**PARKING APPEALS SERVICE**

**DAVID GEORGE BURNETT -v- BUCKINGHAMSHIRE COUNTY COUNCIL**

# DECISION

## Introduction

On 5 March 1997, a parking attendant saw a green Rover car, registration mark G972 MWF, parked in Guinions Road with its two nearside wheels on, and its two offside wheels off, the carriageway. The parking attendant issued a Penalty Charge Notice ("PCN"), on the basis that he believed the following contravention to have occurred: "Parked on an urban road with one or more wheels resting on a footway, land between two carriage-ways, grass verge, garden or space." How the car got there is not clear - its owner, Mr Burnett, has adduced evidence that it broke down earlier in the day and was towed to Guinions Road for repair - but that is not an issue in this case.

Mr Burnett made representations against liability for the payment of the penalty, but these were turned down by the Council. He appealed to the Chief Parking Adjudicator Caroline Sheppard, who allowed his appeal giving the following reasons:

> "Mr Burnett's car broke down in London and was taken by the AA to his garage in High Wycombe. On 5/3/97 it was seen by a parking attendant with two wheels on the footway on Guinions Road and issued with a penalty charge notice. There seems to be some confusion whether this is the place where the AA deposited it or whether it had subsequently been moved by the mechanic. In any event Mr Burnett says he is not liable for the penalty.
>
> Article 14 of the Buckinghamshire County Council (High Wycombe) (Prohibition and Restriction of Waiting) Order 1997 prohibits waiting on the footway in roads and streets designated by [Schedule 7]. Guinions Road is not one of those designated in [Schedule 7].

> In the circumstances, whether or not the car was capable of being driven and regardless of who left it in Guinions Road, no contravention occurred and no penalty is payable."

She directed the Council to cancel the PCN and subsequent Notice to Owner ("NTO"). She also noted from the parking attendant's notebook that PCNs were issued to other vehicles parked on the footway in Guinions Road, and she suggested to the Council that they consider these without delay.

The Council requested a review of the Adjudicator's decision, under The Road Traffic (Parking Adjudicators) (London) Regulations 1993, on the basis that the interests of justice require such a review. The Council says that, for the issue of the PCN, it does not rely upon the provisions referred to by the Adjudicator in her decision (i.e. The Buckinghamshire County Council (High Wycombe) (Prohibition and Restriction of Waiting) Order 1997 ("the Prohibition and Restriction Order"): but to a different Order, namely The Buckinghamshire County Council (High Wycombe) (Designated Parking Places) Order 1997 ("the Designated Parking Places Order") which, the Council says, effectively imposes a blanket ban on footway parking in the relevant area.

The matter came before Parking Adjudicator Brian James, who agreed that the Chief Adjudicator's decision of 10 September 1997 should be reviewed. This is now that review.

**Statutory Provisions**

Before I come to the relevant traffic regulation orders ("TROs"), it is necessary briefly to review the statutory provisions upon which the orders were made. The Council is a corporation, and is consequently subject to the doctrine of ultra vires: it can only do those things in respect of which it has an express or implied authority, or which are incidental to the doing of those things.

The Council purports to derive its powers in this case from a TRO made under various provisions of The Road Traffic Regulation Act 1984 ("the 1984 Act"). In the preamble to the Prohibition and Restriction Order no less than 40 sections and sub-sections of the 1984 Act are cited as enabling provisions, and an identical list is set out in the Designated Parking Places Order. No doubt these provisions - many of which cannot conceivably be enabling - were set

out as a result of an abundance of caution by the draughtsman, but reliance on this plethora of provisions is unhelpful, and has potential for confusion. Nevertheless, it is clear that the primary statute relied upon by the Council as empowering them in this case is the 1984 Act.

The 1984 Act gives local authorities a variety of powers for managing traffic, and specifically the parking of vehicles. Three particular provisions are relevant. First, Section 1 allows a non-London local authority to make a TRO: and Section 2 allows such an order to make provision for "prohibiting, restricting or regulating the use of a road, or any part of the width of the road, by vehicular traffic... either generally or subject to such exceptions as may be specified in the order or determined in a manner provided for by it, and... subject to such exceptions as may be so specified or determined, either at all times, or at times, on days or during periods so specified" (Section 2(1)). In particular, the order may include provision for "prohibiting or restricting the waiting of vehicles..." (Section 2(2)(c)), thereby confirming that "the use of a road" that may be governed by a Section 2(1) order includes use of a road by a stationary - as well as a moving - vehicle). Section 5 renders it an offence to contravene such an order. In short, these provisions give a local authority a wide discretion to prohibit or restrict the parking and waiting of vehicles on a road.

