C1/2005/1210

Neutral Citation Number: [2005] EWCA Civ 1540
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
ADMINISTRATIVE COURT LIST
(MR JUSTICE STANLEY BURNTON)

Royal Courts of Justice
Strand
London, WC2

Thursday, 17th November 2005

B E F O R E:

LORD JUSTICE CHADWICK

LORD JUSTICE SEDLEY

LORD JUSTICE KEENE

- - - - - - -

WALMSLEY

Respondent/Applicant

-v-

TRANSPORT FOR LONDON AND OTHERS

Appellant/Respondent

- - - - - - -

(Computer-Aided Transcript of the Stenograph Notes of
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MR P VAUGHAN, MR C GEORGE QC & MR J PEREIRA (instructed by Simmons & Simmons) appeared on behalf of the Appellant
R SPENCER QC, MR A THOMAS & MR J HARDY (instructed by Blades) appeared on behalf of the Respondents

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J U D G M E N T
(As Approved by the Court)

Lord Justice Chadwick :

1. This is an appeal from an order made on 18 May 2005 by Mr Justice Stanley Burnton in proceedings for judicial review of a decision made by an adjudicator under the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001 (SI 2001/2313). The appeal raises an issue as to the scope of the adjudicator's powers under regulation 16(2) of those Regulations

2. Regulation 16(2) of the Enforcement and Adjudication Regulations is in these terms:

> "On an appeal under this regulation, the adjudicator shall consider the representations in question and any additional representations which are made by the appellant on any of the grounds mentioned in regulation 13(3) and may give the charging authority concerned such directions as he considers appropriate."

Put shortly, the issue is whether the adjudicator has power under that regulation to give directions which go beyond such directions as are necessary to give effect to a determination whether one or other of the statutory grounds on which an appeal can be brought to the adjudicator under regulation 13 has been established. That is an issue on which judges sitting in the administrative court have taken different views.

The Congestion Charging Scheme

3. The Congestion Charging Scheme for London is a road user charging scheme made and operated by Transport for London under powers conferred by the Greater London Authority Act 1999. The scheme was first made on 23 July 2001 by The Greater London (Central Zone) Congestion Charging Order 2001 ("the Congestion Charging Order"). The charges which have given rise to this

appeal were imposed under that Order. That Order was revoked with effect from 1 November 2004. The scheme is now found in the Greater London (Central Zone) Congestion Charging Order 2004, as varied by The Greater London (Central Zone) Congestion Charging (Variation No 4) Order 2004 and The Greater London (Central Zone) Congestion Charging (Variation No 5) Order 2004. But the provisions of the scheme relevant to the issues before this Court have remained unaltered in substance.

4. Article 4(1) of the Congestion Charging Order provided (so far as material):

> "Subject to the following provisions of this Scheme, a charge of the amount specified in article 7 or paragraph 3 of Annex 4 is imposed by this Scheme in respect of each charging day on which a relevant vehicle is used or, . . . kept on one or more designated roads at any time during charging hours."

5. Article 6 provided for the payment of charge imposed by article 4(1). Article 6(1) is in these terms:

> "(1) Subject to the following provisions of this article, a charge imposed by this Scheme shall be paid by the purchase from Transport for London of a licence for a specified period falling on or beginning with a specified date."

And article 6(5) required that:

> "(5) Except in a case where paragraph (10) applies --
>
> (a) a licence may be purchased only for a single vehicle having a specified registration mark;
>
> . . . "

Article 6(10) was not in point in the present context.

6. Article 12 permitted the imposition of penalty charges:

> "(1) A penalty charge shall be payable for each charging day as respects which –
>
> (a) a relevant vehicle has been used on a designated road in circumstances in which a charge is imposed by article 4; and
>
> (b) the charge has not been paid in full in the manner in which and within the time by which it is required to be paid by article 6.
>
> (2) A penalty charge payable by virtue of paragraph (1) shall be paid within the period ('the payment period') of 28 days beginning with the date on which a penalty charge notice is served under regulation 12 of the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001 in respect of the penalty charge and in the manner specified in the penalty charge notice.
>
> (3) The amount of a penalty charge payable in accordance with paragraph (1) shall be £80 but, if the penalty charges paid before the end of the fourteenth day of the payment period, the amount shall be reduced by one half to £40.
>
> (4) Where a charge certificate is issued in accordance with regulation 17(1) of the Road User Charging (Enforcement and Adjudication) (London) Regulations 2001, the amount of the penalty charge to which it relates shall be increased by one half to £ 120."

7. It can be seen from those provisions that there is a distinction between a "charge" and a "penalty charge". A charge is imposed by article 4 at the time (during charging hours) that the vehicle is used or kept on a road within the central zone. The charge is paid by the purchase of a licence under article 6. A penalty charge is imposed by article 12 if (and only if) (a) a charge has been imposed by article 4 and (b) that charge has not been paid as required by article 6. But, although payable when imposed, a penalty charge does not have to be paid until a penalty charge notice has been served under the Enforcement and Adjudication Regulations. The debt arises under the Congestion Charging Order (read with regulation 4 of the Road User Charging (Charges and Penalty

Charges) (London) Regulations 2001 (SI 2001/2285)); but enforcement of the debt is prescribed by the Enforcement and Adjudication Regulations.

The Enforcement and Adjudication Regulations

8. Part II of the Enforcement and Adjudication Regulations makes provision for the appointment by the Lord Chancellor of legally qualified persons as road user charging adjudicators; and requires the Greater London Authority to make arrangements for their accommodation and administrative support. The procedure to be followed in relation to proceedings before adjudicators is set out in the schedule to the Regulations.

9. Part IV of the Regulations is directed to the recovery of penalty charges. Regulation 12(1) provides that where a charge with respect to a vehicle under a charging scheme has not been paid by the time by which it is required by the scheme to be paid and, in those circumstances, the scheme provides for the payment of a penalty charge, the charging authority may serve a notice ("a penalty charge notice"). Save in circumstances which are not material in the present context, a penalty charge notice is to be served on the registered keeper of the vehicle – regulation 12(2). Regulation 12(3) prescribes what information a penalty charge notice must contain. In particular, the notice must inform the recipient of his right to make representations under regulation 13; and must state the effect of regulation 16.

