



Neutral Citation Number: [2023] EWHC 1586 (Admin)

Case No: CO/784/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 27th June 2023

Before:
MR JUSTICE FORDHAM

Between:	
THE KING (on the application of MARIELA ANASTASSOVA)	<u>Claimant</u>
- and -	
NORTHAMPTON MAGISTRATES COURT	<u>Defendant</u>
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	<u>Interested party</u>

David Sonn (Sonn Macmillan Walker) for the **Claimant**
The **Defendant** and **Interested Party**
did not appear and were not represented

Hearing date: 27.6.23

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM:

Introduction

1. Having convicted the Claimant on 6 November 2022 of driving a car with an alcohol concentration above the prescribed limit, in contravention of section 5 of the Road Traffic 1988, the Defendant Magistrates declined on 27 November 2022 to state a case pursuant to section 111 of the Magistrates Courts Act 1980, issuing a s.111(5) certificate of non-viability (I avoid the statutory language of frivolity). It is accepted that the Claimant did drive her car with an alcohol concentration above the prescribed limit. The question was and is whether Vancouver Close, Corby where that took place falls within a s.5(1)(a) “road or other public place”, where “road” is itself defined as any highway other road “to which the public has access” (s.192).
2. Many cases have grappled with this topic. I have been made aware of Harrison v Hill (1932) JC 13 (High Court of Justiciary, 22.10.1931); Deacon v AT (A Minor) [1976] RTR 244 (DC 5.12.75); DPP v Vivier [1991] RTR 205 (DC 11.3.91); R v Spence [1999] RTR 353 (CA 23.3.99); R v DPP, ex p Taussik [2001] ACD 10 (DC 7.6.00); R (Planton) v DPP [2001] EWHC 450 (Admin) (DC 6.6.01); May v DPP [2005] EWHC 1280 (Admin) (DC 15.4.05); Hallett v DPP [2011] EWHC 488 (Admin) (Rafferty J 8.3.11); and Brown v Fisk [2021] EWHC 2769 (QB) (Master Dagnall 29.9.32). Although the question is one of fact and degree, the sufficiency of the evidence and sufficiency of the findings of fact can engage a question of law: see Vivier 209K-L.
3. In this case, the Magistrates heard live evidence from the taxi driver (Mr Panesar) into whom the Claimant’s car had collided in Vancouver Close on 15 July 2022. He described it as an open road with no gates, with lamp-posts and roadside parking, where a couple of people were walking around. He said he had been there, as a taxi driver, around a hundred times. There was a Google Maps photograph showing the road markings, pavements and houses on either side. The police officer who had attended the scene (PC Gostage) also gave live evidence and described this as a single lane road with off-road parking spaces and residential properties on either side, street lighting, no parking permits required, ‘give way’ markings at the end of the road, and no gates or buzzers. The Magistrates refused a submission of no case to answer. The Claimant then gave evidence. She said she said she had lived there for 2½ years and residents used Vancouver Close and others if there were deliveries.
4. In their non-viability certificate, the Magistrates explained that, by reference to photographic evidence and the evidence of PC Gostage, they had concluded as follows: Vancouver Close had all the hallmarks of a public road with unrestricted access; there was no evidence of any signage stating ‘residents only’ or similar. They said the Claimant’s evidence that the road was for residents’ access only was merely her opinion and was unsubstantiated. The Magistrates said they were satisfied beyond reasonable doubt from the evidence of PC Gostage that this was a public road with no gate or buzzers, no signage to restrict access, being a single lane carriageway, with off-road and residential parking on either side.

The Claim

5. As I see it, the essence of the claim for judicial review – developed in helpful written and oral submissions by Mr Sonn – is that this conviction is unsafe in the same way as