Second, Section 32 empowers local authorities to "authorise the use as a parking place of any part of a road within their area ..." (Section 32(1)(b)). There are detailed provisions as to the use of parking places so provided (Section 35): and it is an offence to contravene a provision of Section 35 (Section 35A). Therefore, these provisions relate, not to the prohibition and restriction of parking, but rather to the provision of parking on a road (albeit subject to conditions, where the relevant authority consider conditions appropriate).

Third, Section 45 enables a local authority to designate parking places and make charges for vehicles left in such places. Again, there are detailed provisions with regard to such places (particularly in Section 46). It is an offence to park and to fail to pay the charge payable under Section 45, or to park in a place otherwise than as authorised by the relevant order. Therefore, these provisions specifically relate to parking places at which payment must be made (e.g. meter places, or pay & display places).

In relation to each of these, I would point out that it is an offence to breach the substantive provisions of the TRO which is made under the relevant part of the Act: it is not an offence

(e.g.) merely to contravene a restriction which a traffic sign purports to convey. Furthermore, of course, under the 1991 Act it is no longer a criminal offence to contravene the relevant provisions: it is a contravention that the local authority may pursue by the issue and service of PCN and NTO, under the decriminalised scheme.

**Signing**

Before I leave the general provisions of the 1984 Act relating to parking, I should say something about signing.

The procedure to be followed by local authorities (including the Council in this case) when making orders under the 1984 Act is set out in The Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 (SI 1996 No 2489) ("the 1996 Regulations"). The 1996 Regulations specifically apply to orders made under Sections 1, 32 and 35, and 45 of the 1984 Act (i.e. orders made under any of the provisions referred to above) (Regulation 4). Regulation 18(1) provides:

> "Where an order relating to a road has been made, the order making authority shall take such steps as are necessary to secure:
>
> (a) before the order comes into force, the placing on or near the road of such traffic signs in such positions as the order making authority may consider requisite for securing that adequate information as to the effect of the order is made available to persons using the road;
>
> (b) the maintenance of such signs for so long as the order remains in force...."

On its face, what this provision says is that any regulation of parking by a local authority under the 1984 Act must be brought to the attention of the motoring public by means of traffic signs.

It has long been held in the context of the criminal enforcement scheme that, for a parking enforcement authority successfully to enforce a penalty, it must show that, at the time of the alleged contravention, the relevant prohibition, restriction or condition upon which it relies was duly signed: and, indeed, the signing complied with the relevant signs regulations. That has been

held to be the case even where the enforcement scheme is such that a contravention is not expressed in terms of a failure to comply with a traffic sign, but rather in terms of a failure to comply with a substantive provision of an underlying order (which, as I indicate above, is the case under the 1984 Act).

The authority often cited for this proposition is the Scottish case of Macleod v Hamilton [1965] SLT 305, in which Mrs Macleod parked in a restricted street during prohibited hours, but there was no traffic sign indicating the restriction. The relevant regulatory provisions were The Traffic Regulations Orders (Procedure) (Scotland) Regulations 1961. The Lord Justice-General (Lord Clyde) said:

> "It was an integral part of the statutory scheme for a traffic regulation order that notice by means of traffic signs should be given to the public using the roads which were restricted so as to warn users of their obligations. Unless traffic signs were there accordingly and the opportunity was thus afforded to the public to know what they could not legally do, no offence would be committed. It would, indeed, be anomalous and absurd were the position otherwise..."

That case was applied in England (so far as The Traffic Regulation Orders (Procedure) (England & Wales) Regulations 1961 were concerned) in the Divisional Court case of James v Cavey [1967] 1 All ER 1048.

The principle of these cases has subsequently been confirmed. In Hassan v DPP [1992] RTR 209, the Appellant had left his car in a street in which there were restrictions, but there was no plate indicating the restriction or prescribed hours. Regulation 18(1) of The London Authorities Traffic Orders (Procedure) Regulations 1972 (which was in substantively the same terms as Article 18(1) of the 1996 Regulations) applied to the underlying TRO. The Divisional Court allowed the appeal. Nolan LJ (as he then was), giving the judgment of the Court, said:

> "It is plain that the procedure followed by [the local authority] to create the conditions in which the offence would have been committed included the placing of the signs indicating the permitted and restricted hours. On the findings in the stated case, it cannot be said that that condition was satisfied and therefore this appeal must be allowed".

