CO/4743/2009

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

MONDAY, 29TH NOVEMBER 2010

B e f o r e:

MR JUSTICE BURNETT

Between:
THE QUEEN ON THE APPLICATION OF MAKDA

Claimant

v

THE PARKING ADJUDICTOR

Defendant

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MR C MORRISON appeared on behalf of the **Claimant**
MR I ROGERS (instructed by PATAS) appeared on behalf of the **Defendant**

J U D G M E N T
(as approved by the court)

1. MR JUSTICE BURNETT: This is an application for judicial review of two decisions of parking adjudicators, each upheld on review within the parking adjudication system. The claimant, Mr Makda, is a licenced minicab driver who operates through an office in Frith Street, London W1. Licenced minicab drivers, unlike those licenced to drive Hackney carriages, may not tout for work but must pick up only pre-booked fairs.

2. At about 9.17 in the evening of 25 June 2008 Mr Makda drove to Dean Street, London W1, in response to a booking that had been made at 9.03 by telephone to the office. The customer who had booked the journey was called Laura. She wished to be taken to Streatham Place SW2. Mr Makda pulled up close to the junction with Dean Street, where he had been told that the passenger would be waiting. He did not leave his car. She, however, did not show up. Having established that she was not there, Mr Makda very shortly thereafter drove off.

3. A CCTV camera operator watched the car in real time for a total of 1 minute 30 seconds. Mr Makda was stopped on double yellow lines. The operator issued a parking charge notice for £120 subject to a reduction if paid within 21 days.

4. An almost identical event occurred on 3 July 2008 at about 9.25. On that occasion the CCTV camera operator watched Mr Makda for about 1 minute 20 seconds. Again, Mr Makda was responding to a telephone booking made to his control office. That booking had been made about 3 minutes before hand and asked for a cab immediately in Dean Street. The destination was Kingsland High Road, E8. The passenger on this occasion was noted in the office as Noella Bible. Again, she did not show up and a parking charge notice was issued by the camera operator.

5. Parking restrictions in the City of Westminster are enforced by Civil Enforcement Powers, deriving from the Traffic Management Act 2004. Parking on a double yellow line used to be a criminal offence in Westminster, but this has not been the case for many years. The civil contravention is created by Article 5(1) of the City of Westminster Traffic Management Order 2002. It provides:

> "No person shall cause or permit any vehicle to wait during the prescribed hours in any restricted street except subject to the provisions of the next paragraph for so long as may be necessary for the purposes of delivering or collected goods or loading or unloading a vehicle at premises adjacent to the street."

The exemptions relating to loading are then further refined within Article 5.

6. Article 12 provides the first of a number of further exemptions from parking restrictions. As material, it reads:

> "Nothing in Article 5 of this order shall render it unlawful to cause or permit a vehicle to wait in any restricted street for so long as may be necessary for the purpose of enabling any person to board or alight from the vehicle or to load there on or unload there from his personal luggage."

7. The Civil Enforcement of Parking Contraventions (England) Representations and Appeal Regulations 2007 allow someone served with a penalty charge notice, or the owner of a vehicle concerned, to make representations to the local authority why he should not be liable to pay the charge. The grounds of such representations are set out in regulation 4(4). It is sufficient to record that one of those grounds is "that the alleged contravention did not occur."

8. A local authority is obliged to consider any representations made and respond to them. If the representations are not accepted, the reasons must be set out in a "Notice of Rejection" which is provided for by Regulation 6 of the 2007 Regulations.

9. Following the rejection of representations, the person concerned has a right of appeal under Regulation 7 to the Parking Adjudicator. The grounds of appeal are the same as those upon which representations could be made to the Local Authority. An adverse decision from the Parking Adjudicator may be reviewed by another parking adjudicator. The nature and extent of such a review jurisdiction is set out in paragraph 12 of schedule 1 to the 2007 Regulations.

10. The scope of that review power has not, it would seem, been the subject of detailed consideration, either by parking adjudicators themselves or in this court. As we shall see, Mr Makda was unsuccessful in his representations, his appeal and also on review.

11. The primary argument advanced by Mr Makda in these proceedings through his counsel, Mr Morrison, is that the exemption set out in Article 12 applied in the circumstances as described. In consequence, Mr Morrison submits that the adjudicators, both when considering the appeal and on review, were wrong to refuse to set aside the notice.