10. Regulation 13 gives the recipient of a penalty charge notice a right to make representations to the charging authority; and imposes on the charging authority a duty to consider these representations. The regulation is in these terms (so far as material):

> "(1) Where it appears to the recipient that one or other of the grounds mentioned in paragraph (3) are satisfied, he may make representations in writing to that effect to the charging authority who served the penalty charge on him.
>
> (2) . . .
>
> (3) The grounds are –
>
> (a) that the recipient –
>
> (i) never was the registered keeper in relation to the vehicle in question,
>
> (ii) had ceased to be the person liable before the date on which the vehicle was used or kept on a road in a charging area or
>
> (iii) became the person liable after that date.
>
> (b) that the charge payable for the use or keeping of the vehicle on a road on the occasion in question was paid at the time and in the manner required by the charging scheme,
>
> . . .
>
> (e) that the penalty charge exceeded the amount applicable in the circumstances of the case,
>
> (f) . . .
>
> . . .
>
> (6) It shall be the duty of a charging authority to whom representations are duly made under this regulation –
>
> (a) to consider them and any supporting evidence which the person making them provides, and
>
> (b) to serve on that person notice of their decision as to whether or not they accept that the ground in question has been established."

11. Regulation 14 requires that, where representations are made under regulation 13 and the charging authority concerned accept that the ground in question has been established, they *shall* cancel the penalty charge notice and *shall* state in

the notice served under regulation 13(6) that the penalty charge notice has been cancelled. The imperative is significant in this context. If one of the statutory grounds is made out, the penalty charge notice must be cancelled. But regulation 14(2) provides that:

> "(2) The cancellation of a penalty notice under this regulation shall not be taken to prevent the charging authority from serving a fresh penalty notice on the same or another person."

An obvious case for serving a fresh penalty notice on another person would be that ground (3)(a)(ii) or (iii) had been established. A case for serving a fresh penalty notice on the same person (but in a lesser amount) would be that ground (3)(e) had been established. The significance of regulation 14(2) – in the present context – is that it recognises that cancellation of the penalty charge notice does not, of itself, have the effect of cancelling, waiving or releasing the underlying debt.

12. Regulation 15 provides that where the charging authority do not accept that a ground has been established, the notice served under regulation 13(6) ("the notice of rejection") must state that a charge certificate may be served under regulation 17 unless, within 28 days of the date of service of the notice of rejection, either the penalty charge is paid or the person on whom the notice of rejection is served appeals to an adjudicator against the penalty charge. Regulation 17(1) provides that, where a penalty charge notice is served on any person and the penalty charge to which it relates is not paid before the end of the relevant period, the charging authority may serve on that person a charge certificate to the effect that the penalty charge is increased (in accordance with the charging scheme under which it was incurred). Regulations 17(2) and (3)

define the relevant period for that purpose. Regulation 18 provides for enforcement of the charging certificate: the charging authority may, if a county court so orders, recover the increased charge as if it were payable under a county court order.

13. Regulation 16 is in these terms (so far as material):

> "(1) Where a charging authority serve notice under regulation 13(6) that they do not accept that a ground on which representations were made under that regulation has been established, the person making those representations may appeal to an adjudicator against the charging authority's decision . . .
>
> (2) On an appeal under this regulation, the adjudicator shall consider the representations in question and any additional representations which are made by the appellant on any of the grounds mentioned in regulation 13(3) and may give the charging authority concerned such directions as he considers appropriate
>
> (3) It shall be the duty of any charging authority to whom a direction is given under paragraph (2) to comply with it."

Transport for London

14. In relation to the Congestion Charging Scheme for London, Transport for London ("TfL") is both the operator of the scheme and the charging authority for the purposes of the Enforcement and Adjudication Regulations. TfL was established as a body corporate by section 154(1) of the Greater London Authority Act 1999. It has the functions conferred or imposed on it by that Act, or made exercisable by it under that Act – section 154(2). The power to establish and operate a road user charging scheme is conferred by section 295(1) of the 1999 Act. That section is to be read in conjunction with schedule 23 to the Act.

15. TfL has the powers conferred by schedule 11 of the Act for the purpose of discharging its functions. Paragraph 32 of schedule 11 empowers TfL to do all such things as, in its opinion, are necessary or expedient to facilitate the discharge by it of any of its functions. There is, as it seems to me, no doubt that, in discharging its functions as operator of the Congestion Charging Scheme for London, TfL can, if it thinks fit in a proper case, decide not to pursue the enforcement of a charge or a penalty charge imposed under article 4 or article 12 of the Congestion Charging Order; not to issue a penalty charge notice under regulation 12 of the Enforcement and Adjudication Regulations; not to serve a charge certificate under regulation 17(1) of those Regulations; and not to seek recovery through the county court of the charge provided for in a charging certificate. And, as it seems to me, TfL can decide to waive or release the underlying debt.

16. Regulation 17(1A) of the Enforcement and Adjudication Regulations provides an express power to cancel a charge certificate (and to serve or cancel such further charge certificates as it thinks fit). But, for my part, I do not doubt that the power to cancel would fall comfortably within paragraph 32 of schedule 11. Nor do I doubt that TfL would have power, under that paragraph, to cancel a penalty charge notice. Regulation 14(1) of the Enforcement and Adjudication Regulations does not confer a power to cancel. Properly understood, the purpose of that provision is to prescribe circumstances in which the power to cancel, conferred by schedule 11 to the 1999 Act, *must* be exercised.

