

LEGISLATION AND CASELAW UPDATE

Committee	Licensing Committee
Officer Contact	Beejal Soni, 01895 556351
Papers with report	Appendix 1 - Select Committee "Call for Evidence"
Ward(s) affected	All

HEADLINE

This report provides an update for Members on recent caselaw and legislative developments.

RECOMMENDATION

That the Committee notes the update.

SUPPORTING INFORMATION

1. Legislation Update

The Immigration Bill received Royal Assent in May and so became the Immigration Act 2016. There are a number of requirements contained within Schedule 4 of the Immigration Act 2016 which will have an effect on licensed premises. Members are advised that the provisions relating to the powers of immigration officers to enter premises to investigate and the offences of illegal working and employing illegal workers come into force on 12 July 2016. The Home Office has advised that it is likely that changes to the licensing acts will be implemented in Spring 2017, subject to approval of the amendment to the licensing legislation and their accompanying regulations.

The principal points of note that arise from the Immigration Act 2016 are summarised below.

Premises Licence applications

- Individuals resident in the UK will not be able apply for a premises unless the individual is entitled to work in the UK.
- The Secretary of State will become a Responsible Authority where the premises is or proposes to sell alcohol by retail or provide late night refreshment.

Premises Licence lapse

- Premises licences will lapse if the licence holder ceases to be entitled to work in the UK whilst resident in the UK (or becomes resident without being entitled to work).

Premises Licence transfers

- Individuals resident in the UK will not be able apply for a licence transfer if the licence authorises the sale of alcohol or late night refreshment (neither may they give an interim authority notice) unless the individual is entitled to work in the UK.

Report Classification: Public

Licensing Committee: 13 July 2016

- The Secretary of State will need to be served with a copy application (where the premises sells alcohol by retail or provides late night refreshment) and will have 14 days to object if satisfied that the exceptional circumstances of the case are such that granting the application would be prejudicial to the prevention of illegal working in licensed premises.
- In a hearing convened due to the Secretary of State's objection, the Licensing Authority must reject the transfer application if it considers it appropriate for the prevention of illegal working in licensed premises to do so.

Personal licences

- Those not entitled to work in the UK will not be able to apply for a personal licence.
- All Immigration offences under "any of the Immigration Acts" become a relevant offence for the purposes of a personal licence application.
- Immigration penalties contrary to s15 *Immigration, Asylum and Nationality Act 2006* or s23 *Immigration Act 2014* also become disclosable, subject to certain exceptions.
- The Secretary of State will need to be served a copy of the application if the applicant has an unspent immigration offence, foreign offence equivalent or has been required to pay an immigration penalty. The Secretary of State will have 14 days to object to application.
- In a hearing convened due to the Secretary of State's objection, the Licensing Authority must reject the application if it considers it appropriate for the prevention of illegal working in licensed premises to do so.
- There will be a new duty for personal licence holders to inform the Licensing Authority if required to pay an immigration penalty.
- A personal licence will cease to have effect if the holder ceases to be entitled to work in the UK.

Rights of Entry

- Immigration officers, like police officers, will be able to enter premises (selling alcohol or providing late night refreshment) with a view to seeing whether an offence under any of the Immigration Acts is being committed in connection with the carrying on of the licensable activity.

Closure Notices (schedule 6)

- The new Act creates new powers of *illegal working closure notices* and *illegal working compliance orders*. It is not clear whether these new powers will be implemented in Spring 2017 or earlier. Very briefly:

An *Illegal Working Closure Notice* will be able to be issued by a Chief Immigration Officer (or more senior) in certain circumstances but principally due to an illegal worker being at the premises (which is further defined in the Act). The Notice will prohibit for a period specified:

- I. access to the premises other than by a person who habitually lives on the premises; and
- II. paid or voluntary work being performed on the premises, except where so authorised.

The Closure Notice will be able to last up to 24 hours or up to 48 hours if issued by an immigration inspector (or higher).

Unless cancelled, the Court must, within 48 hours, hear an application for an *Illegal Working Compliance Order*. The Court can make any such order that it deems appropriate including

- I. requiring right to work checks to be carried out
- II. requiring right to work documents to be produced and specifying times for an immigration officer to enter the premises
- III. prohibiting access to the premises

The Court will notify the licensing authority of the order and the licensing authority must then review the premises licence. If an offence is committed in relation to the compliance order, the Court can impose a prison sentence for up to 51 weeks or a fine.

An *Illegal Working Compliance Order* will be able to last for 12 months albeit they may be extended but cannot be in force for a period exceeding 24 months in total.

2. Caselaw Update

East Lindsey District Council -v- Abu Hanif (t/a Zara's Restaurant)

In *East Lindsey District Council v Abu Hanif (a licensed restaurant and takeaway)*, a High Court Judge has restored a licensing authority's decision to revoke a premises licence for employment of an illegal worker.