12. I should note that there was a subsidiary argument founded upon guidance issued by the Council, which suggests that camera operators cannot issue parking charge notices unless they observe a vehicle waiting for more than 2 minutes. That argument is not pressed in this application, not least because the guidance to which reference is made post-dates the alleged contraventions with which I am concerned.

13. The sequence of events in respect of the first notice was as follows: the penalty charge notice itself was dated 2 July 2008. It was served by post. It stated that a camera operator was observing the vehicle in real time at 21.17 parked on double yellow lines in Dean Street. A rather grainy still appears on the notice. Mr Makda made representations to Westminster City Council, the essence of which were as follows:

> "I am a minicab driver by trade. On the day in question I had a fare from Dean Street to Streatham Place SW2. I enclose the printout for the job, which was booked for 21.15 hours."

Westminster rejected the representations by letter dated 15 July 2008. The substance of that letter was as follows:

> "I have considered all of the information you have provided but I am unable to cancel the PCN. This letter is therefore a formal notice of

> rejection to your representations. The PCN was issued because the vehicle was seen parked in a street when parking restrictions were in force. Yellow lines at the edge of the road mean that there are parking restrictions which apply to the entire road. The vehicle was observed by a CCTV operator, but no picking up/setting down activity was observed. The picking up/setting down exemption does not permit the vehicle to wait for passengers at any time. Whilst appreciating that you drive a minicab, I must, however, advise that there is no exemption for you to wait for passengers. The exemption means that passengers must be ready to board the vehicle upon its arrival. If passengers are not ready, the vehicle must move on to a legal parking space. The evidence you supplied shows a 2-minute wait from the appearance time. This is not permitted. The PCN was therefore correctly issued."

14. The author of the letter indicates that his understanding of the exemption is that it allows for no waiting at all for a passenger to show up. The clear impression given by this letter is that no tolerance is allowed for a passenger who may not know the identity of the driver or a driver who may not know the identity of a passenger to establish contact.

15. Mr Makda's representations to Westminster in respect of the second penalty charge notice which is dated 11 July 2008 were, for practical purposes, in the same terms. So too was the response from Westminster City Council, except that there was of course no reference to the timing of the first incident. I should say that the print outs from both jobs which were produced in due course by Mr Makda to the adjudicator identify the passengers in the way that I have described.

16. Mr Makda appealed to the parking adjudicator in respect of both penalty charge notices. As regards the first, he wrote this to the adjudicator:

> "I work as a minicab driver. On the day in question I had a fare booked for 21.15 and arrived at the appointed time to pick up my passenger. The normal practice is for me to arrive at the designated place at the appointed time and the pre-booked passenger would come up to my window to confirm their name and destination. I cannot approach people to the street, as this would constitute touting. I agree with the council's view in their notice of rejection that the passenger should have been ready when I arrived. Unfortunately she was not there at the appointed time. There were some people at the car window, but none of them was the passenger that had booked the journey. As is sometimes the case, some passenger would book a fare and then decide not to travel or find and take a taxi without even calling my office to cancel. I absolutely refute the council's assertion that I was waiting for the passenger. I arrived at the booked time to pick up the passenger and it just happened that she was not there when I arrived."

The account that Mr Makda gave in respect of the second occasion on which he had been issued a penalty charge notice was similar, save that he gave no indication that people

were at the window of the vehicle.

17. Both appeals were considered on paper by the same adjudicator, Edward Houghton. His reasons for rejecting the first appeal were these:

> "the appellant's vehicle was waiting in a restricted street. This is unlawful unless some legal exemption applies, although there is an exemption allowing vehicles to wait whilst passengers board or alight from the vehicle. This does not extend to waiting for the passenger to arrive, inconvenient though this may be for chauffeurs and private hire drivers. The vehicle was therefore in contravention and it cannot be said that the PCN was issued other than lawfully."

As far as the second is concerned, he said this:

> "It is not in dispute that as the DVD evidence shows, the vehicle was waiting in a restricted street indicated by double yellow lines. The appellant is a minicab driver and was waiting for a pre-booked passenger who was not on time. However, although there was an exemption allowing vehicles to wait whilst passengers board or alight from the vehicle, this does not extent to waiting for passengers to arrive, inconvenient though this may be for chauffeurs and private hire drivers. The vehicle was therefore in contravention and it cannot be said that the PCN was issued other than lawfully."

