequential or transitional provision or savings.

23. In section 92(1) of the 2004 Act,

- a) "approved device" means a device of a description specified in an order made by the appropriate national authority" and
- b) "appropriate national authority" means - (a) as regards England, the Secretary of State ...

24. Regulation 6 of the General Regulations stipulates "A penalty charge shall not be imposed except on the basis of - (a) a record produced by an approved device ..."

25. The Approved Devices Order is made under sections 89(1) and (3) and 92(1) of the 2004 Act. The wording of this Order is so central to this matter that we reproduce it substantially in the text of this Decision

Citation, commencement, application and interpretation

1(3) In this Order -

"the scheduled requirements" means the requirements set out in the Schedule to this order; and

"the statutory purposes" means the purposes of regulations relating to the civil enforcement of parking contraventions made under section 72(4)(a) of the Traffic Management Act 2004

Approved devices

2 (1) A device is an approved device for the statutory purposes, if it is of a type which has been certified by the Secretary of State as one which meets the scheduled requirements.

(2) A device shall be taken to meet the scheduled requirements if there has been produced to the Secretary of State evidence which satisfies him that it has been found by a competent authority in an EEA state to be one which meets the requirements of an EEA standard which requires a level of performance equivalent to that required by the scheduled requirements.

(3) (omitted)

Transitional provision

3 (1) A device which is not an approved device by virtue of article 2, but which was in use in Greater London immediately before the coming into force of this Order for the purpose of parking enforcement in accordance with section 4 of the London Local Authorities Act 2000 .. (service of penalty charge notice on the basis of camera-derived information), shall be treated as an approved device during the transitional period.

(2) The "transitional period" is the period of 12 months beginning with the day on which this Order comes into force.

SCHEDULE

THE SCHEDULED REQUIREMENTS

1. The device must include a camera which is-

(a) securely mounted on a vehicle, a building, a post or other structure;

(b) mounted in such a position that vehicles in relation to which parking contraventions are being

committed can be surveyed by it;

(c) connected by secure data links to a recording system; and

(d) capable of producing, in one or more pictures, a legible image or images of the vehicle in relation to which a parking contravention was committed which show its registration mark and enough of its location to show the circumstances of the contravention.

2. The device must include a recording system in which-

(a) recordings are made automatically of the output from the camera or cameras surveying the vehicle and the place where a contravention is occurring;

(b) there is used a secure and reliable recording method that records at a minimum rate of 5 frames per second;

(c) each frame of all captured images is timed (in hours, minutes and seconds), dated and sequentially numbered automatically by means of a visual counter; and

(d) where the device does not occupy a fixed location, it records the location from which it is being operated.

3. The device and visual counter must-

(a) be synchronised with a suitably independent national standard clock; and

(b) be accurate within plus or minus 10 seconds over a 14-day period and re-synchronised to the suitably independent national standard clock at least once during that period.

4. Where the device includes a facility to print a still image, that image when printed must be endorsed with the time and date when the frame was captured and its unique number.

5. Where the device can record spoken words or other data simultaneously with visual images, the device must include a means of verifying that, in any recording produced by it, the sound track is correctly synchronised with the visual image.

26. We make some comments about the Approved Devices Order.

a) Regulation 2(1) states that a "device" is "an approved device" if it is of a type certified by the Secretary of State as meeting the Scheduled Requirements.

b) Crucially in our determination, Regulation 2(2) stipulates that it is the Secretary of State who needs to be satisfied that the requirements of the Schedule are met. The evidence must be produced to satisfy him or her.

c) The requirements of an approved device in the Schedule to the Order cover far more than the camera, and include equipment and much of the process.

d) There is nothing in this Regulation that could directly or indirectly be taken as prescribing how or what evidence should be presented to the motorist or to the Tribunal.

