Local authority decision-making and the Licensing Act 2003

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The Licensing Act 2003 provides for sweeping changes to the system of liquor licensing in England and Wales. Intended to make matters simpler, cheaper and more easily regulated, opinion is divided on whether this will be achieved. Chief among the concerns is the transfer of jurisdiction from licensing justices to local authorities. Fears of bias and lack of independence have been expressed by both the licensed trade and licensing lawyers. This article reviews the principal grounds upon which local authority decision making may face challenge by way of judicial review in the High Court and sees them as a valuable set of principles to assist successful implementation of the new system.

BACKGROUND TO THE ACT

Since the introduction in 1552 of a statutory system for the licensing of alehouses the retail supply of alcohol in England and Wales has been subject to a licensing regime administered by licensing justices sitting in magistrates’ courts. Current legislation is contained in the Licensing Act 1964 (as amended). The Licensing Act 2003 introduces an almost totally new licensing regime. By far the most controversial of the Act’s many reforms is the transfer of responsibility for liquor licensing from licensing justices to local

1 I am very grateful to my colleague Brian Cummings, principal lecturer, UWE who provided valuable material for this article.
government. The transitional period for the transfer commences on 7 February 2005 and the new system aims to be fully operational some nine months later.

Local authorities currently administer public entertainment and other forms of licensing, such as taxi and street trading. However, the scale and scope of the new responsibilities have led some local authorities to voice concern that they have been given neither the resources nor the time properly to introduce the new system. Added to this, lawyers and the drinks industry, unsettled by the prospect of a new licensing authority, have expressed concern at the possibility that committees, made up of elected members, may exhibit bias, lack impartiality and even be incapable of properly administering the new and much more extensive system. On publication of the White Paper which heralded the new system an experienced licensing practitioner addressed a national conference in the following terms:

I do not regard it as a criticism to assert that local authorities are not fair and impartial. Local councillors quite rightly have agendas of their own, pre-election promises to keep, policies to follow – policies sometimes deep rooted in the party to which they belong, allegiance to which may be the sole cause of their having been elected. Pressure may be, and often is, brought by the Party for a particular Councillor to take the party line. None of this is bad. It is the stuff of politics. But it does not produce a tribunal capable of being fair and impartial in the circumstances that will inevitably arise in many a contested hearing. Hearings in which the authority is an affected landowner. Hearings involving a planning consent that was granted against the authority on appeal. Hearings opposed by the authority’s own officers.
The permutations are endless. To anyone practising in this field such hearings are commonplace. (James Rankin, Central Law Training Annual Conference, Café Royal, London, 5 March 2001 at page 35 in conference papers)

Such fears are compounded by the fact that while an appeal from the decision of a local authority licensing committee will lie to the magistrates’ court (on fact and law) there is no further appeal to the Crown Court. At present in local authority licensing matters there is a further appeal on fact and law from the magistrates’ court to the Crown Court. Similarly, appeals against the decisions of licensing justices currently lie to the Crown Court. The removal of this tier of appeal to a professional judge (although long or complex cases may be assigned to a District Judge rather than lay magistrates) is likely to result in an increased number of applications to the High Court for judicial review - particularly in light of the novelty and complexity of some of the new provisions. This article sets out to provide an overview of the principal grounds upon which local authorities may face challenge by way of judicial review in the High Court.

POWERS AND DUTIES
The body of general principles, evolved over the centuries to govern the exercise by public authorities of their powers and duties, has been joined by the newly incorporated Human Rights Act 1998. These general principles together with the provisions of the 1998 Act provide not only a set of safeguards to assist individuals in their dealings with local authorities but also a valuable guide for the authorities themselves in the proper exercise of their responsibilities.
In addition to any express powers given by a statute there may also be implied powers. As Lord Selbourne put it: ‘Whatever may be fairly regarded as incidental to, or consequent upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held ultra vires’ (AG v Great Eastern Railway Company (1880) 5 App Ca 473). This common law principle is given statutory recognition by section 111 of the Local Government Act 1972 which states that ‘a local authority shall have power to do anything … which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions’. Further, section 3 of the Human Rights Act 1998 empowers the courts to interpret primary and secondary legislation ‘so far as it is possible to do so … in a way which is compatible with’ the rights guaranteed by the European Convention on Human Rights. Local authority committee members must develop an awareness and understanding of both the common law principles and the Convention. They may well be called upon to balance the demands of the community and the rights of the individual.

