

# Public safety versus public health

**Jeremy Phillips** considers a European ruling on gambling licences, cases on the boundary between the planning and licensing jurisdictions, and other significant developments



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**M**any of you will remember the latest developments in the public safety versus public health debate, outlined in my previous update (SJ 159/35). For those who do not, the issue, briefly, was whether premises with an appalling food safety record could be made the subject of a premises licence review under the Licensing Act 2003, 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 on such grounds. So far, so clear.

Unnecessarily, though, the judge then proceeded to find that it was 'clear from the whole of the decision of the committee that they took into account a number of factors before making their decision', so it could not be said that the food safety issue was pivotal. While 'food safety and/or hygiene cannot of itself engage the public safety licensing objective', he said, 'a local authority may have regard to food safety as part of its general supervisory function when brought to its attention by responsible bodies, as long as it clearly demonstrates that it made its decision by an application of one or more of the licensing objectives'. His afterthought has now been made the subject of a judicial review. I will report on the outcome of that application in due course.

## European issues

It is not uncommon for the European courts to review the licensing arrangements of individual member states. In the most recent example of this type, the European Court of Justice (Third Chamber) considered in *Stanley International Betting Ltd and another v Ministero dell'Economia e delle Finanze and another* (Case C-463/13) the appeal of Stanley International Betting Ltd (already active in the Italian betting and gaming market through data transmission centres (DTCs), where computer links were available for gamblers to transmit the data relating to each bet to the company) against the proposal that tenders should

be invited for the award of 2,000 licences for the joint conduct of public gambling activities by means of the establishment and management of a physical network of betting shops in Italy. Having carefully analysed the position, the court confirmed (as previously) the base proposition that a licensing requirement which specified situations in which a licence is to be withdrawn potentially constituted an obstacle to the freedoms guaranteed by articles 49 and 56 of the Treaty on the Functioning of the European Union 2007 (TFEU).

The court held: 'It [was] necessary, however, to determine whether such a restriction [might] be allowed as a derogation, on grounds of public policy, public security, or public health, as expressly provided for under articles 51 and 52 TFEU, which are also applicable in the area of freedom to 'provide services' by virtue of article 62 TFEU, or justified, in accordance with the case law of the court, by overriding reasons in the public interest...

'In the present case, as regards the classification as an "overriding reason in the public interest" of the reason given by the national authorities in order to justify the shorter period of validity of the new licences, namely the reorganisation of the licensing system through the alignment of licence expiry dates, it is true that, according to settled case law, considerations of an administrative nature cannot justify derogation by a member state from the rules of EU law. That principle applies with even greater force where the derogation in question amounted to preventing or restricting the exercise of one of the fundamental freedoms of EU law...

'However, it is appropriate to bear in mind the specific nature of legislation on betting and gambling, which is one of the areas in which there are significant moral, religious, and cultural differences between the member states. In the absence of harmonisation on the issue at EU level, it is for each member state to determine in those areas, in accordance with its own scale of values, what was required in order to ensure that the interests in question are protected, since the



**The court held that it was not permissible for a review to be brought on the grounds of risk to public safety**

identification of the objectives which are in fact pursued by the national legislation falls, in the context of a case referred to the court under article 267 TFEU, within the jurisdiction of the national court.'

In the light of all the considerations before the court, it held that the principles of 'equal treatment' and 'effectiveness' must be interpreted as not precluding national legislation which challenged the reorganisation of the system by way of an alignment of licence expiry dates.

#### Planning and licensing overlap

The library of decisions addressing the oft-disputed boundary which exists between the licensing and planning jurisdictions has been supplemented by the recent decision of Mr Justice Cranston in *Gold Kebab Limited v Secretary of State for Communities and Local Government, London Borough of Brent* [2015] EWHC 2516 (Admin). The operator sought to bring forward the opening hours for Woody Grill at Willesden from 7am to 5am throughout the year. The premises had been granted a refreshment licence under the Licensing Act 2003 until 5am and the proposal would cater for shift workers and others looking for late night food and drink. It was argued that there was a 'massive overlap between the two regulatory regimes' and that since the planning department had not raised objections to the extended licensing hours, the attitude of the licensing authority was a material consideration which should have been given proper consideration by the inspector.

Dismissing the challenge, Cranston J suggested that, although there might be some overlap, the planning and licensing regimes were quite separate. The inspector in this case had clearly been aware of the attitude of the licensing authority and had taken that into account when making his decision. The court would not interfere with matters of planning judgment.

#### 2015 overview

While notably light on significant decisions in the Administrative Court, 2015 did nonetheless see a number of significant legislative and procedural

developments:

- On 6 March 2015 the House of Lords published its report on the EU Alcohol Strategy;
- The Anti-social Behaviour, Crime and Policing Act 2014 made provision for new so-called public spaces protection orders, closure notices, and closure orders;
- The commencement of section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 resulted in a number of fines, including many of those under the Licensing Act 2003, no longer being capped;
- The Deregulation Act 2015 repealed measures requiring the renewal of personal licences, increased to 15 the maximum number of temporary event notices that might be given in relation to the same premises in any calendar year, and created the new part 5A to the Licensing Act 2003, allowing the sale of alcohol at community events, subject to conditions; and
- The Protection of Freedoms Act 2012 (Code of Practice for Powers of Entry and Description of Relevant Persons) Order 2015 set out guidance about the exercise of powers of entry in order to ensure greater consistency in the exercise of such powers and greater clarity for those affected by them. Relevant persons, as described in article 3 of the order, will be under a statutory duty to have regard to the code when exercising any functions to which the code relates. The code of practice may be found on the Home Office website. Relevant considerations include:
  - The seeking of consent beforehand (where practicable and reasonable);
  - Notice of a minimum of 48 hours is to be provided before the right is exercised (where practicable and reasonable);
  - Standards of conduct to be observed by individuals exercising the power; and
  - Records to be made and kept of all visits.

Finally, readers may wish to note that the government's delayed Alcohol Wholesaler Registration Scheme, designed to crack down on the production of counterfeit alcohol, was at last launched on 1 January 2016. **SJ**