27. The Government established the Vehicle Certification Agency (VCA) to certify or approve "devices" for the purpose of camera enforcement. They published comprehensive public guidance on the purpose, process and requirements for certification on 28 February 2008, entitled Civil Traffic Enforcement Certification of Approved Devices (COAD 2008)

[<http://assets.dft.gov.uk/publications/tma-part-6-certification-of-approved-devices/certapproveddevices.pdf>]. We quote from the introduction to that document.

Parking restrictions, bus lane use and certain other moving traffic contraventions are increasingly being enforced by local traffic authorities who have sought and been granted civil enforcement powers.

Changes to legislation are harmonising the civil enforcement procedures throughout England.

And include provisions for the production of evidence from Closed Circuit TV cameras and associated recording equipment. Such devices, or parts of a device not covered by an existing

recognised approval must be certified by the Secretary of State for Transport to show that the complete system is an "approved device". The Vehicle Certification Agency has been appointed

to do this on his or her behalf. The "approved device" legislation applicable to the civil

enforcement of the contravention in question will indicate the extent to which any existing

approvals (including HOSFB approvals for enforcement under criminal law) may be valid. This document describes the certification procedures and requirements. It underpins, and must be read in conjunction with, applicable legislation concerning "approved devices" made under the Transport Act 2000 or the Traffic Management Act 2004 as appropriate, which prescribe the fundamental requirements which, when applied collectively, will demonstrate whether equipment is fit for purpose and meets the statutory requirements. (The Department for Transport and local traffic authorities will produce guidance on other operational aspects of civil enforcement)

A device may be designed and produced by one manufacturer or may be a system specified by a system designer incorporating sub-systems and/or equipment produced by one or more manufacturer.

Civil enforcement reduced the burden of proof for contraventions from 'beyond reasonable doubt' to 'the balance of probability'. Detection can be via equipment that is manually controlled, or that is triggered automatically. Increasingly it uses digital technology. This document is concerned with ensuring that the certification of such devices or systems meets 'the balance of probability' criterion, although some of the requirements might go beyond this to meet the 'beyond reasonable doubt principle'. The overall objective is to ensure that evidence produced by devices certified in accordance with the procedure described is defensible when taken to adjudication.

Consideration is also given to the need for all those involved to be able to demonstrate that the operation of the certification process is transparent, fair and ultimately defensible in law, and that the individual applications also satisfy those criteria.

28. The document goes on to describe the process and requirements for securing approval and certification. It draws a clear distinction between the approval process and the Adjudication process: see for example the diagram at page 18 of the document.

29. We have dealt with this background in some detail because it is central to our determination that the approval and certification process is a matter between the enforcement authority, the VCA and the Secretary of State. That is entirely clear from that statutory structure and VCA literature. It follows that our central finding is that if an enforcement authority produces evidence that the Secretary of State has approved and certified the device, the Tribunal is not concerned with whether the VCA should have certified the device or whether the device does in fact satisfy the scheduled requirements of the Approved Devices Order. We find that this position is clear from the wording of the legislation in any event, but if we were looking for confirmation of it, we would rely on the authority in respect of breathalyser devices: *DPP v Brown*, *DPP v Teixeira*, [2001] EWHC Admin 932. In that case the Divisional Court made it clear that it is not open to the court or Tribunal of first instance to look behind the certification of equipment. This was the conclusion of Adjudicator Miss Verity Jones in *Field v Westminster PATAS* case number 211000697A, and one with which we entirely agree. The appropriate remedy to challenge a failure in the approval or certification process is a Judicial Review application in the Administrative Court.