The Licensing Act 2003 provides the basic legal framework for the new licensing system. Of great importance are what may be termed quasi-legal sources such as guidance notes, circulars and policy statements. Although not strictly sources of law, such material effectively attracts legal status as it determines the actual practice and procedure of the local authority. The courts frequently consider circulars and memoranda of guidance issued by central government to explain how the department expects a particular service or function to be administered. Decisions may be challenged on the grounds that the local authority failed to take account of the guidance, applied the guidance too rigidly or that the guidance should not have been followed, as it was unlawful. The 2003 Act requires each authority to produce a policy statement
formulated with reference to the guidance document issued by the Department of Culture Media and Sport. (The final version of the guidance was published in July 2004, runs to some 180 pages and is predicted to provide fertile ground for challenge in the higher courts.) The guidance is not binding and the local authority may depart from it where local circumstances permit. There must be evidence to justify departure and authorities need therefore to gather relevant evidence. (For example, local patterns of complaints, disturbances and crime.)

GROUNDs OF CHALLENGE: THE ULTRA VIRES PRINCIPLE

Should a local authority exceed the statutory powers expressly or impliedly given by the 2003 Act its actions will be ultra vires and can be challenged by way of judicial review in the High Court. The review is not so much concerned with the merits of the case but with whether the decision is one which the authority could legally make. The effect of a successful judicial review is that the public authority is prevented from taking a decision, or taking it in a particular way, or that a decision already made is quashed or declared invalid. Judicial review must be distinguished from an appeal, which is available only when specifically provided for, and in which the appeal court or tribunal can substitute its decision for that of the body appealed from.

A convenient classification of the legal grounds on which judicial review may be sought was given by Lord Diplock in the GCHQ case (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374) where his Lordship identified three categories of challenge that a decision was ultra vires – illegality, irrationality and procedural impropriety.
The principles of *ultra vires* are flexible as well as complex. The categories of challenge are used for convenience of analysis. They do not form rigid compartments and there is considerable overlap. The flexibility of the *ultra vires* principles and the discretionary nature of the remedies mean that a court will have a considerable degree of latitude in deciding whether a local authority has acted unlawfully and if so whether a legal remedy is to be issued.

*Illegality*

A decision may be challenged for illegality where, due to an error of law, the local authority did not have legal authority for the decision made. There may have been a lack of jurisdiction, an absence of evidence to support the decision, a fettering of the exercise of a discretionary power, the exercise of a power for an improper purpose or the taking into account of irrelevant considerations. There may, for example, be conditions imposed other than for purposes specified in the Act or a licence may be granted outside the authority’s jurisdictional boundaries.

The local authority may simply go beyond the boundary of the power conferred by the Act. For example, the Court of Appeal in *R v Liverpool City Council ex parte Karl Barry* 2001 WL 239787 held that the authority acted within its powers to set up a mandatory door staff scheme but was not entitled to charge a fee (see also House of Lords in *McCarthy and Stone Ltd v Richmond upon Thames LBC* [1991] 4 All ER 897). Or the authority may go beyond its jurisdiction as in *Terry v Huntingdon* (1668) Hardr 480 where a statutory power to levy a duty on wines of strong alcoholic content did not extend to wine of low alcoholic content because such wines were not within their
jurisdiction. The first job then for local authority licensing committees will be to establish the range of their powers and the extent of their jurisdiction under the 2003 Act.

As well as having power or jurisdiction to entertain the matter initially, it is important for authorities to recognise that they may lose their power/jurisdiction to make the final decision as a result of legal error during the decision making process - such as an absence of evidence, the fettering of discretionary powers, use of a discretionary power for an improper purpose, unreasonableness/irrationality or incorrect procedures.