The underlying facts in the present case

17. The facts which led to an appeal to an adjudicator in the present case are not in dispute. They are set out by the judge at paragraphs 5 to 10 of his judgment, [2004] EWHC 896 (Admin):

> "5. The Claimant is the registered keeper of her car, a Ford Puma the registration number of which is W616 OJC. She used it within the charging area of the Scheme on 29 and 30 October 2003. Owing to a breakdown in the telephone system by which she usually pays the charge, she paid on the Internet. She correctly entered the first 4 characters of the registration number. Unfortunately, however, she keyed in the last 3 letters of the registration number of her previous car: she keyed in W616 JBF. She made the same mistake on both days. She paid a total of £10, the charge of £5 for each of the days in question.
>
> 6. The Claimant's car was duly photographed, and it was found that no charge had been paid on either date for W616 OJC. Transport for London promptly issued penalty charge notices dated 30 and 31 October 2003, stating that the car had been used in the charging area "without payment of the appropriate charge". The notices give information for paying the penalty charge. They inform the addressee:
>
> > '… you are advised to pay the penalty charge or, if you have reasonable grounds, dispute this notice in the form of a representation by completing and returning the representation section provided at the back of this form. You have 17 days to pay the discounted penalty charge of £40.00. If the discounted penalty charge is not received before 16 Nov 2003 then the full penalty charge of £80.00 is payable. If you fail to pay the penalty chargeable or make a representation by 30 November 2003 a Charge Certificate will be pursued which will increase the amount payable to £120.00.'
>
> 7. Page 3 of each of the notices contained information for the making of a representation against the penalty charge. It set out the grounds on which a representation against the notice could be made. The second ground reads:
>
> > 'I had paid the congestion charge due on that date (*please enclose proof of payment*).'
>
> 8. Not surprisingly, the Claimant thought that this ground applied to her. She had indeed paid the charge, and she had

proof of her payments. On 7 November 2003, she duly completed and returned the representation section in each of the notices. Under the heading "Details of your representation" she wrote: "I paid the charge and enclose a copy of the receipt." She also sent a letter dated 7 November 2003, stating that the penalty notices were both erroneous because she had paid the charge, and that she enclosed a copy of the receipt.

9. Transport for London replied on 24 November 2003, rejecting the representation. Its letter stated that the Claimant had paid for a different vehicle registration number. It informed her that the discounted penalty of £40 per penalty charge notice would be accepted if payment was received within 14 days, but that otherwise the full payment of £80 per penalty charge notice would be required, and failure to pay within 28 days of the date of the letter would result in the issue of a charge certificate, which would increase the charge by 50 per cent to £120 per penalty charge notice. The letter also informed the Claimant of her right of appeal, and a form of notice of appeal was attached.

10. The Claimant appealed against the rejection of her representation. She completed the notice of appeal and sent it off on 7 December 2003. The notice of appeal form set out the available grounds of appeal with tick boxes. One of the grounds stated was: 'The charge has already been paid'. She ticked the box for this ground of appeal, and stated, in the box for the details of her appeal:

> 'As you see from the attached receipt, I did pay the charge for the days in question. However, I paid on the Internet and made a keying error while inputting my car registration number. I put the 3 final letters as JBF – which were the letters of my previous car. … Very sorry!'

She also enclosed a receipt for her payment of the charge on another date, so as to show that W616 OJC was indeed her car."

The adjudicator's decision

18. The Parking and Traffic Appeals Service ("PATAS") received the notice of appeal on 10 December 2003. But it was not until 20 August 2004 that the adjudicator gave his decision. He refused the appeal. He pointed out that the only ground under regulation 13(3) which was relied upon by the appellant

was that in paragraph (b) – that she had paid the charge in question at the time and in the manner required by the scheme. He expressed himself satisfied that, on 29 and 30 October 2003, charges were incurred under the scheme in respect of vehicle registration W616OJC and that the appellant was then the registered keeper of that vehicle. He went on to say this:

> "The issue in this appeal is whether the correct payment was made for the correct vehicle registration for these charges in accordance with the Congestion Charge Regulations. There is a high level of responsibility on the registered keeper of the vehicle to pay any charge incurred by it by midnight of the day on which the charge was incurred. Liability is strict.
>
> The Congestion Charge Regulations afford no discretion in this situation. The registration recorded on the receipt must be for the vehicle used within the Zone during the prescribed hours. Article 6(5)(a) of the Congestion Charging Scheme states, 'a licence may be purchased only for a single vehicle having a specified registration mark'. The appellant did not pay for the vehicle's specified registration mark. I accept that this was a genuine error but I have no alternative other than to refuse this appeal."

19. The appellant sought an internal review of the adjudicator's decision, as she was entitled to do under paragraph 12 of the schedule to the Enforcement and Adjudication Regulations. But the decision was confirmed. She issued these proceedings for judicial review on 12 October 2004.

These proceedings

20. The defendants to these proceedings were the adjudicator and PATAS. The grounds were set out by the claimant under section 5 of the claim form:

> "1.The adjudicator has found as a fact that I had made a genuine error in completing the internet payment details in respect of the registration mark of my car. It follows that he accepts that I have made payment in the sum of £10 for a licence for the use of my car on the two relevant days.

> 2. The Scheme for Congestion Charging in Central London by Article 4(1) imposes a charge in respect of each day on which a relevant vehicle is used on a designated road during charging hours. My car was a 'relevant vehicle' as defined by Article 1(v).
>
> 3. Article 6 of the Scheme provides for the purchase of a licence. By paragraph (5) a licence may be purchased only for a single vehicle having a specified registration mark. The term, 'specified registration mark' is not otherwise defined. The Adjudicator's finding is that 'the appellant did not pay for the vehicle's specified registration mark'. I was required to pay for the vehicle, not the registration mark and I have done so.
>
> 4. Further, by reason of appealing to the Parking and Traffic Appeals Service within the specified period for appeal, I am now required to pay the Full Penalty Charge of £80 for each of the two occasions. I have already paid £10 for my car. I am now asked to pay a further £160. Had I accepted the original penalty, I would have paid only £80 within the discount period. It took 10 months to Adjudicate on my appeal. My right to the fair and speedy determination of my civil rights and obligations under Article 6(1) of the ECHR has been infringed in that I am penalised for appealing and have an unreasonable wait for the result."

She sought an order that the decision of the adjudicator - and the penalty charge notices – be quashed.

