Upper Tribunal for Scotland

2025UT10

Ref: UTS/AP/24/0082

DECISION OF

SHERIFF COLIN DUNIPACE,

MEMBER OF THE UPPER TRIBUNAL FOR SCOTLAND (GENERAL REGULATORY CHAMBER)

IN THE CASE OF

Mr Damion Spittles,

Appellant

- and –

Glasgow City Council

Respondent

FTS Case Reference - LZ00052-2405

13 February 2025

Decision

The Upper Tribunal allows the appeal and remits the matter back to a re-constituted First-tier Tribunal to fully consider the grounds of appeal in terms of section 47(2)(b) of the Tribunals (Scotland) Act 2014.

Representation in the Appeal

In the course of the present appeal, Mr Damion Spittles, (hereinafter referred to as "the Appellant") was represented by Dr Yvonne Spittles who submitted written representations on his behalf. The Respondents, Glasgow City Council, (hereinafter referred to as "the Council") were represented by David Blair, Advocate, who also submitted written representation on their behalf.

Introduction

1. This appeal proceeds against a decision of the First-tier Tribunal of the General Regulatory Chamber (hereinafter referred to as 'the Tribunal') dated 12 September 2024 wherein the Appellant's appeal to the effect that a Low Emission Zone Penalty Charge Notice (hereinafter a "LEZCN") had been wrongly issued against him on 26 April 2024 was refused. The Appellant thereafter sought leave to appeal against this decision on the following grounds:

> *The Tribunal's Decision Notice says that the council had evidence that the vehicle did not meet the specified emission standards as a matter of fact, because they had used an online emissions checker which said so. The online checker, however, has disclaimers in its use which say that it might not be accurate and that the definitive emissions should be checked with the manufacturer, especially if the number plate has hanged within the past 5 years. It also says that if an appeal is made against the issuing of a ULEZ penalty charge notice, the council will obtain the emission details from the DVLA to ratify the online emissions findings. During the appeal, the council were invited to provide further evidence. They had the opportunity to obtain the vehicle emission details from DVLA but did not do so. Section 7(2) of the Transport (Scotland) 2019 Act states"A record obtained from the Secretary of State or from another source as specified in the regulations by the Scottish Ministers, certifying a vehicle's emission standards, as at the date and time of the record produced by an approved device, is determinative of whether the vehicle meets the specified emission standards. "The Tribunal, therefor, made an error in law in finding that the vehicle did not meet the specified emission standards as a matter of fact. This is because the council did not, as a matter of fact, have any certification, which met the burden of proof required in law, which was determinative of*

whether the vehicle met the specified emission standards at the time of the alleged contravention."

2. Leave to Appeal was granted by a Legal Member of the First-tier Tribunal on the full foregoing ground of appeal on the basis that an arguable point of law had been raised. The Appellant has now submitted a full Appeal and in support thereof the following documentation has been submitted:

a. Form UTS-1

b. Legal Member's decision

c. Decision of First-tier Tribunal granting Permission to Appeal

3. In considering this Appeal, the parties indicated they wished matters to be considered solely based on their respective written submissions.

Background

4. By way of background, Mr Damion Spittles was issued with a LEZCN on 26 April 2024 in respect of a purported contravention at 09.15 on 24 March 2024, wherein it was alleged that he had been driving his motor vehicle registration number WV13UXT in a Low Emission Zone in Argyle, Glasgow when that vehicle did not meet the specified emission standard of the low emission zone, and that vehicle was not exempt by virtue of section 17(4) of the Transport (Scotland) Act 2019).

5. At the original hearing before the First-tier Tribunal, the appeal was said to have proceeded on a different ground, namely that the Notice had been issued out of time, and that there were extenuating circumstances. The Council opposed the appeal, stating that the reason for issuing the LEZCN was that the Appellant's vehicle did not meet the required Low Emission Zone (LEZ) standards and therefore could not be driven in a Low Emission Zone. It

was submitted that in order to meet the emission standards, that diesel engines required a Euro 6 rated engine, and that the Emissions Zone Scotland webpage had a vehicle checker function which confirmed that the vehicle was non-compliant. The Appeal was dismissed on the basis that the vehicle did not comply with the requirements and that there were no extenuating circumstances which would allow that Tribunal to quash the penalty.