WESTMINSTER CAMERAS AND THE APPROVAL CERTIFICATE

30. The certificate on which the respondent authority relies in order to demonstrate approval of their device is contained in a letter from Tony Stenning, "Member of the Board. Technical & Quality Support, Authorised by the Secretary of State" to Kevin Goad, "Head of Commissioning, Westminster County Council" dated 18 February 2010. That document is unambiguous in its approval of the respondent authority's device. It contains however a reference to "Camera:

DVTel 9840". Mr. Wise submits that the camera of that description does not satisfy the technical requirements of The Approved Devices Order or of COAD, so should not have been certified. Mr. Couser responds with reference to a letter dated 22 November 2011 from Mr. Petrook, UK Managing Director of DVTEL. Mr. Petrook explains that DVTEL had worked with the respondent authority to upgrade the DVTel 9840 cameras (which the respondent authority had been using when the certification process was introduced), with new encoder boards to achieve statutory and COAD compliance. They succeeded in that and the VCA approved the respondent authority's device. In so doing, DVTEL added an "A" suffix to the camera specification used by the respondent authority so that they now referred to them as DVT9840A cameras. Mr Petrook explains that "the "A" is a reference to the encoder type and not the camera type. The camera itself did not change and can still be correctly described as "9840" camera."

31. Mr. Wise responds that it is not correct to describe the "9840A" camera as "9840" because there is a separate camera called the "9840A", and in any event, the 9840 with an encoder board should be properly described as such in the certificate. Mr. Wise submitted that as there was a discrepancy between the camera type or model in the VCA certificate and the camera actually used to capture the contravention, the certificate was invalid and the evidence should be disregarded.

32. In support of his submission Mr. Wise referred us to an appeal in which he was the appellant, *Wise v Richmond upon Thames PATAS* case number 2100576279. In that appeal the Adjudicator Mr. Lane determined, "During the course of the hearing Mr. Johnson (note - Mr. Johnson was the Richmond upon Thames representative) conceded that the camera specification on the mobile enforcement vehicle specification did not match up with the VCA certificate in force at the time of this alleged contravention. He did not resist the appeal any further. I must therefore formally allow the appeal."

33. In the *Wise v Richmond upon Thames* appeal, the Authority conceded that there was insufficient evidence to prove that it had used an approved device. The respondent authority in the current appeals does not make that concession. Mr. Wise addressed us on the technical specification details of the camera known as DVTel 9840 and DVTel 9840A and submitted that these were two different cameras with different specifications. We concluded that this did not assist Mr. Wise. The issue is not how a camera is described in the approval certificate, but whether the camera identified in the approval certificate is the one used in recording and providing evidence of the contravention in the case before us. We accepted the evidence of Mr. Petrook that the approved device included the camera that has been known as DVTel 9840 but which prior to the approval process had been fitted with a new encoder. That upgrade enabled the respondent authority's device, which included the camera as one element, to be approved. We were further satisfied that that the camera used in capturing the alleged contraventions was the upgraded camera referred to in the approval certificate, despite it being known sometimes as DVTel 9840A. If the camera should not have been approved as part of the respondent authority's device, or if there is any other perceived error on the face to the approval certificate, the remedy may be found in Judicial Review proceedings. It is however disproportionate for these matters to be determined and repeatedly reconsidered in this Tribunal.

OBJECTIONS TO THE WESTMINSTER DEVICE

34. We have concluded that the Tribunal is concerned only with whether or not the device is approved. We have determined that the respondent authority's device is approved. Even though

we find that they are not matters for the Tribunal to determine, for completeness we did consider the objections made by Mr. Wise and Mr. Segal to the respondent authority's device and its supposed failure to comply with one or more of the requirements of the Approved Devices Order, to determine whether they would cast any doubt upon our conclusions. In reviewing these we noted that some of these representations have found favour with Adjudicators, and have paid due regard to that. For example, representatives have argued successfully that the failure of the respondent authority's device to show, "each frame ... sequentially numbered automatically by means of a visual counter" is a failure to comply with paragraph 2(b) of the Schedule to the Approved Devices Order, and Adjudicators have allowed appeals on that ground. This in our view demonstrates one of the dangers of the Tribunal going behind the registration certificate and investigating the approval process. The respondent authority acknowledges that its device does not produce sequentially numbered frames, which is a requirement of the Approved Devices Order. However, when it sought approval from the VCA the respondent authority submitted that as its device produced millisecond timing on its frames that should be an acceptable alternative. The VCA and the Secretary of State accepted that and approved the device on that basis, even though it did not comply with the requirements in the Schedule to the Approved Devices Order. By attempting to go behind the certificate and consider whether the device complies with the requirements of the Approved Devices Order, the Tribunal may find itself determining that the device is in some way invalid when in fact it is properly approved. It is not the role of the Tribunal to determine whether the VCA should have approved the device, merely whether it did.

