

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2010

Before :

THE HONOURABLE MR JUSTICE BEATSON

Between :

**THE QUEEN ON THE APPLICATION OF
OXFORDSHIRE COUNTY COUNCIL**

Claimant

- and -

THE BUS LANE ADJUDICATOR

Defendant

- and -

SHAUN DUFFY

**Interested
Party**

MR T. STRAKER QC and MR M. WENBAN-SMITH

(instructed by **Oxfordshire County Council**) for the **Claimants**

MR I. ROGERS (instructed by **The Traffic Penalty Tribunal**) for the **Defendant**

Hearing date: 9 March 2010 at Birmingham Civil Justice Centre

Judgment

Mr Justice Beatson:

A. Introduction:

1. This is a case about bus lanes, bus gates, traffic signs and whether a valid traffic prohibition in the High Street of Oxford can be enforced by civil process or only by criminal proceedings. Since 1999, save for buses and exempt vehicles, motor vehicles have been prohibited from passing through a 15 metre section of the High Street to the west of its junction with Queens Lane between 7.30 am and 6.30 pm. The designated section of the street is also known as a “bus-gate”, a term not legally defined but used in practice to describe a short length of bus only street into which other specified vehicles are sometimes admitted: see [40] and [41].

2. At 12.48 pm on 10 July 2008 Shaun Duffy, the Interested Party, drove his Peugeot car through the designated section. He was travelling from Portsmouth to Kenilworth and was unfamiliar with the road system in Oxford. His car was photographed and, on 17 July, Oxfordshire County Council (hereafter “the Council”) served him with a fixed penalty notice for “being in a bus lane (as defined by section 144(5) of the Transport Act 2000)”. Mr Duffy appealed to a Bus Lane Adjudicator who, in a postal decision dated 16 November 2008, allowed the appeal. On 2 December 2008 the Council applied for the decision to be reviewed and revoked. On 8 April 2009 the Chief Adjudicator confirmed the decision.
3. In this application for judicial review, the Council challenges the Chief Bus Lane Adjudicator’s decision that the designated section of the street is not a bus lane and was not so constituted by the relevant Traffic Regulation Order, Article 50B of the Oxfordshire County Council (City of Oxford) (Central Area) (Traffic Management) (Consolidation) Order 2003 as amended, hereafter the “2003 Order”. The effect of the decision is that while Article 50B lawfully prohibited non-exempt motor vehicles from the area, it can only be enforced by criminal process in the magistrates’ court and the owners of vehicles contravening it are not liable to civil enforcement by the Council. I refer to this as “the bus lane issue”.
4. There is also a dispute as to whether the signs put up by the Council give adequate information to road users about the status of the designated section of the street. As well as holding that it is not a bus lane, the Chief Adjudicator (see [46] and [49]) confirmed the Adjudicator’s decision that there was insufficient signing to convey to drivers “the supposed bus gate” as required by Regulation 18 of the Local Authorities’ Traffic Orders (Procedure) (England and Wales) Regulations 1996 SI 1996 No. 2489 (hereafter “LATOR 1996”). I refer to this as “the signage issue”.
5. Traffic congestion in the centre of Oxford has been a problem for over half a century. In 1948 the well-known town planner Dr Thomas Sharp suggested that the way to deal with it was by a road across Christchurch Meadows. This highly controversial proposal was not abandoned until the early 1960s. Sharp considered that Oxford’s High Street, which would be saved by his proposal, was “the greatest and most typical work of art England possesses”. That may be an overstatement but the High Street, described by the architectural historian, Sir Nicolaus Pevsner, as “one of the world’s great streets” is a street of distinction. The traffic restrictions in it and in other streets in the centre of Oxford are an important part of the Council’s efforts to deal with traffic congestion and preserve the character of the city. Its character was recognised by the Chief Adjudicator in her decision in this case. She stated (Decision p. 4) that, “although obvious, it merits recording that a historic city such as Oxford, with buildings of significant architectural importance and having developed from mediaeval times, is not suited to the full panoply of traffic signs that are recommended in more modern environments”.

6. These proceedings were launched on 7 May 2009. The Council has no intention of pursuing Mr Duffy for the £60 penalty charge if it is successful. It has stated (grounds, paragraph 2) that its concern is “to ensure the ongoing viability of the traffic enforcement scheme it operates in central Oxford, which has been put into jeopardy by the Adjudicator’s decision to rely on the reasoning [in the decision in Mr Duffy’s case] in a number of subsequent cases”. The material before me includes eight such cases in the period between 9 April and 5 August 2009.

7. Originally the Council sought an order quashing the decision only on the ground that the Chief Adjudicator erred in concluding that the designated section of the street was not a bus lane. This was because the Council understood she had accepted that the signage used was appropriate. However, on behalf of the Chief Adjudicator Mr Rogers submitted that she only decided that the signs used are appropriate if the section of the street is not a bus lane. In the light of this submission, in addition to the quashing order the Council seeks declarations that (i) Article 50B of the 2003 Order constitutes the designated section of the road as a bus lane within section 144(5) of the Transport Act 2000, and (ii) the traffic signs used by the Council to identify the designated section of the road satisfied the requirements of Regulation 18(1)(a) of LATOR 1996.

8. On 11 September 2009, following an oral hearing, Blake J granted permission. He indicated that it would assist the Court if the Defendant actively defended its decision, and that he expected that, if the Defendant did so, the Claimant would not, if successful, seek to recover its costs. The Claimant has stated it will not do so. At the Claimant’s suggestion Blake J also invited the Department for Transport to join the proceedings as an Interested Party. On 10 November 2009 the Treasury Solicitors wrote to the Court on behalf of the Department. The letter stated the Department did not wish to be formally joined but summarises its understanding of the law in relation to what it stated are the three key areas involved in this matter. On 26 November 2009 Deputy Master Knapman transferred the case to Birmingham.

B. The Evidence

9. The evidence in support of the application consists of a statement dated 7 September 2009 by Mr Smith, the Council’s Assistant Head of Transport (Network Management) and one dated 11 February 2010 and served on 12 February by Mr Cramer, the Council’s Principal Engineer. Mr Cramer is one of those responsible for implementing the infrastructure and administrative framework needed for the civil enforcement of bus lanes, including the signs and the Traffic Regulation Orders.

