

Adjudicator's Decision

J. Hubbard
and
Medway Council

Penalty Charge Notice MW99504164 £70.00

Appeal allowed on the ground that the alleged contravention did not occur.

I direct the Council to cancel the Penalty Charge Notice and Notice to Owner.

Reasons

The PCN is dated 11 May 2011 and was issued by post in respect of a contravention on 7 May 2011 at 13:01 relating to vehicle S46MJU in Ordnance Street for being parked on a taxi rank.

This case was originally listed before me as a personal appeal hearing. In advance of the hearing there was no indication from the appellant as to the basis for her appeal. Mrs Hubbard attended the hearing and confirmed that she authorised Mr Nigel Wise to conduct the appeal on her behalf. Mr Wise submitted a folder of detailed submissions and evidence which caused me to adjourn the hearing to enable the council to have a proper opportunity to respond. Subsequently both parties have made further submissions and produced evidence which I have considered.

At the hearing Mr Wise briefly identified his two main submissions. The first was that the Penalty Charge Notice had not been issued on the basis of a record produced by an approved device as required by section 72(4)(a) of the Traffic Management Act 2004 and the Regulations made under that Act. In particular Mr Wise challenged the validity of the Approved Device Certificates and their alleged failure to certify the system used. The second submission was that a procedural impropriety had occurred because the council had failed to comply with its own Code of Practice in particular paragraph 2.4.5. which prohibits the studying of pre-recorded video images to identify contraventions committed at some earlier time.

Before the hearing was adjourned it was confirmed by Mrs Hubbard and Mr Wise that it was not intended that the appellant would give any evidence as to the circumstances of the alleged contravention and that the appeal depended wholly upon the technical submissions made by Mr. Wise. In the light of this, I have

reviewed the evidence submitted by the council. In particular I have looked closely at the sequence of nine still photographs [timed from 13.01.20 to 13.02.19] taken from the video recording which starts at 13.01.18 and concludes at 13.02.21 and I make the following findings of fact:

- a. When first observed the vehicle is parked on a taxi rank adjacent to the front door of a private residence and the nearside indicator is on.
- b. The driver remains in the vehicle throughout the period of observation.
- c. The nearside indicator is flashing.
- d. Two people emerge from the adjacent front door and get into the rear of the car.
- e. The maximum period during which the vehicle was stationary is between 59 and 63 seconds.
- f. There are bags of shopping on the pavement but it is not clear where they have come from or what happens to them.

Having considered the evidence of this alleged contravention, I have decided to allow this appeal and I give my reasons below.

1. For a restriction to be enforceable it must be authorised by the relevant Traffic Regulation Order. I am satisfied that the car was stationary in a part of Ordnance Street which is a taxi rank authorised by the Medway (Prohibition of Stopping on Hackney Carriage Ranks) Traffic Order 2003. Article 3 provides as follows:

No person shall cause any vehicle to stop in a hackney carriage rank specified in the Schedule to this Order at any time.

Article 4 lists a series of exceptions, none of which applies in this case.

2. For a restriction to be enforceable, the restriction authorised by the Order must be properly signed. The evidence of signage in this case is to be found in still photographs provided by the council which do not form part of the material generated by the mobile camera. This shows that the taxi rank is signed by road markings conforming to diagram 1028.2 of the TRSGD. These road markings must be accompanied by the appropriate sign which must conform to one of five diagrams listed. The photograph of the sign at page 30 of the council's original evidence bundle shows that the sign reads "No waiting at any time except for taxis" above which is a no waiting sign. This sign corresponds with diagram 650.2. In my view it is the wrong sign. The correct sign which corresponds to the restriction created by the Order is diagram 650.1 which reads "No stopping except taxis" below a no stopping sign. This is not a minor technicality because No Waiting and No Stopping are two different restrictions and the latter is significantly more restrictive than the former. On this basis I allow this appeal but I am fortified in this decision by two further factors.

