BIRMINGHAM CITY COUNCIL

LICENSING
SUB-COMMITTEE C
16 OCTOBER 2020

MINUTES OF A MEETING OF THE LICENSING SUB-COMMITTEE C HELD ON FRIDAY 16 OCTOBER 2020 AT 1000 HOURS AS AN ON-LINE MEETING.

PRESENT: - Councillor Mike Leddy in the Chair;

Councillors Mike Sharpe and Bob Beauchamp.

ALSO PRESENT

David Kennedy – Licensing Section
Joanne Swampillai – Legal Services
Mr James Rankin, FTB Chambers
Errol Wilson – Committee Services

(Other officers were also present for web streaming purposes but were not actively participating in the meeting)

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NOTICE OF RECORDING/WEBCAST

1/161020 The Chairman advised, and the Committee noted, that this meeting would be webcast for live or subsequent broadcast via the Council's Internet site (www.civico.net/birmingham) and that members of the press/public would record and take photographs except where there are confidential or exempt items.

2/161020 **DECLARATION OF INTERESTS**

Members were reminded that they must declare all relevant and pecuniary and non-pecuniary interests arising from any business to be discussed at this meeting. If a disclosable pecuniary interest is declared a Member must not speak or take part in that agenda item. Any declarations will be recorded in the minutes of the meeting.

APOLOGIES AND NOTIFICATION OF NOMINEE MEMBERS

3/161020 Apologies were submitted on behalf of Councillor Martin Straker Welds, with Councillor Mike Sharpe as nominee, and Councillor Neil Eustace with Councillor Bob Beauchamp as Nominee.

NAKIRA, QUEENSGATE, 121 SUFFOLK STREET, QUEENSWAY, BIRMINGHAM, B1 1LX – LICENSING ACT 2003 AS AMENDED BY THE VIOLENT CRIME REDUCTION ACT 2006 – CONSIDERATION OF REPRESENTATIONS IN RESPECT OF THE INTERIM STEPS IMPOSED ON 1 OCTOBER 2020

The following report of the Interim Assistant Director of Regulation and Enforcement was submitted:-

(See document No. 1)

On Behalf of the Applicant

Ms Sarah Clover – Counsel of Kings Chambers representing the Premises Licence Holder
Mr Carl Moore – CNA Risk Management
Mr Antonii Mankulu
Mr Dexter Lasswel

Those Making Representations

Gary Grant – Counsel of FTB Chambers
Ms Jennifer Downing – West Midlands Police
PC Abdool Rohomon – West Midlands Police
PC Ben Reader – West Midlands Police

The Chairman then explained the hearing procedure prior to inviting the Licensing Officer, Bhapinder Nandhra to outline the report.
The Chairman introduced the Members and officers present and asked if there were any preliminary points for the Sub-Committee to consider.

Ms Sarah Clover advised that an email was received in her inbox at 2200 hours on Thursday 15 October 2020 from Mr Grant, Barrister on behalf of the Police apologising that an email from PC Abdool Rohomon to the Licensing Authority had not been included in the Sub-Committee's pack. He attached the email dated 13 October 2020 at 0933 hours and was sent only to the Licensing Authority making a further allegation about an assault at the premises, Nakira on the 24 September 2020.

Ms Clover stated that she did not know the reason PC Rohomon had only sent it to the Licensing Authority on the 13 October 2020, nor who had seen it. It stated at the bottom of the email, supporting document that will be provided prior to the hearing, but nothing had been sent to the representing party in making representation against the interim steps today nor to any of their representatives and that she knew noting of the allegations. There will be statements and paper work with that allegation that had not been disclosed. Ms Clover requested that Regulation 18 to be invoked and for the Sub-Committee to pay no attention to the email whether or not the Sub-Committee had seen it at this stage. Ms Clover requested an indication as to whether the Sub-Committee had seen the email.

The Members of the Sub-Committee confirmed that they had not had sight of the email.