10. Mr Smith’s statement sets out the history of the measures taken in Oxford to deal with heavy congestion in the historic town centre and the derivation of the signage used. Mr Smith also stated that the approach of the Chief Bus Lane Adjudicator in this case

has subsequently been applied to a case in Bath. He observed that other city centres have adopted comparable traffic regulation schemes to the one in Oxford and that the outcome of this application for judicial review is likely to “have a significant impact on the ability of a number of councils to enforce the prohibited use of their bus lanes by way of penalty charge notices”; i.e. civil enforcement. Mr Cramer’s statement refers to and exhibits the eight other Oxford cases in which the reasoning in Mr Duffy’s case has been applied. But it is principally concerned with changes made to the signage in February 2008 as a result of comments by the Chief Adjudicator in October 2007 after viewing the signs as part of her consideration of a number of appeals against penalty notices and comments the Council received from motorists. Photographs of the signs before and after the changes are exhibited to the statement.

11. On 24 February, eleven working days after being given notice of the statement, eight working days after it was filed and nine working days before the hearing the defendant indicated she would challenge the claimant’s reliance on Mr Cramer’s statement. The Council had informed her that it would be serving a statement by him shortly before its skeleton argument was served.
12. In his skeleton argument on behalf of the Defendant Mr Rogers submitted that Mr Cramer’s evidence should not be admitted because it could and should have been presented to the Adjudicator and Chief Adjudicator. He also stated: (a) it is not clear whether it was suggested that a photograph of the signs at the junction of the High Street and Longwall exhibited to Mr Cramer’s statement, which was not before the Adjudicator or the Chief Adjudicator, was of signs that were there when Mr Duffy drove through Oxford; (b) the defendant has not been able to check the material in the time available; and (c) Mr Duffy, on whom the penalty was imposed, has not had the opportunity to comment on it. Mr Duffy has taken no part in these proceedings and will not be affected by their outcome. It was the Defendant who particularly wanted the signage issue to be determined. I considered that there had been ample opportunity for her representatives to check the statement and in particular what was said about changes to the signage made in February 2008. I therefore admitted the statement but have not relied on the photograph of the signs at the junction of the High Street and Longwall or what is said in Mr Cramer’s statement about it.

C. The legislative framework

(1) The prohibition and bus lane issue

13. The Council is the traffic authority for the High Street. By sections 1 and 2 of the Road Traffic Regulation Act 1984 (“the 1984 Act”) it may make Traffic Regulation Orders “prohibiting, restricting or regulating the use of a road”. Where it has made such an Order and has lawfully placed a sign on or near the road, a person who fails to comply with the indication given by the sign is guilty of an offence: Road Traffic Act 1988, section 36. Section 142(1) of the 1984 Act provides that “road” means “any length of highway or of any other road to which the public has access”. Section

144(14) of the Transport Act 2000 states that road in that Act has the same meaning as in the 1984 Act.

14. The Traffic Signs Regulation and General Directions 2002 SI 2002 No. 3113 (hereafter the “TSRGD 2002”) make provision for the design of road signs. They contain many drawings of sign designs. When traffic was first restricted on the High Street the regulations were the TSRGD 1994. But it is common ground that as far as the diagrams that are relevant in this case are concerned there is no material difference.
15. At present the only power to enforce Traffic Regulation Orders civilly by the imposition of penalty charges is in respect of bus lane and parking contraventions. As for bus lane contraventions, section 144(1) of the Transport Act 2000 empowers the Secretary of State to make regulations for the imposition of penalty charges in respect of such contraventions. Regulation 3 of the Bus Lane Contraventions (Penalty Charges, Adjudication and Enforcement) (England) Regulations 2005 SI 2005 No. 2757 (hereafter the “Bus Lane Contravention Regulations 2005”) empowers an approved local authority to impose a penalty charge in respect of a bus lane contravention relating to any road in its area. Oxfordshire County Council is an approved local authority.
16. Further provision for the civil enforcement of traffic contraventions is provided for in Part 6 of the Traffic Management Act 2004 but the provisions for such enforcement in respect of moving traffic contraventions are not yet in force. The defendant referred to this at page 9 of her decision. Schedule 7 of the Traffic Management Act 2004 defines failure to comply with Diagram 619 set out in the TSRGD 2002 as a moving traffic contravention. It does not define it as a bus lane contravention. The defendant relies on this to show the inappropriateness of Diagram 619 to denote a bus lane.
17. Section 144 of the Transport Act 2000 provides:

“(4) A bus lane contravention is a contravention of any such provision of –

(a) a Traffic Regulation Order,

...

as relates to the use of an area of road which is or forms part of a bus lane.

(5) And an area of road that is or forms part of a bus lane if the Order provides that it may be used –

(a) only by buses (or a particular description of buses), or

(b) only by buses (or a particular description of bus) and some other class or classes of vehicular traffic.”

18. Regulation 23(2) of TSRGD 2002 provides:

“(2) ‘Bus lane’ in the signs referred to in paragraph (1) means a traffic lane reserved for –

(a) motor vehicles constructed or adapted to carry more than eight passengers (exclusive of the driver);

(b) local buses not so constructed or adapted; and

(c) pedal cycles and taxis where indicated on the sign shown in Diagram 958 or 959 and pedal cycles where indicated on the sign shown in Diagram 960, 962.2, 963.2 or 1048.1.”

The difference between the two definitions is that the one in the Transport Act 2000 envisages a stretch of road remaining a bus lane although classes of vehicles other than buses, pedal cycles and taxis are permitted to use it while the definition in the TSRGD does not.

19. As far as the reference to “some other class or classes” of traffic in section 144 of the Transport Act 2000 is concerned, section 142(3) of the Road Traffic Regulation Act 1984 provides that:

“References in this Act to a class of vehicles or traffic ... shall be construed as references to a class defined or described by reference to any characteristics of the vehicles or traffic or to any other circumstances whatsoever.”

20. The “2003 Order”, the Oxfordshire County Council (City of Oxford) (Central Area) (Traffic Management) (Consolidation) Order 2003 as amended in 2004 and 2007 provides:

“2 ... “bus lane” means any lane in a length of road reserved during specified hours for local buses and such other classes of vehicle as are specified;

...