Without evidence to support its decision a local authority might be held to have fettered the exercise of its powers by reaching a decision based on consistency or policy considerations rather than merits. Or even to have acted unreasonably or irrationally. The essence of discretion is the power to choose between alternative courses of action. The law requires that public bodies do not exclude consideration of the merits of each decision and are able to respond to exceptional circumstances or mitigating factors. It will be ultra vires for a public authority to put itself in a position where its discretion is fettered by some prior commitment so that the discretionary power only can be exercised in one way or cannot be exercised at all.

Unfortunately, this may clash with both the requirement under the Act that a policy be formulated and the desire for convenience, consistency and certainty in decision-making. While it is legitimate for a public authority to adopt a policy in the light of which discretionary powers will be exercised the adoption and implementation of a policy must not exclude the consideration of the merits of individual cases (British Oxygen Company Limited v Minister of Technology [1971] AC 610). The local authority must take into
account the circumstances of each case and be prepared to make an exception to policy where appropriate \((R \text{ v } Torquay Licensing Justices ex parte Brockman [1951] 2KB 484)\). For example, in \(R \text{ v } Windsor Licensing Justices ex parte Hodes [1983] 2 All ER 551\) the justices adopted a policy that off-licences would only be granted to multiple stores which sold alcoholic drinks in a separated area within the store – termed ‘a shop within a shop’. A branch of Marks and Spencer refused to comply and its licence renewal was refused. This was held to be illegal. The justices were required to exercise their discretion on the merits of each case and could not properly determine an application simply by reference to a predetermined policy.

A modern statement for licensing committees on the way in which they should approach the Secretary of States Guidance is set out in \(R \text{ (on the application of S) v Brent London Borough Council [2002] EWHC 2696}\): the decision maker ‘must keep in mind that guidance is no more than that: it is not direction, and certainly not rules. Any [decision maker] which, albeit on legal advice, treats the Secretary of State’s Guidance as something to be strictly adhered to or simply follows it because it is there will be breaking its statutory remit in at least three ways: it will be failing to exercise its own independent judgment; it will be treating guidance as if it were rules; and it will, in lawyer’s terms, be fettering its own discretion. Equally, however, it will be breaking its remit if it neglects the guidance. The task is not an easy one’ (per Schiemann LJ).

Local authorities cannot legally bind themselves by contract or other agreement not to exercise a discretionary power if the result would be to prevent the authority from fulfilling the primary purpose for which the discretion was granted. There may well be overlap here with other powers or duties, such as planning, or in relation to council
owned/operated land or premises (Birkdale Electricity Supply Co v Southport Corporation [1926] AC 335; Blake v Hendon Corporation [1962] 1 QB 283; R v Hammersmith and Fulham LBC ex parte Beddowes [1987] 1 All ER 369).

Discretion under the Act must not be exercised for an improper purpose or a purpose different from that envisaged by the legislation (Sidney Municipal Council v Campbell [1925] AC 338; R v Somerset County Council ex parte Frewins [1995] 3 All ER). Discretion must be exercised in good faith and in accordance with such purposes as the courts may attribute to the intentions of Parliament. This ground of challenge has arisen in relation to conditions in both planning and licensing cases. For example, conditions imposed on a caravan site licence were held invalid because they dealt with landlord and tenant matters, rather than with the physical condition and use of the site (Mixnam’s Properties Ltd v Chertsey Urban District Council [1965] AC 627).

Of particular concern to commentators on the administration of the new law is the fact that party politics exist and flourish in local government and party policies influence and determine many decisions. In a number of cases specific statutory powers have been used to further a political view and to punish or disadvantage particular individuals not in agreement with the prevailing opinion on the council. The leading case is probably Wheeler v Leicester City Council [1985] AC 1054; 2 All ER 1106. Leicester Rugby Football Club refused the council’s request to discourage three of its members from taking part in England’s rugby tour of South Africa and also to condemn the tour. In response, the council exercised its statutory power in relation to the administration of its playing fields to ban, for a year, the club from using the council owned ground for its matches. The House of Lords held that, although the council was entitled to take into
account the preservation of good race relations in the city, the ban on the rugby club was *ultra vires* because the statutory power had been used to punish the club for not complying with the council's views.

