Neutral Citation Number: [2013] EWHC 3483 (Admin)

Case No: CO/8618/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/12/2013

Before :

MRS JUSTICE PATTERSON

- -

Between :

SEVKET GURGUR	**Appellant**
- and -	
LONDON BOROUGH OF ENFIELD	**Respondent**

- -
- -

Jeremy Phillips (instructed by **Dadds LLP**) for the **Appellant**
Philip Kolvin QC (instructed by **The London Borough of Enfield**) for the **Respondent**

Hearing date: 29th November 2013

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Approved Judgment

Mrs Justice Patterson :

1. This is an appeal by way of case stated from a decision of the Enfield magistrates court on the 13th of November 2013 when it refused an appeal by Mr Sevket Gurgur from a decision of the London Borough of Enfield Licensing Authority when that authority refused Mr Gurgur's application for a variation of the hours when alcohol could be sold from premises known as "Ponders End Food Centre" at 182-186 High Road, Enfield.

Factual Background

2. On the 31st August 2005 the then existing justices restaurant licence was converted to a premises licence upon an application by Mr Hazan Imanly. That licence was transferred to Mr Mustafa Bozdag on the 17th May 2007.

3. On the 21st April 2011 the trading standards department of the London Borough on Enfield made an application for review of the licence on the grounds of prevention of crime and disorder. That was heard on the 29th June 2011 by the Licensing Sub-Committee which, having considered the representations and submissions, decided that:

    i) the existing licence would be surrendered;

    ii) a new premises licence would be granted with conditions in respect of enlarged premises;

    iii) the new licence would not take effect until the 28th July 2011 and the existing designated licence holder (Mr Bozdag) would not apply with regard to the new licence.

4. On the 5th August 2011 Mr Sevket Gurgur applied for transfer and variation of the licence and to be the designated licence holder. Those applications were granted.

5. On the 9th December 2011 Mr Gurgur was granted an extension of the opening hours of the shop. As a result the current hours are:

    i) For the opening of the shop from Sunday until Saturday 24 hours, 7 days a week.

    ii) For the supply of alcohol for consumption off the premises, from Monday to Saturday from 8am until 1am the following day and on Sundays from 10am until 1am the following day.

6. On the 1st February 2012 the Licensing Sub-Committee considered an application by Mr Gurgur for a variation of the hours when alcohol could be sold so that it accorded with the opening hours of the premises. The application was opposed by the Metropolitan Police and by Trading Standards. Following a hearing the application was refused.

7. At the hearing Mr Gurgur gave evidence as did a member of his staff, Mr Derin. The respondent called evidence in opposition to the granting of the extension of licensing hours. There were seven live witnesses and statements were read from five others.

8. The Deputy District Judge (Magistrates' Court) Clive Spencer Wiles said as follows,

> "20. There was a clearly established legal framework governing the approach by a Licensing Authority to applications for new premises licences or variations of existing licences and this court in hearing this appeal had to adopt the same approach. The starting point was the Licensing Act 2003 which clearly indicated that "a Licensing Authority must carry out its functions under the Act with a view to promoting the licensing objectives."
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> The licensing objectives are:
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> "i) The prevention of crime and disorder;"
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> ii) Public safety;
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> iii) The prevention of public nuisance;
>
> iv) The protection of children from harm.
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> 21. The Licensing Authority must also have regard to its licensing statement and to any guidance issued by the Secretary of State. My approach to the appeal was clearly governed by the Hope and Glory case, namely, that I should not lightly reverse the decision of informed locally elected councillors and that I should interfere only if it was clear that the original decision was "wrong". The Cumulative Impact Policy issued by the local authority on the 1st April 2012 imposed a reversed burden upon the appellant to show that there would be no negative cumulative impact.
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> 22. The Licensing Authority's policy indicated,
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> i) the licensing objectives were paramount;
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> ii) there is no presumption in favour of longer hours;
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> iii) stricter conditions may be necessary in residential areas;
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> iv) alcohol sold late at night could contribute to anti-social behaviour;
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> v) late-night sales would be resisted in the case of premises known to be or likely to be a focus of crime and disorder or nuisance.
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> 23. The Secretary of State's guidance states that shops should normally be free to provide alcohol during trading hours unless there are good reasons based on the licensing objectives for restricting them. In this appeal the appellant wanted the court to

