

BIRMINGHAM CITY COUNCIL

**REPORT OF THE INTERIM ASSSITANT DIRECTOR OF
REGULATION AND ENFORCEMENT
TO THE LICENSING AND PUBLIC PROTECTION COMMITTEE**

23 JUNE 2021
ALL WARDS

STREET TRADING POLICY 2020 - JUDICIAL REVIEW

1. Summary

- 1.1 The City Council considered and approved the Street Trading Policy 2020 on 3 November 2020.
- 1.2 In January 2021 two long standing street traders applied to bring an expedited judicial review against the Council.
- 1.3 The judicial review was heard by the High Court on 7 and 8 April 2021.
- 1.4 On 7 May 2021 the judgement was handed down. That being that the judicial review was dismissed in its entirety.

2. Recommendations

- 2.1 That the report be noted.

Contact officer: Sajeela Naseer, Head of Licensing, Registration Services and Markets
Telephone: 0121 303 6112
Email: sajeela.naseer@birmingham.gov.uk

3. Background

- 3.1 Birmingham City Council is the Licensing Authority responsible for considering applications for a range of activities that require a street trading consent under Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982.
- 3.2 This legislation allows the Council to set a policy, conditions and fees for the grant, variation, renewal and revocation of street trading consents or licences.
- 3.3 Birmingham adopted street trading provisions in 1991, which stated all public roads are classified as 'consent streets' for the purposes of street trading. No formal Street Trading Policy was adopted further to this.
- 3.4 In order to ensure that street trading in Birmingham reflects the current needs, the Street Trading Policy 2020 was approved by Full Council on 3 November 2020. This was after lengthy consultation on the draft policy which commenced on 16 December 2019 and concluded on 23 February 2020. A further opportunity for the public to comment was given in July 2020 (6-26 July 2020).
- 3.5 The new policy designated certain streets as prohibited streets (red routes and metro lines), all other streets in Birmingham remained consent streets except for 51 specific parks and open spaces which were not given a designation. These designations came into force on 6 December 2020.
- 3.6 The new fees and charges for the year 2021/22 (under the new policy) were approved by your Committee on 18 December 2021.
- 3.7 On 19 December a 6-week window for 2021 to 2022 street trading consent applications. This relates to street trading consents commencing from 1 April 2021. This enabled all initial applications to be considered at the same time. Subsequent applications were and are being considered chronologically.

4. Judicial Review

- 4.1 On 28 November 2020 the Council received a "Pre Action Protocol" from Simpson Millar LLP acting on behalf of the claimants of the eventual judicial review, Mr. and Mrs. Poole. In this protocol they laid out initial grounds for their action and requested that a pause in the implementation of the policy to avoid litigation and to seek to find common ground. (Note: the consultation on this policy had been extensive and had included both the Claimants and the Birmingham Street Traders Association, whom it was stated in the pre action protocol that Mr. and Mrs. Poole were proposing making the judicial review on behalf of, as well as themselves in their own right.)
- 4.2 The Council's response was to the effect that we did not agree with the grounds of their submission and we would not be suspending the policy.
- 4.3 On 21 January the claimants made an application for an expedited judicial review.

- 4.4 The judicial review was heard on the 7 and 8 April 2021 at the High Court.
- 4.5 Jonathan Manning of 4-5 Gray's Inn Square appeared for Birmingham City Council.
- 4.6 Sarah Sackman and Conor Fegan of Francis Taylor Building appeared for the claimants, instructed by Simpson Millar.

5. **Grounds of Judicial Review and Remedy Sought**

- 5.1 The Claimants make reference throughout the judicial review to an Innovative Products Criterion that they label as the "IPC". This criterion does not exist. There are 12 stated criterion that are considered in an assessment of a street trading consent application. One of these 12 criterion is "selling the right goods" within this criterion there is reference to innovative approach/products being considered.