Mr Grant, Counsel of FTB Chambers made the following statements: -

- That the Police was asked to rely on what they say was essential information that was summarised in an email that PC Rohomon did send to the Licensing Authority on the 13 October 2020.
- When he saw the agenda papers last night, he noticed that it had not been included in the papers.
- On abundance of caution he had forwarded it to all parties as he intended to rely with the Sub-Committee's permission on the information within the email.
- It was served before the hearing at 2200 hours on the 15 October 2020. It was regrettable that the nature of an expedited review process was that things happened at the last minute as we were only given 24 hours' notice of the licence holder's application.
- The Sub-Committee must and would wish to make its decision based on the best available information. The information contained within the email goes to the heart of this interim steps challenge today. It dealt firstly with a serious assault on the 24 September 2020.
- It dealt with the suggestion that on the 26 September 2020 a suggestion made by the licence holder at the first interim steps hearing before the Sub-Committee on the 1st October 2020 that people somehow invaded the venue. It showed that to be untrue as CCTV was seen and it also showed what was going on.

At this juncture the Chair interjected and advised Mr Grant that the Sub-Committee did not had sight of the email and because of that he did not saw the relevance to go into the content of the email. The Chair added that what Ms Clover was asking was whether it should be presented for this hearing or not and the Sub-Committee did not want it to c*olour our judgement in any shape manner or form*.

Mr Grant commented that if Ms Clover needed time to go through its contents, the Sub-Committee could cure any potential prejudice by giving her some time. But to not permit the Police to use what was essential information for the Sub-Committee's decision today, would greatly prejudice the West Midlands Police (WMP) case and the public interest. It was an email that spans one page and would not take Ms Clover long to take instructions if she has not already done so from her client. The Sub-Committee would wish to make its decision on the accurate position and the best available information. This was the reason it was stated that it ought to be admitted as it was served before the hearing and not at the hearing. It was a matter of the Sub-Committee whether they wish to hear the most relevant information today.

The Chair advised that he asked Mr James Rankin, Counsel FTB Chambers to join the Sub-Committee in a private meeting where the Sub-committee would discuss whether to accept the email that was presented to the parties.

Ms Clover indicated that she had further submissions.

Ms Clover then made the following statements:

- That it was important to respond to what Mr Grant had stated. Firstly, Mr Grant stated that the email was served before the hearing, but he sent the email at 2200 hours last night.
- That she did not see the email at 2200 hours last night as those were not working hours and she would not be expected to see it nor did she saw it before the commencement of working hours this morning , nor would she be expected to.
- The hearing began at 0930 hours working hours realistically began at 0900 hours and she requested that the Sub-Committee take this into account when deciding whether that was before the hearing for Regulation 18 purposes.
- Mr Grant stated that it contained everything the Sub-Committee needed to know, but it did not as it was an email from PC Rohomon.
- That the Sub-Committee might wish to consider why PC Rohomon considered at such a late stage to circulate an important email only to the Licensing Authority and not to copy her, or Mr Moore or any of the parties at the premises to make sure they had that information at the earliest possible opportunity.
- The nature of the content of the email will be based upon statements and supporting documentation and in fact PC Rohomon referred to the supporting documentation at the end of that email – it would be vital if we were going to look into this alleged incident.
- Mr Grant stated that it was important for the Sub-Committee to have accurate information before making its decision to see the basis for this email and what the email was based on.
- PC Rohomon' s email was not evidence in and of itself. It was based on something that at the moment remained undisclosed.
- Mr Grant stated that it was in the nature of the expedited and summary reviews that things happened at the last minute. No, its not and did not had to be.
- The incident allegedly took place on the 24 September 2020 and so the material about it had been available since then and was available before the first summary review hearing but as not disclosed.
- There was no excuse for serving it at 2200 hours the night before an appeal against an interim steps that the Sub-Committee had already had enough information about this case to be able to make a decision on.
- Ms Clover invited the Sub-Committee not to accept this late submission. She added that she would not be in a position to take instructions about it as she had this hearing and another hearing with a client at 1130 hours this morning.

At 1008 hours the meeting was adjourned for the Sub-Committee to discuss in private whether to accept the late paper.

At 1017 hours the meeting was reconvened.

