

TRAFFIC COMMISSIONER FOR SCOTLAND

VEHICLE IMPOUNDING - VEHICLE SP53 EHN

APPLICANT: MR DOUGLAS MCKENDRY

DECISION OF THE TRAFFIC COMMISSIONER

Background

1. On 6 June 2018, DVSA detained (impounded) public service vehicle registration number SP53 EHN. The vehicle had been observed carrying passengers and not displaying any operator licence disc. The impounding was made by DVSA under powers given to DVSA by the Public Passenger Vehicles Act 1981.
2. The relevant legislation is the Public Passenger Vehicles Act 1981 and in particular sections 1, 12 and the Public Service Vehicles (Enforcement Powers) Regulations 2009. Guidance and directions are given in the Senior Traffic Commissioner's Statutory Document No 7 Impounding effective from 1 January 2016.
3. DVSA placed a notice in the Edinburgh Gazette of 12 June 2018 intimating the detention and that any application(s) for its return should be made to my Office.
4. On 27 June 2018, Mr Ian Ward of 8 Owl Close, Wokingham, RG41 3HY applied, on behalf of Douglas McKendry, for the return of vehicle SP53 EHN. Mr Ian Ward is neither solicitor nor counsel. With the application for return of the vehicle was an email from [dmckendry@\[REDACTED\]](mailto:dmckendry@[REDACTED]) to [volvotec@\[REDACTED\]](mailto:volvotec@[REDACTED]) dated 23 June 2018 authorising documentation to be sent to Mr Ward and including an authorisation by Ann McKendry for Ian Ward to act; that Douglas McKendry owns SP53 EHN; and that Mr McKendry is in hospital long term.
5. In the application, a hearing was requested. The ground given for the return of the detained vehicle was "b) It was not being, and had not been, used in contravention of section 12 of the 1981 Act".
6. Mrs McKendry provided a statement as the detail of the application. It is quoted in full later in this decision.
7. I considered the application and decided that I must hold a hearing. The usual call up letters and brief for the hearing were sent to the applicant, Douglas McKendry at 100 Straiton Road, Loanhead; and to Douglas McKendry c/o Ian Ward at the Wokingham address; to Douglas McKendry c/o Ann McKendry at the Straiton Road address; and to DVSA.

Withdrawal of the hearing request

8. On 16 July, Mr Ian Ward phoned and then emailed my Office requesting cancellation of the hearing scheduled for 17 July. He had received and read the hearing papers. He wrote, "In short, after reading the statements and evidence I feel the hearing would be a complete waste of the commissioner's time and also the Traffic Examiner's time attending". He explained that the telephone statement he had taken from driver Allan differed from what was said to the Examiner under caution. "Please therefore dispose of this vehicle as per normal course of action". He apologised for the waste of time and energy from all parties concerned that this had caused. That email was acknowledged but I required confirmation from Mr and Mrs McKendry that their position is to withdraw. An email followed from Ann McKendry speaking on behalf of Douglas who is unable to do this for himself. She gave authority to cease the hearing process. She had advice from Ian Ward and was happy to run with his decision.

9. In light of these requests to withdraw the request for a hearing, I decided that I would determine the application without a hearing and DVSA was advised of that. I now proceed to consider the paperwork and give a decision without a hearing.
10. DVSA's statement and productions were in the hearing brief. I do not repeat them but I have had full regard to their content.

DVSA evidence

11. DVSA was aware of enforcement action taken against the business, with trading name of McKendry Coaches. Two vehicles were impounded in 2016 and Douglas McKendry was party to the unsuccessful application for the return of one of these.
12. On 6 June 2018, DVSA Examiners in Edinburgh observed vehicle SP53 EHN being used to uplift passengers. The Examiners followed the vehicle to Duffus Park, Cupar. Meanwhile Traffic Examiner Wardrop and colleague linked the vehicle to McKendry Coaches, Douglas McKendry and that a licence application by Carrie Ann McKendry and Tracey Jane Lauder was refused by me. DVSA found an active website www.mckendrycoachhire.co.uk. DVSA believed that the McKendry family were operating for hire and reward without a licence.
13. DVSA Examiner Wardrop and colleague attended at Duffus Park, Cupar and spoke to the driver of SP53 EHN, Mr George Allan (b.1957) of Gorebridge. Mr Allan was interviewed and asked about the journey. He replied it was to take bowlers from 2 pick ups in Edinburgh. He said he was employed by Ann McKendry and that his instructions came from her. He is a part time driver, paid by cash, didn't know how much he would get; he did it to get out the house. It was always SP53 EHN he drove. It was based in a scrap yard at Loanhead. He expected the hirer to pay at the end of the journey; he had a line. The vehicle did not have a tachograph.
14. Mr Allan was seen making phone calls and he approached Examiner Wardrop and his colleague and said "Ann isn't the boss it's my mistake, I thought it was Ann, but it's Douglas McKendry who is the Boss, he is in hospital in Glasgow after suffering a major heart attack. Been in hospital six and a half weeks" or words to that effect.
15. DVLA records show SP53 EHN registered to Douglas McKendry at the Straiton Road address. Checks show there is no finance on the vehicle
16. Examiner Wardrop spoke to the hirer of the vehicle, the Match Secretary of Coltbridge Bowling Club, Roseburn, Edinburgh. She had searched the internet for a vehicle to hire to take to Duffus Bowling Club on 6 June 2018. She phoned and spoke to a lady and requested confirmation so that a cheque could be issued. The contact was McKendry Coach Hire [dmckendry@\[REDACTED\]](mailto:dmckendry@[REDACTED]). A price of £230 was quoted. The intention was to give the driver a cheque for that in name of McKendry Coaches. The arrangement was confirmed by email exchanges of 26 and 30 April.
17. The Traffic Examiner asked driver Allan for the line he'd been given. It gave the joining instructions and times, the amount £230 and in top right corner (chq D McKendry).
18. The vehicle was impounded. Arrangements had to be made for the passengers. Driver Allan had received a call and another operator was engaged to return the passengers. The operator was DY Travel (David Yeaman of Kinross). Mr Yeaman thought he was being called out because the driver had a heart attack.
19. Ann McKendry lost her operator licence in 2016. It was DVSA's position that public passenger vehicles have operated illegally since then. McKendry Coaches had not changed and continued its family run business.

