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#NTC2022

Defending licensing appeals: a practical guide  
Asitha Ranatunga and Tara O'Leary

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Overview

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Appeal framework

LA 2003 Case study and tips

Taxi licensing appeals

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**Appeals - key principles**

The diagram consists of four blue circles arranged in a diamond shape. The top-left circle contains the text 'Exercise of discretion'. The top-right circle contains 'Appeal by way of re-hearing'. The bottom-left circle contains 'Not necessarily one right decision'. The bottom-right circle contains 'Full and clear reasons respected on appeal'. In the top right corner of the slide, there is a 3x3 grid of dots, with the bottom-right dot being pink.

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**What may be appealed?**

Section 181 and Schedule 5 Licensing Act 2003

- Refusals of:
  - Applications for new premises licences s.18
  - Applications to vary existing premises licences s.35
  - Applications to specify new DPS or applications for personal licence ss.39, 120
  - Applications to transfer premises licences s.44
  - Applications for club premises certificate or to vary CPC: ss.72, 85
- Decision to grant premises licence s.18
- Conditions attached to a licence or steps specified in licence s.18(2)-(4)
- Grant/cancellation of interim authority notice (death/incapacity of LH) s.47
- Outcome of reviews and summary reviews, including interim steps s.52
- Temporary event notices & counter notices ss.100, 104

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**Parties to the appeal** Schedule 5 LA 2003

The diagram features four pink circles. One circle at the top contains the text 'Local authority: always a respondent'. Below it are three circles: 'Licence holder or applicant' on the left, 'Responsible authority (ies)' in the center, and 'Other objectors' on the right. In the top right corner of the slide, there is a 3x3 grid of dots, with the bottom-right dot being pink.

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### Appeals - in summary



- Appeal notice to be filed within 21 days
- Appeal proceeds by way of **rehearing**
- 'Rehearing' means new evidence & cross-examination of witnesses
- Civil jurisdiction: no criminal rules of evidence, hearsay admissible
- Powers of Magistrates' Court:
  1. Dismiss appeal: *i.e.* uphold decision
  2. Grant appeal and vary the decision: *i.e.* to substitute for the decision appealed against, any other decision which the LA could have made
  3. Remit the case to the licensing authority to dispose of it in accordance with the direction of the court




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### Appeals – burden of proof



- Balance of probabilities
- Burden rests on the appellant to persuade Magistrates' Court that decision below was 'wrong'. What does that mean?
- *R (Hope & Glory) v Westminster CC* [2011] EWCA Civ 31 [34]:
  - Not limited to points of law, and not a question of whether LA's decision was 'reasonable'
  - Court must simply be satisfied – based on the evidence on appeal – that the LA's decision is **wrong now, even if it was not wrong at the time**
  - *"It means that the task of the [Magistrate] having heard the evidence which is now before him, and specifically addressing the decision [of the LA] is to give a decision whether, because he disagrees with the decision below in light of the evidence before him, it is therefore wrong"*

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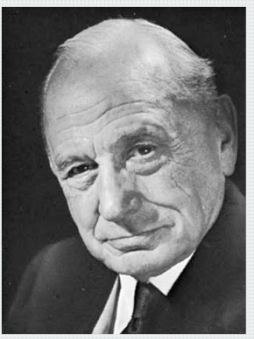
### Importance of local authority's decision



"That does not mean to say that the court of appeal ... ought not to pay **great attention** to the fact that the duly constituted and elected local authority have come to an opinion on the matter, and it ought not lightly to reverse their opinion.

It is constantly said (although I am not sure that it is always sufficiently remembered) that **the function of a court of appeal is to exercise its powers when it is satisfied that the judgment below was wrong**, not merely because it is not satisfied that the judgment was right."

*Stepney Borough Council v Joffe* [1949] 1 KB 599, DC




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### Importance of local authority's decision



"It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities.

The weight which the magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal."