- 5.2 There were five grounds to the judicial review:

(i) Ground 1 — The "innovative products" criterion breaches Regulation 15 of the Provision of Services Regulations 2009 (the "Services Regulations") because it is not in pursuit of a legitimate aim and is disproportionate:

The Policy says that a "key consideration" is whether the applicant is "selling the right goods", which includes a consideration of whether the applicant is selling "innovative products". That criterion falls foul of Regulation 15 because it interferes with the freedom to provide services in a way that is not in pursuit of a legitimate aim and is disproportionate;

(ii) Ground 2 — The "innovative products" criterion breaches Regulation 21 of the Services Regulations because it impermissibly subjects the grant of a consent to an economic test:

The grant of consent must not be subject to a "case by case application of an economic test" (Regulation 21(1)). But that is exactly what the innovative products criterion does; it makes the grant of a consent subject to a test of the "appropriateness of the activity in relation to the economic planning objectives set by the competent authority", those objectives being those set out in the Policy to improve the quality of the street retail offer in Birmingham, and in effect leads to the "indirect involvement of competing operators" in the consenting process;

(iii) Ground 3 — The "innovative products" criterion breaches Regulation 18 of the Services Regulations because it not clear and is dissuasive:

The innovative products criterion is "dissuasive" (Regulation 18(2)). It involves council officers making a subjective judgement about the type and quality of goods. The First Claimant has explained the effect of this criterion on traders like him who will be applying for a consent under the Policy;

(iv) Ground 4 — The general conditions are not reasonably necessary:

The list of general conditions in the Policy are not “reasonably necessary” (Schedule 4, Paragraph 7(4) Local Government (Miscellaneous Provisions) Act 1982). Many of them duplicate requirements and controls in other statutory regimes, and fall outside the purpose of the legislation

(v) Ground 5 — The innovative products criterion is contrary to the statutory purpose of the Local Government (Miscellaneous Provisions) Act 1982:

The power to regulate street trading that is set out in Schedule 4 of the Local Government (Miscellaneous Provisions) Act 1982 must be exercised for the purpose that it was intended; that is to ensure that street trading is safe and regulated in the interests of consumers. Introducing an “innovative products” criterion with a view to influencing the “quality” of goods sold on the street is not a lawful use of the powers in Schedule 4. There is no statutory indication that the street trading consent regime was intended to achieve economic objectives like that

REMEDY SOUGHT

- (i) An Order quashing Birmingham's new Street Trading Policy
- (ii) A declaration that the innovative products criterion is unlawful
- (iii) An Order quashing any consents granted in reliance on the Policy, as decisions based on the application of an unlawful policy should not stand. (note: *this remedy was withdrawn prior to the hearing*)
- (iv) Costs

6. Judicial Review Outcome

- 6.1 On 7 May 2021 the High Court judgement dismissed Street Trading judicial review in its entirety. The Council was awarded an £11,000 interim payment of costs (by 28 May 2021). *Note: Agreement has now been reached with the Claimants and they have pay Council costs of £23,000 by 28 May 2021.*
- 6.2 The judge refused the Claimants application for permission to appeal although they can go directly to the Court of Appeal if they choose.

The full judgment of the court is available by request to streettrading@birmingham.gov.uk

- 6.3 Below is an extract from an article that appeared on the Local Government Lawyer website on 10 May 2021 that summarises the outcome on each ground.

Ground 1 outcome

On the first ground, Sarah Sackman, counsel for the claimants, argued that the "Innovative Products Criterion" (the IPC) laid out in the policy breached Regulation 15 (2)(b) of the 2009 Regulations, which says that any criteria set out in an authority's authorisation scheme must be "justified by an overriding reason relating to the public interest".

Ms Sackman said that the IPC was a criterion on which the consent policy was based but that it was not "justified by an overriding reason relating to the public interest". It could not be so justified, she said, because it had an economic objective, and ECJ case law (*Commission v Spain* [2011] 2 CMLR 50) established that "purely economic objectives cannot constitute an overriding reason in the public interest".

