

## **PUNISHMENT**

**JAMES RANKIN**

1) Prosecution:

**1. Whether to prosecute or to review**

Many local authorities will seek to review rather than to prosecute because it is far simpler to apply to review the premises license than to commence lengthy and costly prosecutions. Prosecutions present a number of drawbacks for the prosecuting authority:

1.1 Time constraints/service

1.2 Burden of proof

1.3 Sufficiency of evidence

1.4 More than one appearance/pre-trial reviews

1.5 Abuse of process arguments:

- prosecutions policy – whether oppressive

***R v Adaway [2004] EWCA 2831***

- prosecuting authority's public protection enforcement policy included a section indicating that "to take forward a prosecution the individual or organisation must meet the following criteria: engaged in fraudulent activity – deliberately or persistently breached legal obligations"

- Either of the criteria was capable of substantiation. It followed that the judge, in refusing to allow a stay for abuse of process, exercised his discretion in a way which was without foundation

- before instituting proceedings the local authority must consider with care the terms of its own prosecuting policy. If it fails to do so, or if it reaches a conclusion which is wholly unsupported by material establishing the criteria for prosecution, it is unlikely that courts will be sympathetic in the face of other demand on their time at the Crown Court and appellate level, to attempt to justify such prosecutions

## 2. Review on the other hand

2.1 A much quicker process

2.2 Civil standard of proof

- the burden is on the reviewer to prove that the grounds for review have been made out
- ***Muck It Ltd, Merritt and Merritt v Secretary of State for Transport* [2005] EWCA Civ 1124: Court of Appeal**
- When making the application (revocation of license to operate goods vehicles) it is the applicant who has to satisfy the authority that the license should be revoked, and not the license holder who must satisfy the authority to the contrary (per Rix LJ)

2.3 No power to award costs at first instance. Qualified immunity of the authority to appeal to the Magistrates for an award on costs (***Bradford City Council v Booth***) unless they have acted unreasonably. However, ***Crawley Borough Council*** provided that Court takes Booth principles into account it has a total discretion

2.4 generally easier “to get home”

2.5 What if the operators claim that the authority should have prosecuted rather than reviewed the license?

***The Queen OTA of Crew (Chief Constable of West Midlands Police) v Birmingham Licensing Justices* [2001] EWHC Admin 113**

Per Elias J – Renewal of Justices’ Licence – allegations (inter alia) of trading after hours and providing entertainment without a PEL – no prosecution

- *“It appears, therefore, that the justices may have taken the view that the failure to prosecute was a decisive factor which ought to lead them not to give weight to those particular elements. If they did adopt that form of reasoning, then that would be wrong”*

### 3) ***The Queen OTA Bassetlaw District Council v Worksop Magistrates’ Court* [2008] EWHC 3530 (Admin)**

An unfortunate decision: Review can be used as a deterrent. DJ’s decision to overturn four week suspension of convenience store premises licence for two failed test

purchases to 14 year old girls. DJ reached conclusion having regard to DCMS Guidance that the function of the local authority and the magistrates on review was not punitive but remedial.

Slade J overturned the decision following JR application by the local authority on the grounds that it had to act in the interests of the wider community where some form of criminality was involved. She held that in such instances wider considerations came into play, including the prevention of crime and in such cases review could be used as a form of deterrence, if not punishment.

- Argued only one way; Unopposed decisions of High Court cannot be treated as authoritative unless the judge so rules. She did not. See practice direction LCJ 2001.
- Judge may have imputed the wrong thrust to the Guidance. Deterrence spoken of in The Guidance in respect of criminal intent comparable with prostitution, drug trafficking, sale and distribution of illegal firearms etc.

4) **Hall & Woodhouse Ltd v The Borough and County of the Town of Poole [2009] EWCH 1587 (Admin)**

- Applicant was charged with offence under section 136(1)(a) for carrying on or attempting to carry on licensable activity other than in accordance with permission. Breach of conditions. Appellant was merely the freeholder, and did not itself carry on the licensable activity
- Richards LJ thought that the section was directed at persons who as a matter of fact actually carry on or attempt to carry on licensable activity on or from premises.