# PARKING APPEALS SERVICE

## JEFFREY DAVID HARRIS -v- THE ROYAL BOROUGH OF KENSINGTON & CHELSEA

## PAS Case No. 2000005623

## PCN No. KC06221603

## DECISION

In this case, it is common ground that the Appellant, Mr Harris, is the registered keeper of vehicle registration mark S757 BPA. On 14 September 1999, his wife drove the car to Elystan Street, where she parked it in a pay & display bay. She did not purchase or display a pay & display ticket. She left the vehicle there, whilst going in to an adjacent laundry, Lewis & Wayne Limited. She took in two sheets to be laundered, and collected two sheets and two shirts. As she has an account at the shop, she did not have to pay: she merely had to hand in her laundry ticket and collect the previous week's cleaning, and leave the current week's laundry and pick up the ticket for that. In evidence, she said that this took her, perhaps, 6 minutes.

In the meantime, a Parking Attendant (Louise Jackson) came up Elystan Road. She says (and it is not disputed) that she observed the car for 5 minutes, without there being any activity.

There is then a dispute on the evidence. Mrs Harris says that she came out of the laundry, and she saw the Parking Attendant in the doorway next to the laundry. The Attendant spoke to her, and said that she was just about to give the car a ticket, and Mrs Harris should not park in that bay again. Mrs Harris said she was sorry, and drove off, before any penalty charge notice ("PCN") was either affixed to the windscreen of the car or given to Mrs Harris herself. The Appellant says that the first time he or his wife knew about the PCN was two months later, when he received a Notice to Owner.

The version of events given by the Parking Attendant (who also gave evidence before me) was different. She said that she had already issued the PCN and fixed it to the windscreen, when Mrs Harris came out of the shop. She was by the car, when Mrs Harris came up and said she was loading.

The Attendant told her that she had seen no loading or unloading: that she had already fixed the PCN to the windscreen: and, if she wished to do so, Mrs Harris would have to make representations to the Council as to why the penalty was not due.

There are two issues for me to determine. First, there is the issue of whether the activity in which Mrs Harris was engaged was loading or unloading, or delivering or collecting goods. If it was, then the Council accept that the vehicle would fall within an exemption from the relevant restriction, and there would have been no contravention. Second, there is the issue of whether the PCN was affixed to the vehicle at all. If it was not, then the Council quite correctly accept that they cannot pursue any penalty.

With regard to the first issue, I do not consider that the laundry involved in this case amounted to a "load", which carries with it connotations of weight or bulk. Although in the case of Sprake -v- Tester (1955) 53 LGR 194, the Court expressly did not exclude "a heavy laundry basket" as a load for the purpose of loading or unloading a vehicle, in this case, the relevant items comprised only one or two plastic bags containing no more than two sheets or two shirts each. As a matter of fact, I find that this was not a "load" - and the activity in which Mrs Harris was engaged did not fall within the first limb of the exemption.

Turning to the second limb, "delivery" or "collection" does not imply weight or bulk. However, Mrs Harris was not engaged upon a commercial delivery, and consequently the activity is only covered by the exemption if the parking at the particular location was necessary in the sense that the vehicle could not reasonably have been parked elsewhere or the delivery made at some other time (Jane Packer Flowers Limited -v- The City of Westminster (PAS Case No 1960034955) (19 July 1997), relying upon Richards -v- McKnight [1977] RTR 289). Mr Harris properly conceded that it was not necessary for his wife to park in that bay, to deliver or collect this laundry. She could equally have parked elsewhere, and walked. Bearing in mind the goods involved, this concession was inevitable.

In the circumstances, the Appellant (upon whom the burden of proof lies) has failed to satisfy me that the car was involved in loading, unloading, or delivering or collecting goods, at the time the PCN was issued.