35. A second objection raised to the respondent authority's device relates to paragraph 2(c) of the same Schedule, where it is a requirement that "each frame of all captured images is timed (in hours, minutes and seconds), dated". This, supplemented by reference to the COAD literature, was referred to in the hearing as the requirement for "embedded metadata". Mr. Segal, in particular, argued that even when it was possible to get the Westminster DVDs (or DVTs) to play, it was apparent that the metadata was not embedded "in the frame", in the sense that the information was overwritten on the images, but ran separately alongside or underneath the images themselves. Westminster's device records the images and the time separately, combining the two elements when preparing the evidential and working copies of the evidence. The resultant DVDs then contain both elements, the images and the metadata. Mr. Segal submitted that this was not compliant because the metadata was not embedded into the image itself. We find that this argument fails. If the Adjudicator is satisfied that the device is approved, then it does not matter whether the metadata is displayed in a way that satisfies the motorist or the motorist's representative. It remains the fact that this device was approved, so that the VCA and the Secretary of State were both satisfied with it. It is not a matter for the Tribunal to go behind the certificate.

36. Mr. Wise and Mr. Segal raised other issues, such as whether the still images that the respondent authority provided could really be true copies from their evidential or working copy of the DVD evidence because of a difference in appearance and format. We are of the view that any differences in appearance do not detract from the basic premise that the device is approved and that the evidence is generated from the device. Differences in appearance and format are not material, particularly as all the copies contain all the required information.

37. We have dealt in detail with the specific objections above raised to the respondent authority's device by Mr. Wise and Mr. Segal. We have not responded to all the objections raised as they were merely further examples of asking the Tribunal to go behind the certificate, which we have concluded is not within the Tribunal's jurisdiction.

THE RELEVANCE OF DEVICE APPROVAL IN APPEALS

38. The enforcement authority must be able in every appeal to establish that their device is approved and that the evidence on which they rely comes from an approved device. Beyond that the approval process itself or technical elements of the equipment used are not matters for the Adjudicator. If the enforcement authority can provide evidence that satisfies an Adjudicator that their device is approved, the Adjudicator has no role in investigating whether that approval was rightly given, either because the device should not have been approved or that the device does not meet any of the statutory or other requirements.

39. In coming to this conclusion after full argument, we note that we are again endorsing the very helpful decision of Adjudicator Miss Verity Jones in *Field v Westminster PATAS* case number 211000697A. Miss Verity Jones described what the enforcement authority must demonstrate, namely that,

- a) the record is produced by an approved device - i.e. that the camera and recording equipment used has been approved by the Secretary of State, and
- b) the record is produced by the approved device i.e. there must be an evidential link between the video footage produced and the equipment used.

40. The enforcement authority produced in these two applications the certification document (which for the reasons outlined above, we accept as evidence of the required approval) and a statement by Cathryn Scott, Approval Manager at Westminster Council that covers that certificate and other statements and documents relating to the certificate and the approved device. We have no hesitation in finding that this evidence satisfies the two stage test rightly proposed by the Adjudicator Verity Jones above.

EVIDENCE OF A CONTRAVENTION

41. Once the enforcement authority has demonstrated that they are entitled to rely on the approval of their device, they must provide sufficient evidence to prove the contravention. The enforcement authority provides evidence of the contravention to both the motorist and the Tribunal primarily by way of an online footage, which is taken from the approved device but is compressed and may not show all of the data captured or generated by the approved recording equipment and device. This online footage is in AVI format. Its resolution is lower than the images on the respondent authority's evidential and working copy DVDs, and lower than required for approval. In compressing the moving images some of the metadata may not be viewable. The respondent authority also provides still images of the required resolution taken from the approved device that do contain the metadata. The enforcement authority does not, as a matter of course, and indeed need not, provide to appellants or to the Tribunal their evidential or working copy DVD (or for technical reasons, more properly their DVT), which is part of the device approved by the VCA.