6. In granting leave to appeal on 1 October 2024, another Legal Member observed that the Appellant had correctly identified the provisions of section 7(2) of the Transport (Scotland) Act 2019 (hereinafter referred to as "the 2019 Act"). The Appellant had submitted that the only source from where a record of the vehicle's emission standard could be obtained was from the Secretary of State, and that this had been a live issue during the appeal. The Council were said to have produced as evidence of the non-compliance with the emission standards a screenshot of the "vehicle checker" and made no other comment on why this should be considered sufficient in terms of S 7(2) of the Transport (Scotland) Act 2019. The decision of the First-tier Tribunal was said to have found in fact: "The Appellant's vehicle did not meet the Euro 6 standards related below." However there was no reference to the sufficiency of the source of this information in relation to the terms of the aforementioned section 7(2) of the Transport (Scotland) Act 2019. Reference was made to the terms of The Low Emission Zones (Emission Standards, Exemptions and Enforcement) (Scotland) Regulations 2021, which referred in Regulation 6 (4) (b) to relevant information including the emission standards of the vehicle involved in the alleged contravention, and also referred in Regulation 6 (3) to the enquiry being made with the Secretary of State. The Legal Member concluded that the vehicle checker as a tool did not appear to have been identified as a source for information as specified in Regulation 6(4)(b).

Findings in Fact Made by the First-tier Tribunal

7. The First-tier Tribunal, having considered the evidence made the following findings in fact:

- The Appellant drove in the restricted zone at the time and place stated above.
- The Appellant's vehicle did not meet the Euro 6 standards related below.
- The confirmed minimum criteria for vehicles to access an LEZ are:

  a. Euro 4 for petrol cars and vans (generally vehicles registered from 2006)

  b. Euro 6 for diesel cars and vans (generally vehicles registered from September 2015)

  c. Euro VI for buses, coaches and HGVs (generally vehicles registered from January 2013)

  d. Euro 3 for mopeds and motorcycles.

- These dates are indicative.
- There are no LEZ restrictions to fully electric vehicles. The emission standards apply to hybrid vehicles.

Submissions by Parties

8. On behalf of the Appellant, it was submitted that the original Tribunal's Decision Notice asserted that the Council had evidence that the vehicle did not meet the specified emission standards as a matter of fact, on the basis that they had used an online emissions checker which so confirmed. Reference was however made to the online emissions checker itself which was said to include disclaimers indicating that it might not be accurate and that the definitive emissions should be checked with the manufacturer, especially if the number plate has been changed within the past 5 years. It was also said to confirm that if an appeal was lodged against the issuing of a ULEZ penalty charge notice, that the Council would obtain the emission details from DVLA to ratify the online emissions findings. It was asserted that during the appeal, that the Council were invited to provide further evidence, and that they had the opportunity to obtain the vehicle emission details from the DVLA but had not done

so. Reference was also made to the terms of Section 7 (2) of the Transport (Scotland) 2019 Act which stated:

> "A record obtained from the Secretary of State or from another source as specified in the regulations by the Scottish Ministers, certifying a vehicle's emission standards, as at the date and time of the record produced by an approved device, is determinative of whether the vehicle meets the specified emission standards."

9. It was submitted therefore on behalf of the Appellant that the Tribunal, had made an error in law in finding that the vehicle did not meet the specified emission standards as a matter of fact, because the Council did not have any certification which met the burden of proof required in law, and which was determinative of whether the vehicle met the specified emission standards at the time of the alleged contravention.

10. On behalf of the Council it was submitted that the appeal should be refused, given it was said to proceed on an erroneous interpretation of section 7(2) of the Transport (Scotland) Act 2019 ("the 2019 Act"). The Council was said to have produced evidence to the First-tier Tribunal of the vehicle's emissions standard, and whether or not that was a certificate from the Secretary of State in terms of s. 7 (2) of the 2019 Act, the Tribunal was entitled to rely on that evidence and make the finding in fact that it did to the effect that the vehicle had not complied with the Low Emission Zone requirements. That conclusion was said to apply *a fortiori* given that no challenge had been made by the Appellant to the effect that the vehicle was non-compliant, and no suggestion has been made that it was compliant.

11. The Council referred to the fact that the Appellant had originally appealed on the basis that he considered that the Penalty Charge Notice had been issued out of time, a ground

rejected by the Tribunal, and indeed the Appellant was said to have made no suggestion that his vehicle was compliant with the emissions standards. It was said to be unclear whether he did so contend before the Upper Tribunal.