With regard to the second issue, Mr Harris earlier applied to another adjudicator for an order that the Parking Attendant be present at the hearing. A brief statement of the Attendant had been submitted by the Council, who indicated that they intended to rely upon it. That order was granted and, in the circumstances (particularly, that a statement had been submitted), there can be no criticism of that order which was clearly within the proper discretion of the Adjudicator. Miss Jackson was consequently required to attend so that Mr Harris could ask her questions. In fact, he cross-examined her at some considerable length (a matter to which I will return shortly). Although Miss Jackson recalled some details, after 6 months, inevitably her memory of this particular incident was not perfect. For example, she could not recall the colour of the car, nor details of the weather. However, at the time of issuing the PCN, she made notes both hand-written in her pocket book and in her hand-held computer. In the former, after noting various details (including the tax disc number), are the initials "FTW", which, Miss Jackson confirmed, was the well-known abbreviation used by attendants for "fixed to windscreen". Similarly, in the computer notes, there is the note "After Printed: Fixed to Windscreen". Miss Jackson said that both of these notes were made immediately after she had issued the PCN, and attached it to the windscreen of the vehicle.

I find the evidence of the contemporaneous notes compelling. On the basis of all of the evidence - including, of course, the evidence of Mrs Harris - I am satisfied that the PCN in this case was properly issued and served, by it being affixed to the windscreen of the Appellant's car.

Therefore, I find that the contravention occurred in this case, and there was no procedural defect in the issue and service of the PCN. In the circumstances, I dismiss this appeal.

However, I would like to add a note concerning the calling of Miss Jackson, the Parking Attendant. For a parking attendant to be called to give evidence is rare: in virtually all cases (even at personal hearings), the Council rely upon the attendant's contemporaneous notes, and do not seek to rely upon oral evidence. The reason for this is clear. Miss Jackson gave evidence that she issues approximately 100 PCNs per week and, in many cases, because of the nature of the job, it is unlikely that the attendant could remember anything about a particular case that would assist the adjudication of an appeal, over and above the contemporaneous notes made. These issues were considered in Anthony Sutton -v- The London Borough of Camden (PAS Case No. 1990203734) (15 December 1999), a review case based partly on a parking adjudicator's decision to admit contemporaneous

notes of parking attendants as hearsay evidence, and refusing to call those attendants to be cross-examined. I attach the relevant part of that Decision as an appendix.

Of course, there will be some cases in which oral evidence from a parking attendant may be useful or even crucial for the just determination of an appeal. However, this case before me shows the potential downside of calling an attendant. The hearing lasted nearly 2 hours. Included in that was a lengthy cross-examination of the attendant by Mr Harris, which was vigorous and, at times, bordered on the oppressive. Miss Jackson, in fact, dealt with the questioning in a quite robust manner: but, on several occasions, I intervened to restrain Mr Harris asking questions that were not relevant to the narrow issues before me. One of the aims of this tribunal is to make the determination of parking appeals less formal, with a procedure that is proportionate to the amounts of money involved. At the end of the day, in this case, as I have indicated, I found the contemporaneous notes of the attendant the most compelling evidence with regard to the issue of service of the PCN - which was the only issue upon which the attendant gave evidence. In adjudicating upon the determinative issues, I was not greatly helped at all by the oral evidence of Miss Jackson.

It has been suggested that, with the incorporation of The European Convention of Human Rights (by virtue of The Human Rights Act 1998, which comes into force in England on 2 October 2000), parking attendants should more often be tendered for cross-examination, i.e. be available to be questioned by appellants. The fairness of any hearing is of course very important, but the evidence that a tribunal might find helpful is a question that the tribunal itself can best determine. Whilst the decision as to whether an attendant should be called will remain in the discretion of an adjudicator dealing with a particular case, the exercise of which will depend on all the circumstances of that specific case - and, I reiterate that there will be cases where it will be appropriate for the attendant to be called - I do not consider that it will be helpful to an adjudicator in many cases to have oral evidence from the attendant. This case has done nothing to alter my view.