42. It is of course a matter for each enforcement authority to determine what evidence they produce and for each Adjudicator to decide whether the evidence produced is sufficient to prove an individual contravention. In these review applications we found, as had the original Adjudicators, that the online footage in AVI format and the still images were sufficient evidence to demonstrate that a contravention had been committed. It is relevant to note that whatever objection that Mr. Wise and Mr. Segal took to the approved device, the online footage and other

evidence, neither sought to argue that the images did not demonstrate a contravention. The online footage was clear and sequential. The enforcement authority had demonstrated that an approved device had produced the images. The images showed the location and circumstances of the incident with sufficient of the time details to show they were sequential. By reference to the high resolution still images, it was possible to corroborate the accuracy of the online footage. The respondent authority had demonstrated, to the required standard (and indeed well beyond) that the contravention had been committed. We were satisfied (as had been the Adjudicators who heard the original appeals) of all these matters without reference to the DVT evidential version of the moving image, which should not be required and need not be viewed as a matter of routine.

43. The respondent authority has to date provided to motorists, when requested and in its discretion, a copy of their evidential DVT, which includes the moving images in the resolution and standard required to have their device approved, with the metadata. It is important to recognise however that the DVT version of the incident is required only where there is a genuine issue about whether the online version and other evidence proves the contravention to the required standard, and such cases are likely to be extremely rare. The respondent authority is not required to produce their DVT evidence as a matter of routine, although it remains a matter for each Adjudicator, should the matter come to appeal, whether the evidence that has been provided proves the contravention to the required standard.

44. There are considerable, often insurmountable, difficulties in playing these DVT images on any hardware. They do not play on standard DVD recorders and require considerable technical expertise to operate them on home computers, or indeed in the Tribunal. In these review applications the Adjudicators, following the detailed instructions provided by the respondent authority, could not make the DVTs play on the Tribunal equipment. The Tribunal relied on the expertise of the manufacturer's technical staff to play the footage. That is something that the respondent authority should rectify. If there is a genuine need to play these DVTs to prove a contravention (albeit such occasions may be rare) and they are not readily playable, then Adjudicators could find that the respondent authority had failed to prove its case.

45. Mr. Wise and Mr. Segal both submitted that PATAS procedure requires DVDs, including DVTs, to be viewable on standard DVD players. They relied on a Newsletter on the PATAS website dated "Spring 2007" where it is stated, "Please ensure that both the recording equipment you use and the disc itself are in good condition. The disc must be formatted or "finished" so that it can be played back on a standard desktop DVD player. This is important, as some DVDs created using computer software and submitted to PATAS can only be played back on a PC using DVD player software. Please do not simply copy a video file, such as MPEG, or AVI, onto a DVD. The Adjudicator does not presently have the facility to play these files back through a PC." Mr. Wise and Mr. Segal submitted that as the respondent authority's evidence does not comply with PATAS guidelines, it should be excluded. That advice is however out of date. Adjudicators do now have the facility to play the DVDs on their PC equipment. Also, PCs have in the five years since that advice become more common, and DVD players less so. We did not feel in any way constrained by that advice on the PATAS website to exclude DVD material. No doubt the website will be updated in light of Mr. Segal and Mr. Wise bringing this to our attention.

46. Difficulties in playing the DVT format does not mean that Westminster are unable to issue PCNs or that they would routinely lose appeals when either the motorist or the Tribunal cannot play the DVT. That version is provided where there is some reason to suggest that the online

version and images are insufficient or because the motorist has specifically asked for the evidence and the respondent authority have agreed to provide it. An Adjudicator may be satisfied both that a contravention has been proved and that the device is certified without having to view the DVT evidence. He may be satisfied of the contravention by reference to the online footage and the still images; that the device is approved by reference to the certificate and the still images containing the metadata; and that the evidence has come from an approved device by the statement of Cathryn Scott and supporting documents. If the Adjudicator is so satisfied, he is entitled to make a finding to that effect, even if the motorist or his representative is not so satisfied.