“exempt vehicle” means any: -

(a) vehicle in the service of or employed by the fire, police or ambulance services when on an emergency call;

- (b) police vehicle on patrol;
- (c) vehicle in the service of or employed by the Post Office or which is employed in the operation of a delivery service similar to a postal service while in use for the purpose of loading, unloading, delivering or collecting postal packets at premises of posting boxes in any length of road to which this Article applies;
- (d) vehicle conveying cash or other valuable securities to or from any premises in the lengths of road to which this Article applies;
- (e) vehicle in the service of a local authority, public telecommunications operator, gas, water or electricity undertaking being used in pursuance of statutory powers and duties in the lengths of road to which this Article applies;
- (f) vehicle necessarily associated with any essential servicing of or at premises in the length of road to which this Article applies;
- (g) vehicle being used in connection with any building operation, demolition or excavation in or adjacent to the length of road to which this Article applies, the removal of any obstruction to traffic or the maintenance, improvement or reconstruction of the length of road.”

...

Part IX

BUS LANE

“50B High Street

- (1) Save as provided in Parts (2) and (3) of this Article no person shall cause or permit any vehicle to enter, proceed or be in the length of the road specified in Item 4 of Part B of Schedule 8 to this Order between 7.30am and 6.30pm.
- (2) Nothing in Part 1 of this Article shall apply to any
 - (a) local bus used in the provision of a local service
 - (b) other bus subject to obtaining the prior written consent of the Chief Officer of Police or the Council
 - (c) pedal cycle
 - (d) taxi
 - (e) licensed private hire vehicle whilst:
 - (i) carrying a passenger;
 - (ii) travelling to answer a call for hire
 - (f) vehicle on a ring-a-ride service
- (3) Nothing in Part 1 of this Article shall apply to:

- (i) Any exempt vehicle in category (a) or (b) in the definition of an exempt vehicle in Article 2 of this Order
- (ii) Any vehicle in the service of or employed by the Post Office or which is employed in the operation of a delivery service similar to a postal service
- (iii) Any exempt vehicle in category (d) (security vehicle), (e), (f) or (g) in the definition of an exempt vehicle in Article 2 of this Order if this is for the sole purpose of gaining access to any other road or length of road within the list of roads contained in Schedule 1 to the City of Oxford (Central Area) (Controlled Parking Zone) Order as amended from time to time.”

(2) The signage issue

21. Section 65 of the Road Traffic Regulation Act 1984 contains the powers and duties of highway authorities as to the placing of traffic signs. It provides:

“(1) The traffic authority may cause or permit traffic signs to be placed on or near a road, subject to an in conformity with such general directions as may be given by ministers acting jointly or such other directions as may be given by the Secretary of State.

...

(3) The Secretary of State may give directions to a local traffic authority –

(a) for the placing of a traffic sign of any prescribed type or authorised character specified in the directions...”

22. Section 64 of the 1984 Act defines “traffic sign” to mean any object or device for conveying to traffic on roads or any class of traffic “warnings, information, requirements, restrictions or prohibitions of any description” specified by regulations or authorised by the Secretary of State. By section 64(2) traffic signs are to be of the size, colour and type prescribed by regulations (i.e. TSRGD 2002) except where the Secretary of State authorises the erection or retention of a sign of another character.

23. LATOR 1996, the Local Authority’ Traffic Orders (Procedure) (England and Wales) Regulations 1996 SI 1996 No. 2489 make provision for the procedure to be followed by a traffic authority before making a Traffic Regulation Order. Regulations 6 – 11 deal with consultation, publication, the consideration of objections at a public enquiry and the procedure at such an enquiry. Regulation 12 provides that an order may not be made without the consent of the Secretary of State. Part 3 of the Regulations concern the making of the order. Regulation 18 of the 1996 Regulations provides:

“(1) Where an order relating to any road has been made, the order making authority shall take such steps as are necessary to secure –

(a) before the order comes into force, the placing on or near the road of such traffic signs in such positions as the order making authority may consider requisite for securing that adequate information as to the effect of the order is made available to persons using the road...”

(3) Appeals against the imposition of penalty charges

24. The relevant provisions are contained in the Bus Lane Contraventions Regulations 2005 (SI 2005 No. 2757). They are:

“Representations in respect of penalty charges

9(1) The recipient may make written representations on any of the statutory grounds of appeal to the authority against the imposition of the penalty charge...

(2) The grounds are –

(a) that the alleged contravention did not occur...

[the other grounds include that the recipient was not the owner of the vehicle on the relevant date, it was subject to a hiring agreement, was in the control of a person who did not have the recipient’s consent, and the charge exceeded the amount applicable in the circumstances of the case.]

...

Initiating an appeal

14(1) a person on whom a penalty charge notice has been served may appeal against the imposition of the penalty charge if –

(a) he has made representations to the authority under regulation 9; and

(b) he has received from the authority a notice of rejection...”

25. The Adjudicator is required to determine the appeal after considering all the evidence and representations made by or on behalf of the parties and to state the reasons for his or her decision: Regulation 22(1) and (2). Regulation 23 makes provision for the review of an Adjudicator’s decision on the application of a party. One ground upon which a decision may be reviewed is that new evidence has become available since the conclusion of the hearing or since the decision was made the existence of which could not reasonably have been known or foreseen. Another ground is that the interests of justice require such a review. The reviewing Adjudicator is empowered to confirm, revoke or vary a decision. If he directs that it be set aside, he shall substitute such a decision as he sees fit or order a redetermination by either himself or a different Adjudicator: regulation 23(5).