21. The substantive proceedings for judicial review came before Mr Justice Stanley Burnton on 14 April 2005. In his written judgment, handed down on 18 May 2005, the judge identified two issues to be decided in relation to the provisions of the scheme (including the provisions relating to appeals):

> "(a) In the events that happened, was the Claimant liable to penalty?
>
> (b) Did the adjudicator have any discretion to reduce or to relieve her of the penalty by reason of her payment and her admittedly genuine error in specifying the registration number of her car?"

And, as he said, there was the further discrete issue: whether the delay in deciding her appeal was a breach of Article 6 of the European Convention on Human Rights giving rise to any right to relief on her part.

22. The judge decided the first of those issues against the claimant. He said this, at paragraph 33 of his judgment:

> "33. . . . Sensibly construed, the Scheme requires that when purchasing a licence, the purchaser must specify the registration mark of the vehicle to which it relates. The licence that the Claimant purchased was for a single vehicle having a registration mark that she specified when she purchased it on the Internet (i.e., W616 JBF), and the vehicle that she drove on 29 and 30 October 2004 did not have that registration mark, but a different one, namely W616 OJC. It seems to me that any other interpretation of article 6 of the Scheme is liable to render the Scheme unworkable. But I make it clear that this is the only consideration that leads me to this conclusion, and having regard to the lack of clarity of the provisions of the Scheme, I do so reluctantly and without confidence or satisfaction."

23. The judge decided the second issue in the claimant's favour. He identified the question in these terms (at paragraph 40 of his judgment):

> "40.The question that arises under regulation 16(3) (*sic*) is whether it confers a discretion on the adjudicator to direct the charging authority to cancel a penalty charge notice in circumstances where the appellant has not established one of the grounds set out in regulation 13(3), but there are grounds for mitigating the penalty or totally relieving the appellant of the penalty. The provision that the adjudicator 'may give the charging authority concerned such directions as he considers appropriate' is entirely apt to confer discretion on him to relieve the appellant in a suitable case. If it had been intended to restrict the powers of the adjudicator, I should have expected the regulation to provide that he is to consider the representations of the appellant on the specified grounds and determine whether or not that ground or those grounds have been established to his satisfaction, in which case he is to direct the charging authority to cancel the penalty charge notice, and if not to dismiss the appeal and direct that the notice is to stand. Such language is used in regulations 14 and 15, and it is to be presumed that different words were used in regulation 16 because a different meaning was

> intended. I add that, although it is a minor point, the use of the plural "directions" does not assist the Defendants' interpretation."

It is common ground that the reference to regulation 16(3) in the first sentence of that paragraph is an error; plainly the judge intended to refer to regulation 16(2) in that context.

24. After setting out the contentions of the parties before him, the judge reached his conclusions at paragraphs 43 and 44:

> "43. Faced with these conflicting considerations, I think that it is right to construe the Regulations as conferring discretion on the adjudicator in a case such as the present. The Claimant did consider, and contended to the adjudicator, that she had established that she had paid the charge 'in the manner required by the charging scheme', i.e. the ground set out in regulation 13(3)(b). After considering her representations on that ground, the adjudicator was entitled to 'give the charging authority such directions as he considers appropriate', and, given the mitigating circumstances that he accepted, he might reasonably consider it appropriate to direct that the penalty charge notice be cancelled even though the ground had not formally been established.
>
> 44. This interpretation of regulation 16 has the effect of reconciling the provisions of the Scheme as a whole with its purpose, which is to ensure that charges are paid for cars that enter the Zone and that those who fail to pay are penalised. It is not a purpose of the Scheme to penalise those who make a genuine error as to their vehicle's registration number. As has been seen, many people do make such errors and are relieved of penalty. It is and must always have been obvious to Transport for London that there were bound to be many people who would mis-state the registration numbers of their vehicles. For example, it is obviously easy to confuse the letter I with the numeral 1, and the letter O with the number zero, quite apart from the room for mistyping or simple mistake as occurred in this case."

25. That led the judge to hold that the adjudicator had misunderstood his powers. As the judge put it (at paragraph 45 of his judgment):

> "45. . . . It was open to him in the circumstances of this case to direct that the penalty notices served on the Claimant should be cancelled. Indeed, there was good reason so to direct."

So the judge quashed the adjudicator's decision of 20 August 2004 and remitted the claimant's regulation 16 appeal to PATAS for further consideration in the light of his judgment.

26. I should add, for completeness, that the judge accepted that the time taken to determine the regulation 16 appeal (some eight months) had been unreasonably long; and that the claimant's convention right (conferred by article 6(1) ECHR) had been infringed. It was no answer that PATAS had been under-resourced. But the delay had caused her "no significant or discernible loss". In particular, it was not the appeal (or the delay in determining the appeal) which had led to the loss of the discount (from £80 to £40) which had been available in respect of the penalty charges. The discount had been lost because the claimant had chosen not to pay the penalty within the period of 17 days from the date of issue of each penalty charge notice.

This appeal

27. Neither of the two defendants to the judicial review proceedings (the adjudicator and PATAS) has sought to appeal the order of 18 May 2005. The appeal is brought by TfL, who was joined as a party to the claim in the proceedings, after judgment, by an order made in this Court (Lord Justice Laws) on 6 July 2005. It may well be that, in making that order, Lord Justice Laws had in mind the judge's expression of regret (at paragraph 51 of his judgment) that TfL had not been made a party when the proceedings were issued and had not sought to intervene. Permission to appeal was granted to TfL by this Court (Lord Justice Latham) on 21 July 2005.

28. In its grounds of appeal TfL drew attention to the decision of Mr Justice Elias in *R (The Mayor and Citizens of Westminster) v The Parking Adjudicator* [2002] EWHC 107 (Admin). Mr Justice Stanley Burnton does not refer to that decision in his judgment in the present case; and there is no reason to think that he was aware of it.

29. In the *Mayor of Westminster* case Mr Justice Elias had held that, on an appeal under paragraph 5(2) of schedule 6 to the Road Traffic Act 1991, the parking adjudicator was limited to the consideration of the matters set out in paragraph 2 of that schedule: "It is only those matters which he can consider, and only those in respect of which he can issue directions". He had no power to issue directions in the light of "wider mitigating or extenuating factors which may affect the exercise of the authority's discretion when deciding whether or not to collect parking fines". Those matters fell outside his province.

