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"But I'll Lose My Job!" New Guidelines to Provide Clarity on What Amounts to 'Exceptional Hardship' in Totting Up Disqualification Cases

From 22nd January 2020 through to 15th April 2020, the Sentencing Council ran a public consultation on the proposed changes to sentencing guidelines for driving offences disqualifications, breach of community orders and clarifications to some explanatory materials.

One of the proposals to be discussed over the 12-week period was concerning new guidance on 'totting up' disqualifications, whereby a driver may have incurred a driving ban because he/she has accrued 12 or more points on their licence.

Magistrates continue to hold the discretionary power to allow any driver, who has 'totted up' the aforementioned 12 points, a reprieve. However, for the magistrates to exercise this discretion, the driver must demonstrate that a ban from driving would have such a detrimental effect on their life, or the lives of others, that it would result in 'exceptional hardship'.

Currently, the guidance on what amounts to 'exceptional hardship' is built up from case law. *Brennan v McKay (1996) 1997 S.L.T. 603*, for example, demonstrating that loss of employment, in itself, may not amount to 'exceptional hardship'. This, notwithstanding the fact that the knock-on effect of the individual losing their job would mean his family would also suffer as a consequence.

However, that is not to say that any hardship suffered by others would not amount to 'exceptional hardship'. Cases such as *Cornwall v Coke [1976] Crim. L.R. 519* and *Waine v PF [2016] SAC (Crim) 19; 2016 S.C.L. 804* seem to suggest, respectively, that any hardship caused to the public or employers or employees, who suffer a hardship as a result of the disqualification, would be strong mitigating factors in not enforcing a ban.

In any event, although helpful in identifying exact cases of 'exceptional hardship', case law does not always exude great lucidity on an issue, and as any legal professional will undoubtedly attest to, no two cases are ever the same. For the lay magistrate, and of course the general public, this can leave the guidance slightly ambiguous, which is why new guidance has been requested to clarify the law.

The new guidance provides certain considerations the courts should have regard to when assessing the potential significance any ban would have on the driver and whether, in the circumstances, it should be considered 'exceptional hardship'. The guidance is as follows:

- The test is not inconvenience or hardship, but exceptional hardship for which the court must have evidence – which may include the offender's sworn evidence.
- Some hardship is likely to occur in many if not most orders of disqualification.
- Courts should be cautious before accepting assertions of exceptional hardship without evidence that alternatives (including alternative means of transport) for avoiding exceptional hardship are not viable.
- Loss of employment will not in itself necessarily amount to exceptional hardship; whether or not it does will depend on the circumstances of the offender and the consequences of that loss of employment on the offender and/or others.

- The more severe the hardship suffered by the offender and/or others as a result of the disqualification, the more likely it is to be exceptional.

Speaking on the new proposed guidelines, Sentencing Council Chairman Lord Justice Holroyde said:

> *"Sentencing guidelines are used in magistrates' courts throughout England and Wales many times a day and it is important that they provide clear guidance to court users.*
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> *"This consultation is in response to requests from magistrates for changes to provide more information and bring more clarity to these guidelines. We are keen to hear views on the proposals from magistrates, others working in the criminal justice system and anyone else with an interest in sentencing."*

Evidently, the new guidance has looked to incorporate the fundamental principles of the case law and tailor them to provide magistrates and court users with a much more condensed and easily comprehensible version of what may amount to 'exceptional hardship'.

There can never be a 'one glove fits all' answer, nor should there be, as each individual case will always have to be judged on its own merits. Case law will still be there to offer a greater deal of insight into 'totting up' cases but hopefully the new streamlined guidance will mean better consistency in decisions, with Magistrates able to give more reasoned judgments.

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