D. The factual and regulatory background:

26. In 1999, in the light of the outcome of a public inquiry held the previous year, the Council introduced a number of bus priority routes in which other traffic is prohibited or restricted. The designated section of the High Street is one of these. It consists of a lane in each direction spanning the full width of the road, commonly described as a “traffic gate”. To alert drivers to the prohibition and restriction the Council has used signs, a physical barrier narrowing the carriageway where it begins, and a different colour and texture on the surface of the restricted roadway by the use of light grey cobbles.
27. The signs used have changed over time. There are now advance signs 450, 180 and 20 yards before the designated section indicating the prohibition and the distance in yards to it. There were originally “bus lane camera” signs but now there are “traffic enforcement camera” signs. At one stage some of the advance signs gave the times of the prohibition. There are also signs pointing drivers away from the High Street.
28. At the beginning of the restriction there are two signs. One, commonly known as the flying motorcycle sign, indicates that motor vehicles and motorcycles are prohibited. It consists of black symbols of a motorcycle and a car in the centre surrounded by a red circle (as depicted in Diagram 619 in the TSRGD 2002). The second, underneath it, is an exception plate stating “7.30am – 6.30pm except local buses, taxis and licensed private hire”. There was originally also a sign stating “Prohibited Traffic Turn Here” and an arrow showing a “U-turn” 20 yards before the designated section. That has now been replaced by a sign showing the flying motorcycle straight ahead and an arrow showing a “U-turn” to the right marked “All Other Traffic”.
29. These signs are not all prescribed signs or authorised variants of the signs in the TSRGD 2002. The reason is that the exemptions from the restrictions in the Council’s Traffic Order (see [20]) were (in the light of the Inspector’s recommendations) wider than the standard exemptions for bicycles and taxis. Mr Smith’s evidence is that because of this they could not be covered adequately by using one of the diagrams in the TSRGD 2002.
30. Mr Smith’s evidence is (paragraph 14) that Diagram 953, a blue roundel indicating a bus route, does not permit variants relating to private hire vehicles or the time of the restriction. He also states that Diagram 619, a prohibition on motor vehicles and motor cycles, does not allow for through traffic other than buses, local buses and taxis. He states that traditional bus lane signs were not appropriate because the whole width of each section of road is set aside for buses.

31. The Council applied (see paragraph 4 of its letter dated 2 December 2008) for a variant to Diagram 953 to permit a time period plate but the Department for Transport refused on the ground that Diagram 619 met all the requirements for the restriction in place. The Council therefore applied to the Secretary of State for authority to use other non-prescribed traffic signs, namely variant plates to be used with Diagram 619, the flying motorcycle sign. On 2 March 1999 the Secretary of State exercised his power under sections 64 and 65 of the Road Traffic Regulation Act 1984 and authorised the use of the signs requested.
32. When the restriction came into force, enforcement was only by criminal proceedings brought by the police. Mr Smith (paragraph 10) states this was sporadic, did not completely deter prohibited vehicles from using the bus lanes, and had an adverse effect on the reliability of the buses operating on the relevant routes.
33. During 2005 the Department for Transport indicated that that regulations enabling the civil enforcement of bus lane contraventions would be introduced. That November it published guidance on civil enforcement including the position of Traffic Regulation Orders and signage. Before that the Council had obtained advice from Jacobs Babtie. Jacobs Babtie considered that the High Street and all but one of the other bus lanes in central Oxford fell within the definition of a bus lane in section 144 of the Transport Act 2000 but recommended that the Council should obtain legal advice on this. The Council took advice from its in-house Legal Services Department which agreed with Jacobs Babtie. The only change Jacobs Babtie recommended to the Traffic Restriction Orders was (following the Departmental guidance – see paragraph 4.8) to make the offence “to be in” the designated area rather than to “enter and proceed”.
34. Jacobs Babtie, however, stated there were “a number of signing problems”. First, as bus lanes are “positive” rather than prohibitive, it advised that the use of the word “except” on an associated plate can be ambiguous. Secondly, the very restricted lists of vehicle types for which the TSRGD 2002 provide signs as being allowed in bus lanes would reduce the number of exemptions or the operating hours for the bus lanes. Jacobs Babtie stated the choice was to do this or to use the existing signage but, after consulting the Department for Transport, replacing the ‘bus lane camera signs’ with ‘traffic enforcement cameras’ signs.
35. Paragraph 4.10 of the Department for Transport’s Guidance deals with signing. It provides:

“Local authorities should check that signs comply with the Traffic Signs Regulations and General Directions, are up to date, consistent with the Traffic Regulations Orders and are properly and visibly mounted. This will avoid challenges on the grounds of inadequate, inconsistent or defective signing. Drivers and riders need to be alerted to the fact that cameras are

being used to enforce bus lanes and, before enforcement can commence, camera enforcement signs should be erected in each of the areas to be covered by the system and advise motorists that camera enforcement is in place and to encourage compliance. Signs informing road users about camera enforcement must conform to diagrams 878 and 879 in the Traffic Signs Regulations and General Directions 2002.”

Save for signs about camera enforcement, the Guidance does not specify what signs are to be used.

36. On 30 June 2006 the Council initiated the consultation process on its proposed amendment to the Traffic Regulation Orders. The consultation period was four weeks. It published draft Orders, placed street notices at each of the bus lanes, and wrote to statutory consultees and local interest groups. In the light of the consultation the 2003 Order was varied with effect from 26 February 2007 *inter alia* by the inclusion of Article 50B. The signage was not changed save for the addition of “bus lane camera” signs: see Mr Smith’s statement, paragraph 22. Civil enforcement of the restrictions then commenced. Mr Smith’s evidence is (paragraph 10) that “compliance at specific points improved by nearly 70% in High Street and by 60% overall”.
37. After the introduction of civil enforcement there were appeals against a number of Penalty Charge Notices. An oral hearing of some of these was held in Oxford before the Chief Adjudicator on 4 October 2007. Mr Cramer attended the hearing. He states (paragraph 4) that the Chief Adjudicator viewed the signing arrangements that were in place. After doing so she made comments about deficiencies she considered needed to be addressed to ensure motorists were provided with sufficient warning of the restrictions. Mr Cramer states (paragraph 5) the matters raised concerned: (a) the symbol on the advance warning signs; (b) that they did not advise the position of the prohibition so motorists could not reasonably assess whether access to a particular part of the High Street was achievable; (c) the use of the phrase ‘bus lane cameras’; (d) the sign identifying a position to perform a U-turn; and (e) the background colour of one of the signs. Mr Cramer states (paragraph 6) that he was not aware “of the Chief Adjudicator making reference to the suitability of using Diagram 619 ... [or] any concerns as to whether the Bus Gate was enforceable under the Transport Act 2000.” Mr Cramer also states (paragraph 11) that since 1999 there has been only one accident (in 2002) involving a vehicle undertaking a U-turn manoeuvre at the indicated position.
38. In February 2008 the Council changed the signage in the light of the Chief Adjudicator’s observations and the feedback received from motorists during the first year of the scheme’s operation. In particular, the advance warning signs were altered to include the distance in yards from the sign to the start of the prohibition, the ‘bus lane cameras’ signs were replaced with ‘traffic enforcement camera’ signs and the

“U-turn” sign was altered to make it more in line with Diagram 2108 and its permitted variants.