30. TfL submits that, although a decision on different facts and in the context of other legislation, the reasoning which led Mr Justice Elias to the conclusion which he reached in the *Mayor of Westminster* case is equally applicable to the facts and legislation in the present case. And, of course, it is said on behalf of TfL that that reasoning is to be preferred to that of Mr Justice Stanley Burnton in the present case.

The Mayor of Westminster case

31. It is sufficient, for the purposes of this appeal, to take as a statement of the facts which gave rise to judicial review proceedings in the *Mayor of Westminster* case, two paragraphs from the judgment of Mr Justice Elias:

> "1. In the two month period between the 19 April 2000 and 19 June 2000 eleven parking fine notices (more accurately described in law as "Penalty Charge Notices") were issued against Mr. Alexander Woolfson by Westminster City Council, the claimant in these proceedings. He appealed against these notices to a Parking Adjudicator, who upheld the appeal and issued a direction whose effect was that no penalties could be imposed in respect of any of the penalty charge notices. . . . The claimant now seeks to challenge the determination of the Adjudicator by way of judicial review.
>
> . . .
>
> "7. Mr. Woolfson has a number disabilities, the major one being spina bifida. He can only walk a limited distance and then only with the aid of crutches. It is not practical for him to travel by public transport, and the continuing use of taxis would be expensive. Of the eleven occasions when he was issued with a relevant parking ticket, nine of them were when he was in Westminster in the evening for social events, and two were in the daytime when he was attending job interviews. On each occasion he knew that he was parking where he was not ostensibly supposed to be, but no other appropriate parking spaces were available. Moreover, he took the view that the restriction on his liberty to park was an interference with his rights under Articles 8 and 14 of the European Convention on Human Rights. He did not, therefore, think that the restrictions were legally enforceable against him."

32. Under the provisions of the Road Traffic Act 1991 penalty charge notices (or, more colloquially, "parking tickets") were issued by parking attendants or traffic wardens. Failure to pay a penalty charge notice led to the enforcement procedure set out in schedule 6 to that Act. The first step in that procedure was the issue by the authority concerned of a "notice to owner". Where it appeared to the recipient of such a notice that one or other of the grounds set out in paragraph 2(4) of schedule 6 were satisfied, he could make representations to the authority to that effect. The grounds set out in paragraph 2(4) were substantially the same as (although not identical to) those in regulation 13(3) of the Enforcement and Adjudication Regulations. In particular, ground (f) in

paragraph 2(4) – "that the penalty charge exceeded the amount applicable in the circumstances of the case" – was the same as ground (e) in regulation 13(3). Paragraph 2(7) required the authority to consider the representations and serve on the person making them notice of their decision as to whether or not the ground in question had been established. The requirement under regulation 13(6) was in identical terms. Paragraphs 3 and 4 of schedule 6 to the 1991 Act were in the same terms as regulations 14 and 15. Paragraph 5 mirrored regulation 16. Paragraph 5(1) gave a right of appeal to a parking adjudicator from the authority's decision that a ground in respect of which representations were made under paragraph 2(7) had not been made out. Paragraph 5(2) provided that:

> "On an appeal under this paragraph, the parking adjudicator shall consider the representations in question and any additional representations which are made by the appellant on any of the grounds mentioned in paragraph 2(4) above and may give the London authority concerned such directions as he shall consider appropriate."

It is not, I think, in dispute that the scheme for enforcement and adjudication under schedule 6 to the 1991 Act is indistinguishable, in the present context, from that under the Enforcement and Adjudication Regulations.

33. The submission made to the parking adjudicator is summarised at paragraph 9 of Mr Justice Elias' judgment:

> "9. However, Mr. Woolfson, through counsel, also submitted to the Adjudicator that under paragraph 2(4)(f) of the Schedule, to which I have made reference, the expression "the amount applicable in the circumstances of the case" did not, as the claimant submits, simply mean the amount of the penalty specified in the relevant order for the particular offence. Rather it referred to all the circumstances of the case, both those relating to the offence itself and any circumstances relevant to the offender. Accordingly, it was

> submitted that the Adjudicator was entitled, and indeed obliged, to take into account all mitigating circumstances in determining whether or not there should be either a reduction of the penalty or indeed no penalty at all."

The parking adjudicator accepted that submission. As Mr Justice Elias observed (*ibid*):

> ". . . he concluded that in this case it would not be appropriate to impose any penalty. His reasons for doing so were summarised in his decision as follows:
>
> > 'I accept that up until the receipt of the 31 July letter (whenever that was) Mr Woolfson held a genuine belief that the [Human Rights Act 1998] would support him in his claim to be able to park as he did in the individual circumstances of each occasion, and that he did only park thus when he found no alternative legitimate parking place. For these reasons I do not consider that in all the circumstances Mr. Woolfson should be liable to pay these penalty charges and I find that the penalty charge exceeded the amount applicable in the circumstances of each case. Accordingly I allow these appeals, using the powers above. I accede to Mr. Tugendhadt's plea that I should grant Mr. Woolfson the equivalent of an absolute discharge.'"

34. At paragraph 13 of his judgment Mr Justice Elias directed himself that "the only question" was whether paragraph 2(4)(f) of schedule 6 to the 1991 Act could be construed so as to justify the adjudicator's decision. He rejected the submission that the answer to that question of construction turned on "Convention considerations". He expressed the view that, but for one factor "which caused me some reflection" he would have had no doubt that that question was to be answered in the negative:

> "The phrase 'he amount applicable in the circumstances of the case' would, in my judgment, naturally refer to the penalty which has been defined by law as the appropriate penalty in the particular circumstances. It presupposes that there is an identifiable penalty which actually applies and is capable of

> precise identification. If the intention had been to enable a wide variety of considerations to be taken into account when determining the appropriate penalty to be imposed, a different expression would have been used. The defendant's construction amounts to reading the phrase as 'such amount as ought to be applicable in all the circumstances of the case'.