R (Hope & Glory) v Westminster CC [2011] EWCA Civ 31 [45]

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### Think local

- An exercise in evaluative decision-making: "a matter of judgment rather than a matter of pure fact": Hope & Glory [42]
- "Licensing decisions often involve weighing a variety of competing considerations [...] Although such questions are in a sense questions of fact, they are not questions of the "heads or tails" variety. They involve an evaluation of what is to be regarded as reasonably acceptable in the particular location. ..."
- Magistrates' Court must adopt and apply LA's policy as if "**standing in the shoes of the council considering the application**": see R (Westminster CC) v Middlesex Crown Court and Chorion Plc [2002] EWHC 1104 (Admin) [21]
- LA Statements of Licensing Policy, Cumulative Impact Policies etc.
- Not appropriate to challenge the content or lawfulness of policies: that is a matter for JR, not a licensing appeal

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### Costs: who pays?

- Magistrates' power to make whatever order as to costs is 'just and reasonable': s.64 MCA 1980
- City of Bradford MBC v Booth [2000] LLR 151 and R (Perinpanathan) v City of Westminster Magistrates' Court [2010] EWCA Civ 40:
  - Costs *can* follow the event but will not do so in every case
  - Presumption that no costs should be ordered if decision made by LA acting "*honestly, reasonably, properly and on grounds that reasonably appear sound*" in the exercise of public duty
  - Decision below plainly flawed?
  - Circumstances 'moving on' by time of appeal?
  - Refusal to negotiate?




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### Appeals against appeals ••••



- Appeal by way of case stated to the High Court within 21 days of decision: s.111 Magistrates' Court Act 1981
- Appeal on a point of law: not a further rehearing on new evidence
- Magistrates' Court itself is always the respondent... but never participates in the appeal
- If LA generally bears the burden of resisting the appeal (if it participates - but if you've come this far...)

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### TOP TIPS



#### Licensing Act 2003 Case Study

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### LA 2003 appeal against standard review decision: some facts ••••

- Longstanding premises licence. Traditional wet-led pub with a few regulars. Low profits. Large underused outside area.
- Hours: Alcohol / Recorded music till midnight Thurs – Sat. Late hours rarely used.
- Area: on corner of small high street in mixed residential / commercial area.
- Few noise conditions: doors and windows, not to cause nuisance / annoyance. Few problems with operation.
- New management seek to turn a profit. Food offer during day. Bar with DJ in the evening / night. Use of outside area with heaters and tables. Full hours used.
- 5 residents complain over 3 month period. Noise in evening / night. Sleep disturbance. Music breakout and people noise outside. ASB / altercations. Complaints to EHO.
- EHO corroborates some complaints and brings review (supported by residents and Police). Application seeks customer numbers restriction or cut back in hours, plus noise management plan and dispersal plan.
- Hearing: Police support review. 3 residents support review, 3 residents support premises. PLH offers noise management and dispersal plans.
- **Decision: conditions covering noise management / dispersal plan, numbers restriction. Plus hours cut back, further than EHO sought.**

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### Assessing the merits of the Appeal

- Reasons and justification for decision
- Is the EHO supportive of the decision - it goes further than sought?
- Police participation at appeal – few incidents.
- Residents
  - Credibility of 5 residents supporting the review vs 3 in support
  - Strength of evidence from residents: up to decision
  - Engagement of residents through to appeal – complaint fatigue
  - Lay witness evidence – marshalling evidence
- Licensing Officer:
  - Dual role: presenter of Officer Report and papers, but also compliance role.
  - Objective professional re: area, other licensed premises, hours etc.
  - Can / should offer a view, especially where no-one else is “defending” the decision.
- Here: What is the basis for hours plus numbers restriction. Numbers chosen?

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### Strategy for appeal

- Lodging of complaint suspends the LSC’s decision until disposal of appeal (s.53(11))
- How is the Appellant intending to operate during the appeal period?
  - What is the scope of the appeal?
  - With noise management plan / dispersal plan in place?
  - Hours / numbers as before review, or as imposed?
- Who will defend the decision?
- Police evidence: analysis of CRIS / CADs. FOI requests
- Gathering evidence during appeal period:
  - Appeals can be won or lost during a lengthy appeal period
  - Keeping residents engaged: noise diaries, video evidence, credibility of evidence; single point of contact
  - Working with premises on noise management / dispersal plan
  - Officer compliance visits: from an objective, impartial standpoint
  - Out of hours visits to the area