Considering this, Judge Cooke said: "Insofar as the ECJ has held matters to be excluded from the permissible scope of public interest on the grounds of pure economic consideration it has been considering much more serious and targeted measures directly bearing on the freedom of establishment of businesses across state boundaries in violation of (now) the TFEU."

He added: "The provision in question here is not such a measure; it is part of an overall package of considerations which are properly considered together since their application is one of combined evaluation by the Council rather than separate individual consideration.

"That package is plainly not in my view 'purely economic', though it is obvious that some or all of its components have economic effects, in the wide sense that they affect the way in which business is carried on or impose costs on businesses, or even in the almost as wide sense that Ms Sackman contends for."

Instead, the package is "predominantly concerned with other matters," Judge Cooke said, "such as the enhancement of the urban environment that are, in my judgment, equally plainly matters of proper concern for an authority such as the Council".

Judge Cooke rejected the argument that the IPC was not justified by a reason relating to the public interest.

Ground 2 outcome

On the second ground, the claimants submitted that the IPC amounted to a case-by-case application of an economic test making the granting of authorisation subject to an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority, contrary to Regulation 21(1)(e) of the 2009 Regulations.

Secondly, Ms Sackman argued that the IPC created an indirect involvement of competing operators in the granting of authorisations, contrary to Regulation 21(1)(f).

According to Judge Cooke, Regulation 21 applies to an "economic test" assessing the "appropriateness" of an activity against "economic objectives" of the authority. But the council is not applying any economic test when it considers the IPC in relation to an application, Judge Cooke said, since "it does not consider the economic result of effect of selling the goods, either on the market as a whole or on other participants, but only whether they are different in some respects from others available locally." Judge Cooke rejected the argument.

Turning to the claim that competing operators could indirectly influence the granting of authorisations, Judge Cooke rejected the contention that the IPC was likely to be decisive in a significant number of cases.

He said: "In any particular application, it may or may not be relevant at all and if it is it will be a matter of chance whether it has any determinative effect on the outcome. In those circumstances, in my judgment, any connection between a competitor's actions and the outcome of an application is too remote and fortuitous for it to be considered that he is involved, even indirectly, in the making of the decision and I reject the argument to that effect."

Ground 3 outcome

Ms Sackman's third ground argued that the IPC was not "clear", "unambiguous" "objective", or "transparent and accessible" contrary to Regulations 15(2) (d)(e) and (g), which made the application procedure "dissuasive" and "unduly complicate", contrary to Regulation 18(2).

Referring to Ground 3, Judge Cooke said that in his judgement there was nothing in these points.

He added: "It would be overinterpreting the Regulations and the [Services] Directive to require an absolute degree of certainty in advance as to the outcome of an application, such as the claimants in effect contend for. It is no doubt the case that to the extent the IPC comes in to consideration it involves an exercise in evaluation by the Council's officers, but so do many of the other criteria that are not objected to.

"It may be said that the drafting leaves something to be desired in that it states that 'innovative approach' will be considered, but then goes on to define (and refer in the assessment framework to) a different term, 'innovative products'. But this is no more than the degree of inconsistency frequently encountered in all manner of documents and does not lead to any real difficulty in interpretation by the court or applicants as to what is meant - an "innovative approach" must mean selling 'innovative products. The condition is sufficiently 'clear' and 'unambiguous'."

Ground 4 and 5 outcome

The final two grounds (4 and 5) were taken together by the judge. The claimant submitted that the 1982 Act has a limited statutory purpose, i.e., to regulate street trading in the interests of safety, the protection of the public and protection of public rights such as rights of traffic. As a result, anything beyond that, and in particular anything amounting to an economic objective such as influencing what goods are sold was outside that purpose and so unlawful, Ms Sackman claimed.