Mr Houghton went on to indicate that the circumstances were such that the council might consider exercising discretion to cancel the penalty. That suggestion fell on deaf ears.

18. As I have already indicated, both decisions were reviewed. The review of the first noted that the vehicle was visible in the CCTV footage for something over a minute and 20 seconds with no sign of anyone getting into the car. The second review was dealt with rather differently. Unlike the adjudicator considering the first review, who engaged with the facts and circumstances of the alleged contravention, the second reviewing adjudicator considered that a review was not appropriate because in essence Mr Makda was simply seeking to challenge the factual finding.

19. Article 12 of the 2002 order allows a vehicle to wait:

> "for so long as may be necessary for enabling any person to board or alight from the vehicle and to load thereon or unload there from his personal luggage."

This provision admits of no difficulty in interpretation in almost all circumstances in which private drivers, Hackney carriage drivers or minicab drivers stop to let someone out of the car. The governing factor is plainly how long it takes to get out of the car, to unload the various things that the passenger has with him and then, in the case of a Hackney carriage or minicab, to pay. Similarly, in most cases of picking up, the driver knows his intended passenger or in the case of a Hackney carriage, is flagged down to the side of the road. In those circumstances the reverse process occurs. There is unlikely to be any difficulty in considering the facts to decide whether the vehicle concerned was stopped for longer than was necessary for those activities to be

completed.

20. Even in cases where the driver and passenger are unknown to each other but the passenger is at the pick up site, ready and waiting, contact is likely to be made very quickly indeed. The time taken to make such contact in those circumstances, would, in my judgment, be necessary for the purpose of enabling that person to board the vehicle. But what if a driver pulls up expecting to find a passenger waiting for him but the passenger fails to show up or, as is not uncommon, has made other arrangements?

21. In the skeleton argument lodged on behalf of Mr Makda by his solicitors, it was submitted that any waiting for a pre-booked passenger is exempted by Article 12. It is fair to say that Mr Morrison has not supported that submission in oral argument. It is not a submission that I can accept. It over looks two important features found within Article 12, one of which is explicit and the other which is clearly implicit from its context.

22. The explicit feature within Article 12 is the concept of necessity. So, for example if a driver were early for a rendezvous it could hardly be said to be necessary to wait in a restricted area until the pick up time. Neither would it in general terms be necessary for a driver to wait for a passenger who was late. A fresh rendezvous could, in almost all modern circumstances, be arranged. If that were not possible, then, using language which is perhaps not entirely apt nowadays, the driver would have to go round the block.

23. The implicit feature is in my judgment that the exemption in Article 12 is concerned with a time which is proximate to the getting into or the getting out of the vehicle.

24. For those reasons I do not accept the bold submission found in the skeleton argument. I deal with it despite Mr Morrison's not supporting it, simply to make the position clear in the event that similar arguments are advanced in other cases.

25. Mr Morrison has advanced an alternative construction. It is essentially this: that Article 12 is concerned with allowing a vehicle to wait to facilitate the immediate pick up or drop off of passengers. That, as it seems to me, comes closer to identifying the true meaning of Article 12. It is unnecessary to rewrite the language of Article 12, which is not lacking in clarity. In the context of a driver picking up any passenger at a pre-determined time and place, it is in my judgment necessary for the purpose of enabling that person to board the vehicle for the driver and passenger to make contact with each other; alternatively for the driver to conclude that the passenger is not there.

26. Whether the time spent on that exercise in any given case was necessary is a question of fact. That will depend upon the myriad circumstances which can apply on the ground at the time. The fact that the passenger fails to materialise does not, in my judgment, mean that the exemption can have no application. The time spent by the driver seeking out his passenger by looking for him from the vehicle or waiting for his passenger to identify the vehicle is capable of being time necessary for the purposes of enabling the person to board his vehicle.

27. The reasons given by the adjudicator in respect of these two notices and supported on review in the instance in which the facts were considered drew a distinction between waiting whilst passengers boarded and waiting for passengers to arrive. Mr Makda "absolutely refuted" that he was waiting for his passenger to arrive on either occasion in a general sense. Although he did not express himself with the clarity with which Mr Morrison has been able to develop arguments, the point that Mr Makda was seeking to make was that he pulled up for as long as was necessary to make contact with his passenger. Having failed to do so, within fairly short order he drove away. I have already noted that in the review decision in which the facts were considered, the absence of a passenger seen on the CCTV was a factor that was given considerable weight.