The Chairman advised that the Sub-Committee had deliberated on whether the Sub-Committee should see sight of the email that was sent out last evening and

whether or not it was relevant to this hearing. The Chairman advised that the Sub-Committee felt that the email was relevant, but the Sub-Committee would not take it into consideration for this hearing. The Sub-Committee would take everything else that was presented in the pack that was sent to the Sub-Committee for deliberation. The Chairman asked Mr Grant not to refer to the email in presenting his evidence.

Mr Grant requested confirmation that on that basis that Ms Clover too would be restricted to the information contained in the written representations of the 14 October 2020, mainly the generic information.

The Chairman stated that that information was already in the pack that was distributed. He added that what was distributed to the Sub-Committee, will be taken account of excluding the email that was not in the pack itself.
Mr Grant enquired whether any new information from the licence holder that had not been stated in the email that sets out the reason for challenge would be entertained by the Sub-Committee.

The Chairman advised that the only evidence that he had seen was an email from Mr Carl Moore dated the 14 October 2020 that was sent at 2328 hours that was sent to Mr David Kennedy. The Chairman added that this was the only documentation that the Sub-Committee had from the premises licence holder. The rest of the paperwork was from WMP and the licence documents.

Ms Clover made the following points on behalf of the applicant:-

a) There was no evidential challenge at this stage. This was a legal point tightly drawn in relation to the public nuisance point. This she thought was the first time this would have been subjected to a direct legal challenge and it was anticipated that it would need to be looked at by the courts in due course.

b) That she regarded this as a first stage. That this was the point as the Sub-Committee may well had anticipated that both counsels had fully anticipated that a summary review was not well founded upon the crime of public nuisance. That this was the reason Mr Grant had submitted (again late) a suite of authorities – ***Remington v Goldstein***, the case of ***Harvey*** in order to support the case that he anticipated.

c) That this was Mr Grant's idea in relation to the argument about public nuisance. It was innovative and she thought that Birmingham maybe the first or second authority to have picked upon this. That Manchester had a go as well and the thesis goes the offence of public nuisance was a crime.

d) That the definition being used was taken from ***Remington v Goldstein*** and the crime was said to be serious as it carries potentially life imprisonment. That the nature of the crime was to do something the effect of which would be to endanger lives and health.

e) That there was a subsidiary point on that, but her main point relates to the requirement for the Section 53A Summary Review Certificate referred to serious crime or serious disorder. That serious crime for the purpose of

summary review had a definition of its own and it comes under Section 81 of the Regulation of Investigative Powers Act 2000 as set out in the agenda pack as set out in the Chief Officer's Certificate.

f) That the definition of serious crime for the purposes of summary review was that a first time offender over the age of 21 could reasonably be expected to be sentenced to 3 years. That her simple point was there was no way on this planet that anybody would be getting 3 years for a first offence of the nature of the allegations set out anywhere in the Police evidence.

g) That her subsidiary point lies into that because the police case was predicated upon the idea that the activities at Nakira on any of the occasions alleged, in fact, had the effect of endangering health and lives. That this was not so and at best one could say the activities at Nakira one could take their pick and for her part it would not be necessary to go through any of the Police statements or any CCTV.

h) That she knew that the Police would be excited about gaps in CCTV and what it may or may not show. That her case at this point without prejudice to any further case she may bring in the future around fact and evidence, her case today was legally based was that at its height any of that evidence from any source could only demonstrate a potential for a risk.

i) That it did not go further as the Police representation asserts and demonstrates an actual effect of endangering health or life. That you could not go that far as it could not be known whether anybody on the premises had the virus, was capable of transmitting the virus, actually went on into an environment where they could transmit the virus. That this was entirely hypothetical and speculative.

j) That there was that distinction between the offence in ***Remington*** and anything that could have been perceived in the premises in question. That at its height and at its worse the penalty for any of the matters disclosed in the Police evidence was built into the Coronavirus Regulations (take your pick as to which regulations they were talking about).

k) That the regulation they had yesterday might not be the same regulations they had today nor the same one they had tomorrow as they were moving that fast. That it did not matter as the regulations made provisions for an offence or offences disregarding the governments fixtures on social distancing and other protective measures, closing premises and so forth.

