On appealing

Roy Light considers the appeals process under the Licensing Act 2003

The nine-month transitional period for the implementation of the Licensing Act 2003 (the Act) commences on 7 February 2005. From that date local authorities will start to process applications for both new licences and the conversion of existing licences. After a four-year gestation period, most practitioners are by now fully acquainted with the provisions of the new Act. What may be less generally known are the provisions for appeals against the decisions of local authorities on both new and transitional applications. While these closely mirror existing procedures, there are important detailed differences.

It is envisaged that there will be fewer hearings under the 2003 Act than were necessary under the old law. Whether this proves to be correct will depend largely on the extent to which the “new levels of protection for local residents and communities” (DCMS Press Release, ‘Major Reform of the Licensing Laws Completed’ 09.07.03) result in an increased number of contested hearings. However, even if the number of first instance hearings does decline, it is generally predicted that there will, at least initially, be a significant increase in licensing appeals. This view is based on two assumptions. First, as with all new legislation, the provisions of the 2003 Act and its supporting secondary legislation will need to be interpreted. Second, that the new tribunals, utilising the government guidance and their own local licensing policy statements will see their decisions questioned both on the facts and by way of judicial review. The latter may be driven by the fact that, unlike the existing system, the new provisions do not provide for appeal to the Crown Court, only to magistrates’ courts – from where there will be the possibility of stating a case or applying for judicial review. There is an exception to this in relation to ‘closure orders’ where s 166 of the Act provides for an appeal to the Crown Court against a magistrates’ court decision under s 165.

Appeals under the Act

Section 181(1) brings into effect Sched 5 of the Act, which makes provision for appeals against local authority decisions. Section 181(2) provides that a magistrates’ court may dismiss such an appeal; substitute any other decision which could have been made by the licensing authority; or remit the case back to the licensing authority to dispose of in accordance with the direction of the court. The court, unlike the licensing authority, may make such order as to costs as it thinks fit. No further guidance is given and it is expected that existing authorities will be applied (principally City of Bradford MDC v Booth [2001] LLR 151 and R v Crown Court at Stafford, ex p Wilf Gilbert (Staffs)Ltd [1999] 2 All ER 955).

Appeals must be made to the petty sessional area in which the premises are situated or, in the case of a personal licence, to the petty sessional area in which the licensing authority that made the decision is situated. An appeal must be commenced by notice of appeal given to the justices’ chief executive within 21 days from the date on which the appellant was notified by the licensing authority of the decision appealed against.

Premises licences

Part 1 of Sched 5 covers premises licences. Where a licensing authority rejects an application for a premises licence under s 18, an application to vary a premises licence under s 35, an application to vary to specify an individual as the premises supervisor under s 39, or an application to transfer a premises licence under s 44, the applicant may appeal against the decision.

Where a premises licence is granted under s 18, the licence holder may appeal against any decision to impose conditions under s 18(2)(a) or 3(b), or to take any step mentioned in s 18(4)(b) or (c) (exclusion of licensable activity or refusal to specify a person as a premises supervisor).

A person who made relevant representations in relation to the application may be a respondent to the appeal. Where the applicant is successful, that person too will be a respondent to any appeal. In the more usual case, where an unsuccessful applicant appeals, any person who made relevant representations against the application (objectors) will not be respondents, but the licensing authority may choose to call such persons as witnesses.

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appeal on the basis that the licence ought not to have been granted or that the granting of the licence, the authority ought to have imposed different conditions or to have taken a step mentioned in s 184(4)(b) or (c). Where a provisional statement is issued under s 31(3)(c), an appeal may be made in respect of the terms of the statement by the applicant or any person who made relevant representations. There is only an appeal where a provisional statement has been made, as the authority cannot refuse to issue a provisional statement.

Where an application to vary a premises licence is granted (in whole or part) under s 35, the applicant may appeal against any decision to modify the conditions of the licence under s 35(4)(a) and a person who made relevant representations may appeal on the basis that the variation ought not to have been made or ought to have been made differently.

In the event of an appeal to vary to specify a specific individual as premises supervisor under s 39(2) where a chief officer of police gave a notice under s 37(5) (which was not withdrawn), the chief officer of police may appeal against the decision to grant the application. Similarly, in the event of an application for transfer under s 44 where a notice under s 42(6) has been given, the chief officer of police may appeal against the decision to grant the application. Where an interim authority notice is given in accordance with s 47 and a chief officer gives a notice under s 48(2), the person given the notice can appeal against a decision to cancel the interim authority and the chief officer against a decision not to cancel it.