**G R Hickinbottom**

**10 March 2000**

**APPENDIX**

**EXTRACT FROM ANTHONY SUTTON -v- THE LONDON BOROUGH OF CAMDEN**

**(PAS CASE No. 1990203734)**

Mr Sutton submits that the Adjudicator wrongly exercised her discretion in admitting and taking into account hearsay evidence from two parking attendants, and failing to order their attendance in person at the appeal.

Mr Sutton correctly points out that an adjudicator "may require the attendance of any person (including a party to the proceedings) as a witness... at the hearing of an appeal and require him to answer any questions..." (Paragraph 6(1) of the 1993 Regulations). It is therefore clear that an adjudicator has the *power* to require a parking attendant to attend a hearing. Whether the power is exercised in a particular case is a matter of discretion for the adjudicator. He or she must, of course, exercise that discretion judicially, taking account of all relevant matters. Those will include the extent to which the witness is likely to be able to assist: the extent to which other evidence, including documents, may assist the adjudicator in any event: the costs of requiring the presence of a witness, compared with the amounts of money involved in the specific case: and the delay that may be caused by requiring a witness to be present.

The Adjudicator dealt with the application for a direction under Paragraph 6(1) of the 1993 Regulations as follows:

> "Mr Sutton has today addressed me on the issue of the hearsay evidence of the two attendants."

The Adjudicator then referred to a case relied upon by Mr Sutton, namely R -v- Board of Visitors of Hull Prison ex parte St Germain [1979] 1 QB 425. He did not refer me to the case, and it does not appear to me to be of any material assistance upon this point. The Adjudicator continued:

> "I accept that, in exercising my discretion whether or not to direct the attendance of these witnesses to give oral evidence, my overriding obligation is to provide Mr Sutton with a fair hearing. I do not consider that the calling of these witnesses would further that end. Their

> evidence is contemporaneously recorded and its content is such that I could not expect them to recall the details of the vehicle or of its location after this passage of time. I am confident that were they to give evidence in person they would have to rely on the recorded notes."

Mr Sutton submits that "it was essential for the attendance of the Parking Attendants as there was a direct conflict of evidence between them and [himself] as to whether the vehicle in question was parked on a yellow line in the prescribed hours as they suggest" (Page 4, Paragraph 6 of Application for Review dated 11 October 1999). However, I do not agree. In my view, the Adjudicator correctly identified her "overriding obligation" to the Appellant, namely to provide him with a fair hearing, in accordance with the rules of natural justice (which Mr Sutton prays in aid on this point). The exercise of the discretion given in Regulation 6 of the 1993 Regulations must be viewed in the light of this obligation. The Adjudicator found that, bearing in mind the number of cars seen - and notes made - by a parking attendant, it was very unlikely that the two parking attendants whose evidence was in dispute could remember anything other than what was recorded in their contemporaneous notes. In my view, that is a conclusion which the Adjudicator was perfectly entitled to reach. In coming to her conclusion, from the face of her decision it is clear that she took into account the pertinent matters so far as fairness of hearing under the rules of natural justice is concerned. Her admission of the Parking Attendants' notes as evidence fell well within her discretion on evidential matters.

However, in Paragraph 11 of his Application for Review dated 11 October 1999, Mr Sutton also relies upon The Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4 November 1950 ("the Convention"). Although, in the written application, he refers specifically to Article 6(1) - and he did not expand upon this submission at the hearing - Article 6(3)(d) appears to be the more pertinent provision. Article 6 provides (under the heading "Right to a Fair Trial"):

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights...

(d) to examine and have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him..."

Article 6 confers "a Convention right" under The Human Rights Act 1998 ("the 1998 Act"). By Section 3(1) of the 1998 Act, so far as it is possible so to do, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights: and, by virtue of Section 6(1), it is unlawful for a public authority to act in a way which is incompatible with a Convention right. For the purposes of the 1998 Act, a parking adjudicator is "a public authority".