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### Presenting the evidence

- On paper
  - Who goes first? Who is taking the lead here (EHO or Licensing Officer)?
  - Civil statements which will often stand as evidence in chief.
  - Licensing Officer should set out all background, provide Agenda papers, Decision, Policy etc.
  - Resp. Auths. (EHO / Police etc.) explaining their position, detailing events since decision, and whether or not in support of decision.
  - Residents telling their story, detailing events since, and explaining position.
  - Dovetailing evidence with that of Licensing Officer (e.g. reference by others to description of area / other premises etc). Residents kept separate.
  - Generally, each WS should be a standalone document allowing the Court to gain the complete picture, without referring to other documents.
- At Court
  - Evidence stands as exam-in-chief
  - Where permitted, focussing on clear, evidenced, recent incidents / breaches.

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**Cumulative Impact Policy at appeal** 

- The defence of a Cumulative Impact Policy case can have implications for the strength of the policy. CIP appeals are relatively rare, but non-binding decisions referencing the policy are still public documents
- Express reliance on s.182 Guidance (14.39ff) should prevent the Court from undermining the evidential basis for policy.
- Addressing the particular cumulative impact issues of the area of the premises, especially if not explained in CIP (e.g. type of premises / operations in issue).
- Focus of evidence should be on what Appellant has provided to rebut the presumption of the likely additional effect.
- Grappling with exceptions
- Acknowledging each case on its merits

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**Settlement** 

- The avenues to settlement should always be kept open through licensing / legal.
- Important to provide all parties who were a party to the application with clear reasons for subsequent decisions, where settlement outside of court (Guid. 13.11)
- E.g. settlement of case in cumulative impact area and implications for CIP.
- Here, EHO would have to be comfortable with decision on regulation of noise:
  - Noise complaints from residents after settlement agreed
  - Implications for statutory nuisance under Environmental Protection Act 1990 and best practicable means defence
  - Does the numbers / hours restriction seek an appropriate balance which can be justified?
- Residents should be kept informed (Guid. 13.5), but Licensing Authority is statutory Respondent and ultimately takes the decision to settle
- Logistics of authorising settlement (standing orders, advice, keeping LSC / Chair informed, keeping advice on file with reasons).
- Could a noise limiter / more staff / SIA supervisors unlock the appeal?

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**Final points** 

- Defending the decision and the appeal on the evidence, not at all costs.
- However, officer witnesses need to take ownership of the case, and defend the decision for the reasons given, and evidence since.
- Keeping residents engaged and supportive of the Council's decision is critical, given wider implications.
- Explaining the basis for any settlement to any residents involved in the review is equally important.
- It is for the Appellant to demonstrate that the decision is now wrong.

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**Taxi licensing appeals** 




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**Taxi licensing appeals** 

- The good news? Same principles apply!
- Typically - appeals from decisions to (i) refuse licence app; (ii) revoke existing licence; (iii) suspend for finite period; (iv) refuse to renew licence
- Burden rests on aggrieved applicant or licence holder to prove the decision was 'wrong' – court must have regard to reasons for LA's decision
- Court will apply any taxi licensing policy as if 'standing in shoes' of LA itself
- Do not have to 'prove' allegations against the driver to any particular standard of proof: an exercise in evaluative judgment
- Can take into account allegations which have not resulted in criminal charges, or which led to acquittal, or on wholly non-criminal matters

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**Taxi licensing appeals** 

- The only real issue is the safety of the travelling public
- *McCool v Rushcliffe BC* [1998] 3 All ER 889 at [891f]:  
*"One must, as it seems to me, approach this case bearing in mind the objectives of this licensing regime which is plainly intended, among other things, to ensure so far as possible that those licensed to drive private hire vehicles are suitable persons to do so, namely that they are safe drivers with good driving records and adequate experience, sober, mentally and physically fit, honest, and not persons who would take advantage of their employment to abuse or assault passengers."*
- Evidence of hardship for the appellant or their family if driver loses their livelihood is not relevant: *Cherwell DC v Anwar* [2011] EWHC 2943 (Admin)

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