35. The consideration which had caused Mr Justice Elias to reflect whether his "firm initial view" could be wrong was that there would be cases in which "the individual admits the breach of the order but relies on extenuating circumstances"; and that, in some cases of that nature "it would no doubt be widely considered to be harsh for the penalty to be imposed". Unless those cases could be brought within ground (f) there appeared to be no basis within the scheme for the penalty to be waived or cancelled. Nevertheless, the practice of waiving the penalty in appropriate cases was clearly recognised in a Department of Transport circular (Local Authority Circular 1/1995) and was widely adopted. So, he asked himself, "wherein lies the source of the power to exercise this exceptional power to waive the penalty". He answered that question at paragraphs 20 to 22 of his judgment:

> "20. . . . In my view the power lies in the fact that Schedule 6 does not oblige the authority to enforce the penalty charge notice. It *may* serve a Notice to Owner where the penalty remains unpaid after 28 days - the language indicating that service is discretionary- and even if any representations made under paragraph 2(4) are rejected, there is still equally a discretion whether or not to serve the charge certificate. Finally, the authority would in any event retain a discretion whether or not to seek to take enforcement proceedings against someone who was refusing to pay.
>
> 21. By contrast, where the grounds referred to in paragraph 2(4) are established, the council is obliged to cancel the notice to owner. There is not discretion.
>
> 22. In short, there are two distinct categories of representation. First, there are the statutory representations which, if

> successful, oblige the authority to cancel the notice to owner and impose no penalty. There are then other representations which may cause the authority to choose not to exercise its discretion to pursue or enforce payment, but which do not oblige it to do so. No doubt in a very exceptional case that discretion could be challenged by way of judicial review if there were grounds for saying that it had been unlawfully exercised. However, the statutory power of the adjudicator is limited to the consideration of the matters which are statutorily set out in paragraph 2. It is only those matters which he can consider, and only those in respect of which he can issue directions. Accordingly, the wider mitigating or extenuating factors which may affect the exercise of the authority's discretion when deciding whether or not to collect parking fines are not issues which the adjudicator can consider. They simply fall outside his province: his powers are limited by the statutory provisions."

36. It was that reasoning which led Mr Justice Elias to adhere to his "firm initial view" as to the correct construction of ground (f) in paragraph 2(4). There was no need to give that ground an enlarged (and artificial) meaning in order to a provide a basis for the power – which the authority required and was plainly intended to have – to waive the penalty in exceptional cases. And so he was able to conclude, at paragraph 24 of his judgment, that:

> "24. . . . I am satisfied that the adjudicator's powers are limited in the way contended for by the claimant. It follows that he had no power to issue the directions which he did in this case and I quash them. I also declare that the adjudicator has no power to take mitigating circumstances into account when determining the amount of any payment payable by a person adjudged to be in contravention of a parking regulation."

37. The respondents to the present appeal – the adjudicator, TAPAS and the claimant – have submitted that the decision in the *Mayor of Westminster* case can be distinguished on the ground that the question to which Mr Justice Elias was addressing his mind (the true construction of the phrase "the amount applicable in the circumstances of the case" in ground (f) of paragraph 2(4) of

schedule 6 to the 1991 Act) was not the question which arises in this case (the true construction of the phrase "may give the . . . authority concerned such directions as he considers appropriate" in paragraph 5(2) of schedule 6 - or, more accurately, the comparable phrase on regulation 16(2) of the Enforcement and Adjudication Regulations).

38. In my view that submission cannot be sustained. It ignores, as it seems to me, the process of reasoning which led Mr Justice Elias to the conclusion which he reached. In particular it ignores the reason which he gave in paragraph 22 of his judgment:

> ". . . the statutory power of the adjudicator is limited to the consideration of the matters which are statutorily set out in paragraph 2. It is only those matters which he can consider, and only those in respect of which he can issue directions."

39. It was submitted on behalf of the claimant that, in taking that view – that the power of the adjudicator is limited to consideration of the matters on which the statutory scheme provided for representations to be made – Mr Justice Elias had overlooked the decision of Mr Justice Scott Baker in *R v Parking Adjudicator, ex parte Bexley London Borough Council* [1998] RTR 128. That, too, was a decision on schedule 6 to the Road Traffic Act 1991. Mr Justice Scott Baker held that the adjudicator had been entitled to hold that the relevant designation order was invalid, because *ultra vires*. But an appeal to the adjudicator on the ground that the relevant designation order was expressly within the statutory scheme – paragraph 2(4)(d) of schedule 6 so provided. In that respect there was no inconsistency between Mr Justice Scott Baker's decision in the *Bexley* case and the decision in the *Mayor of Westminster* case.

40. The claimant places reliance, however, on Mr Justice Scott Baker's observation, in the *Bexley* case, that even if the adjudicator had not been given express power to consider an *ultra vires* challenge, he would have been entitled to do so. Mr Justice Scott Baker said this, at [1998] RTR 128, 139B-D:

> "In my judgment, the adjudicator is given express power to consider *ultra vires* in paragraph 2(4)(d), but, even apart from that express power, it is my view that he would have been entitled to do so.
>
> The law on collateral challenge often raises difficult and interesting questions. I was taken to the speeches in the House of Lords in *R v Wicks* [1997] 2 WLR 876. Lord Hoffmann said, at 892A: 'The correct approach in my view is illustrated by the decision of the Divisional Court in *Quietlynn v Plymouth City Council* [1988] QB 114'. In that case Webster J had said that the question could be determined by the proper construction of the legislation in question.
>
> [Counsel] argues that questions such as the validity of article 12 are much better decided by judges with expertise in judicial review cases rather than parking adjudicators and that anyway the adjudicator's decision could only be binding in the case under consideration. My conclusion is that Parliament has entrusted the work of parking adjudicators to those who are legally qualified (section 73(4), Road Traffic Act 1991). They are unlike magistrates who often have to consider the validity of bye-laws, and on a true construction of Schedule 6 they are entitled to consider the issues of collateral challenge that arose in this case."