REVIEW AND APPEAL DECISIONS

47. We have outlined above that the evidence produced by the respondent authority was, in our finding, sufficient to demonstrate that the contravention in each case had occurred.

48. In the review application of Mr. Lund and Pool Motors, we noted above that Mr. Wise had not established that any of the grounds in 12(1)(b)(iv) or (vi) applied, and having heard his substantive arguments in his review application, we find that he has not raised any arguable point, and dismiss his application for review. Mr. Wise had withdrawn all substantive grounds of appeal at the hearing before Mr. Teper. We confirm the decision of the Adjudicator Mr. Teper and refuse this application.

49. In the appeal of Mr. Burgess, we allowed his application for review. For the reasons outlined above, we find that the respondent authority has provided admissible and relevant evidence to establish that a contravention occurred. We invited Mr. Segal to provide evidence of Mr. Burgess' substantive defence relating to the picking up and dropping off of passengers. He was unable to do so. The burden is upon him to establish the exemption. Without evidence he cannot do that. We allow Mr. Segal's application to review the decision but confirm the decision of the Adjudicator Miss Brennan to refuse that appeal.

REPRESENTATION IN PATAS

50. Having made our decision, we turn to another issue, which Mr. Couser raised concerning the legality, appropriateness and potentially the ethics of some representatives in PATAS. Mr. Couser invited us to treat Mr. Wise and Mr. Segal not as representatives but as "intermeddlers" and to prevent them from representing the appellants. We did not consider that an appropriate action in this instance, but, as the issue was raised in some detail before us, we do make some comments about representation in the Tribunal, the starting point for which is Paragraph 9 in the Schedule to the Appeals Regulations:

- (1) The appellant and the enforcement authority shall be entitled to appear at the hearing of an appeal.
 - (2) Any other person may appear at a hearing at the discretion of the Adjudicator.
 - (3) At the hearing of an appeal, the appellant may conduct the case himself (with assistance from any person if he wishes) or may be represented, by a solicitor, counsel or any other person.
 - (4) If in any particular case the Adjudicator is satisfied that there are sufficient reasons for doing so, he may prohibit a particular person from assisting or representing either party at the hearing.
- COMPENSATION ACT 2006

51. Mr. Couser's initial submission was that it was a criminal offence for a non-regulated

representative to charge a fee to represent a party in the Tribunal. He referred us to section 4(1) of the Compensation Act 2006, which makes it a criminal offence for a person to provide a regulated claims management service unless -

- a) he is an authorised person
- b) he is an exempt person
- c) the requirement for authorisation has been waived in relation to him, or
- d) he is an individual acting otherwise than in the course of a business.

52. Mr. Couser pointed out that Mr. Segal received a fee for representing motorists in the Tribunal. He led us through the legislation, which, in his submission, made that a criminal offence. Mr. Segal acknowledged that he received a fee, but made a contrary submission that this was not prohibited by this legislation. The Tribunal accepted that Mr. Wise did not receive a fee when he represented motorists, and that this legislation therefore did not apply to him.

53. We do not need to make a decision on whose submission we preferred. Given the informality of the Tribunal and the wide range of people who can act as representatives in reliance on Paragraph 9 above, it is not a matter for the Adjudicator to enquire about the relationship between a motorist and their representative. Enforcement of the criminal law is not a matter for an Adjudicator, and Mr. Couser indicated that he would not be reporting Mr. Segal as a result of these proceedings. It is a matter for Mr. Segal and any other paid representative to ensure that they are acting lawfully, and a matter for those entrusted with the enforcement of the legislation to investigate and take the matter further if they deem that appropriate.