Judge Cooke said: "Certain of the conditions attached to consents are not, she says reasonably necessary for such a purpose and so not within the powers given to the Council under Sch 4. The statement of grounds seeks to attack the requirement of the policy that applicants must specify what goods they intend to sell and that the consent granted will be limited to sale of the specified goods as outside this purpose and a restriction on competition since no similar condition attaches to fixed shops.

"In relation to that, it sufficient [sic] in my judgment to say that there is no foundation for such a statement of purpose whatever in the 1982 Act itself. On the contrary, the powers and discretions it creates are expressed in entirely general terms."

He added: "The requirement to specify the types of goods sold is, as is apparent from the policy and preceding documents, imposed because the Council wishes to ensure that street traders take adequate responsibility for ensuring that their goods are of minimum legal standards and are not, for instance counterfeit, and that their officers will have effective powers to enforce such matters.

"Pursuing such a purpose cannot be said to be outside the statutory purpose of the Act (and would be within even the limited purpose Ms Sackman argues for). It is no objection that there may be other measures available to enforce compliance with such legal standards, such as prosecution by trading standards officers. The Council is entitled to take the view that the possibility of revocation of a consent is an appropriate additional weapon in its compliance armoury."

Claim outcome

Judge Cooke dismissed the claim.

Concluding his judgment, he said: "In case the matter goes further however I should say that had I been with the claimants on any of the matters relating to the IPC, which was the principal focus of their claim, I would not have made an order quashing the policy as a whole, or quashing the decision to adopt it, but limited any remedy to a declaration that would have prevented the council from taking the IPC into account in any assessment of an application.

"Ms Sackman submitted that where a decision was found to be unlawful, the normal remedy is for the decision to be quashed and remitted so that it may be taken again lawfully. But questions of remedy are as she accepts discretionary, and it would in my judgment be wholly disproportionate to quash the entire policy because one small aspect of it was found to be unlawful. If the policy were quashed, the council would have no basis in place to regulate the existing consents or evaluate new ones, until it was able to put a new policy in place, which would likely entail the expense and delay of a further consultation process."

Judge Cooke added: "The policy would however be perfectly operable without the IPC, which is unlikely in any event to come into consideration until 2022 when existing consents fall to be renewed and there may be competition for pitches. By that time, the policy will have been reviewed and, if it had been found that the IPC was unlawful, it would no doubt be removed during any such review."

7. Consultation

- 7.1 Consultation was not required in this matter

8. Implications for Resources

- 8.1 The costs for this judicial review have been met almost entirely by the Claimants. The total cost to the Council was £26,237.32. A settlement of £23,000 has been reached with the Claimants and has been paid by 28 May 2021.
- 8.2 It was considered prudent to make a settlement to ensure that further costs and time was not spent in any formal process to agree and pursue costs.
- 8.3 The remaining £3,237.32 will be met through the Street Trading budget within the portfolio of this Committee.

9. Implications for Policy Priorities

- 9.1 The outcome of this judicial review has reinforced the ability of the Council to make policy that underpins the City Council Vision, Birmingham is an entrepreneurial city to learn, work and invest in, Birmingham is an aspirational city to grow up in, Birmingham is a great city to live, Birmingham is a fulfilling city to age well in.
- 9.2 Furthermore this policy will ensure Birmingham residents and businesses gain the maximum benefit from hosting the Commonwealth Games by supporting legitimate street trading.
- 9.3 The policy also supports the Regulation and Enforcement Mission Statement: Locally accountable and responsive fair regulation for all – achieving a safe, clean, green and fair trading city for residents, business and visitors.

10. Public Sector Equality Duty

10.1 The policy considered and complied with this duty.

INTERIM ASSISTANT DIRECTOR OF REGULATION AND ENFORCEMENT

Background Papers:

Street Trading Policy 2020

Local Government Lawyer website: "Street traders lose legal challenge over "innovative product" criterion imposed by council" published on 10 May 2021

R on the application of (1) Allan John Poole and (2) Samantha Poole v Birmingham City Council