l) That the offences were built into the regulations and the penalties were built into the regulations. That the circumstances in which those penalties could be meted out was built into the regulations and that was where Parliament had decreed the level of penalty for offences of this nature.

m) That this was the benchmark and was of a financial nature and that she would not go into the imprisonment territory. That it was wrong to disregard that matric for penalising the types of activities that anybody at Nakira had

engaged in and putting them into an entirely different context by saying that was not how we would penalise that actions.

n) That nobody would be using the regulations, they would take it to court prosecute under the common law offence of public nuisance and fully anticipate that for exactly the same thing somebody might get 3 years.

o) That it was not a tenable argument and was not even beginning to be viable. That the Police had not identified who it was amongst any of the people implicated that they would expect to get 3 years.

p) That that was a starting point as to who they were pointing the finger at and why specifically there was a generic allegation against premises so the person who might be susceptible to the 3 year penalty had not been pinpointed and the justification for 3 years had by no means being pinpointed.

q) That Mr Grant referred to the case of ***Harvey*** and that in her submission simply demonstrate the desperate nature of the Police argument. That *Harvey* was a completely different case as it pertained to a dangerous child sex predator with serious form and mental illness whose offences were so serious and of such concern that the trial judge gave him life imprisonment.

r) That the Court of Appeal's reaction to that was that it did not justify life, but for a man who was dangerous and trying to lure little girls into his car again did not think 3 years was justified.

s) That 3 years was what the Court of Appeal deemed to be justified for offences of that gravity that gives an excellent benchmark as to the likelihood of 3 years being meted out for any of the allegations that had appeared in any of the Police material put before the Sub-Committee for a summary review.

t) That if it would not be likely to achieve a sentence of 3 years and that was the conclusion that the Sub-Committee reached, they were not in summary review territory and that we should not be here and that this was the correct analysis.

u) That this was a standard review and that if you look at the paperwork there was no urgency and the Crime Reduction Act was about urgent situations, the urgent need to lockdown premises for violent and serious crimes under the Crime Reduction Act if you look at the guidance etc. was focussing on knives. That the benchmark as to the purpose of introducing that summary review provision.

v) That the Police was running a clever legal argument courtesy of Mr Grant to bring these entirely novel Covid situations into a summary review scenario. That it was not necessary and was not required and there were powers enough to close premises for Covid purposes under the correct regime either using the Coronavirus Regulations using fixed penalties, fines, using health and safety at work and other measures as they were all there.

w) That this was a novel argument being run on an academic basis which was not appropriate and that this will need to be looked at in due course by the courts.

x) That the Public Sector Equality Duty (PSED) – as it happened the three clubs that the Police chose to bring to summary review for their operation – they went out on a Covid operation to see who were and were not complying more than once and the only premises that had been brought to summary review were ethnic minority premises.

y) That these were Afro/Caribbean premises all three of them and that the Sub-Committee might wish to look at that with some care as that triggered our PSED. That the Sub-Committee would want to know how many premises the Police investigated and what happened to the others.

z) That some of the evidence from the Police was that they had used the four E's approach – educate encourage and so on. That three premises only had come up for summary review and they were all black owned premises.

aa) That the Police will want to explain to the Sub-Committee whether this was because of enhanced risk of transmission or for some other reason and what happened to other premises that were not of the same ethnic orientation and were not of the same demographics.

bb) That if the Sub-Committee had any concerns whatsoever under its PSED for the way in which this case had be brought that was something the Sub-Committee needed to reflect in its reasons.

There were no questions to Ms Clover from Councillors Sharpe and Beauchamp.