*Unreasonableness and Irrationality*

Beyond the matters already outlined, although often intertwined with them, a separate and distinct ground of invalidity exists that has become known as ‘Wednesbury unreasonable’: ‘an authority may come to a conclusion so unreasonable that no reasonable authority could ever come to it ... but to prove a case of that kind would require something overwhelming’ (Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223). More than ordinary negligence, there must be ‘something overwhelming’. This can occasionally be found simply in the bare facts of the case itself - £18,000 per week rent for a council house, a retirement gratuity of one penny per year of service, four days allowed to make objections to a school closure scheme. In such cases the reviewing court need not look beyond the bare facts.

In the GCHQ case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374) Lord Diplock introduced the term ‘irrationality’ to apply ‘to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it’. There is some debate as to whether ‘irrationality’ adds anything to ‘unreasonableness’ but whatever term is preferred, the test remains stiff. The emphasis is still on the perverse, the absurd, the bloody-minded or the pig-headed. For example, the refusal of the authority to exercise discretion to consider a grant application made out of time.
following wrong advice given by the council's officials was held to be irrational and unfair (R v West Glamorgan CC ex parte Gheissary (1985) The Times 18 Dec). Similarly it was held that no ‘rational’ local authority could intervene and take sides in an industrial dispute and use its powers relating to its library service to punish the applicants by banning their publications from the local authority's libraries (R v Ealing LBC ex parte Times Newspapers Ltd (1987) 85 LGR 316). And where there was no evidence of change in the character of the locality to justify refusal to renew a sex shop licence, the decision was ‘wayward and irrational’ (R v Birmingham City Council ex parte Sheptonhurst Ltd [1990] 1 All ER 1026).

Recent years have seen an increased willingness by the courts to find unreasonableness or irrationality. This has been further accelerated by decisions of the European Court of Human Rights that the English courts had fixed the level of unreasonableness/irrationality too high, effectively preventing the courts from considering whether the interference with the applicants’ private lives was socially justified or was proportionate to the requirements of national security and public order, thereby denying the applicants an effective domestic remedy.

**Procedural Fairness: Natural Justice**

Local authorities will need to ensure that the procedures adopted to deal with the new licensing powers and duties operate fairly. The notion of procedural fairness in relation to the activities of public authorities is contained in the common law rules of natural justice. The rules of natural justice embody the right to be heard before a decision is taken (audi alteram partem) and an absence of bias in the decision maker (nemo judex in causa sua).
The leading authority on natural justice is the decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66. Ridge was dismissed as Chief Constable by the Brighton police authority exercising statutory power to dismiss a constable ‘they think negligent in the discharge of his duties or otherwise unfit for the same’. Ridge successfully sought a declaration that his dismissal was *ultra vires* and void because the police authority had failed to give him a hearing before dismissal. There is now also Article 6(1) of the European Convention of Human Rights which contains the basic principle that, in the determination of ‘civil rights and obligations or of any criminal charge’, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law’. There is also the principle of ‘equality of arms’ which implies ‘that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent’ (*Dombo Beheer v Netherlands* (1998) 18 EHRR 213, para.32).

Decisions to revoke trading licences have been quashed because of failure to give a hearing or a fair hearing - examples include *R v Barnsley Metropolitan District Council ex parte Hook* [1976] 3 All ER 452 (unfair and biased hearing); and *R v Wear Valley District Council ex parte Binks* [1985] 2 All ER 699 (licensee not told of decision to revoke licence, no hearing given, no reasons given).

A licensee applying for the renewal of a licence almost certainly has a legitimate expectation of a hearing in the event of any difficulty arising. The decision of the National Lottery Commission to exclude the existing licence holder, Camelot, from the
process of determining the destination of the licence to run the national lottery from October 2001 and to continue negotiations solely with Camelot’s rival, the People’s Lottery, was condemned as ‘so unfair as to amount to an abuse of power’ and was quashed (R v National Lottery Commission ex parte Camelot Group plc (2000) The Times 12 October).