> adopt this generalised approach and match his ability to sell alcohol to the times his shop was permitted to open.
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> 24. I have been greatly assisted in the hearing of this appeal, not only by counsel but also by seeing and hearing from the various witnesses. The Licensing Sub-Committee had not enjoyed that luxury. The burden was upon the appellant to satisfy me on a balance of probabilities that the decision of the sub-committee was wrong and that to grant the appeal would have no negative impact. The evidence given by the appellant was on his own behalf and his witness Mr Derim was less than convincing in a number of respects and did not inspire confidence that they were able to deal with the present level of noise, disturbance and anti-social behaviour, let alone the inevitable increase were the appeal to succeed and the licensing hours extended.
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> 25. The evidence given by the witnesses called by the respondents, and which is accepted, created a very large picture of unacceptable noise and disturbance often late at night when residents had retired to bed, accompanied on occasions by clear anti-social behaviour. Mr Phillips whose evidence was compelling described the situation as "bedlam". The inescapable conclusion was that this unacceptable behaviour was likely to increase if the licensing hours were extended. The only person in favour of the extension of hours was the appellant,
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> 26. I was persuaded by the force of the respondent's case that the licensing objectives would be undermined by granting variations sought by the appellant, and that the concerns raised by the evidence could not be adequately dealt with by conditions.
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> 27. The burden upon the appellant to persuade me that the decision of the Licensing Sub-Committee on the 1st February 2012 was wrong had not been discharged and accordingly the appeal failed."

9. The Deputy District Judge posed the following questions for this court:

   i) Was I correct in ruling that the guidance issued by the Secretary of State applicable to the hearing of the appeal was that which came into force on the 25th April 2012?

   ii) Was I correct that the Cumulative Impact Policy issued by Enfield Borough Council on the 1st April 2012 would apply to this appeal?

10. Those questions arose from a preliminary ruling which had been sought from him on what the applicable guidance and policy was that applied to the application made by Mr Gurgur in June 2011 as a variation to a premises licence.

11. Mr Gurgur contended that the answer on guidance was that which was issued in October 2010 and which had been considered by the Licensing Sub-Committee. The Licensing Authority contended that the Deputy District Judge should consider the most up to date version which post dated that considered by the licensing sub-committee. That was the version issued in April 2012.

12. On policy the issue was whether the Cumulative Impact Policy which had been issued by the Licensing Sub-Committee on the 1st April 2012 should be excluded from consideration as it did not exist at the time of the sub-committees decision on the 1st February 2012. Mr Gurgur contended that it did not apply and the licensing authority contended that it did.

13. The Deputy District Judge ruled that both the guidance of April 2012 and the Cumulative Impact Policy applied. He then proceeded to hear the evidence which I have summarised above drawn from the case stated. He dismissed the appeal.

14. As a preliminary point before me the respondent submits that the appeal is academic because it is clear from the Deputy District Judge's reasoning that he reached his substantive decision on the evidence. His conclusions were such that they were totally unaffected by which policy or guidance was in play at the relevant time. He found that a variation of the existing licence would be harmful by reference to the licensing objectives. There is, therefore, no need to go any further.

15. The claimant rejects that contention and says, firstly, that the issue of what is the guidance or policy is fundamental and, secondly, that the decision on what was the relevant guidance and policy affected the way the case proceeded.

16. By the time of the hearing of the 12th November 2012 guidance had been issued in October 2011, April 2012 and October 2012. Each was a revision of the former. It was common ground that the Secretary of State's guidance issued in October 2012 should be ignored as it contained express provision that it was not to have retrospective effect. The local authority had issued its cumulative impact policy on the 1st April 2012.

Legal framework

17. The general duties of licensing authorities are set out in section 4 of the Licensing Act 2003. That says:

> "**4 General duties of licensing authorities**
>
> (1) A licensing authority must carry out its functions under this Act ("licensing functions") with a view to promoting the licensing objectives.
>
> (2) The licensing objectives are—
>
> (a) the prevention of crime and disorder;
>
> (b) public safety;
>
> (c) the prevention of public nuisance; and

> (d) the protection of children from harm.
>
> (3) In carrying out its licensing functions, a licensing authority must also have regard to—
>
> (a) its licensing statement published under section 5, and
>
> (b) any guidance issued by the Secretary of State under section 182."

18. Each licensing authority must, in respect of a set period, currently five years, determine its policy with the respect to the exercise of its licensing functions and publish a statement of that policy before the beginning of that period. During each five year period a Licensing Authority must keep its policy under review and make such revisions to it at such times as it considers appropriate: see section 5.

