Remote licensing hearings are lawful

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The purpose of this short article is to help to dispel any lingering doubts as to whether it is lawful for licensing hearings to be conducted remotely.

When the Coronavirus Bill and its subordinate regulations pass into law, local authorities will have direct statutory authority to hold remote meetings. This is probably necessary for meetings under the Local Government Act 1972, which sets out more prescriptive requirements than under the Licensing Act. My strong view, however, is that it is not necessary to await legislative fiat for remote licensing meetings, for the following reasons. I have enumerated them so that they can be easily cut and pasted for onward use.

1. Hearings under the Licensing Act 2003 are conducted under that legislation. The Local Government Act 1972 is not relevant at all. See s 101(15) of that Act, as added by Sch 6 para 58 Licensing Act 2003.

2. The Licensing Act 2003 provides for hearings in certain situations, usually involving contested applications. See e.g. section 18(3). To my mind, a hearing is a procedure in which a party is heard. The Act does not circumscribe how they must be heard. Imagine they were ill and could not attend in person. It would be discriminatory to prevent their dialling into the meeting.

3. Section 9(2) of the Act says that regulations may make provisions for the proceedings of Licensing Sub-Committees including "public access" to the meetings. It goes on to say that subject to such regulations, each licensing committee may regulate its own procedure and that of its sub-committees.

4. According to section 183 of the Act, the procedure for hearings is set down in regulations under that section.

5. The Licensing Act 2003 (Hearings) Regulations 2005 are made pursuant to sections 9(2) and 183.

6. It is noteworthy that certain hearings have to be held within a certain period, e.g. summary reviews. Clearly, authorities must do all they can to hold such hearings.

7. The regulations use language such as "attendance" (regs 8, 15 and 20), "appearance" (reg 8), "leave" and "return" (reg 25). They also state that the hearing must be public (reg 14). The question is whether these terms are satisfied by allowing people to attend, appear etc virtually rather than physically.

8. In considering this, it is important to stress that the purpose of remote meetings is not to exclude anybody who is entitled to speak or watch from the right to speak or watch, but to allow them to participate virtually. There are at least two statutory rules of interpretation in play. The first is that in general statutory provisions are to be construed purposively, so as to fulfil the intention of the legislature. Clearly, the purpose of the language in the regulations is to enable participation and

open justice. The second is the concept of “always speaking”. In Turkington v Times Newspapers [2001] 2 AC 277 the House of Lords explained the concept as meaning that courts must interpret and apply a statute to the world, and in the light of the legal system, as it exists today. Even in 2005, the idea of virtual hearings was, well, unheard of. But it is not unheard of now, and the language of the regulations is sufficiently elastic to permit people to attend and be heard by remote communication.

9. In the light of the above, it is possible to make five specific points to support the proposition that remote hearings are lawful.

10. First, such hearings are permitted under the language of the regulations and Act, construed purposively and having regard to the principles of always speaking.

11. Second, this may be tested. Certain of the Licensing Act provisions require hearings within set periods of time. This could pose a dilemma. Were an authority to hold the hearing live, participants might be breaking the government directive on travel. But if the authority is precluded from holding it virtually and therefore finds itself obliged to cancel the hearing, it would be breaching the procedural requirements of the Licensing Act and subordinate regulations. The authority would thus be between the devil and deep blue sea. If the authority decided to cut the Gordian knot and hold a virtual hearing, then providing the hearing is fair, the High Court would not overturn the decision. It would hold that (a) the authority was entitled (and in some cases obliged) to hold the hearing and/or (b) that having regard to the terms of section 31(2A) of the Senior Courts Act 1981 the Court should not overturn the decision because it would have been no different had a live hearing been held and/or (c) relief should be refused as a matter of discretion.

12. Third, there is case law specific to the Licensing Act 2003 - R (D&D Bar Services Ltd) -v- Romford Magistrates Court (the Funky Mojoe case) [2014] EWHC 213 (Admin) – which holds that procedural defects do not automatically render licensing decisions invalid. It is a question of whether there has been substantial compliance and what relief should be applied.

13. Fourth, bear in mind that Committees are entitled to set procedures, subject to the regulations. Given that the regulations say nothing express on the topic, the Committee can (and should) set the procedures for virtual hearings.

14. Fifth, the Lord Chief Justice has made it clear in directions to courts and tribunals that we all have to do our best to get hearings dealt with virtually. It is inconceivable that the courts would take the opposite view when dealing with an administrative committee.

15. Finally, it seems to me that it is a requirement for such hearings that:

a. proper notice is given, with all papers served timeously on the authority and published online;

b. the actual parties to the hearing are able to participate;

c. any member of the public can see or hear, albeit not participate in, the hearing.

These are challenging times, but it is incumbent on all of us working in the licensing system to ensure that it does not grind to a halt. I hope that this modest contribution helps to set minds to rest and galvanises activity in the field.

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