41. Mr Justice Scott Baker's observations command respect – *a fortiori* in the field of administrative law – notwithstanding that they are made *obiter*. But it is important to appreciate that he was addressing those remarks to the question whether adjudicators could entertain a collateral challenge to the decision under appeal. The present was not a case of collateral challenge; nor was the *Mayor of Westminster* case. When Mr Justice Elias said what he did at

paragraph 22 of his judgment in that case – that the power of the adjudicator is limited to consideration of the matters on which the statutory scheme provided for representations to be made – he was not considering a collateral challenge. I am not persuaded that there is anything in the decision in the *Bexley* case which should lead to the conclusion that Mr Justice Elias was wrong to take the view that (absent a collateral challenge) the power of the adjudicator is limited to consideration of the matters on which the statutory scheme provided for representations to be made.

42. I should add two further observations. First, when Mr Justice Stanley Burnton held, at paragraph 43 of his judgment, that:

> "43. . . . it is right to construe the Regulations as conferring discretion on the adjudicator in a case such as the present. . . . [T]he adjudicator was entitled to 'give the charging authority such directions as he considers appropriate', and, given the mitigating circumstances that he accepted, he might reasonably consider it appropriate to direct that the penalty charge notice be cancelled even though the ground had not formally been established."

he was not treating the matter as one in which the adjudicator had decided a collateral challenge. He was accepting that the adjudicator had power to substitute his own view on the question whether the penalty charge should be pursued for that of TfL. Second, that the question whether adjudicators are given power to determine a collateral challenge under the Enforcement and Adjudication Regulations may well be both "difficult and interesting" – to borrow Mr Justice Scott Baker's description. But it is not a question which arises in this case. In my view that question should be left to be decided by this Court in an appeal in which it does arise.

Should the reasoning in the Mayor of Westminster case be preferred to that of the judge in the present case

43. On the basis that (as I would hold) the reasoning of Mr Justice Stanley Burnton in the present case cannot be reconciled with that of Mr Justice Elias in the *Mayor of Westminster* case, the question arises: which should be preferred?

44. I prefer the reasoning of Mr Justice Elias. The starting point, as it seems to me, is to recognise that the charging authority (in this case, TfL) has power – without recourse to any provision in the Enforcement and Adjudication Regulations – to chose (in an appropriate case) that it will not pursue or enforce payment of the penalty charge. There is nothing in the Regulations which prevents the recipient of a penalty charge notice from making whatever representations he wishes in order to persuade TfL to exercise that power. But, in a case where the representations are directed to matters which do not fall within regulation 13(3), there is nothing in the Regulations which requires TfL to chose that it will not pursue or enforce payment. That is not, of course, to suggest that TfL's decision to pursue payment could not be challenged by judicial review in an appropriate case – as Mr Justice Elias recognised at paragraph 22 of his judgment in the *Mayor of Westminster* case. Indeed, the decision of Mr Justice Collins in *R (Dolatabi) v Transport for London* [2005] EWHC 1942 (Admin) provides an example of a successful challenge under that jurisdiction.

45. Where, however, the representations are directed to matters which do fall within regulation 13(3) of the Enforcement and Adjudication Regulations the position is different. Regulation 13(6) requires TfL to consider those

representations and to notify the person making the representations of its decision whether or not the regulation 13(3) ground in question has been established. And, if the decision is that the regulation 13(3) ground has been established, TfL must cancel the penalty charge notice – regulation 14(1). TfL cannot chose not to cancel the notice. But, as regulation 14(2) makes clear, notwithstanding the cancellation of the notice it remains open to TfL to chose whether or not to pursue the penalty charge by serving a fresh notice.

46. An appeal lies to an adjudicator under regulation 16(1) if, but only if, TfL serves notice under regulation 13(6) that it does not accept that a ground "on which representations were made under that regulation" has been established. In that context "that regulation" can only mean regulation 13 – and the ground must be one of the grounds set out in regulation 13(3). If representations are made in respect of matters which do not fall within regulation 13(3), TfL is not required to serve a notice under regulation 13(6) in relation to those matters – indeed it cannot do so – and regulation 16(1) is not engaged. No right of appeal to an adjudicator is conferred in such a case.

47. It is against that background that regulation 16(2) must be construed. It is important to note the opening words – "On an appeal under this regulation". The duty of the adjudicator to consider representations and the power of the adjudicator to give directions are each confined to cases where the appeal is an appeal under regulation 16. And, as I have said, an appeal under regulation 16 will lie only where TfL has made a relevant decision under regulation 13(6) – that is to say, a decision that a ground under regulation 13(3) has not been established.

48. The only representations that an adjudicator can consider on an appeal under regulation 16 are (i) representations already made to TfL under regulation 13(3) and (ii) "any additional representations which are made by the appellant on any of the grounds mentioned in regulation 13(3)". That is what regulation 16(2) requires; and there is nothing in regulation 16(2) which confers any wider power. How, then, are the words "and may give the charging authority concerned such directions as he considers appropriate" to be interpreted?

49. There are two, and only two, ways in which regulation 16(2) can be read. It must be read either [A] as "the adjudicator shall consider the representations . . . on any of the grounds mentioned in regulation 13(3) and *if satisfied that the ground in question has been established* may give the charging authority concerned such directions as he considers appropriate"; or [B] as "the adjudicator shall consider the representations . . . on any of the grounds mentioned in regulation 13(3) and *whether or not satisfied that the ground in question has been established* may give the charging authority concerned such directions as he considers appropriate". I have no doubt that the first of those two interpretations gives effect to the intention of the rule maker. I cannot accept that, having so carefully limited the right of appeal conferred by regulation 16(1) to the regulation 13(3) grounds, the rule maker intended to confer on the adjudicator a general power to give such directions as he thought appropriate if no regulation 13(3) ground was established.

50. That is sufficient to dispose of this appeal. The appeal should be allowed on the ground that the judge was wrong to hold that the adjudicator had misunderstood his powers. It was not open to the adjudicator, in the

circumstances of this case, to direct that the penalty charge notices served on the claimant be cancelled.