28. In the course of argument this morning I have had cause to observe that adjudicators have an extremely difficult task. They perform what seems to me to be an important yet very difficult judicial function. It is important because thousands of appeals are adjudicated upon each year in circumstances where many people who appeal parking tickets will have no other cause to become involved with the judicial system. Mr Rogers, who appears for the parking adjudicator this morning, indicated that overall about 80,000 appeals are made each year. The task is difficult because a very large number of those appeals are dealt with on paper. They are dealt with on short submissions made by drivers or vehicle owners. Those submissions are inevitably not informed by reference to the underlying statutory provisions or legal concepts in play. Adjudicators are therefore in one sense expected to be all seeing and all knowing.

29. In the circumstances that are revealed in the papers before me and which I have sought to summarise, the subtlety of the argument being advanced by Mr Makda does not appear to have been fully appreciated by the adjudicators concerned. That is not altogether surprising and should not be taken as any real criticism.

30. However, taking the reasoning in the round, it is clear that Mr Makda's evidence was not explicitly rejected. The impact of his evidence on the true interpretation of Article 12 was similarly not explored in the decisions to which I have referred. It does not appear that the underlying interpretation of Article 12 which was being applied by the adjudicators accorded with the meaning I have sought to give it in the course of this judgment. That being the case, in the course of both decision making processes there was an error of law.

31. The question was not asked whether the time during which Mr Makda's vehicle was seen to be stationary in Dean Street was necessary for the purposes of enabling his passenger to board the vehicle, albeit that on both occasions the passenger failed to show. Mr Rogers helpfully suggested in the course of argument that were I to conclude that there was an error of law in the course of the decision making process, the proper course of action would be to quash both decisions of the adjudicators on review, quash both of the underlying decisions of Mr Houghton in respect of the appeals brought by Mr Makda and issue a mandatory order that in the circumstances both appeals should be allowed on the matters being remitted to the adjudicator. In the circumstances, that is the order I shall make.

32. Mr Morrison, Mr Rogers, have I covered everything in the course of that judgment that needs to be covered?

33. MR MORRISON: Yes, my Lord.

34. MR ROGERS: In the appropriate relief it may be, since Westminster are not here and have not intended to participate at all in this judicial review, it may be appropriate to order further declaratory relief in terms of liability to pay the penalty charges. Would your Lordship be minded to do that?

35. MR JUSTICE BURNETT: If there is a mandatory order that Mr Houghton's decisions on appeal are quashed, that the matters are then remitted to him with an order that he allow the appeals, will that not sort it?

36. MR ROGERS: Yes, what would normally then happen is my Lord might be aware that if the adjudicator allows an appeal he normally has to consider what direction to say make, and standard direction when one allows an appeal is the penalty charge be cancelled.

37. MR JUSTICE BURNETT: You are quite right. The subtleties of the directions had slipped my mind. Could I invite you and Mr Morrison to draft an order and to email it to my Clerk, or the associate later today so that we can have a look at it and ensure we have covered all bases.

38. MR ROGERS: My Lord, yes.

39. MR JUSTICE BURNETT: The critical thing, Mr Rogers, is that as far as Mr Makda is concerned, today should be his last engagement in the process. What is to follow may involve Mr Houghton in a little bit of paperwork, but nothing more than that.

40. MR ROGERS: My Lord yes, I understand that.

41. MR JUSTICE BURNETT: Yes, all right. Thank you very much.

42. MR MORRISON: My Lord, I am instructed to apply for a limited costs order. I am very care aware and I am sure you are too that ordinarily course costs would not be awarded, however I am instructed that until we received the defendant's skeleton argument we understood that they opposed the application for judicial review based on a letter explaining their grounds for the decision, page 165 to 168 of the bundle.

43. MR JUSTICE BURNETT: These are the summary grounds.

44. MR MORRISON: Yes and they renewed that opposition in a further short letter at page 173. I would not suggest that we should get any costs in respect of this hearing and the preparation for it, but my instructing solicitors are keen to secure some form of costs order for the preparation of the skeleton argument, since they understood at that point that the application was opposed. It is a limited order we seek. I appreciate that this is a --

45. MR JUSTICE BURNETT: What are you asking for?

46. MR MORRISON: Unfortunately a cost schedule has not been prepared yet, so costs to be summarily assessed at a later date, the proportion of costs between the preparation of the skeleton argument up to the defendant's skeleton argument and the costs incurred after that, in a form of a recovery order.