39. The Department for Transport and the corresponding departments in Northern Ireland, Scotland and Wales publish a Traffic Signs Manual. The current edition was published in 2008. Chapter 3 deals with regulatory signs. Paragraph 1.1 of the introduction to this chapter states that the Manual is intended to give advice to traffic authorities on the correct use of signs and road markings and that traffic authorities should remember that the purpose of regulatory signs is to ensure that drivers clearly understand what restrictions or prohibitions are in force. Paragraph 1.5 states that the word “must” denotes a legal requirement in the Traffic Signs Regulations and General Directions that must be complied with, “shall” indicates an essential (mandatory) requirement of compliance with this chapter, “should “ indicates a course of action that is “strongly recommended and represents good practice”, and “may” generally indicates a permissible action.

40. “Bus only streets and bus gates” are dealt with at paragraphs 15.29-15.32 of chapter 3 of the Manual. Paragraph 15.29 states that where a road is reserved for buses and cycles the entry points should be indicated by signs to Diagram 953, a blue roundel with a bus and a cycle. This paragraph continues:

“Where access to premises is required by other vehicles or where the bus only restriction does not apply at all times, a sign to Diagram 619 (no motor vehicles) with an exception plate to Diagram 620 should be used... the plate should have the legend ‘except buses and for access’ and, if appropriate, include a time period. ‘Buses’ may be varied to ‘local buses’.”

41. Paragraph 15.30 states that “a bus gate is a short length of bus only street” and is “often used to remove through traffic from a road but allow full access. They effectively create a ‘no through road’ for all traffic other than buses.” Paragraph 15.4 states that:

“Bus-only streets and bus gates are a length of road or part of a road where access is restricted to buses, although sometimes other vehicles such as pedal cycles, taxis and trams are also admitted”.

42. Paragraph 15.32 of the Manual states that “the appropriate road markings for bus only streets and bus gates are Diagrams 1048.3 BUS ONLY and 1048.4 BUS AND (CYCLE SYMBOL) ONLY”. It also states “no markings are prescribed for use with the supplementary plates to Diagram 618.1 and 620. This would not be practicable; the descriptions of possible exceptions can be lengthy ... and moreover these might apply only at certain times”.

43. The letter dated 10 November 2009 from the Treasury Solicitors department on behalf of the Department for Transport states (paragraph 3.2) that “a bus gate does not have continuous road marking to indicate a lane and the road marking ‘bus lane’ cannot be used”.

E. The Decisions of the Adjudicator and Chief Adjudicator

44. The Adjudicator’s decision was given on 16 November 2008. He noted (Decision, p. 1) that Mr Duffy stated the bus lane signing was not sufficiently clear to give any driver notice of the intended restriction, and that there had been a number of appeals arising out of the restriction. He stated:

“The signs used “are included in the 2002 Regulations although are said to be for use in a context which is rather different to the establishment of a bus route” (Decision, p. 2),

“The signing does not give adequate notice of the start of the restriction and that by the time any vehicle passes the signs it has already begun so that there is no way of the driver seeing the sign and taking an alternate route” (Decision, p. 2),

It is unclear why the Council chose “to sign the restrictions in this way given that both the 2002 Regulations and the guidance issued by the Department for Transport stipulates the use of different signing for bus lanes and bus gates” (Decision, p. 2),

In the absence of any carriageway markings or any warning on the approach to the restriction it does seem to me that a driver may well be confused being presented with a sign which apparently restricts vehicle access for a very short stretch of road which is positioned at the very start of the restriction when there is no real opportunity to avoid it (Decision, p. 3), and

With reference to the photographs of the advance signs, “it is not apparent... how clear [the signs] would be to any driver approaching the area that the High Street was not a through road” and “these signs are advisory only and do [not] establish the bus route” (Decision, p.4).

45. The Adjudicator concluded (Decision, p. 4) that the “particular nature of the signs which were being used” and the absence of carriageway marking meant that the provisions of Regulation 18 of LATOR 1996 had not been complied with because there was insufficient signing to convey to drivers the restriction imposed by the Traffic Regulation Order. He also said (Decision, p. 6) that the scheme arguably did not establish a bus route within the meaning of the Transport Act 2000 which can be enforced civilly, although (see Decision, p. 4) it is clear that this is not part of the basis of his decision to allow Mr Duffy’s appeal.

46. On 8 April 2009 the Chief Adjudicator confirmed the Adjudicator's decision. She stated (Decision, pp 2 and 9) that the Adjudicator was correct to state that the sign used was not one drivers associate with a bus lane or bus gate and did not convey "the supposed bus gate". But she stated (Decision, p 9) the Adjudicator was "more correct to question whether contraventions of the 'no motor vehicles' can be subject to a Penalty Charge imposed by the Council". In stating this she did not set aside his decision on signage.
47. She held (Summary of Reasons, paragraph 4 and Decision, pp 7-10) that the nature of the exceptions to the general prohibition contained in Article 50B(3) of the 2003 Order meant that the area of road was not within the definition of "bus lane" in section 144(5) of the Transport Act 2000. Accordingly (Summary of Reasons, paragraphs 5-7 and Decision, p 9), while the relevant Traffic Regulation Order lawfully prohibited motor vehicles from that area so that Mr Duffy contravened the Order by entering it, since the relevant parts of the Traffic Management Act 2004 have not been brought into force, contravention is only enforceable as a criminal offence in the magistrates' court and the Council has no power to impose a penalty charge.
48. As to the effect of the nature of the exceptions in Article 50B(3), the Chief Adjudicator found (Decision, p 7) that the language of Article 50B(1) is prohibitive and "is not language which reserves a length of road for a bus and other classes of vehicle". She considered (Decision, p 8) that a "class of vehicle or traffic" in section 142(3) of the 1984 Act could only be a group and that the circumstances that define the class must relate to the vehicles themselves or to the traffic and that "the purpose for which the vehicle is at any particular time being used does not constitute a characteristic of the vehicle, nor can it be said to apply to a group". It was for this reason that she concluded (Decision, p 8) that the exemptions to the general prohibition do not "create a 'class of vehicle or traffic'" and (Decision, p 9) that in those circumstances the length of road in the High Street does not fall within the definition of bus lane contained in section 144(5) of the Transport Act.
49. As to the signage, in the summary of reasons it is stated that "the prohibition was properly signed with sign 619 ("motor vehicles prohibited")" but examination of the reasons themselves shows that the Chief Adjudicator did not give the signage unqualified approval. On page 5 of the Decision she stated that in order to decide whether the signs used are appropriate it is necessary to consider the terms of the Traffic Regulation Order creating the traffic scheme and that Article 2 of the 2003 Order is a hybrid of the two statutory definitions in section 144(5) of the Transport Act 2000 and Regulation 23 of the TSRGD 2002. She then considered whether the length of road in the High Street is a bus lane and concluded that it is not. She returned to signage on page 9. She stated that since the length of road does not fall within the definition of bus lane contained in section 144(5) of the Transport Act:

“It follows that it does not fall within the narrow definition of bus lane contained in the Traffic Sign Regulations and General Directions 2002 and therefore the Department of Transport were correct... not to agree to the use of sign 953.

The correct sign to convey the prohibition of motor vehicle[s] travelling through the 15 metre length of the High Street is the one the Council has used namely 619.... [It] is irrelevant that sign 619 has been recommended by the DfT in the TSM3 for use in certain bus gates, because, as I have shown, this area of road is not a bus gate within the meaning of the legislation”

Although, particularly in view of what was said in the summary, the point could have been put more clearly, I conclude from this that her statement that the sign was appropriate was made in the context of the section of road not being a bus lane.

50. The penultimate paragraph of the Chief Adjudicator’s decision states:

“[M]uch of Mr [Duffy]’s case concerned whether the warning and approach signs to the High Street prohibition are adequate. As I have said, those familiar with Oxford have no difficulty with the traffic scheme, but there are clearly problems for many visitors, such as Mr Duffy. The lead-in signs are genuinely confusing because, apart from anything else, they give the impression that traffic is prohibited at all times, whereas it is only prohibited between the hours of 7.30am and 6.30pm. The council itself recognises that they are likely to cause confusion because it has provided an entirely unauthorised sign advertising vehicles to do a U-turn on arrival at the prohibited sign 619. To add to this confusion, in this case Mr Duffy was following the instructions provided by his ‘sat-nav’, which was apparently not programmed to the finer details of traffic management in Oxford. Furthermore, there are signs around Oxford warning drivers of camera enforcement of bus lanes, yet there are no discernable bus lanes (at least ones marked in accordance with bus lane signs in the TSRGD and the Highway Code, apparent in central Oxford). However I am not taking these issues into account for refusing the Council’s application to revoke Mr Knapp’s decision.”

F. Discussion:

(1) The Bus Lane issue:

51. There is no requirement that a bus lane should cover only part of a carriageway. Section 144(5) of the Transport Act 2000 refers to “an area of road” which “is or forms part of a bus lane”. This differs from Regulation 23 of the TSRGD 2002 which only refers to “a traffic lane” reserved for buses. There is no reason why “an area of road” cannot include the whole width of a length of road. There is also no minimum length required for an area to qualify as a road in either section 144 of the 2000 Act or

section 142(1) of the Road Traffic Regulation Act 1984. Section 142(1) of the 1984 Act states that “road” means “any length of highway or of any other road to which the public has access”.

52. The Chief Adjudicator had two and possibly three grounds for her decision on this issue. The first is that the language of Article 50B of the 2003 Order is prohibitory and not inclusive, and is thus “not language that reserves a length of road for buses and other classes of vehicle”. The second is that she considered that the nature of the exempt classes put Article 50B outwith the definition of bus lane in section 144(5) of the Transport Act 2000. This was because the exempting circumstances in it do not relate to the vehicles themselves or to the traffic but to the purpose for which the vehicles are used or to the activities they are undertaking. She stated that an exemption in favour of blue cars would be an exemption in favour of a class of vehicle because blue is the characteristic of the vehicles but an exemption in favour of blue cars dropping off an animal at a specified veterinary surgery would not create a class of vehicle since qualification depended on something which is not a characteristic of the vehicle but its destination and who or what is in it. She gave similar examples in relation to classes of traffic. So, on her approach, an exemption in favour of northbound traffic would constitute a class, whereas one in favour of northbound traffic delivering to a particular factory would not.

53. I have mentioned a possible third ground for the decision. The Chief Adjudicator refers (Decision p.9) to the terms of the Traffic Management Act 2004 and the fact that the provisions which will enable the civil enforcement of contravention of a “motor vehicles prohibited sign” are not in force. In paragraph 48 of his skeleton argument Mr Rogers states that the relevance of the 2004 Act is that “as the relevant parts of it which make passing a ‘motor vehicles prohibited’ sign suitable for civil enforcement are not yet in force, the offence is only enforceable in the criminal jurisdiction by the police”. On this basis, those provisions are not in fact being relied on as a reason for the conclusion that the designated section of the High Street is not a bus lane. It would indeed be difficult to contend that they are of assistance in construing section 144 of the 2000 Act, enacted four years earlier, particularly since the relevant provisions of the 2004 Act are not yet in force. Moreover, as Mr Straker QC’s skeleton argument states (paragraph 49), Diagram 953 of the TSRGD 2002 indicates a bus lane but is in the list of signs defined as moving traffic contraventions in the 2004 Act. This strongly suggests that the legislature did not conceive of the two categories being mutually exclusive.

54. I first deal with the first of the Chief Adjudicator’s grounds. The effect of Article 50B of the 2003 Order should be construed by having regard to its overall effect and not by according undue significance to the fact that the first sub-paragraph in it, Article 50B(1), is prohibitive. The overall effect of the provision does not depend on the order of the sub-paragraphs. Had Article 50B(2), suitably amended, been the first sub-paragraph and Article 50B(1) the second, there would be no impact on the meaning or

effect of the two provisions. Taken as a whole Article 50B(1)-(3) provides that the designated section of the High Street may be used only by buses and the other specified vehicles. Taking the provisions together, the length of road is reserved for buses and the other specified vehicles with all other vehicles prohibited. It thus satisfies the requirements of section 144(5) of the Transport Act 2000. I accept Mr Straker's submission that an advantage of the order of these provisions is that there is clarity as to what constitutes a contravention of the Order in Article 50B(1).