Evidence for the applicant

20. Mrs Ann McKendry submitted a written statement, dated 22 June 2018, with this application. I reproduce this statement as her evidence

“Statement of facts

“On Wednesday the 6th June vehicle PSV minibus reg no: SP53 EHN was used to transport a group of people to Cupar in Fife, The driver who was driving the bus at that time was Mr. George Allan. The vehicle was stopped by DVSA officers who at the time I believe they were under the opinion that this was a hire and reward journey which it was not.

“The facts are as follows, the hirer was known to Mrs. Ann McKendry, as a previous customer, Mrs. McKendry took the hire booking from her and her intentions were to have another coach operator take the job over through herself and thereby gain a small amount of commission for this.

“Due to Douglas McKendry being very seriously ill in hospital [REDACTED].

Due to above and Mrs McKendry spending most of her day's attending hospital she completely forgot to hire the other company to cover the booking.

“The hirer rang Mrs. McKendry the day before to check everything was still okay and on schedule for their (sic) trip. As Mrs. McKendry had totally forgot due to other hospital commitments she was unable to get an operator to take the job on, she felt sorry for the hirer and therefore asked Mr. George Allan to driver Douglas McKendry's minibus to take them to their venue and was looking to have an operator from Fife area to bring them back to Edinburgh. There was at no time any payment paid for the job or neither asked for by the driver, and is still the case. The journey was made totally free from any payment. Mrs. McKendry estimated that a return cost may be around £230.00 pounds but also said that it could be cheaper, which she would know when she spoke to the operator. Mr Allan was not being paid for the journey apart from a small amount of money for food and drink at a rest stop.

“The journey was not in contravention of section 12 of the public passenger vehicles act 1981 due to it being a non-profit or hire and reward journey. We would therefore request to have the vehicle returned back to us. Due to Mr McKendry's condition we have passed all forms over to Mr. Ian Ward whom we have given our permission for him to communicate with the traffic commissioner and DVSA in order to bring these matters to a conclusion.

“Please also note that this vehicle when returned will be sold. The company of McKendry coaches was closed for good in March 2018. We requested that we did not wish to continue our application for the operators licence we had originally applied for. The workshop premises at Ramsey colliery have been closed and are now back in the hands of the landlord.

“Please contact Mr Ian Ward on [REDACTED] or email [volvotec@\[REDACTED\]](mailto:volvotec@[REDACTED]) I have provided a separate authorization for your convenience. Should you need any further confirmation re any of the above please contact Mr Ward who will be happy to help you in any way he can, including representing ourselves in place of Douglas at any hearing if so required”.

Consideration of the evidence and my decision

21. I quote these relevant paragraphs from my 12 October 2016 written decision:-

“78. The factual history of the licences held by or applied for by either Douglas or Ann McKendry or a partnership of the two of them is set out in paragraphs 24 - 29 above. I do not repeat it here save to say in briefest summary that a sole trader licence held by Douglas McKendry trading as McKendry Coaches was revoked in 2004; an application by a partnership of Douglas McKendry and Ann McKendry trading as McKendry Coaches was refused in 2004; a licence was granted to Mrs Ann McKendry as a sole trader trading as McKendry Coaches in 2004 following an application by Mrs McKendry made using the official form for such and considered at a Public Inquiry. It was a condition of grant of that sole trader licence that Douglas McKendry would not be engaged in the management of the business. In 2009 the licence granted to Ann McKendry was scrutinised by me at a Public Inquiry which included financial standing for the licence. The evidence produced to me for that Inquiry was consistent with sole trading. The condition relating to Douglas McKendry remained on the licence with no intimation to my Office of any partnership”.