was the conviction in Hallett (and the conviction in Deacon). In Hallett there was a service road (which residents covenanted to maintain) with 20 houses leading off it, open at both ends, with ‘give way’ road markings, and with no signage indicating that it was private or that access was prohibited. There was a conviction. But the conviction was overturned on the basis of an insufficiency of evidence to convict. The Prosecution had failed to lead evidence of use by members of the public, beyond use by residents or visitors. It was not to be assumed, simply because there was no evidence to suggest that the road was private, that it was a road to which the public had access. There needed to be evidence led. In the present case, it is accepted for the Claimant that there were “all the hallmarks of a public road”, and the absence of any signage indicating otherwise. But it is said that no evidence was led of actual use by members of the public, outside the category of a visitor (and so special class). The people who were observed by Mr Panesar in Vancouver Close could have been residents or visitors. The Magistrates relied on PC Gostage rather than Mr Panesar, whose evidence was about attending as a taxi driver to pick up or drop off a fare (not, as now suggested by the Prosecution, as a member of the public). So, the appearance of a normally constructed road is insufficient in law and, where the only evidence of access is by people who use the road as residents or visitors to residents, that cannot and will not suffice. All of this can be seen from Deacon, as well as Hallett.

Discussion

6. I am going to grant permission for judicial review. I do so because the claim, whose essence I have sought to summarise, is arguable. But I am not doing so with enthusiasm. On the papers, Lavender J thought it clear that there was evidence on which the Magistrates could find that this was a public place. That may prove correct. I am myself provisionally attracted to the following points. First, the statutory test is public “access” (not any particular level of public “use”). Secondly, many of the cases which speak of a need of ‘evidence of use’ by the public (and not by residents or visitors) are about grey-area land: car-parks, yards, driveways etc. Thirdly, many roads which are not through-routes or rat-runs may be used by residents and visitors, and I find it odd that they can satisfy the statutory test only if evidence can be called about people, say, ‘going for a drive’ or ‘having a driving lesson’ there. Fourthly, the key may lie in Sedley LJ’s observation in the knife-possession case of Harriot v DPP [2005] EWHC 965 (Admin) (DC 4.5.05) at §10 that:

the principle which runs through all of the] cases is that land may either be on the face of it public or on the face of it private: a street would be an example of the former ... In the latter case ... the ostensibly private character of the land may be negated by evidence that the general public – that is to say – anyone who wants to – does in fact have access to it.

This passage also featured in the dangerous dogs case of R v Bogdal [2008] EWCA Crim 1 (CA 16.1.08). The present case can be characterised as a “street” case. Those cases which (correctly) emphasise a need for leading evidence of actual public use may be those which can be characterised as ostensibly private character (or ambiguity) cases. Fifthly, what was said in Deacon (see Hallett at §12) is revealing. It was that the “best” way – but not the ‘essential’ and ‘only’ way – for showing that a member of the general public has “access” to a road is to “show” that a member of that public “does in fact” so use it. Sixthly, there are clear virtues in a common sense and non-technical evaluation. I identify these points recognising that they or other points may prevail. Whatever the outcome, it will be good to have the clarity of an

authoritative resolution. Finally, I record that the Prosecution's Summary Grounds, after having cited Harriot, appear – at this permission stage – to have accepted that there must be “evidence that the public actually utilises” any location before a court can conclude that it is a public place, referring to Spence.

Sunworld

7. The parties (Claimant and Interested Party) should prepare for the substantive hearing on the basis that the Court (a) may wish to deal with the substance on the rolled-up Sunworld basis (as if a case had been stated and this were the appeal) or (b) may prefer to apply a conventional judicial review approach. These alternative routes are illustrated by R (McCombie) v Liverpool City Magistrates Court [2009] EWHC 2881 (Admin) §3. That choice should be for the Court in dealing with the substantive hearing.

Venue

8. The Claim Form confirmed that this claim had been filed in “the region with which the claim is most closely connected”. Mr Sonn has this morning accepted that that was an error. The Administrative Court in London is the regional venue for the south-east region of England. The venue with which this claim is most closely connected is the Midlands region where the venue would be the Administrative Court in Birmingham. No reasons were identified in the claim form, nor when I raised venue during the hearing today, as to why this case should continue in London. I have decided to make a ‘minded to transfer order’ transferring this case to the Administrative Court in Birmingham, but allowing the Interested Party – who are not present today – 7 days to file any objections which can be considered by the Liaison Judge for the Midlands. That mechanism does not affect the running of time for other purposes. Absent the filing of such objections, the claim will be transferred to the Birmingham where, in my judgment, it should have been started. I will make appropriate directions in my Order.

27.6.23