Therefore, any regulation of parking by a local authority under its powers under the the 1984 Act must be signed so that the motoring public knows of that regulation.

Furthermore, although not relevant to this particular case (in which there was no sign at all), not only must the traffic sign must be present, it must also comply with The Traffic Signs Regulations and General Directions 1994 (SI 1994 No 1519) ("the 1994 Regulations") (Section 64(2) of the 1984 Act): and the 1984 Act makes clear that the signing of parking restrictions etc by a local authority in pursuance of its powers under the provisions of the 1984 Act with which we are here concerned must comply with those regulations (Section 68(2)). There is an express prohibition of signs that do not comply (Section 64(4)). The 1994 Regulations are over 350 pages long and, in meticulous detail, they provide for every particular of permitted signs - including the type, size, colour and dimensions.

Consequently, in summary, as a condition precedent of a local authority enforcing a parking penalty as a breach of a TRO made under the 1984 Act, the obligations of the motorist must be properly signed in accordance with the detailed provisions of the 1994 Regulations.

**Restrictions on Parking on Footways etc**

As will be apparent from the above, the relevant enabling provision in the 1984 Act that may empower a local authority to prohibit parking off the carriageway (e.g. on a footway) is Section 2. That is the section under which a local authority may make provision "prohibiting, restricting or regulating the use of a road, or any part of the width of a road, by vehicular traffic": and it is this section upon which the Council specifically and exclusively rely in this review as the relevant enabling provision.

"Road" is defined in Section 142 of the 1984 Act, as:

> " ...any length of highway or of any other road to which the public has access, and includes bridges over which a road passes..."

"Highway" is not defined in the 1984 Act, nor does it appear to be defined in any other relevant statute. Even the interpretation provisions of the Highways Act 1980 (Section 328) do not define

the term: they merely provide that it includes "the whole or part of the highway". Consequently, for the definition of "highway", recourse must be had to the Common Law.

Put simply, at Common Law, a "highway" is a way over which all members of the public have the right to pass and re-pass without hindrance (see, e.g., Suffolk County Council -v- Mason [1979] AC 705 at 710, per Lord Diplock). I am satisfied that Guinions Road is a highway on the basis of this definition (and, consequently, a "road" under the 1984 Act).

The Common Law rules also have to be considered in the context of the lateral extent of a highway. There is no doubt that "highway" includes a footway, over which the only public right of passage is on foot (see Suffolk County Council -v- Mason, referred to above). However, what constitutes limits of the "highway" where there is (for example) not only a carriageway, but also a footway on both sides of it, and perhaps various verges and gardens in the middle of the carriageway and/or between the carriageway and the footway and/or beyond the limits of the footway? The essence of a highway is that it is a way over which all members of the public are entitled to go: and, conversely, every piece of land which is subject to such public right of passage, is a highway or part of a highway (Rideout -v- Hollett (1913) DLR 293 at 295, per Barry J). Land which is not subject to such public right of passage is not part of the highway. Therefore, the carriageway and footway are both part of the highway. At the other end of the spectrum, an ornamental horticultural bed abutting the carriageway - perhaps as a traffic island - would not be part of the highway. It would be a question of fact and degree as to whether land adjacent to a carriageway or footway (e.g. a verge) was part of the highway.

Therefore, as I have construed the relevant provisions, Section 2 of the 1984 Act would empower a local authority to make provision prohibiting the use of a footway (or any other part of the highway) by vehicles: but it does not empower a local authority to make provision in respect of vehicles waiting or parking on land that may be adjacent to a carriageway but which does not in fact constitute part of the highway. The power of a local authority to restrict off-carriageway parking is therefore restricted under the 1984 Act.

Furthermore, if a local authority did exercise its powers to regulate off-carriageway parking, that would have to be the subject of proper signs. The relevant sign is found as Diagram No 637.1 of the 1994 Regulations: the sign does not have to be accompanied by any road markings (it is not referred to in Direction 22 of the 1994 Regulations, which sets out the signs that require such

markings). However, the sign is the subject of the requirement for regular repetition at regular intervals (Direction 10). It is important to note that the sign can only be used to indicate the effect of a proper statutory restriction or prohibition (Direction 7(1)): it cannot lawfully extend such restrictions or prohibitions. Therefore, as would be expected, the sign does not allow for waiting on a "garden or space", or the like, because these are incapable of forming part of the highway and the regulations are limited to the extent of the highway.

