

Burden of proof in licensing appeals

Jeremy Phillips considers whether a recent case has affected the courts' approach in licence reviews, as well as changes to the requirements for low-level lotteries



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In recent months the Divisional Court case of *Mehrdad Kaivanpor v Director of Public Prosecutions* [2015] EWHC 4127 (Admin) has been exercising licensing practitioners after it was suggested that it fundamentally altered the approach to be taken to licensing appeals. Here I consider briefly whether it does, in fact, have that effect.

Before I do that, however, it may be useful if I summarise just what the conventional approach has been. To do this, one need look no further than the decision of Clare Montgomery QC, sitting as a deputy High Court judge, in *R (Developing Retail Ltd) v East Hampshire Magistrates' Court* [2011] EWHC 618 (Admin), where she explained the practical consequences of *R (Hope and Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] EWCA Civ 31 in these terms:

'In deciding whether the decision of the licensing committee is wrong the magistrates' court is not considering any question of *Wednesbury* unreasonableness since it is not a process of judicial review, it is instead a fresh evidential hearing. This means that the task of the magistrates' court, having heard the evidence and specifically addressed the decision of the authority below, is to give a decision whether, because they disagree with the decision below in the light of the evidence, it is wrong.

'The magistrates therefore have power not merely to review the decision on the grounds of an error of law but also on its merits. It is however for the appellant before the magistrates' court to persuade the court that it should reverse the order under appeal, and in cases where a statutory discretion to attach conditions has been exercised, the magistrates' court should normally consider whether the exercise of discretion was wrong in the light of the reasons given for that exercise and the form of the conditions, rather than considering the discretion afresh in the hearing of the appeal.'

In *R (Townlink Ltd) v Thames Magistrates' Court* [2011] EWHC 898 (Admin) (decided just two weeks prior, but published subsequently), Mr Justice Lindblom further analysed the position in this way:

'What the district judge had to do was to consider the evidence before him with the relevant principles in mind. Those principles included the necessity that the licensing objectives be promoted, and proportionality. Bearing in mind the decision of the council's licensing sub-committee and the significance of that decision as the result of the democratically elected members having applied their minds to the issue, the district judge nevertheless had to adopt the approach approved by the court in *Joffe, Sagnata*, and *Hope and Glory*. He had to do this by considering "whether, because he [disagreed] with the decision below in the light of the evidence before him, it [was] therefore wrong" (see per Burton J in para 45 of his judgment at first instance in *Hope and Glory*).'

Onus of proof

So what, then, of *Kaivanpor*? In that case, Mr Kaivanpor sought to have his taxi licences reinstated by the High Court after their revocation by Brighton and Hove Council following a collision with a cyclist. Before the justices the council had contended that it was up to the driver to show he was a 'fit and proper person' to be a taxi driver. They upheld the decision on that basis.

However, on appeal it was successfully argued by those representing Mr Kaivanpor that the High Court should depart from the recent decision in *Canterbury City Council v Ali* [2013] EWHC 2360 (Admin) and find that the magistrates had erred in placing the burden on the taxi driver to satisfy them that he was a fit and proper person when considering the revocation of his licence for 'any other reasonable cause' under section 61(1)(b) of the Local Government (Miscellaneous Provisions) Act 1976.

Lord Justice Beatson and Mr Justice Wilkie accepted the contention that the Court of Appeal's earlier decision in *Muck IT Ltd v Merritt and others* [2005] EWCA Civ 1124 (a case concerning licences for goods vehicles) should be followed and that in taxi licence revocation appeals, at least, it is for the licensing authority to establish that an individual is not a 'fit and proper person'.



Clear and principled dichotomy

Will this decision apply more generally to appeals under, for example, the Licensing Act 2003? I venture to suggest not. First, *Hope and Glory* does not appear to have been cited in *Kaivanpor*. Second, in the latter case only the appellant was represented (see Practice Direction: Citation of Authorities (2012)). Third, and most importantly, when seeking to apply the Court of Appeal decision in *Muck IT Ltd*, rather than the subsequent High Court decision in *Ali*, counsel for Mr Kaivanpor argued that the provisions plainly provided that on application for a licence it was for the applicant to satisfy the giver of the licence that certain matters are satisfied, including that they are a fit and proper person or persons of good repute.

By way of contrast, when it came to revoking a licence the scheme provided that the licence may be revoked or must be revoked if the giver of the licence is satisfied that one or other of certain things has happened or that circumstances have changed.

Agreeing with that submission, Wilkie J said: 'In my judgment, looking at the two statutory schemes, it is clear that... [t]here is a clear and principled dichotomy between the application stage where the onus of proof is sensibly, properly and clearly on the applicant to satisfy the statutory requirements. Once that person has a licence then the schemes, again sensibly and on the basis of proper principle, require the licensing authority which wishes to revoke or suspend a licence or not renew the licence to be satisfied of certain matters.

'The burden is therefore on the licensing body to establish to its satisfaction that those changes of circumstance or prohibited circumstances have arisen; it is not for the licence holder endlessly to prove that they continue to be a fit and proper person or a person of good repute.'

The distinction that is so evident in the treatment of appeals against the grant of licences and subsequent applications for their revocation under the Local Government (Miscellaneous Provisions) Act 1976 simply does not exist in the statutory scheme laid down in the Licensing Act 2003. While the onus will, in the latter, continue to fall on the applicant for a licence review, the decision does nothing in my view to disturb the oft-reviewed authority of *Hope and Glory* as regards the particular approach to be adopted on appeals.

Low-level lotteries

On 6 April 2016 a number of changes to the Gambling Act 2005 reduced the requirements for running specified 'low-level' lotteries – although the law continues to ensure that they are run fairly

to support charities and other good causes.

The modified position is as follows:

- **Private society lotteries:** These can now be promoted by members of a private society for any charitable or non-commercial purpose (currently lotteries can only be promoted for the purposes for which the society is conducted). The requirement for a private society lottery ticket to contain certain information has also been removed. All other rules remain the same;
- **Work lotteries:** Work lotteries can now be used for fundraising for any purpose (other than private or commercial gain). Previously work lotteries could not be used for fundraising and all money collected had to be used for prizes or expenses incurred in organising the lottery. The requirement for a ticket in a work lottery to contain certain information has also been removed. Again, all other existing rules remain the same;
- **Residents' lotteries:** Residents' lotteries can now be used for fundraising for any purpose other than private or commercial gain. Previously residents' lotteries could not be used for fundraising and all money collected had to be used for prizes or expenses incurred in organising the lottery. Again, the requirement for a ticket in a residents' lottery to contain certain information has been removed, but otherwise all other existing rules remain the same; and
- **Incidental non-commercial lotteries:** Now renamed 'incidental lotteries', these can be held at both non-commercial and commercial events to raise money for charities and other good causes but cannot be operated for private or commercial gain. Lottery results can also now be announced during or after the event. Otherwise, all other existing rules remain the same (including the rule, which can cause practical difficulties in some businesses, requiring that tickets can only be sold at the event and while it is taking place).

It is anticipated that these changes will make it easier for the smaller charities to organise lotteries at previously banned 'commercial' events. The fact that it will not now be necessary for the winner to be announced during the event will be a convenient relaxation in some cases. Similarly, it will assist other charities to be able to make it known henceforth to sports and other members clubs that they are now permitted to receive donations from lotteries held by such bodies. **SJ**



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