The restaurant traded in East Lindsey. The owner and licensee was Mr Hanif. After a raid by the immigration authorities, it was discovered that Mr Hanif was employing an illegal worker.

The Police brought review proceedings and the licensing authority revoked the premises licence. Mr Hanif appealed. At the appeal, which was heard by District Judge Veits, Mr Hanif's counsel argued before the District Judge that, since Mr Hanif had not been prosecuted for employing an illegal worker under section 21 Immigration, Asylum and Nationality Act 2006, but had merely been given a civil penalty under section 15 of that legislation, the crime prevention objective was not engaged.

The Magistrates Court appeal established that Mr Hanif had employed the illegal worker without paperwork showing a right to work in the UK, he had paid him cash in hand, he paid him less than the minimum wage, he did not keep or maintain PAYE records and that, while he had deducted tax from the worker's salary, he failed to account to the HMRC for the tax deducted.

The District Judge hearing the appeal at the Magistrates Court held that, because prosecution proceedings had not been brought and no crime had been reported, the crime prevention objective was not engaged and that, in any event, the failure to pay the minimum wage had not been the main basis of the licensing authority's decision.

The council appealed by way of case stated. It argued that it is not necessary for a crime to have been reported, prosecuted or established in a court of law in order for the crime prevention objective to be engaged. The licensing objectives are prospective and are concerned with the avoidance of harm in the future.

The matter came before Mr Justice Jay at the High Court. He accepted all of the council's arguments. In his view, there was clear evidence of the commission of criminal offences, both in relation to the non-payment of the minimum wage and also tax evasion. As for the offence of

knowingly employing an illegal worker, he considered that, based on the fact that the employee could not provide the requisite paperwork, a national insurance number or a tax code, the clear inference was that Mr Hanif well knew that he was employing an illegal worker. A deterrent approach was justified on the facts.

Mr Justice Jay decided that remission of the case to the Magistrates' Court was not appropriate since he considered that the council's decision to revoke was clearly correct. In reaching that decision, the Learned Judge pointed out that employing an illegal worker involves not only defrauding the Revenue, but also the exploitation of vulnerable individuals including, here, by not paying them the minimum wage.

The Learned Judge ordered Mr Hanif to pay costs in the High Court in the sum of £15,000 and ordered costs of the Magistrates' proceedings in the sum of £4,000.

3. Select Committee to Investigate the Effectiveness of the Licensing Act 2003

The House of Lords Select Committee investigating the effectiveness of the Licensing Act 2003 has published a call for evidence. The committee has also appointed Sarah Clover, a barrister at Kings Chambers, to be its specialist legal adviser.

Areas that the committee has said it will look at include:

- the balance between rights and responsibilities of both the industry and the public;
- the powers of enforcement authorities, including the police;
- the impact that any greater availability of alcohol has had on the health of the population;
- whether the Act has made it easier or harder for communities to enjoy activities that have to be licensed under the Act;
- the role of licensing in shaping local areas, for the benefit of the economy and the local community;
- minimum unit pricing and its potential impact; and
- fees and costs associated with the Act.

Baroness McIntosh of Pickering, Chairman of the Select Committee, said: "The Licensing Act 2003 enabled premises to serve alcohol for 24 hours a day, 7 days a week. While many heralded the Act as the start of a more continental drinking culture, others predicted round-the-clock consumption, leading to disorder and a deterioration in public health.

"But what has the reality actually been like? Has deregulation allowed the drinks industry to thrive? Have drinkers embraced a more relaxed and healthier approach to alcohol? What happened to the anticipated café culture?"

"For good or ill, the Licensing Act has altered the drinking landscape of England and Wales, but an examination of the changes is long overdue. I would therefore encourage as many people as possible to send us written evidence before our deadline of 2 September."

A Home Office report submitted to the committee last month said the 2003 Act would remain "a fundamental pillar in both national and local regulatory frameworks". It noted that the legislation's key principles and objectives had endured, "as its application in practice has proved capable of evolving and adapting to balance divergent interests".

The Home Office also argued that, while there had been in excess of 100 cases which cited the 2003 Act, other than a very small number related to section 53C, these had not called into question the drafting of the legislation or raised issues of public concern.

A copy of the "Call for Evidence" is attached marked Appendix 1. The Home Office report can be accessed on the URL:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/530664/Cm_9278_-_Post-Legislative_Scrutiny_-_Licensing_Act_2003.pdf

Interested parties have been invited to submit evidence to the committee by 2 September 2016. The committee is scheduled to report by 23 March 2017.

Implications on related Council policies

None at this stage.

Legal implications

Legal comments are contained within this report.

Financial Implications

None at this stage.

Background Papers / Further Reading Material

NIL.