Although the 1998 Act does not come into force in England until 2 October 2000, the House of Lords has recently held that it is proper to challenge the compatibility of legislation with a Convention right now, if later challenges (on review or appeal) would be made after 2 October 2000, when the higher courts would have to take into account the Act in any event (R -v- DPP ex parte Kebeline, 28 October 1999). A parking adjudicator, of course, does have the power to consider collateral challenges to subordinate legislation (R -v- The Parking Adjudicator ex parte The London Borough of Bexley [1998] RTR 128). His decision is potentially subject to judicial review. Therefore, it seems to me that I am bound to deal with this human rights issue and, even if not required, I should do so as it has been specifically raised by Mr Sutton.

Consideration of the Convention raises two points.

First, it raises the question as to whether parking adjudicators deal with "criminal charges" for the purposes of Article 6(3) and consequently whether the proceedings before a parking adjudicator are "criminal proceedings". In the consolidated cases of Douglas -v- The London Borough of Brent (PAS Case No 1960031276) and Reason -v- The London Borough of Camden (PAS Case No 196010062A), I had to consider the burden and standard of proof in proceedings before an adjudicator. Having found that the burden of proof with regard to the primary elements of a contravention fell upon the enforcing local authority, I held that the civil (and not the criminal) standard of proof applied. However, that view was reached without considered argument on the

Convention. Certainly, that is no criticism of the Counsel who addressed me in relation to the issues raised in that case, which was decided in July 1997, well before the passing of the 1998 Act. In any event, a finding that proceedings are "criminal" for Convention purposes, does not necessarily mean that the domestic criminal standard of proof will apply.

In the later matter of Davis -v- The Royal Borough of Kensington & Chelsea (PAS Case No 1970198981), the issue was the effect of delay in the enforcement of parking penalties. In that case, Article 6 of the Convention was raised, although not fully argued. Having considered Östürk -v- Germany (1984) 6 EHRR 409 (referred to below), I concluded:

> "Therefore, although it is not a matter I need to decide for the purposes of this decision, it is certainly arguable that the 1991 Act Scheme is such as to bring Article 6(3) [i.e. the additional rights in relation to "criminal proceedings"] into play."

I should make it clear that I did not hear argument on the Convention points in the case before me now either, and consequently I make the points I do make on the Convention with diffidence. At some stage, no doubt, these Convention issues will need properly to be aired, argued and decided. However, although for the reasons set out below it is not necessary for me to determine the issue in this case, I consider it is important to refer to the issue here, so that enforcing authorities do not assume that proceedings before a parking adjudicator under the decriminalised scheme of the 1991 Act are necessarily only civil in nature (attracting only the rights conferred by Article 6(1) of the Convention), and not criminal (in the Convention sense of that word, attracting, in addition, the rights conferred under Article 6(2) and (3)). Whilst not coming to any concluded view, I do not consider it is by any means certain that the proceedings before an adjudicator are not criminal within the Convention sense of that word.

The concepts used in the Convention are autonomous, i.e. they are not confined to the way in which such concepts are used in national law. This has been particularly the case in respect of the concept of "criminal charges" in Article 6. The European Court of Human Rights has stressed that, while domestic law is relevant if it classifies a case as criminal, it is not decisive if it does not. In considering whether a particular matter is "criminal", the Court has had regard to all circumstances, in particular the nature of the matter (the "offence"), the classification of the conduct in other Contracting States and the severity of the sanction (e.g. Östürk -v- Germany (above), Paragraph 53 (a

case concerning causing an accident through careless driving, an "administrative" traffic offence under domestic German law): Umlauft -v- Austria [1996] 22 EHRR 76, Paragraphs 30-31 and Pharrmeier -v- Austria [1996] 22 EHRR 175, Paragraphs 31-32 (both cases concerning the a failure to give a driving breath test, an "administrative offence" under domestic Austrian law)). In respect of parking regulation under the 1991 Act, a penalty is imposed, the traffic management orders are rules of general application imposing obligations owed to the state: and the same behaviour is classified as criminal in parts of the same country where the decriminalised scheme has not yet been applied. Consequently, in my view, although I stress again that I have come to no concluded view and would not do so without the issues being aired in a considered way before me, as I indicated in the Davis case, it must be at least arguable that proceedings before a parking adjudicator are "criminal proceedings" within the meaning of the Convention, attracting the greater rights of Article 6(2) and (3).