Where an application for review of a premises licence is decided under s 52, an appeal may be made against that decision by the applicant for the review, the holder of the premises licence or any other person who made representations in relation to the application.

Club premises certificates
Part 2 of Sched 5 deals with club premises certificates. Where an authority rejects an application for a club premises certificate under s 72 or an application to vary such a certificate under s 85, the club that made the application may appeal against the decision. If the certificate is issued, the club may appeal any decision to impose conditions on the certificate under s 72(2) or (3)(b) or against the taking of any step mentioned in s 72(4)(b) (exclusion of qualifying club activity). A person who made relevant representations may appeal against the grant or in respect of conditions and the steps mentioned in s 72(4)(b). An application to vary under s 85 and a review decision under s 88 may be appealed in a similar way to premises licences discussed above. Where the authority gives notice withdrawing a club premises certificate under s 90, the club that held the certificate may appeal against that decision.

Other appeals
Part 3 of Sched 5 governs temporary event notices given under s 100, personal licence applications and closure orders. In the case of temporary event notices, premises users may appeal against the decision by a licensing authority to give a counter-notice. For personal licence applications there is an appeal against a rejected application for grant made under s 120, a refusal to renew made under s 121 and a decision to revoke under s 124(4). Also covered are appeals by the chief officer of police against a decision to grant or renew a personal licence or a decision not to revoke where the chief officer gave an appropriate objection notice. In the case of closure orders, the licence holder or any person who made representations on a review of a premises licence following a closure order may appeal against the outcome of the review.

Conduct of appeals
Appeals to the magistrates’ court are to be by way of a rehearing on both the merits and law. This will require the justices to be conversant with the 2003 Act, the DCMS guidance and the licensing authority’s statement of policy. The court must carry out its appellate function with a view to promoting the licensing objectives as set out in s 4 of the Act.

Chapter 10 of the DCMS Guidance relates to appeals and advises that in the hearing of appeals from licensing authorities the magistrates’ court “will have regard to that licensing authority’s statement of licensing policy and this Guidance. However, the court would be entitled to depart from either… if it considered it is justified to do so because of the individual circumstances of any case” (para 10.8). The Guidance goes on to explain that although the magistrates’ court would normally be “standing in the shoes” of the licensing authority, it may decide that the authority should, in the individual case, have departed from either or both their own statement and the Guidance. Further, if the court considers that the policy or part of it is ultra vires the 2003 Act it should make such a finding – although “the normal course for challenging a statement of licensing policy or this Guidance should be by way of judicial review” (para 10.8). This latter point is reinforced by R (Westminster City Council) v Middlesex Crown Court [2002] EWHC 1104, where it was said that the proper place to challenge a policy is by way of judicial review (Scott Baker J). Yet would it be sensible for a magistrates’ court, on hearing an appeal, and concluding that a policy is unlawful, to ignore its finding and apply the policy?

To assist appeals, licensing committees are encouraged by the Guidance to ‘give comprehensive reasons for decisions’ (para 10.9). Authorities are also expected to act without delay once an appeal decision is made by the court (para 10.10).

The Justices’ Clerks’ Society and the Magistrates’ Association have issued guidance to magistrates’ courts to assist them in conducting appeals. The advice is mainly twofold:

- A recommendation for the setting-up of specialist panels with knowledge of the 2003 licensing provisions which will then be able to gather expertise and experience for the hearing of these appeals. It is suggested that no more than 50 per cent of the membership of these panels should come from existing licensing justices.

- The production of training packs for justices. These packs are being considered for approval by Judicial Studies Board and are expected to be published at the end of January.

There is concern over the likely burden on the magistrates’ courts between the first and second appointed days (7 February to ‘probably’ November 2005) as it is thought there will be a heavy initial workload as the system beds in and existing licence holders seek to extend their ‘grandfather rights’. Further, during this period, the courts will be dealing with applications under the old law and may have lost staff who have moved either to local authorities or law firms. In any event, licensing practitioners are likely to find themselves busy both with new applications and conversion applications, as well as appeals to the magistrates’ court and Administrative Court.