Adequate prior notice is deemed essential to allow for proper preparation, appearance at the hearing, and the making of representations and if an adjournment is reasonably required but refused, that too could amount to serious unfairness. A person accused of a criminal offence (for example underage sales) or of a breach of professional competence or discipline (for example as a basis for revocation proceedings) will be entitled to know all the charges, the grounds on which the charges are based and the evidence relied upon to support the allegations.

Natural justice or fairness does not require the strict rules of evidence to be followed. The standards required of courts of law are not imposed on administrative bodies such as licensing committees. Hearsay evidence, for example, may be admitted (Kavanagh v Chief Constable of Devon & Cornwall [1974] QB 624). In general, the courts tend to be lenient towards administrative tribunals so far as their handling of evidence is concerned. The question for the tribunal will be one of weight rather than admissibility (Westminster City Council v Zestfair (1990) LGR 288). But a refusal to consider relevant evidence or a serious mishandling of evidence can be a ground of invalidity and in an oral hearing there is normally a right to call witnesses (and to conduct cross-examination) - an improper refusal would be unfair.
Until relatively recently, particularly in licensing cases, the giving of reasons was not regarded as a requirement of fair procedure. It was considered sufficient that the proceedings as a whole were basically fair. However, in recent years the giving of reasons has taken on a new importance and is now regarded as an element of fair procedure. Reasons explain a decision and may make it more acceptable; having to give them even in a brief form acts as a deterrent against sloppy and ill-considered decision making; and the reasons given may indicate a ground of review or appeal.

The second of the two rules of natural justice is that decisions should be free from bias, partiality, personal advantages, commitments or interests. The European Convention on Human Rights Article 6(1) requires civil and criminal proceedings to be determined by ‘an independent and impartial tribunal’. The common law approach to bias and partiality distinguishes between two categories – those which automatically disqualify and others that may disqualify if there is a ‘real danger’ of bias.

There are now two categories of bias which automatically disqualify and will invalidate decisions. The first is direct financial interest. At common law such an interest automatically disqualifies. It does not matter that the decision maker had not allowed the interest to influence the decision and the rule applies however trivial the interest. For example, in *R v Hendon Rural District Council ex parte Chorley* [1933] 2 KB 696 a grant of planning permission was quashed because one of the councillors present, when the council unanimously approved the application, was an estate agent acting for the owner in negotiations for the sale of the land to a prospective developer.
The second form of bias leading automatically to disqualification is what has become known as the Pinochet/Hoffman rule: where an adjudicator is closely and actively involved (for example as a director or trustee) in an organisation which is associated with a party to the action and promotes the same causes. This ground of automatic disqualification was created by the House of Lords in *R v Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577.

Allegations of other types of bias are subject to a judicial test. Actual bias does not have to be proved as this may be difficult if not impossible to do. The old case law indicated that either the court had to be convinced of a 'real likelihood' (probability) of bias (a subjective test much used in licensing cases); or that it agreed that a 'reasonable man' would draw from the circumstances a 'reasonable suspicion' of bias (an objective test).

The application of these tests became extremely confusing. Variations of each developed and sometimes the two tests were combined. In *R v Gough* [1993] AC 646 (alleged bias because a juror lived next door to the appellant's brother) Lord Goff said that their Lordships had 'been faced with a series of authorities which are not only large in number, but bewildering in their effect'. The House of Lords therefore took the opportunity of analysing the two tests (and their variations) and concluded that it would be desirable if only a single test be applied to all allegations of bias which did not involve an automatic disqualification: 'having ascertained the circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias'.
Lord Goff said that it was not necessary to look at the matter through the eyes of a reasonable man because the ‘court personifies the reasonable man’. So the new test was closer to the ‘real likelihood’ test with the important distinction that ‘real danger’ indicated that it was the possibility, rather than the probability, of bias which the court is looking for.