In answer to the Chairman's questions Ms Clover made the following points: -

i. That she did not know the difference the DPS had made between the first visit by the Police to the premises on the 22 August and the second visit in September.

ii. That the two points that arose out of this were that it further demonstrated that because there had been a build up to the summary review proceedings one visit and then another visit etc. essentially the Police had lost patience rightly or wrongly and that might depend upon the answer to the question which she did not know the answer to.

iii. That it may be that someone from the premises could answer that question. That there was nothing urgent about that as far as the Police were concerned. If they had detected that there was non-compliance with the Covid regulations they had ample opportunity themselves or by engaging other officers to intervene and dealt with that under the appropriate powers.

iv. Summary reviews was about an urgent lockdown situation for premises that were causing immediate danger to the public in the way that we would

usually understand that there was an immediate problem and the public needed to be protected.

v. That the Sub-Committee may or may not regard Covid breaches as such a risk, that was a matter for the Sub-Committee. But put it in the context of the Police going there in August and finding there was a problem, if there was one and going back there again in August there was still a problem and going back there in September and there was still a problem and at that point bringing a summary review was her first point.

vi. That her second point was to make a distinction between breaches of regulation which was against the law, breaches of guidance which was not against the law and would not be getting a criminal penalty of any sort for that let alone 3 years and breaches of condition which was three completely separate things.

vii. That the police were not forensic enough in differentiating between those three in bringing the summary review.

The Chairman commented that in the certificate issued by the Superintendent it was noted that a request for CCTV dating back to the 22 August 2020 was requested. The Chairman enquired whether that request had been adhered to.

Ms Clover gave the following response: -

a. That she believed it had now, but that she did not know if it had been done at the time it was requested.
b. That Mr Moore could assist at this stage if the Chairman could be so kind as to what CCTV had been disclosed as he had gone through the CCTV. That she was aware that CCTV had been provided to the Police and that there were things on the CCTV that the Police took issue with and that was fine as far as she was concern.
c. That she was not challenging that today and without prejudice against anything that would be said in the future proceedings whether the full review or whether at the Magistrate's Court.
d. That she was not taking issue with that today which no doubt meant that the Sub-Committee would need to take its position on it at its highest, at its worst as she understood that it was the likelihood today.
e. That to a certain extent it might not be necessary to trawl through this to see who did this who did that as the Sub-Committee could pretty much take it at its highest for today's purposes.
f. That she did not know whether Mr Moore wanted to give the Sub-Committee a little bit more specifics on when the CCTV was handed over to whom and when.

Mr Moore stated that from what he understands the Police wanted two sets of CCTV – one of an incident the Criminal Investigation Department was dealing with and other footage from the night they visited in September. That he understood that the footage from the night the officers turned up in September that had been served on the Police. That he understood that the CCTV from the Criminal Investigation Department was also issued, however, it was all on the

same memory stick. That PC Rohomon wanted it separated and that he believed that this was available today.

The Chair addressed Miss Clover and stated that if they went back to the 26th September 2020 when the Police attended the premises at 0040 hours when everyone should have been out of the premises apart from the staff at 2200 hours on the 25th September 2020, what was the reason for the premises remaining open until 0040 hours.

Miss Clover stated that she was not dealing with evidential matters today and that she understood that it would likely mean that the Sub-Committee will take evidential matters at their highest against the premises. That there was no point for her to be descending into a point by point debate on the evidence as she understood where this would lead her and that no doubt the Sub-Committee's legal advisor as well. That she did not wish to take time on that as her case was worst case scenario whatever the Sub-Committee make of the evidence her legal point holds good.

There were no further questions from the Sub-Committee.

Mr Rankin counsel for the Sub-Committee addressed Miss Clover and stated that so that he could understand her case questioned whether Miss Clover was stating that because nobody could reasonably be expected to receive 3 years as a sentence of imprisonment for this sort of activity that therefore invalidate the certificate issued by the Superintendent.

Miss Clover responded, yes.

Mr Rankin questioned whether Miss Clover was challenging the issue of the certificate itself.

Miss Clover responded that summary review proceedings were inappropriate and should not have been brought. That this was not serious crime by definition.

Mr Rankin questioned Miss Clover how this had married up with ***Lalli v Metropolitan Police Commissioner [2015] EWHC 14 (Admin)*** and Deputy High Court Judge John Howell's judgment where he specifically stated that the place for a challenge to the certificate was not in front of the Licensing Sub-Committee. If you want to quash the certificate then you had to go to through the high Court.

Miss Clover responded that she had to exhaust her available rights to challenge and this Sub-Committee was entitled to decide whether this was a set of proceedings that fell within the remit of summary review at all. That this was a slightly different point to Lalli. That Lalli was about the nature of the quality of the offence. That this was rather different.