19. A variation of a premises licence is made by way of application under section 34. The application is subject to regulations made under section 54 about the form of such an application. Section 35 deals with the determination of an application made under section 34. Under that section where the relevant Licensing Authority receives an application made in accordance with section 34, subject to s35(3), it must grant that application unless there is a relevant representation.

20. Where relevant representations are made, the authority must hold a hearing to consider them and having regard to the representations take such steps by way of the modification of the conditions of the licence, or reject the application in whole or in part as it considers appropriate, for the promotion of the licensing objectives: s35(3) and S35(4).

21. The following principles are agreed:

    i) The appeal before the Deputy District Judge was by way of re-hearing "de novo";

    ii) The appeal court needed to reach its decision upon the totality of the evidence before it and then reach a conclusion as to whether the judgment by the Licensing Sub-Committee was wrong even if it was not wrong at the time it was made;

    iii) The burden of persuading the Magistrates' Court that the sub committee should not have exercised its discretion in the way that it did was upon the appellant.

22. Those principles are well trodden but have recently been restated in the case of R (on the application of Hope and Glory Public House) v City of Westminster Magistrates Court [2011] (EWCA) Civ 31.

23. In R (on the application of Khan) v Coventry Magistrates Court [2011] EWCA Civ 751 the Court of Appeal considered a claim for judicial review in a licensing case about the powers of magistrates to receive evidence about events after the application had been considered by the licensing committee. Mr Khan ran a local supermarket in Coventry selling groceries, other goods and alcohol. A licence to sell alcohol for consumption off the premises was transferred to him some months after he had

acquired the business. Some time later Coventry City Council made an application to its licensing committee to review Mr Khan's licence on the grounds that he had been selling alcohol to persons under the age of 18. The licensing committee revoked Mr Khan's licence. Mr Khan lodged an appeal to the Coventry Magistrates. At that hearing evidence was given of a complaint made by a local resident about the shop receiving large deliveries of alcohol from the back of a van at strange hours several times a week. The issue raised was whether the Magistrates had jurisdiction to consider grounds of complaint other than those which had been raised in the notice of intention to seek a review and the representations received by the Licensing Authority in response. It was submitted that the magistrates ought not to have admitted, or taken into account when making their decision, that part of the evidence which referred to the complaint about receiving deliveries of alcohol at odd hours. That evidence had not been raised in the proceedings before the Licensing Authority. Lord Justice Moore-Bick said at paragraph 12:

> "In my view section 182(2)(b) does not have the restrictive effect for which Mr. de Mello contended. It makes it clear that the magistrates have the power to make any order of the kind that the licensing authority could have made, but it does not say anything about the grounds on which such an order might be made. That will depend on the evidence before the court. Indeed, the fact that the magistrates can make any order that the licensing authority could have made itself tends to support the conclusion that they are indeed considering the matter completely afresh. The magistrates' function is to consider the application by reference to the statutory licensing objectives untrammelled by any of the regulations that govern the procedure for a review under section 51. They are therefore entitled to consider evidence of events occurring before the application to the licensing authority as well as evidence of events occurring since its decision."

24. He continued at paragraph 14 as follows,

> "Having regard to the statutory provisions and to the fact that the appeal is a fresh hearing, I am satisfied that the Magistrates are not limited to considering only those grounds of complaint that were raised in the notice of application or the representations before the Licensing Authority. It is not possible to infer that from section 181(2)(b) and I am satisfied that if that had been intended such a restriction would have been included in the Act itself or the regulations made under it."

Discussion

25. What were the relevant guidance and policy:

i) Is the claim academic because of the findings of the Deputy District Judge on the facts?

ii) If that question is answered in the negative, what was the relevant guidance and policy for the Deputy District Judge to take into account?

Issue number one

26. I have set out above the Deputy District Judge's findings of fact. It is clear from that :-

i) That the evidence given by the appellant on his own behalf and by his witness, Mr Derin, was less than convincing and did not inspire confidence that they were able to deal with the present situation let alone any inevitable increase to noise disturbance and anti-social behaviour if the licensing hours were to be extended.

ii) That the Deputy District Judge accepted the respondent's evidence, including that of local residents, which painted a clear picture of currently unacceptable noise, disturbance and anti-social behaviour late at night when they had retired to bed. In particular, he mentioned the evidence of Mr Phillips who described the situation as "bedlam"

iii) The inescapable conclusion was that the current levels of unacceptable behaviour were likely to increase if the licensing hours were extended.

iv) The Deputy District Judge was persuaded by the force of the respondent's case that the licensing objectives (including the prevention of public nuisance and crime and disorder) would be undermined by the variation sought by the applicant.

v) The concerns raised by the evidence could not be adequately dealt with by conditions.