The Court of Appeal in Re Medicaments Ltd No 2 [2001] 1WLR 7000 pointed out that the Gough test was not quite the same as that followed by the European Court of Human Rights which has applied an objective test (a reasonable apprehension of bias rather than the likelihood of bias). Under the influence of the Human Rights Act, the Court of Appeal held that when the Strasbourg jurisprudence was taken into account a ‘modest adjustment’ of the Gough test was called for to make it plain that it was actually no different from that applied in other common law jurisdictions. The court has to ask whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility (or a real danger, the two being the same) of bias. This has been confirmed by the House of Lords in Porter v Magill [2002] 2 WLR 37, deleting the reference to ‘real danger’ – as these words were felt no longer necessary and were not part of the jurisprudence of the ECHR. The court has to ask whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility of bias.

This test is now incorporated into the National Code of Local Government Conduct (Local Authorities (Model Code of Conduct) (England) Order 2001, SI 2001/3575). A recent example of its operation can be seen in R v Local Commissioner for Administration in North and North East England, ex parte Liverpool City Council [2001]
Liverpool City Council (LCC) granted planning permission for the erection of an extension to a football stadium. Local residents asked the Local Commissioner (C) to investigate the conduct of the councillors and planning officers involved in granting the permission. C found LCC guilty of maladministration on the grounds that (1) six councillors having been season ticket holders and one other councillor a regular attender at matches, they ought to have disclosed their interest in accordance with the rules set out in the National Code of Local Government Conduct, and (2) certain councillors had voted on the basis of loyalty to their political party. LCC sought an order quashing C’s report. That application having been refused, LCC appealed arguing that (1) C had applied too stringent a test when considering the councillors’ duty of disclosure; (2) as the residents had the right to challenge the grant of permission by way of judicial review, C should have declined to carry out an investigation pursuant to the Local Government Act 1974 (s.26(6)(c) and (3)) C having concluded that the decision to grant permission had probably been influenced by a sense of party loyalty, it had not been open to her to make a definitive finding of maladministration on that ground. The Court of Appeal held, dismissing the appeal, that (1) C had been correct in her application of the test envisaged by the National Code whereby ‘a reasonable apprehension or suspicion of bias’ had to be established when dealing with the councillors’ duty to disclose their personal interest. (See also R (on the application of Richardson and another) v North Yorkshire County Council and others [2004] 2 All ER 31 discussed by Colin Manchester in [58] Licensing Review July 2004, 19-21.)

In the aftermath of the Pinochet/Hoffman affair the Court of Appeal (made up of the Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor) considered five
conjoined appeals concerning disqualification of judges on grounds of bias. The Court laid down principles and guidelines to be followed and applied in cases where the disqualification is not automatic. Any doubts should be resolved by disclosure and, if necessary, disqualification. The case provides a useful overview and should be considered by local authorities: *Locabail Ltd v Bayfield Properties* [2000] 1 All ER 65.

The importance of the rule against bias is underlined by the exclusion in 2004 of Lord Steyn from the nine judge panel to hear the case regarding the legality of the government’s anti-terrorist legislation. Having delivered a lecture in November 2001 in which he expressed strong views doubting the legality of the legislation it would be impossible to see him as open minded on the issue.

Examples of bias can be found in licensing case law, for example, prejudgment of the issue, as in *R v Halifax Justices* (1912) 76 JP 235. A licensing justice who was also a campaigning teetotaller expressed his opinion on a particular application so strongly that it was held unlikely that he could have considered the application in the proper, disinterested, manner. This is to be contrasted with *R v Dublin Justices* [1904] 2 IR 75 where it was held that a teetotaller is not by that fact alone disqualified from sitting as a licensing justice. (What, in light of the *Pinochet/Hoffman* decision, of a person who was a member of a total abstinence group or even a Methodist?) In *R v Reading Borough Council* (1986) *The Times* 7 Oct a member of the local authority licensing committee that refused a sex shop licence belonged to a group opposing such establishments.
Other examples from the extensive case law on bias include open hostility to a party or an advocate; excessive concentration on one point to the exclusion of others; lack of interest; falling, or appearing to fall, asleep. All have led courts to conclude that a fair hearing had been denied. In the *Marchioness* disaster inquest case, *R v Inner West London Coroner ex parte Dallaglio* [1994] 4 All ER 139, the fact that the coroner had described one of the relatives as ‘unhinged’ and others as ‘mentally unwell’ indicated to the Court of Appeal a real danger that he had, albeit unconsciously, unfairly regarded their views with disfavour and was hostile to or prejudiced against them when refusing a reopening of the inquest.