Mr Rankin stated that he was not sure that he understands the difference. That the principle as stated was that if Miss Clover wish to challenge the legality of the certificate the place to do so was not in front of the Sub-Committee, but at the High Court.

Miss Clover responded that the Sub-Committee were entitled to decide whether this was a serious crime within their remit or not and that she maintained that they were.

Mr Grant counsel for West Midlands Police made the following statements:-

1. That bearing in mind the submission the Sub-Committee had just heard from the licence holder he would keep his submissions shorter than they otherwise would have been.

2. That the Sub-Committee had read the papers and had seen what the Police had stated was a flagrant and brazen breaches of the Covid related regulations and indeed the obligation on operators to keep their place safe for their customers and staff.

3. That the Sub-Committee had seen the evidence of the 22nd August 2020 at 0500 a large gathering was inside the premises. That the Sub-Committee would have seen the warning meetings that were given to the operators – example a meeting of the Police held at Nakira on the 28th August 2020.

4. That the Sub-Committee would have seen what happened on the 26th September 2020 when the 2200 hours curfew applied when food and drink ought to have been served only to seated customers, yet at 0040 hours there was still a party going on at the premises.

5. That he would leave the facts there on the basis that the licence holder did not challenge them. That it also appeared that there was no direct challenge to whether if you were correctly able to consider this summary review that the Sub-Committee stated they were that the suspension ought to continue.

6. That there was no reason given to the Sub-Committee why the suspension should not continue until the full summary review hearing. That he will say this in relation to the legal challenge that he respectfully endorsed that Mr Rankin's suggestion that if there was a challenge to the legality of the summary review certificate then that lies to the High Court as ***Lalli*** was clear that it was not for the Sub-Committee to look behind that. That this was emphasised when we look at what was the legal test for the Sub-Committee today.

7. That the legal test for the Sub-Committee today was set out in the Licensing Act Section 53B 8. That for this hearing the authority must:-
    (a) Consider whether the interim steps were appropriate for the promotion of the licensing objectives and determine whether to withdraw or modify the steps taken.
    (b) That at this stage of the summary review, the Sub-Committee was entitled to take steps that promote any of the licensing objectives not simply the definition of serious crime, but public nuisance,

public safety, protecting children from harm and indeed general crime and disorder.

8. That this was the only test for the Sub-Committee to consider today. That the test of serious crime could be found in one of several different ways:-

    i. There was a reasonable expectation that someone may get 3 years or more;
    ii. Substantial financial gain and it could be safely assumed that this premises were not operating for charitable purposes; and
    iii. A large number of people in a common pursuit and we have a very large number of people in this venue.

9. That the Superintendent was perfectly entitled in his opinion to certify the serious crime, but this was simply the trigger for the application before the Sub-Committee.

10. That once it had been triggered the Sub-Committee only had to ask itself what it needed to do and what was appropriate to promote the licensing objectives until the full review hearing. T

11. hat the evidence showed clearly a brazen, flagrant disregard of people's safety by not complying with the Covid regulations and subsidiary guidance and that therefore suspension was the right course of action until the matter could be considered in full at the full review hearing.

The Chair stated that Miss Clover in her statement mentioned the number of premises that had been visited and where certificates had been issued all being from premises owned or managed by people from African origin and enquired whether Mr Grant wished to comment on that point.

Mr Grant advised that he had asked PC Rohomon to come in on that point.

PC Rohomon stated:-

- That as the Sub-Committee would be aware the first case was a nightclub in Hockley that took a lot of engagement from the Police.
- That the two cases that was being heard by the Sub-Committee today were from secondary visits on the 26 October 2020.
- That these were visits that were being made throughout.
- That the reason these were with the Sub-Committee today was simply that they had engaged with these premises and had tried to work with these premises that clearly in the eyes of WMP were not listening and were putting the public at danger.
- That race and anything else were not in WMP consideration as they were looking purely at public safety and what was going on at those licensed premises to bring it to the Sub-Committee's attention.
- That WMP made no point that these happened to be African/Caribbean premises. That this was just what they had found and when WMP was doing its intervention these premises had not being listening to the Police.