55. Mr Straker also relied on the provisions of Direction 7 in Part II of the TSRGD 2002 which provides that Diagrams 619 (the flying motorcycle) and 953 (the bus and pedal cycle on a blue roundel) may be placed on or near a road "only to indicate the effect of an Act, Order, Regulation by-law or notice... which prohibits or restricts the use of the road by traffic". He relied in particular on the words "prohibits or restricts" in the context of authority to use a bus lane sign. This does support the thrust of his submissions, but I have reached my conclusion without relying on it. While reasoning concerned with the signage used might in practice be seen as affecting consideration of the nature and effect of a Traffic Regulation Order, the latter question is a prior one. Some of the reasoning in the decisions, however, appears to suggest that the designated area is not a bus lane because of the signage. See in particular the decision of the Adjudicator: [44] above.
56. I also reject Mr Rogers' submissions on the meaning of "class or classes of vehicles or traffic" in section 144(5)(b) of the Transport Act 2000. There is no definition of "class or classes" in the 2000 Act and no internal indication that the class has to relate generically to the vehicle or the traffic as opposed to the purpose of the journey or to the activity being undertaken. It is difficult to see why the legislature would have wished for example, to allow an exemption for all marked police cars to qualify but not one only for marked police cars on duty.
57. I have concluded that the Chief Adjudicator, while correctly having regard to section 142(3) of the Road Traffic Regulation Act 1984, fell into error in applying its provisions. The 1984 Act is relevant in this context because it conferred the powers to make Traffic Regulation Orders and sections 144(4) and (5) of the Transport Act 2000 refer to the provisions of Traffic Regulation Order. Section 142(3) of the 1984 Act provides that a class of vehicles or traffic is a class "defined or described by reference to any characteristics of the vehicles or traffic or to any other circumstances whatsoever".
58. The Chief Adjudicator, in my judgment, fell into error in holding that the phrase "any other circumstances whatsoever" must apply to the group i.e. to the vehicles or the traffic and not to the purpose of use or the activity for which a vehicle is used or the traffic flows because those are not characteristics of the vehicle or the traffic. The phrase "any other circumstances whatsoever" is an alternative to "any characteristics

of the vehicles or traffic”. The interpretation placed on it by the Chief Adjudicator denudes the phrase of all or virtually all its content. There is no reason to construe these provisions as excluding from the term “class” of vehicle or traffic the circumstances relating to the purpose for which a vehicle is being used. There are, in Article 50B a number of such classes of exempt vehicles (police, post office and emergency services vehicles) on patrol, operating a delivery service, or on an emergency call, and specified vehicles used solely to gain access to a road within a defined area of central Oxford.

59. Mr Straker again relied on the TSRGD 2002 in this context. He observed that the notes to Diagrams 959 and 960, denoting “bus lanes which may be used by pedal cycles and contra flow bus lanes”, provide that “any vehicle may enter the bus lane to stop, load, or unload where this is not prohibited”. Mr Straker submitted this clearly demonstrated that Parliament envisaged that a bus lane Traffic Regulation Order could provide exemptions to a general prohibition for vehicles undertaking specified activities such as stopping loading and unloading without undermining the essential nature of the restriction as a bus lane. Again, while this supports his argument, I have reached my decision without taking account of this factor.

(2) The signage issue:

60. I have (see [4] and [49]) rejected the Council’s submissions that, if contrary to the Chief Adjudicator’s decision, the designated area is a bus lane, she found that the signage was appropriate and that her decision replaced rather than supplemented the Adjudicator’s decision.
61. Regulation 18 of LATOR 1996 requires an authority, before a Traffic Regulation Order comes into force, to take “such steps as are necessary to secure... (a) ... the placing on or near the road of such traffic signs in such positions as the order making authority may consider requisite for securing that adequate information as to the effect of the order is made available to persons using the road”.
62. The Council accepts (skeleton argument paragraph 55(5)) that “this in practice obliges it to install such traffic signs as *are requisite* so as to make it *reasonably clear* to any road users what action is expected of them by a particular [Traffic Regulation Order]”. This is a question of fact for the tribunal of fact. A court exercising a judicial review jurisdiction can only interfere where the tribunal of fact has made an error of law in posing the question to be asked, has acted contrary to the propriety of purpose or relevancy doctrines, or its conclusion or the finding is *Wednesbury* unreasonable.

The following elements are to be found in the decisions of the Adjudicator and Chief Adjudicator:

(a) The signs used are not signs stipulated for bus lanes and bus gates and there are no carriageway markings as for a bus lane. The Adjudicator considered that Diagram sign 953 should have been used to indicate a bus lane.

(b) The Chief Adjudicator considered that the signage gave adequate notice of the prohibition but not that it is a bus lane.

(c) No adequate notice is given of the start of the restriction because the signs with the full information are only at the start so that by the time any vehicle passes the sign the restriction has begun.

(d) With respect to the advance signs, the Adjudicator stated they were advisory and it was not clear from them that the High Street was not a through road. The Chief Adjudicator considered the advance signs were confusing because they gave the impression that traffic was prohibited at all times but she did not take this factor into account in reaching her decision.

63. I have concluded that the Adjudicator and the Chief Adjudicator fell into error in concluding that the signage was inadequate in not giving notice that the rationale or basis of this prohibition was a bus lane. I accept the Council's submission that the duty to place signs providing adequate information as to the effect of an Order requires notice of the prohibition and not notice that it was a prohibition because the prohibited area is a bus lane (and it is therefore civilly enforceable). It is the practical effect of the Order not its precise juridical basis or rationale that is relevant. Secondly, in the light of the acceptance by the Chief Adjudicator that the signage was adequate for the purpose of a criminal prosecution for contravening the prohibition (see [49]), it was not open to her to conclude that the signs were not sufficiently clear for the purposes of civil enforcement. There is a trend to permit civil enforcement of regulatory offences, but it remains the case that a criminal prosecution is a more serious event and carries or should carry a more serious stigma than civil enforcement. The result of the decision, that the signage is adequately clear for the purposes of the criminal law but not for the purpose of the civil law, is counter-intuitive.