CONDUCT BY REPRESENTATIVES

54. PATAS is an informal Tribunal. Adjudicators have become used to the assistance of a variety of non-professionally qualified representatives and we would resist any attempt to introduce unnecessary formality into the proceedings. That said, many such representatives profess expertise and/or experience with the law and the Tribunal process. Adjudicators are entitled to expect and require that they behave in a professional manner and that they assist the Tribunal as well as their clients to dispose of matters fairly, proportionately and efficiently.

55. In this context however, Mr. Couser alerted us to important issues about the nature of representation in this Tribunal by some representatives who are not bound by codes of conduct issued by a professional body.

a) Inappropriate and unprofessional language. We have noted above that Mr. Wise used language that is inappropriate and unprofessional in a professional context about an Adjudicator. For completeness we recite some of the language used here, Mr. Teper's decision ... is self-evidently false and ridiculous ... an appalling Statement of Decision ...

It seems to depend on which day of the month Mr. Teper decides an appeal as to whether he allows it

It is further reprehensible on the part of Mr. Teper ...

b) Litigation by ambush. As in all civil procedure, the Tribunal works on the basis that both sides disclose evidence. PATAS does not condone litigation by ambush by either party. In respect of an appellant's representations this is emphasised by paragraph 4(5) in the Schedule to the Representations and Appeals Regulations, "Where the appellant delivers representations to the proper officer under this paragraph, the proper officer shall send a copy of the representations to the enforcement authority." At the first listing of Mr. Lund's appeal Mr. Wise withdrew all of

Mr. Lund's own grounds of appeal and filed a large bundle of papers. Mr. Teper, appropriately, adjourned the appeal to allow the respondent authority to comment on those papers. There may of course be occasions when it is necessary to file additional or alternative evidence on the day of an appeal, even though the parties have had some time and a number of opportunities in which to make representations. However, there are occasions where that may be simply a tactical ambush. If in any doubt whether Mr. Wise uses this approach, Mr. Couser provided evidence from a website to which Mr. Wise regularly contributes. In an entry on 7 March 2012 under the title, "Re: Massive PaTAS Win For The MOB. 200+ Westminster Fixed Cameras Uncertificated!", Mr. Wise had written, "The whole point of me not giving them prior notice is so that I do not get a DNC. I want to ambush them and get a ruling on my grounds." We do not understand how the avoidance of a DNC ("Do Not Contest" - i.e. where a respondent authority does not contest a motorist's appeal against a PCN) can ever be in the interests of a client. If Adjudicators believe that representatives are using inappropriate and unprofessional "tactics" in dealing with appeals, there are powers under Paragraph 9(4) above to exclude them, refuse to hear them, require them to act as a "McKenzie Friend" so as to advise a motorist but not address the Tribunal directly, or, in regulating their own procedure, to refuse to consider the additional evidence, because it should have been served in time.

c) Failing to follow appropriate judicial procedure. An example of this followed the hearing of this appeal, and was not therefore raised specifically by Mr. Couser. After the proceedings had concluded, both Mr. Wise and Mr. Segal sought to make further written submissions in support of their case. This demonstrates a misunderstanding of the basic principles of open justice and the judicial process. A similar example (although not relating to these applications) is representatives appearing before the Tribunal in the absence of the appellant and with no letter of authorisation to represent the motorist to present to the Tribunal.

d) Failing to represent the best interests of appellants. As described above, Mr. Wise may sometimes seek a decision made on the ground that he wishes, rather than have a case discontinued by the enforcement authority. The best outcome for an appellant would almost inevitably be the cancellation of the PCN. By not actively pursuing that outcome, a representative puts an appellant at risk of having their appeal fail, in the hope that he will get a decision in his favour on the grounds that he is pursuing.