Collateral challenge

51. It is important to keep in mind that these judicial review proceedings did not seek to challenge TfL's decision to pursue the penalty charges. TfL was not a party to the proceedings before the judge. That was a matter which caused the judge concern. He expressed that concern at paragraphs 51 and 52 of his judgment. He pointed out that:

> "52 …If Transport for London has a discretion to waive the penalty in circumstances where none of the grounds mentioned in regulation 13(3) of the Enforcement and Adjudication Regulations is established . . . it must exercise that discretion rationally and by reference to relevant facts. So far as possible, different decisions should be made in different cases only where there are relevant differences between their facts."

He observed that it was not clear that TfL had lawfully exercised its discretion in the case of the claimant. But, as the judge recognised, that question was not before him. Nor is it before this Court.

52. At paragraph 53 of his judgment the judge said this:

> "53.Lastly, at the beginning of this judgment I referred to the need for the Scheme to be clear, easily understandable and accessible and to be operated fairly. The provisions of the Scheme to which I have referred are not clear or easily understandable. If the Scheme requires accurate specification of a registration number by the person paying the charge, the penalty notice is misleading. The wording of the Scheme (in particular article 6(5)) and of the documents used for it (in particular the penalty charge notice) should be made clear. The requirement that the correct registration number must be specified by the person paying the charge must be spelt out, and the relevant ground for challenging a notice clearly stated. If Transport for London has a policy for the exercise of the discretion that it assumes it has to relieve from penalties, the public is entitled to know what that policy is

> and to be assured that it is a policy that is fair and fairly applied. "

I respectfully agree with those observations. I have had the opportunity to read, in draft, the judgment which Lord Justice Sedley is about to deliver. I agree, also, with his observations on the need for a published policy.

53. I am conscious that I have left open the question whether an adjudicator has power to entertain a challenge to TfL's decision to pursue payment on grounds which would found an application for judicial review – as Mr Justice Scott Baker suggested in the *Bexley* case. We were taken to the decision of Mr Gary Higginbottom, sitting as a parking adjudicator, in *Davis v The Royal Borough of Kensington and Chelsea* (PAS Case No 1970198981, 30 March 1998) which provides a helpful analysis of the arguments. We were shown decisions made by adjudicators since the decision of Mr Justice Stanley Burnton in this case in which they have, in terms, treated themselves as having that power: the adjudicator's reasons for his decision in *Chess v Transport for London* (Case No 9050067211, 9 July 2005) provides a good example. For the reasons that I have given I do not think that we can or should address that question on this appeal. It can be expected that, sooner or later, there will be an appeal to this Court in which that question will arise and will need to be decided. But it may be that the rule maker will think it sensible to consider the question as a matter of policy and put it beyond doubt by an appropriate provision to the Enforcement and Adjudication Regulations.

54. LORD JUSTICE SEDLEY: I agree with Chadwick LJ that this appeal succeeds. One important thing that emerges from his reasons, with which I agree, is that while Adjudicators at present have no power to remit or quash

penalties on grounds other than the prescribed ones, TFL does possess a general power not to enforce a penalty charge.

55. Any public body exercising discretionary powers of this kind, affecting a large number of people, risks being castigated for inconsistency if it does not have a policy to guide the officials who exercise the power. Since as long ago as the decision in **Kruse v Johnson** [1898] 2 KB 91 consistency in public administration has been recognised as a judiciable question. But consistency is not the same thing as rigidity, and public authorities are also at risk if they fetter their discretion by being unduly formulaic. The courts have accordingly recognised that it is proper to adopt a policy provided it is applied flexibly in exceptional cases: **R v Port of London Authority, ex parte Kynoch** [1919] 1 KB 176; **British Oxygen v Minister of Technology** [1971] AC 610.

56. It has emerged only during the course of these proceedings that TFL has for some time had a policy for waiving fines in meritorious cases falling outside the prescribed grounds of appeal. For the reasons I have mentioned (and which echo the remarks of Stanley Burnton J) this is to be welcomed. The policy and the changes it has undergone are described in general terms in the evidence tendered to this court, though not to the court below, of Paul Cowperthwaite, TFL's representations and appeals manager for congestion charging.

57. It is no part of this court's task to say what such a policy should contain. But it is right to say that it is inimical to good public administration for a public authority to have and operate such a policy without making it public: see **R v Home Secretary, ex parte Urmaza** [1996] COD 479. It also exposes such an authority to the risk of lawsuits based on ignorance of how it has gone about

taking the material decision. In any such proceedings the policy would probably have to be disclosed. Indeed, because of our admission of Mr Cowperthwaite's evidence in the present appeal, the existence and outlines of TFL's policy have become public property.

58. What TFL now does is for it to decide. Its counsel, Mr Charles George QC, has pointed out the risk that publishing a set of guidelines on the discretionary waiver of fines will encourage some people, perhaps quite a lot of people, to fabricate excuses which will fall within the guidelines. But it is clear that a very large number of people -- the majority, we are told, of the 110,282 who asked TFL for remission or waiver of penalties from January to July 2005 -- write in anyway with non-scheduled reasons, true or false, for letting them off their fines. TFL has to make up its mind what to do about each of these: whether to accept the excuse or to investigate it, and if the latter, how far. It may be that an increase in such submissions is a price that has to be paid for being fair to the public. For it is unfair that those who, despite the absence of any indication that they can do so, write to TFL in the hope of clemency, at present obtain an advantage over those who assume, from looking at the Regulations, the penalty charge notice, the appeal form and TFL's website, that there is no way of doing any such thing, and pay a fine which they ought not in fairness to be required to pay.

59. Whether it would be better, instead of TFL's acting, however conscientiously, as judge in its own cause, for the jurisdiction of the Adjudicators to be enlarged to include a power to remit fines for non-scheduled reasons is something which the

Lord Chancellor, who is the Minister responsible for making these regulations, might want to consider. For the present, however, it is not the law.

60. LORD JUSTICE KEENE: I also agree that for the reasons given by my Lord Chadwick LJ this appeal should be allowed. I also expressly agree with the judgment that my Lord Sedley LJ has just delivered.

61. LORD JUSTICE CHADWICK: The appeal is allowed.

Order: Appeal Allowed. No order as to costs.