3. Approved devices should not be used for routine enforcement. In the Operational Guidance issued by the Department for Transport at paragraph 8.78 the following appears:

The Secretary of State recommends that approved devices are used only where enforcement is difficult or sensitive and CEO enforcement is not practical.

The council recognises in its later submission that it must justify the use of an approved device in Ordnance Street. At page 11 of an additional submission the close proximity of John Fisher Secondary School and instances of verbal abuse to CEO's are given as the justification in this case. I am not satisfied that this is capable of amounting to an adequate justification. It is unclear why the proximity of a school should be of any relevance to this issue. Also, there is no specific evidence from which one could properly conclude that verbal abuse, which sadly occurs all too frequently in all kinds of locations, is a particular hazard for CEOs in the Ordnance Street area.

4. As indicated in my findings of fact above, this vehicle was stationary for a maximum of 63 seconds during which the driver remained in it throughout and two people got into the vehicle. At the time the visible part of the taxi rank was empty and no obstruction was caused. In MW06157C, a decision issued in July 2010, the Chief Adjudicator allowed an appeal on the principle of "de minimis non curat lex" (the law will not concern itself with trifles) where a vehicle had stopped in a bus stop for 46 seconds to enable the passengers to change places. The Chief Adjudicator also criticised the council's Code of Practice for failing to deal with the issue of fairness. I can see no evidence in this case that the council has genuinely considered the issues of fairness and proportionality in deciding to enforce a PCN where a vehicle had stopped for just over a minute with the driver remaining in the car throughout and where no obstruction was caused.
5. Having thus allowed the appeal, it is not necessary for me to make further findings of fact in this case. However, in deference to the quantity of submissions made by the parties, I am prepared to make the following observations.
6. Paragraph 2(1) of the Approved Devices Order 2007 provides that a device is an approved device for the statutory purposes if it is of a type which has been certified by the Secretary of State as one which meets the schedules requirements. It follows that the enforcing authority must prove that the particular camera used to record the alleged contravention is of a type approved by the Secretary of State. This is a two-stage process. Firstly, the council must prove what camera was used. Secondly, it must prove that it is of a type certified as approved by the Secretary of State. It will be necessary to examine the certification carefully so as to be satisfied that it confirms that the particular camera is of the relevant type. But I doubt that it would be appropriate for this Tribunal to entertain challenges to the

validity of the Secretary of State's certification. Contrary to what may have been suggested to the appellant, other public law remedies would have to be considered in the event of a substantive challenge to the Secretary of State's certification of an approved device.

7. I am not persuaded that the Approved Device Certificate issued by the Secretary of State is defective because it allegedly fails to certify the 'System' employed. I note that one of the certificates cited with approval by the appellant describes the system as "Mobile enforcement vehicle". I can see little difference in substance between this description and the term "Smart Car" used in this case. I accept the council's submission on this point that the term "Smart Car" would be understood to mean the system of enforcement using such vehicles.
8. The appellant submits that there has been a breach of the Council's Code of Practice amounting to a procedural impropriety. My attention is drawn to paragraph 2.4.5. which provides that contraventions must be identified at the time when they are committed and prohibits the studying of pre-recorded video images to identify earlier contraventions. It is argued that this has happened twice in this case after the contravention has occurred when the footage has been reviewed by council operatives. In my view this submission confuses the original identification of the contravention with the later review. The original identification was recorded on a log in accordance with paragraph 2.4.6., a copy of which has been supplied by the council. Although the evidence captured at this time is subsequently viewed as part of the process of issuing the Regulation 10 PCN [and on this occasion was viewed twice], I am satisfied that the contravention had already been identified at the time that it occurred. However I suggest that since in accordance with paragraph 2.5.1. "the operator's observation of a contravention is the primary evidence of the contravention", it would be helpful if the evidence of the operator's observation in the form of an extract from the log could be provided in each case in the council's evidence bundle.
9. This appeal is allowed for the reasons given above.

John O'Higgins
Adjudicator

5 June 2012