However, even assuming for the purposes of this case that an Appellant before a parking adjudicator does have the rights conferred by Article 6(3)(d), a question would still arise as to whether there was a breach in this case, by the Adjudicator's refusal to direct the attendance of the parking attendants.

As matters of principle, the European Court has found that:

(i) As a general rule, it is for the national courts to assess the evidence before them, as well as the relevance of evidence which a party seeks to adduce: and, specifically, whether it is appropriate to call witnesses. It does not require the attendance and examination of every witness. The question is whether the proceedings in issue, considered as a whole, are fair. Where a domestic tribunal, having exercised its discretion, does not consider it necessary to call a witness, in the absence of "exceptional circumstances", that will not constitute a breach of Article 6, if the Court explains why it has not thought fit to have the witness called (Vidal -v- Belgium (1992) A 235-B, Paragraph 33: and Bricmont -v- Belgium [1990] 12 EHRR 217).

(ii) Where a person does not appear as a witness, it may be a breach of Article 6 for a statement made by him to be admitted as evidence without the "accused" having had the opportunity to confront him where the statement is the only (or, possibly, the main) evidence against the

accused (Unterpertinger -v- Austria [1991] 13 EHRR 175, Paragraph 28-33 (conviction for actual bodily harm to a step-daughter, on the basis of statements of wife and step-daughter, that were read out to the court: these statements were compared with "other available evidence", such as the written police reports): Kostovski -v- Netherlands [1990] 12 EHRR 434 (convictions for serious offences, including armed robbery, on the basis of written statements from an anonymous witness): Asch -v- Austria [1991] 15 EHRR 597 (conviction for actual bodily harm on the basis of a report from a police officer on his interview with the complainant who refused to give evidence): Artner -v- Austria (1992) A242-A (conviction for serious usury and fraud charges, on the basis of written statements to the police of a woman who had disappeared by the time of trial): and Lüdi -v- Switzerland [1993] 15 EHRR 173 (conviction for serious drugs offences on the basis of written reports of an undercover police officer)).

(iii) Article 6(3)(d) requires that "a Court must give the reasons for which it decides not to summon those witnesses whose examination has been expressly requested" (Bricmont -v- Belgium (above)).

In this case:

(i) It seems to me that there is nothing contrary to the Convention in the *scheme* of the 1993 Regulations in so far as the calling of witnesses is concerned. It is very unusual (although, certainly, not unknown) for a parking attendant to be called as a witness: indeed, requests for a parking attendant to attend a hearing are themselves very rare. But, an adjudicator can require the attendance of a parking attendant: and, as in this case, a party can make an application for such a direction. There is consequently a mechanism by which witnesses can be called, although subject to the exercise of the tribunal's discretion.

(ii) Turning to this specific case and the way in which the Adjudicator dealt with the application to require the attendance of the parking attendants, the Council did not submit a statement or report from the parking attendants, but merely contemporaneous notes from them. The Adjudicator found that, had the attendants been called, it was likely that they could not have recalled anything other than what was set out in their contemporaneous notes. She set out her

reasons for not calling the attendants. In my view, having taken account of the Convention and the European Court cases to which I have referred, I consider the manner in which the Adjudicator dealt with the application to require the attendance of the parking attendants not only complied with our rules of natural justice, but also with the requirements of Article 6 of the Convention.

Consequently, I do not consider that the Adjudicator wrongly exercised her discretion in taking into account the contemporaneous documentary evidence of the two parking attendants, and failing to order their attendance in person at the appeal.