12. Reference was made to the fact that the Appellant was granted permission to appeal to the Upper Tribunal, on the grounds that the Tribunal did not have before it sufficient evidence to make a finding that the vehicle was non-compliant with the relevant emissions standard, because no certificate from the Secretary of State had been produced certifying that the vehicle was non-compliant. This approach was said to be misconceived, because section 7(2) of the 2019 Act was said not to impose a sufficiency requirement in terms of the evidence needed to prove non-compliance. It was submitted that notwithstanding the fact that the document produced to the Tribunal was not a certificate from the Secretary of State, that the Tribunal was still entitled to make the finding it did, having regard to the evidence before it. The terms of the aforementioned section were said not to impose a sufficient requirement, and were referred to for their terms, namely:

Section 7

> *(2) A record obtained from the Secretary of State or from another source as specified in regulations by the Scottish Ministers, certifying a vehicle's emission standard as at the date and time of the record produced by an approved device, is determinative of whether the vehicle meets the specified emission standard.*

13. The Council were said to hold a licence for use of a Vehicle Checking Application interface owned, developed and licenced by the Department of Transport. This application was said to allow the Council to check the emissions standard of a vehicle by entering that vehicle's registration number, which was the process which had been followed by the Council

in the present case. However, the Council could not provide a certificate from this programme to the Tribunal, as it did not allow a certificate to be produced. Instead, therefore the Council had produced an extract from the Low Emissions Zone Scotland website, the source of information from this website being understood to be the same as the DVLA's Vehicle Checking Application.

14. It was further submitted that section 7(2) of the 2019 Act did not impose a minimum sufficiency requirement in respect of proving a vehicle's non-compliance, and that there was nothing within that statutory wording which imposed a requirement on the Council to produce a certificate from the Secretary of Stat. This was not stated to be a condition of issuing a Penalty Charge Notice, and on that basis, it could not be said that a failure to produce a certificate compelled the Tribunal to refuse to make any finding that the vehicle was non-compliant. Rather it was submitted that the purpose of section 7 (2) was to place beyond doubt the question of non-compliance when a certificate was produced, and therefore if the Council produced a certificate in terms of the aforementioned section, then it was not open to the Tribunal to look behind it, nor was it permitted to consider and test any evidence to the contrary produced by the Appellant, given that the certificate was said to be conclusive evidence. However, if no such certificate was produced, that did not mean the Tribunal required to find there had been no contravention, rather, in those circumstances, it required to consider the available evidence and to determine which adminicles of evidence it preferred.

15. By way of contrast, reference was made to the provisions of section 7(1) of the 2019 Act, which provided:

Section 7

> *(1) The fact that a person was driving a vehicle on a road within a low emission zone may be established only on the basis of a record produced by an approved device.*

This language was said to clearly impose an evidential requirement in respect of proof that a person was driving a vehicle within the low emission zone, requiring the Council to prove that a motorist was driving in that zone by reference to any photographs or other images produced by an approved device, and in the absence thereof the Tribunal would be required to make no such finding. This was entirely different language from section 7(2), thereby demonstrating Parliament's intention not to impose a threshold condition for making a finding of fact, as section 7(1) does.

16. It was submitted therefore that the information before the Tribunal was sufficient to justify a finding in fact that the vehicle was non-compliant. It was accepted that had there been any evidence to the contrary, that the Tribunal would have required to consider the weight to be given to that evidence, but in the present instance there was no such evidence, and the Appellant had not explicitly argued that his vehicle was compliant. The Council's evidence was unchallenged, and accordingly it was appropriate for the Tribunal to find that the vehicle was non-compliant. The Appellant's present argument had not been made before the Tribunal, when the Appellant could have produced evidence to challenge the suggestion that his vehicle was non-compliant. He had chosen not to do so, and it was said not to be for the Upper Tribunal to now re-hear previously uncontested issues of fact.

17. The Appellant responded to the submissions made on behalf of the Council, stating that there had been no erroneous interpretation of section 7(2) of the 2019 Act. The Council had confirmed that they only obtained the vehicle emission details from a public domain online website checker tool, which was not a source specified in the 2019 Act nor in its accompanying explanatory notes. The Council was said to have accepted that the tool used by them did not meet the requirements of the 2019 Act given that it does not have the functionality to certify a vehicle's determinative emission standards. Further the tool was said

to have several written disclaimers to all users, one of which was a disclaimer to the effect that if an appeal is made against the serving of a ULEZ penalty charge notice, then the Council would obtain the vehicle emission standards from the DVLA. The Appellant stated that the Tribunal at first instance had been provided with screenshot evidence of one of the tool's disclaimers, and therefore the reliability of the tool had been challenged at the initial appeal.

18. It was further submitted that during the First-tier Tribunal hearing that the Council had been afforded an opportunity to produce the vehicle's emission standards from a source specified in the Act but had failed to do so. They had not provided any explanation for this failure, nor had they explained whether they obtained the vehicle's emission standards from a source specified in the Act. It was submitted that the terms of the 2019 Act were mandatory, and that the Council had chosen not to provide certifiable evidence of the vehicle emission standards from a source specified in the regulations by the Scottish Ministers, and as the Tribunal did not have any certifiable evidence before it from a source so specified in the Regulations by the Scottish Ministers, that the appeal should have been allowed.