“86. In 2015 the business McKendry Coaches experienced financial difficulties which led to a petition for the sequestration of Mrs Ann McKendry at the instance of Dawson Rentals Bus and Coach Ltd who held a decree against her. The date of the petition and vesting date in terms of the Bankruptcy (Scotland) Act 1985 was 28 October 2015. The deliverance awarding sequestration was dated 8 March 2016 and Mrs Claire Middlebrook was appointed to be trustee. Mrs Middlebrook’s staff attempted to close down the business and seize the coaches. This was met by an action of interdict raised by Douglas McKendry and Carrie McKendry of 100 Straiton Road, Loanhead and lodged on 15 April 2016. I find from the instance and condempnations in that writ that Mr McKendry and Miss McKendry knew of the sequestration of Ann McKendry and the appointment of Mrs Middlebrook as Trustee. In condempnation 1 the pursuers stated “The pursuers are father and daughter who own between them the five buses and operate a bus for hire business in Loanhead, near Edinburgh. The defender is the Trustee in the sequestration of Ann McKendry who was the licence holder of McKendry Coaches.”

“87. The sequestration of Ann McKendry, the licence holder of McKendry Coaches, was not intimated to the Office of the Traffic Commissioner. I find that there was no cessation of PSV operation by those engaged in the business of McKendry Coaches on 8 March 2016. Mr Douglas McKendry was in control of the business given the indisposition of and sequestration of Mrs Ann McKendry and he was assisted by members of his family including Carrie Ann McKendry and Mrs Nicola McCallum who was transport manager on the licence. None of these persons had lawful authority to operate public service vehicles or to use the licence or discs issued to Mrs Ann McKendry”.

“88. By an application dated 9 March 2016 but not lodged at the Central Licensing Unit in Leeds until 10 May 2016 Carrie Ann McKendry and Tracy Jane Lander applied for a PSVOL to operate 5 vehicles from Unit 3, Ramsay Colliery, Engine Road, Loanhead and with Nicola McCallum as transport manager. That application was formally acknowledged by Leeds in a letter dated 18 May 2016 which advised that “there is no authority to operate any

public service vehicles for hire or reward in any capacity until you have been granted authority to do so by the traffic commissioner.” That application has not been granted. No one at the Office of the Traffic Commissioner whether in Leeds or elsewhere has at any time represented to the applicants or anyone on their behalf including Mr James McDonald that an operator licence had been granted to Miss Carrie McKendry and Tracy Jane Lander. Miss Carrie McKendry knew that she did not have a licence to operate. Mr Douglas McKendry is long experienced in PSV operating and knew that a licence holder would receive a licence document (which he described as a “certificate”) and blue discs and that such discs were necessary for lawful operating. Mr Douglas McKendry has not held a PSVOL since 2004. He knew that he did not hold any licence in 2016. He knew that no licence documentation had been forthcoming for the application by his daughters Carrie and Tracy Jane. He knew that Mrs Ann McKendry was no longer the holder of an operator licence. He was aware that the vehicles SIL 3924 and WJI 2321 were on journeys to T in the Park as he put them out on those bookings. The business hitherto operated under the licence of Mrs Ann McKendry had not ceased in any practical sense and the vehicles went out with his direct and actual knowledge. He took the decision to put them out. He took a risk and the vehicles were stopped by DVSA and later detained”.

“95. Ann McKendry was the only person in the McKendry family of Douglas, Nicola, Carrie Ann, and Tracy who, until notified termination on 17 June 2016 was in possession of a PSVOL. None of the others had a licence and Douglas was prevented by a licence condition from lawfully being engaged in the management of the McKendry Coaches business. Ann McKendry’s licence was terminated. Ann McKendry should have notified material change of circumstances long before but had not done so. Carrie Ann McKendry knew there was no operator licence which could cover operating by her, her father, or sister Tracy”.

22. Much of what I was considering here was analogous to what I had to consider in the impounding decision of 12 October 2016 (as upheld by the Upper Tribunal and the leave to appeal declined by the Court of Session – decisions copied in the brief).
23. However, in respect of this application, there was no attempt to deny knowledge of the use of the vehicle. The claim is that it was not being used for hire and reward.
24. I reject Mrs Ann McKendry’s account of how the vehicle came to be carrying passengers to Fife. It does not stand scrutiny. On the contrary, this was a commercial arrangement made by the customer to transport her bowls group from Edinburgh to Cupar at the agreed price of £230, with expectation clearly marked on the driver’s line that payment would be by cheque to D. McKendry. The driver was arranged by Mrs McKendry and he expected some reward for this time. The emails between the customer and McKendry Coach Hire are precise and in line with a commercial arrangement for the hire of a vehicle to take 12 passengers to Cupar and same day return. There is no mention of any third party providing the transport nor of it being an obligation without payment.
25. I do not have the slightest doubt that vehicle SP53 EHN was being used for hire and reward and that an operator licence was required. Accordingly, the application cannot succeed. **I refuse the return of detained vehicle SP53 EHN given that the vehicle was being used in contravention of section 12 of the 1991 Act.**

Joan N Aitken
Traffic Commissioner for Scotland

17 July 2018