**Specific Provisions Relating to Restrictions on Parking on Footways etc in London**

The restriction on the powers of authorities under the provisions of the 1984 Act referred to above is dealt with - so far as London local authorities are concerned - in Section 15 of The Greater London Council (General Powers) Act 1974, which provides :

> "(i) ...[A]ny person who ... in or on any urban road in Greater London parks a vehicle so that one or more of its wheels is resting on:
>
> (a) any footway;
>
> (b) any land (not being a footway) which is situated between two carriageways in any such road; or
>
> (c) any grass verge, garden or space not falling within the foregoing paragraph (a) or (b);
>
> shall be guilty of an offence ..."

"Urban road" is defined in Section 15(12) to include, broadly, those roads subject to a speed limit of up to 40 mph.

It is clear from the terms of Section 15 that, within London, by virtue of this primary legislation, it is an offence to park on any public land abutting a carriageway, whether that land be itself a footway or not. By Section 15(4), an authority may authorise parking on a particular footway or other land abutting the carriageway, and, where it makes such an order, it must duly sign that derestriction (Section 15(5)). However, the signing of the *restriction* imposed by Section 15 is unnecessary. The 1996 Regulations do not apply to the 1974 Act. Although it is unusual for Parliament to impose a duty on members of the public whereby a penalty can be incurred even

though there is no negligence, mental element or even knowledge of the existence of the statutory duty, Section 15 of the 1974 Act clearly does impose such a duty. The requirement to sign any *derestriction* makes it clear that signing of the statutory *restriction* is unnecessary.

Therefore, the 1974 Act (which applies to London) is wider than the 1984 Act (which applies to the whole country), in two ways. First, it applies to all land adjacent to a carriageway, whether that land is technically part of the highway or not. Second, the 1984 Act requires the signing of a restrction of footway parking, and the 1974 Act does not require any sign.

Under the 1991 Act scheme, within London, it is no longer a criminal offence to park in contravention of Section 15: it is a parking contravention capable of being enforced through by the issue and service of a PCN and NTO. However, as Section 15 does not apply outside London, a non-London authority is not empowered by that section to provide in a TRO that to park on a footway etc will lead to the incurring of a penalty. All of these provisions only apply to Greater London (i.e. the London Boroughs): they do not apply to Buckinghamshire or elsewhere.

**The Relevant Traffic Regulation Orders**

In her decision, the Chief Adjudicator referred to Article 14 of The Buckinghamshire County Council (High Wycombe) (Prohibition and Restriction of Waiting) Order 1997, which provides:

> "(1) No person shall cause or permit a vehicle to wait on an area of footway or verge designated by Schedule 7 to this Order on which waiting is prohibited by this Order save as permitted by Article 11 hereof between the hours of 8am and 6pm on any day except Sundays and Bank Holidays.
>
> (2) Any person may cause or permit a vehicle to wait on an area of footway or verge designated in Schedule 8 to this Order ..."

Guinions Road is not designated by Schedule 7: neither is it designated by Schedule 8.

The Council do not rely upon the Prohibition and Restriction Order, but on Article 12 of The Buckinghamshire County Council (High Wycombe) (Designated Parking Places) Order 1997, which provides:

"No person shall cause or permit a vehicle to wait wholly or partly on a verge, footway or cycle track at any time except:

(i) In an area described in Schedule 8 to The High Wycombe Prohibition and Restriction of Waiting (No. 1) Order 1997 and in compliance with the provisions of that Order or

(ii) In compliance with Articles 3 and 11 in an area specified in Schedule 2 Part II to this Order during the controlled hours and days."

Guinions Road is not specified in Schedule 2 Part II to the Order.

On their face, these provisions are inconsistent, and this inconsistency alone may result in the Council being unable to rely upon the provisions of Article 12 of the Designated Parking Places Order, as it purports to do. However, for the purposes of this decision, I will give the Council the benefit of the doubt and I will ignore the relevant provisions of the Prohibition and Restriction Order.