e) Canvassing for appellants. Solicitors and barristers are not permitted to canvas for clients. However, there is some evidence that Mr. Wise does so. For example on the same website referred to above, one of the contributors wrote, on 6 December 2011, "Considering you blagged your way into the hearing on Saturday"

f) Appearing on behalf of a wider agenda. As noted above, Mr. Wise seeks decisions based on his grounds of appeal, not necessarily the grounds put forward by the motorists themselves, and sometimes just abandons the grounds put forward by the motorist. In this review application, Mr. Segal had failed to produce any evidence to support Mr. Burness' own substantive appeal ground of appeal that he had been engaged in the activity of waiting for a passenger, arguing instead the technical grounds outlined above. Mr. Burness may have been deprived of the opportunity to succeed on the merits of his appeal. In that respect it may be that representatives are acting not to represent individual clients, but to achieve results that suit a wider agenda. Another example is that in Mr. Lund's appeal, Mr. Wise told us that were this review unsuccessful, he would be paying Mr. Lund's penalty.

g) An unprofessional approach to expert witnesses. While Mr. Wise and Mr. Segal's arguments were substantially about the way in which the respondent authority presented the evidence of the contravention, Mr. Wise introduced expert evidence without any requirement to establish provenance. There are well-established rules in other jurisdictions about dealing with expert evidence. The aims of these rules are to enable parties and the tribunal to deploy arguments and make decisions on relevant, unbiased and credible expert evidence. In seeking to introduce evidence from Dr. Knottenbelt, Mr. Wise had not sought to demonstrate his credentials as an

expert on particular enforcement issues, nor had he disclosed Dr. Knottenbelt's personal, highly partisan, views on camera enforcement, as demonstrated in the latter's website.

h) Representation of appellant's instructions. Lack of professional restraints means that representatives may consider themselves able to make allegations and submissions that professional representatives could not. For example, they may make allegations of inappropriate conduct by witnesses without evidence to substantiate it, or fail to disclose to the Tribunal authorities contrary to their own case. In the hearing before us Mr. Wise went so far as to accuse a witness for the respondent authority of giving false evidence, and to accuse the respondent authority of exercising undue commercial pressure to achieve certification of their device. There was no evidential basis for these accusations, nor, as Mr. Wise conceded, did he have express instructions to make such serious allegations. Non-professionally regulated representatives may however engage in such unprofessional conduct without fear of sanction by a professional organisation. It is nonetheless unacceptable.

i) Costs. We noted that representatives are not, under the rules of the Tribunal, subject to costs orders made personally against them or to wasted costs awards. However, their conduct of the proceedings could be taken into account whenever an Adjudicator might be required to assess whether a party has acted frivolously or vexatiously or that his conduct in making, pursuing or resisting an appeal was wholly unreasonable. Appellants may feel justifiably aggrieved if representatives are putting them at risk of a costs order being made against them if they take inappropriate points that are not raised on their client's specific instructions, or conduct the proceedings in a frivolous, vexatious or wholly unreasonable manner.

56. Some representatives may believe that the lack of professional supervision gives them an unfettered right to present their case unconstrained by the rules that apply to professional representatives. That is not the case. The involvement of representatives in appeals remains a matter that the Adjudicator can regulate, pursuant to Paragraph 9 of the Schedule to the Appeals Regulations. Adjudicators have power to prevent a representative from acting for a party, to exclude them from a hearing, or to require them to act only as a McKenzie Friend. We do not intend to lay down any rules for when that may be appropriate. If however representatives deliberately and persistently behave in a manner that is not conducive to a fair and proportionate disposal of an appeal, the Adjudicator may act to ensure that unacceptable conduct does not form part of the proceedings. The Adjudicator would no doubt draw the relevant powers to the attention of a representative before exercising them.

57. Alternatively, the Tribunal has power to deal with inappropriate behaviour by representatives by declining to hear evidence or representations that it believes are being inappropriately relied upon or being introduced in an unfair manner.

58. It would clearly be preferable if representatives voluntarily conducted themselves in a professional manner in the first instance.

Date of Review Hearing: 23 May 2012

Date Decision Promulgated: 21 June 2012