27. Against those findings it is patently clear that, as the respondent submitted, "it is quite plain that the learned District Judge dismissed this appeal because he was satisfied that the grant of longer hours would cause further harm to the licensing objectives."

28. The respondent went on to point out that there was no attack in the current appeal on any of the District Judges conclusions on the evidence, which is correct. Therefore, the debate as to which set of guidance or which policy was to apply was not going to affect his decision one way or the other.

29. The appellant maintains that the way the appeal proceeded and the structure of the appeal proceedings was materially affected as a result of the District Judge's ruling on the two preliminary points. The preliminary points are those which are stated in the statement of case by the District Judge. The gravamen of the appellant's submission is that as a result of ruling as the Deputy District Judge did the burden of proof was inverted.

30. The Deputy District Judge concluded on the two points as follows,

> "My conclusion following these submissions was that I was obliged to consider the law as it stood at the hearing of the appeal in view of the fact that this was a hearing de novo and I was "standing in the shoes of the council considering the

> application" I was further persuaded in this view by the fact that both parties intended (whatever my ruling) to call evidence not previously considered by the Licensing Sub-Committee. The acceptance of the appellants submissions would have meant that had there been any applicable case law between the date of the hearing before the Licensing Sub-Committee and the hearing of this appeal, it would have been necessary to ignore it.
>
> In my judgment the direction contained in the Secretary of State's guidance of October 2012 that it was not to have retrospective effect was referring to itself. No mention was made of the applicability of that direction to any guidance issued previously. If that had been the intention of the Secretary of State it would have been necessary for a clear and unambiguous statement to that effect. Section 4(3)(b) of the licensing Act 2003 refers to "any guidance issued by the Secretary of State."
>
> I rule that the applicable guidance was that of April 2012 and that the cumulative impact policy issued by Enfield Borough Council on the 1st April 2012 would apply to this appeal."

31. Given the very strong findings that the District Judge made which I have set out above, in my judgment, it would have made no difference at all what the answers were to the two questions that were posed of him as preliminary points. He clearly considered the application for variation, as he had to do, de novo, and concluded that the licensing objectives would be harmed in a significant way. In those circumstances the respondent is correct in its submission that this appeal is entirely academic.

Issue Two

32. I do not need to deal with the two questions that have been raised in those circumstances. For the sake of completeness, and very briefly, it would seem to me to be entirely inconsistent with the approach to a rehearing to constrain the policy and guidance to how it was at the time when matters were heard by the Licensing Sub-Committee. That would not be consistent with the approach in Khan (supra) and, indeed, common sense.

33. Under the Licensing Act 2003 the function of a Licensing Authority in licensing matters is an administrative one. It has a duty to behave fairly. In so doing, it will consider the policy as it stands at the relevant time before it when it makes its initial decision of the variation application. The same approach will apply when the Magistrates' Court considers any appeal which has been brought. That is, it will consider the application in the light of the policy as it stands when the application is before it. Matters may well have moved on from the policy or guidance base when the licensing sub-committee considered the application. That is a feature of policy driven regimes. But not to take recent policy into account would be to place an entirely artificial constraint upon a rehearing and runs the risk that such a hearing will not be fair. If matters have moved on between the hearing before the licensing sub-committee and the appeal in the magistrates court then the change in policy or

guidance or both is capable of being addressed through evidence or submissions at the appeal.

34. The appellant submitted that the application form was important as that set out the application. That was what was advertised and it was to that that the representations were made. That is true, but there is no reason why on an appeal evidence from any party cannot be adjusted to take into account the most up to date policy or guidance position. Just as factual evidence may be adjusted on any appeal and the parties are able to deal with that I can see no reason why the policy or guidance position cannot be adjusted similarly. Magistrates have wide powers and can substitute any order that they make for one that could be made by the licensing sub-committee. But that does not mean, in my judgement, that their consideration is constrained to the position as it was before the licensing sub-committee. If it were, that would mean that up to date factual evidence could be received on the appeal but that would have to be judged or interpreted against a historic policy or guidance position. That would not be a sensible outcome. There is no restraint in relation to factual evidence and there is no reason why that should be the case for policy or guidance either. There is no injustice to either party as a result of the most contemporaneous policy or guidance being used at the time of the relevant hearing. It produces a more realistic decision making process.

35. For those reasons, had I had to go on to consider the two questions I would have answered both in the affirmative.

36. This application is dismissed.

37. I invite submissions on the final order and costs.