47. MR JUSTICE BURNETT: All right.

48. MR MORRISON: Thank you.

49. MR JUSTICE BURNETT: Mr Rogers, has the position softened a little?

50. MR ROGERS: My Lord, I don't think it has. The page 163 -- it looks like the acknowledgement of the service may have -- it is said that the adjudicator, with the tribunal finding submission at 163, did use the words, unfortunately, "grounds for contesting", but when one reads the summary grounds, if one reads the summary grounds I don't believe there is any softening of the position at all. There is nothing in there that suggests that this is matter in which this decision was contested and nothing which would suggest that the Tribunal was departing from the normal position of the Tribunal being neutral. There is nothing in there contesting the substance of the points, indeed there is a letter written recently, there was recent correspondence suggesting that the claimant thought he was going to be applying for a costs order and the tribunal drew the claimant's solicitor's attention to the case of Davies v Birmingham Deputy Coroner, copies of which I have.

51. MR JUSTICE BURNETT: I am very familiar with it.

52. MR ROGERS: I appreciate your Lordship is very familiar with that. There is no reason to say this case falls outside the Davies guidelines. This is a case where the Tribunal has effectively played a neutral role throughout regardless of the slight differences in wording there.

53. MR JUSTICE BURNETT: I am just looking for the claim form. It is also a fair observation, is it not, that the original claim form did not quite raise the point with the clarity as has later emerged.

54. MR ROGERS: My Lord, yes.

55. MR JUSTICE BURNETT: It is very difficult to make a generalisation, but it looked as though the the matter was being challenged on factual grounds fairly substantially.

56. MR ROGERS: Yes, my Lord, and I did not draw up the summary grounds, but I notice that they stated effectively the claim raises no new point, it is essentially a challenge which the adjudicators and the reviewing adjudicator were ones they were entitled to come to on the evidence before them.

57. MR JUSTICE BURNETT: I am trying to remind myself whether the grounds mentioned Article 12 at all in terms.

58. MR ROGERS: It is certainly a case where the extent of the argument was really clear from the skeleton argument, which came later.

59. MR JUSTICE BURNETT: Yes, that is right.

60. MR MORRISON: They did not, my Lord, I am afraid the particular Article we relied upon was not available at the application for permission.

61. MR JUSTICE BURNETT: All right. There is an application made on behalf of Mr Makda by Mr Morrison for costs. This is a case which has, to put it mildly, evolved since it was first issued. The original claim form made no mention of the Article 12 point, which is what has occupied time this morning. The original claim seemed to be founded upon a suggestion that the adjudicator had come to a factual conclusion which was not truly open to him. The acknowledgement of service suggested, in fairly measured terms, that the application would be resisted on the basis that the findings and conclusions were open to the adjudicator. Much has happened since. Permission was originally refused on the papers, but allowed at the renewed oral application before Judge Thornton. He granted permission on the basis of what might loosely be called the guidance point, which has in fact not been pursued.

62. The real focus of this challenge became apparent when an extremely detailed skeleton argument was lodged and served by the claimant's solicitors, dated 19 April 2010. The arguments came into focus at that stage. The adjudicator, in compliance with the order made by Judge Thornton, responded to that skeleton argument. Mr Rogers settled that skeleton argument on 21 May 2010. The skeleton made it plain that the adjudicator was not taking up an adversarial position in these proceedings. In summary, the adjudicator was taking part to assist the court.

63. The nature of the arguments today have happily not engaged very detailed technical aspects of law relating to parking. Occasionally that does happen, and in those circumstances the attendance of the adjudicator can be vital to ensure that the court does not fall into error.

64. The principles in play in respect of the costs application of this sort are well known. They are conveniently set out in the decision of the Court of Appeal in Davies (No.2). that of course was a case which concerned a coroner, but the principles are no different. If a judicial respondent in judicial review proceedings attends to assist the court and does not take up an adversarial position then only exceptionally would be it right for the court to award costs against the judicial officer if the judicial review is successful.

65. In my judgment the parking adjudicator has remained on the right side of the line as far as Davies (No. 2) is concerned throughout these proceedings. Despite Mr Morrison's attractive submission, it is not a case in which it would be appropriate to order the adjudicator to pay the costs or any part of the claimant's costs.