64. Mr Straker characterised the differentiation in this part of the decision as to what constitutes adequate clarity according to the proposed means of enforcement as “irrational”. I agree that this part of the decision falls into Lord Greene MR’s residual category in *Wednesbury*; a decision “so unreasonable that no reasonable authority could ever have come to it”. However, notwithstanding Lord Diplock’s terminology in the *GCHQ* case [1988] AC 374, I do not consider that “irrationality” is a helpful term. It carries undeserved and mistaken connotations of concern with the decision-maker’s mental state: see the criticism in *R v Devon CC, ex p G* [1989] AC 573, 577. Moreover, the courts, as Professor Jowell and Lord Lester have observed ([1987] PL 368 at 372), “are willing to impugn decisions that are far from absurd and indeed often coldly rational”: see also Lord Cooke in *R (Daly) v Home Secretary* [2001] 2 AC 532 at [32].
65. The Defendant’s submission that the fact that signs are prescribed or authorised does not mean they are sufficient for securing adequate information as to the effect of an order is made available to road users is clearly correct. If the signs do not in fact provide adequate information no offence is committed; see *James v Cavey* [1967] 2 QB 676. Such information is a requirement and, as Jackson J stated in *R (Barnett LBC) v Parking Adjudicator* [2006] EWHC 2357 (Admin) at [41], if the statutory conditions are not met the financial liability does not arise. This, however, is not a decision like Case RG2541 *Wright v Reading BC*, a decision of the Parking Adjudicator involving ambiguous signs. The ambiguity in that case concerned the period of time during which the prohibition operated i.e. ambiguity as to its extent. Subject to one qualification, in this case the ‘confusion’ and the ‘inadequacy’ found relates to the precise judicial basis of the prohibition and not to its existence or extent.
66. A reviewing court must accord respect to the findings of the primary decision maker, but, apart from the matters to which I have referred, there are other difficulties with the decisions in this case. First, whether or not, as stated by the Adjudicator, the advance signs were advisory, from February 2008 they gave information about the distance in yards from the sign to the start of the prohibition. The Adjudicator appears unaware of this perhaps in the light of the material before him. But the material supplied by the Council when it sought a review of the decision by the Chief Adjudicator included photographs and a map of the High Street with images of the signs on it. Only if those signs were missed or ignored could drivers find themselves at the sign at the beginning of the designated area without being aware of the prohibition.
67. Secondly, the Adjudicator considered that Diagram 953 should have been used to denote a bus lane but (see [31]) the Secretary of State refused to permit that sign to be used. The Chief Adjudicator stated that Diagram 953 was not permissible. She did so in the context of her finding that the designated area is not a bus lane. But if, as I have found, the designated area falls within the definition of “bus lane” in section 144 of the Transport Act 2000, the Defendant’s submissions would, if accepted, put the Council in an impossible position. The Secretary of State refused to permit the use of

Diagram 953 because he considered an alternative, Diagram 619 with additional plates, to be adequate. If the position taken by the Defendant is correct, apart from the point that the Traffic Regulation Order would create a bus lane contravention that, notwithstanding the Transport Act 2000 and the 2005 Regulations, can only be enforced in the criminal courts, in the light of the Secretary of State's position, there would be no way of placing signs which the Adjudicator and Chief Adjudicator would consider provided adequate information. As a footnote, the absence of traditional blue and white bus lane signs was a factor taken into account by the Adjudicator. It appears that there had at one time been "bus lane camera" signs but that they may have replaced by "traffic enforcement camera" signs as a result of the Chief Adjudicator's comments in 2007. The effect of that change was to remove the only express reference in the signage to bus lanes.

68. Thirdly, the Defendant did not take account of the fact that the Council; (a) followed the Department for Transport's November 2005 Guidance (see [33]), and (b) modified the signs (see [38]) to take account of the experience of the first year of operation and the Chief Adjudicator's comments during the hearings in October 2007. She also did not take into account the signage's conformity to the Department's formal guidance set out in Chapter 3 of the Traffic Signs Manual. That (see [40]) specifically states that Diagram 619 *should* be used for bus lanes "where access to premises is required for other vehicles or where the bus lane does not apply at all times". The introduction to Chapter 3 states that "should" indicates a course of action "that is strongly recommended and represents good practice". Although the Chief Adjudicator sets out paragraphs 15.4 and 15.30 of the Traffic Signs Manual she does so at the beginning of her decision (pages 2 and 3) and in the context of her consideration of the definition of bus lanes. She does not refer to the Manual or these paragraphs in the section of her decision dealing with the adequacy of the signage.
69. In such circumstances, where the signs have not been placed in positions where they cannot be seen or easily seen, are not obscured by vegetation or other street furniture, and are clearly visible and comply with Departmental Guidance, there must be strong reasons given for concluding that they do not provide adequate information. None were given in this case. Nor indeed are the two documents containing the Department's Guidance referred to in the relevant part of the decision. These matters have led me to conclude that relevant matters were not taken into account by the Adjudicator and Chief Adjudicator in their decisions on the signage issue and that this vitiates the decision on classic public law grounds. Moreover, to the extent that the Defendant took into account the absence of the traditional blue roundel bus lane signs as showing there was inadequate notice of the prohibition, this constituted the taking into account a consideration which was, in the light of the Manual and the Departmental Guidance, irrelevant.
70. Subject to the qualification to which I have referred, that suffices to justify setting aside the decision. The qualification relates to the hours of the prohibition. The Adjudicator relied on the absence of indication about this until the very start of the

designated area. The Chief Adjudicator referred to this but stated she did not take it into account in her decision. The hours of the prohibition appear to have been on some of the advance signs before the changes in February 2008. They may have in a sense been replaced by the information about the distance to the start of the prohibition. I agree with the Adjudicator that the absence of such information is misleading in giving the impression that the prohibition applies at all times rather than only between the specified times. But, since the Chief Adjudicator did not rely on this factor, I do not consider that I should reject the Claimant's submissions and dismiss this application because of it.

71. For these reasons this application is granted. The decision is set aside. I will make the first declaration sought by the Claimants. I will not, however, make the second declaration in the terms that the Council seek. I will hear submissions as to whether an alternative formulation can be found in terms that are appropriate to reflect the fact that the adequacy of signage is a fact sensitive issue depending on the particular circumstances of a case.