Apart from unfair procedure (breach of the rules of natural justice) there are many other forms of potential procedural irregularity. Particular aspects of procedural irregularity have been recognised over the years. First, the body or person taking a decision must have been properly constituted or appointed. This will depend upon the interpretation of the relevant statutory provisions. A second aspect of procedural irregularity is improper delegation of authority (*delegatus non potest delegare*). This is one of the most important principles contained within the *ultra vires* doctrine and requires that a discretionary power is to be exercised only by the person or body properly authorised.

For administrative decisions the matter is more complex. The maxim *delegatus non potest delegare* represents a general principle of statutory construction and not a rigid rule. *Prima facie*, a discretionary power conferred by statute is to be exercised by those to whom it is given. However, this presumption may give way before the words or the object of the statute, or before the general circumstances surrounding and influencing the working of the statutory scheme - for example, the scope of the power, its impact on
individual interests, and the demands and interests of administrative convenience and efficiency.

The rule against delegation has been applied to the exercise of discretionary, administrative powers such as powers to regulate activities and to grant licences and permits. For example, in *Allingham v Minister of Agriculture* [1948] 1 All ER 780 a wartime agricultural committee, with power to give directions concerning the use of agricultural land, decided that eight acres should be devoted to sugar beet but left it to its executive officer to select the acres. The notice served on the farmer was held invalid because the committee should have decided both matters. The official's role was simply to communicate the committee's decision and check that it had been implemented. (see also *Lavender v Minister of Housing and Local Government* [1970] 3 All ER 871).

Since, in practice, effective government requires a great deal of delegation extensive statutory provision is made for local authorities to delegate important powers of decision making. The 2003 Act requires a licensing authority to establish a licensing committee (s.6) but provides that such a committee may create sub-committees consisting of three members to which it may delegate any of its functions (s.9). The Act provides for further delegation to an officer of the licensing authority but not in contentious matters (s.10(4)).

This is familiar ground for local authorities as the Local Government Act 1972 (sections 101 and 102) empowers councils (comprising, on average, 70 to 80 councillors) to arrange for the discharge of any of their functions (with some specified exceptions notably in the area of taxation and borrowing) by committees, sub-committees, or officers. The Town and Country Planning Act 1990 gives local planning authorities
similar powers specifically in the field of planning and officers may be authorised to determine planning applications. But if a council establishes a committee it cannot delegate its power to appoint or remove the members of the committee. Another limitation on these powers of delegation is that it has been held that a council committee or sub-committee must consist of more than one person. A committee or sub-committee cannot delegate its powers of decision to one councillor, its chairman for example, to take action (R v Secretary of State for the Environment ex parte Hillingdon LBC [1986] 1 All ER 810).

Consultation is an important part of both legislative and administrative processes. So far as the latter are concerned the common law ideas of natural justice and legitimate expectations may require consultation. The 2003 Act provides for extensive consultation with stakeholders, whether statutory agencies, businesses or residents prior to producing the licensing policy that the Act requires each authority to publish. The policy must be kept under review, amended as appropriate and revised every three years. There is a requirement to consult before any changes are implemented.

'Effective consultation' means a genuine invitation to comment and give advice, with sufficient information and time being given to allow the party consulted to consider and respond (see R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities [1986] 1 All ER 164). There must also be a genuine consideration of the response.

CONCLUSION
Local authorities have vast experience of dealing with regulatory functions such as those contained in the Licensing Act 2003. As stated above, the general principles outlined in this article, together with the provisions of the 1998 Human Rights Act, provide not only a set of safeguards to assist individuals in their dealings with local authorities but also a valuable guide for the authorities themselves in the proper exercise of their responsibilities. There will inevitably be a period of settling in and adjustment but with the guidance offered by the case law discussed above, careful planning and the support of all of those engaged in the enterprise a new streamlined and efficient system will emerge. To this must be added a caveat: adequate funding and resources are required, the government must ensure their provision.