19. No further representations have been made by the Council.

Discussion

20. The terms of section 46(1) the Tribunals (Scotland) Act 2014 ("the 2014 Act") provide that the Upper Tribunal for Scotland may only hears Appeals in cases where permission to appeal has been granted either by the First-tier Tribunal or by the Upper Tribunal itself. Permission can only be granted in accordance with section 46(2)(b) of the 2014 Act if the Appellant identifies an arguable error on a point of law in the decision of the First-tier Tribunal which he wishes to Appeal. In the present case leave to appeal has been granted by a Legal Member of the First-tier Tribunal.

Relevant Law

Transport (Scotland) Act 2019

Conclusion

21. The Appellant has been granted Leave to Appeal on the full grounds of appeal as set out in paragraph 1 above. In granting Leave to Appeal, the Legal Member noted that, notwithstanding the terms of the submissions made on behalf of the Council, that the issue of the source of the information in relation to the vehicle emission standards had in fact been a live issue at the initial Tribunal hearing. As stated by the Legal Member:

> "The appellant had raised under point 2 of her appeal statement that the only source from where a record of the vehicle emission standard can be obtained is the Secretary of State. This was a live issue during the appeal. "

The Legal Member had gone on to confirm that:

> "This was again raised by the appellant in the comments on the Council's evidence dated 17.5.24 (evidence tab 20) under point 2."

22. It would appear to be the case therefore that it might be incorrect for the Council to suggest that the issue of compliance had not been raised at the initial Tribunal hearing, despite the fact that this issue was not specifically addressed by the Tribunal at first instance. That information appears to have been readily available to the Legal Member who granted Leave to Appeal, and reference was made to the initial appeal statement of the Appellant and also to the Appellant's response to the Council's evidence. However the Legal Member has stated in the Reasons provided, that:

> "Low Emissions Scotland are responsible for updating and maintaining the record of compliant vehicles and their vehicle checker confirms the vehicle does not meet emissions standards.
>
> This is not denied by the Appellant who appeals on a different ground."

Accordingly, I am satisfied that the issue of the source of the information from which a record of the vehicle emissions standard can be obtained was a "live issue" at the original hearing, and that this continues to be an issue in the context of this appeal.

23. Notwithstanding the foregoing, the Legal Member at first instance has clearly proceeded on the basis that the only grounds of appeal submitted were to the effect that there were extenuating circumstances, and indeed that the Appellant did not know what grounds of appeal are relevant. Reference was also made to a suggestion that the Appellant considered that the Penalty Charge Notice was issued incorrectly as it was out of time. At no point did the Legal Member at first instance address the issue of the sufficiency of evidence lodged by the Council which had been raised by the Appellant. In particular the Legal Member has stated that the Low Emissions Scotland website confirmed whether vehicles meet emissions standards and that this was not denied by the Appellant. This appears to be factually incorrect, and the Legal Member may therefore have proceeded on a factually incorrect basis when so asserting. It was in fact denied by the Appellant. This is of some significance in relation to the question of proof, given that even in their own submissions that the Council cannot state further than that the source of information for that website *is understood* to the same as DVLA's Vehicle Checking Interface.

24. It would appear therefore that the Legal Member at first instance has misdirected themselves in relation to the application of the initial grounds of appeal to the present circumstances, and by not fully considering the matters raised by the Appellant that there has been a fundamental error in their approach to considering the case.

25. An appeal can only be successful if there has been an error of law, such as:

(i) an error of general law;

(ii) and error in the application of the law to the facts;

(iii) making findings for which there is no evidence, or which is inconsistent with the evidence of contradictory of it: or

(iv) a fundamental error in approach to the case; for example, by asking the wrong question, or by taking account of manifestly irrelevant considerations or by arriving at a decision that no reasonable tribunal could properly reach (see Advocate General for Scotland v Murray Group Holdings 2016 SC 201.)

26. In the present appeal I am satisfied that the Legal Member has made a fundamental error in their approach to the case having regard to the foregoing criteria by not fully considering, or at least misconstruing the full grounds of appeal, which has apparently resulted in the original Legal Member not fully considering the issues raised by the Appellant.

27. Accordingly, I am prepared to quash the original decision of the First-tier Tribunal, and the matter should now be remitted to a re-constituted First-tier Tribunal to determine the appeal on its merits in term of section 47(2)(b) of the Tribunals (Scotland) Act 2014, this time fully considering the terms of the Appellant's appeal.

Decision

28. This Appeal is therefore allowed and the matter remitted back to the First-tier Tribunal to consider the appeal on its merits.

Parties Aggrieved by Decision

29. A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Sheriff Colin Dunipace

Sheriff Colin Dunipace

Sheriff of South Strathclyde Dumfries and Galloway at Hamilton