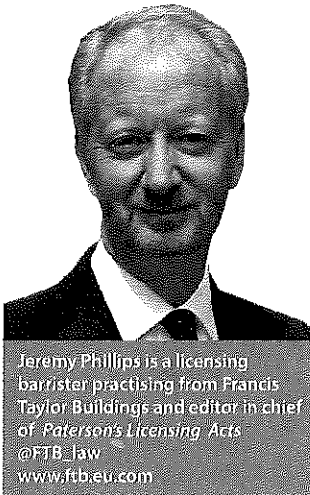


Here's to Her Majesty and other licensing developments

Jeremy Phillips considers an order made in celebration of the Queen's 90th birthday, the relationship between licensing and immigration issues, and the balance of public health and safety



The aptly named Licensing Act 2003 (Her Majesty The Queen's Birthday Licensing Hours) Order 2016, made in celebration of the Queen's 90th birthday, provides for premises licences and club premises certificates to have effect during the period from Friday 10 to Sunday 12 June 2016 (to the extent that this is not already the case) as if specified times were included in the opening hours under the licence or certificate. The 'specified times' are the two hours between 11pm and 1am on the relevant two days.

The order only applies to licences and certificates which authorise 'on sales' to be carried on up to or after 11pm on each of those days. The order also allows qualifying premises to be used for the provision of late night refreshment at the specified times.

While Her Majesty was obviously the prime cause of public jubilation, it has not passed unnoticed that the celebration also happily coincides with the start of the Euro 2016 football. At 5pm on the Saturday, Wales take on Slovakia and at 8pm it's England against Russia in Marseille.

Section 172 of the Licensing Act 2003 allows for extended hours to be set on a national basis and means that it is no longer necessary to persuade the High Court that such events are capable of being considered a 'special occasion'. Since the Act was introduced in 2005, there have been extended hours for the royal wedding, the Queen's Diamond Jubilee, and the World Cup.

Immigration and licensing issues

It is not often that the High Court decides a case which dovetails neatly into the passing of legislation, yet this is exactly what has happened with the passing of the Immigration Act 2016 and the decision of Mr Justice Jay in *East Lindsey District*

Council v Abu Hanif (trading as Zara's restaurant and takeaway) (2016).

The government's justification for the licensing provisions in the 2016 Act arises from the fact that immigration enforcement officers are said to have found that a significant proportion of illegal working happens on licensed premises, where there is the sale of alcohol, late night refreshment (hot food or drink sold between 11pm and 5am), or the provision of entertainment. Accordingly, applying for – and then holding – licences will be conditional on compliance with immigration laws. The controls will also apply to those employing illegal workers (the issue in *Hanif*).

The principal points to note are:

- The Licensing Act 2003 (the 2003 Act) only extends to England and Wales. Section 42 empowers the secretary of state to implement by regulations similar changes in Scotland or Northern Ireland;
- The new section 192A in the 2003 Act defines entitlement to work in the UK for the purposes of the legislation;
- A person without such an entitlement may not apply for a licence to sell alcohol from particular premises (the scheme only applies to licensees who are resident in the UK; non-resident licensees are not subject to immigration controls);
- Illegal working is a crime under the new offence created by the Act and employing an illegal worker may also be an offence if the appropriate *mens rea* exists;
- The secretary of state will be added to the list of responsible authorities to be notified when an application for a premises licence is submitted. This will enable her to make relevant representations in respect of such an application if she is satisfied that issuing the

licence would undermine the crime prevention objective;

- An existing premises licence will lapse if the licence holder ceases to be entitled to work in the UK (this provision also applies to applications to transfer a licence and to interim authority notices);
- An applicant for a personal licence must have an entitlement to work in the UK. The commission of immigration offences and requirements to pay civil penalties under immigration law on employers and landlords of illegal migrants may be considered by licensing authorities when considering whether to grant a licence. The commission of immigration offences may also be considered by courts when considering forfeiture;
- Provisions make an immigration offence a 'relevant offence' for the purposes of an application for a personal licence. The legislation also provides that such a licence ceases to have effect if the holder ceases to be entitled to work in the UK. Where an applicant for a personal licence has been convicted of an immigration offence or been issued with an immigration penalty, the chief officer of police and the secretary of state must be notified of the application. Amendments are also made so as to require a licence holder to notify a licensing authority if required to pay an immigration penalty (It is to be hoped that this provision works rather better than the current requirement to notify offences, which, in the author's experience, is honoured more often in the breach than the observance); and
- Significantly, the Act inserts into schedule 5 to the 2003 Act provision that on any appeal, a magistrates' court may not consider whether or not the individual should have been granted leave to enter or remain in the UK, so heading off a potentially time-consuming and costly source of litigation.

Hanif concerned an appeal against the revocation of a licence following the discovery of a chef working at the premises. It was accepted by the respondent that the chef was an illegal worker with no right to be in or work in the UK. The respondent had paid him cash in hand (at less than the minimum wage), did not keep PAYE records, purported to deduct tax from the chef's salary, and did not account to HMRC for the tax deducted.

The district judge had held that because prosecution proceedings had not been brought (the employer had elected to pay the civil penalty offered) and no crime had been reported, the crime prevention objective was not engaged. Further, the failure to pay the minimum wage had not been the main basis of the licensing authority's decision.

The council appealed by way of case stated. It argued that it is not necessary for a crime to have been reported, prosecuted, or established in a court of law in order for the crime prevention objective to be engaged. The licensing objectives were prospective and concerned with the avoidance of harm in the future.

Jay J agreed. He held that there was clear evidence of the commission of criminal offences, both in relation to the non-payment of the minimum wage and also tax evasion. As for the offence of knowingly employing an illegal worker, he considered that, based on the fact that the employee could not provide the requisite paperwork, the clear inference was that Mr Hanif was aware that he was employing an illegal worker. A deterrent approach was justified on the facts.

Reflecting the importance of the principle which the case established, Jay J certified the case as appropriate for citation, which is likely to lead to its being widely used in similar revocation cases in the future.

More widely, the decision demonstrates that actions ostensibly capable of being addressed by way of a criminal prosecution, but in the event pursued by way of a civil sanction, may constitute a breach of the 'crime and disorder' licensing objective upon which a licence review might be founded.

Public safety versus public health

In my previous update (SJ 160/2) I touched on a case which underlined the distinction that could be made in licensing cases between 'public safety' and 'public health'. By way of a reminder, the issue, briefly, was whether premises with an appalling food safety record could be made the subject of a premises licence review under the 2003 Act, on the basis that its continued operation represented a risk to 'public safety'.

Somewhat to the surprise of many involved, the district judge responsible for determining the preliminary issue on appeal in the magistrates' court held that it was not permissible for a review to be brought upon such grounds. However, the judge also found at the same time that while 'food safety and/or hygiene cannot of itself engage the public safety licensing objective', he considered that the local authority need not wholly discount the issue when making its decision. That afterthought was duly the subject of a judicial review, for which permission was apparently granted.

In the event the parties agreed that the licence should be reinstated, subject to a condition that the licensee should 'keep and maintain the premises in a clean and hygienic condition' and contribute towards the costs of the licensing authority. SJ



A significant proportion of illegal working happens on licensed premises