Nevertheless, I do not consider that the Council can rely upon Article 12 of the Designated Parking Places Order in any event, for the following reasons.

1. The Article purports to restrict vehicles waiting "on a verge, footway or cycle track". In Article 2, verge is defined as:

   ".... any part of the road which is not a carriageway and includes a footway".

   "Road" is not specifically defined in the Order, but must have the same definition as in Section 142 of the (enabling) 1984 Act (set out above). "Verge" is therefore restricted in definition to that which is part of the road.

   As Section 2 of the 1984 Act enables a local authority to make provision "prohibiting, restricting or regulating the use of a *road*, or any part of the width of a *road*, by vehicular traffic", and as Article 12 does not purport to apply to anything other than "any

part of the width of a *road*", I do not consider that Article 12 is ultra vires the Council. It was fully entitled to enact Article 12, by virtue of Section 2.

2. Article 12 provides for the prohibition or restriction of the parking and waiting of vehicles on part of a road. It is found in a section headed "Miscellaneous" in an order dealing with the designation of parking places (primarily under Section 45 of the 1984 Act). Nevertheless, Section 2 (which is the enabling section for the prohibition of parking) is one of the many sections relied upon by the Council in the preliminary paragraphs of the Designated Parking Places Order. Although it is odd to find the provisions of Article 12 in the order in which they are found, I do not consider this incongruity renders Article 12 invalid.

3. However, for the Council to enforce Article 12, for the reasons set out above, it must properly sign the motorist's obligations. These were not signed at all. This was a failure by the Council to comply with its obligations under the 1991 Act.

4. Further, even if the restrction had been properly signed, although the provisions of Article 12 are within the powers of the Council, in this case those provisions were not accurately reflected on the face of the PCN, which they ought to have been.

Prior to the issue of a PCN, a parking attendant must believe a contravention to have occurred, and the perceived contravention must appear on the face of the PCN (Section 63(3) of the 1991 Act). In this case, the face of the PCN indicated the alleged contravention to have been:

> "Parked on an urban road with one or more wheels resting on a footway, land between two carriage-ways, grass verge, garden or space."

Article 12 merely prohibits parking on a "verge, footway or cycle track", which are defined to be part of the road or highway. However, the alleged contravention on the face of the PCN is not so restricted: it is significantly wider than Article 12 allows. A "garden or space" is not - or not necessarily - a part of the road: and to park on a garden or space which is not part of the road is not a contravention of Article 12. It may be

that the words used on the face of the PCN better reflect the provisions of the 1974 Act than the 1984 Act, but it is only the latter which apply to Buckinghamshire.

A motorist is entitled to know the contravention allegedly made against him, and the 1991 Act requires that he is told on the face of the PCN. In this case, the PCN did not properly set out the alleged contravention. This was a further failure by the Council to comply with its obligations under the 1991 Act.

**Consequences of a Breach of The Council's Duty to Comply with the Regulatory Scheme**

Where an authority may have acted outside its lawful powers, a parking adjudicator is entitled to consider and adjudicate upon the vires of the authority (R -v- The Parking Adjudicator ex parte The London Borough of Bexley (CO/1616/96, Unreported, 29 July 1997) (Transcript, pages 12B-15D)). Where an authority fails to comply with the mandatory requirements of the scheme of the 1991 Act (e.g. where a PCN fails properly to include all of the information which it is required to include), an adjudicator must find that the authority has acted ultra vires and that it cannot enforce any penalty (Frederick Moulder -v- The London Borough of Sutton (PAS Case No 1940113243, 24 May 1995)).

Where an adjudicator finds that an authority has acted ultra vires in failing to comply with its mandatory obligations properly to set out the alleged contravention in the PCN, or properly to sign a parking or waiting restriction, he can - and, indeed, must - find that the authority cannot pursue a penalty based upon its own unlawful act, with the result that he must allow the Appellant's appeal. In this case, the Council has failed to comply with two mandatory obligations: first, it failed to sign the restriction, and, second, it failed properly to identify the contravention of the relevant regulations upon which it purports to rely. By virtue of these failures, the Council has acted beyond its powers, and the Appellant's appeal must be allowed.

**Conclusion**

In the circumstances, having reviewed this case, I confirm the Chief Parking Adjudicator's decision of 10 September 1997, to allow the appeal. Her directions to the Council to cancel the PCN and NTO consequently stand.

**G R Hickinbottom**
**April 1998**