There were no questions from the Sub-Committee.

In summing up, Mr Grant on behalf of WMP stated that he did not have anything further to add.

In summing up, Miss Clover on behalf of the premises licence holder stated that she drew a distinction between the authority of Lalli and the current proceedings and her second point was the PSED duty that the Police through Mr Rohomon or Mr Grant had not answered the points that she had raised which was how many other premises were dealt with and what was the distinction between those other premises and the three that had been brought for summary review. We were given to understand that this was a coincidence, but the Sub-Committee had not been given that information and did not know how many other premises wee looked at by WMP and if the Police were understood in these proceedings that all the other premises were compliant and did listen to advice given over the course of months and of the visits these were the only three that did not. Miss Clover stated that she contested that and that the Sub-Committee PSED was engaged

At this stage the meeting was adjourned in order for the Sub Committee to make a decision and all parties left the meeting. The Members, Committee Lawyers and Committee Manager conducted the deliberations in private and the decision of the Sub-Committee was sent out to all parties as follows: -

4/161020 **RESOLVED**:-

That having considered an application made on behalf of the licence holder under Section 53B(6) of the Licensing Act 2003 to make representations against the interim steps imposed by the Licensing Sub-Committee on 1st October 2020 following an expedited summary review brought by West Midlands Police in respect of the premises licence held by RP Restaurant Limited in respect of Nakira, Queensgate, 121 Suffolk Street Queensway, Birmingham B1 1LX, this Sub-Committee determines:

- that it will not lift the interim step of suspension imposed on 1st October 2020 and in consequence the licence remains suspended pending the full review hearing on 23rd October 2020.

and

- that the interim step of the removal of Anton Gasparov as the Designated Premises Supervisor will also remain in place.

Before the meeting began the Sub-Committee was aware of the amended Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020, the updated version of the Guidance entitled 'Closing Certain Businesses and Venues in England' originally issued by HM Government on 3rd July 2020, and the Guidance entitled 'Keeping Workers and Customers Safe in Covid-19 in Restaurants, Pubs, Bars and Takeaway Services' issued originally by HM Government on 12th May 2020 and updated regularly thereafter.

The Sub-Committee was also aware of the special local lockdown measures (specifically for Birmingham) which had been announced by HM Government on Friday 11th September 2020, then introduced on Tuesday 15th September 2020. These measures were an attempt to control the sharp rise in Covid-19 cases in the city.

Furthermore the Sub-Committee was aware of the further national measures to address rising cases of coronavirus in England as a whole, which were announced by HM Government on 22nd September 2020. These national measures had been published on the "gov.uk" website on that date, and detailed the new requirements for all businesses selling food or drink (including cafes, bars, pubs and restaurants), ordering that all such premises must be closed between 22.00 hours and 05.00 hours. Other requirements for such premises included seated table service, wearing of masks, and participation in the NHS Test and Trace programme. These measures were an attempt by HM Government to control the sharp rise in Covid-19 cases nationally.

The pandemic had continued to be the top story in the national news across the Spring, Summer and now into the Autumn of 2020; the Birmingham lockdown, and also the new national measures announced on 22nd September, had been very widely publicised and discussed both in news reports and on social media. The Prime Minister, together with HM Government's Chief Medical Officer and Chief Scientific Officer, had recently resumed the televised 'Coronavirus Briefing' broadcasts which had been a feature of the first few months of the pandemic.

The Sub-Committee was also aware that since 1st October 2020 further HM Government Guidance and regulations had been introduced on 14th October 2020, namely The Health Protection (Local Covid-19 Alert Level) (High)(England) Regulations 2020 No. 1104. Birmingham is now ranked as Tier 2 High. These further measures formed no part of the deliberations. For the purpose of this hearing the Sub-Committee only took into account regulations and guidance that were in force on 1st October 2020.

Sarah Clover of counsel appeared for the applicant. Also in attendance was Carl Moore; Dexter Laswell and Antonio Mankulu.

Gary Grant of counsel represented West Midlands Police. Also in attendance was PC Abdool Rohomon; PC Ben Reader and Jennie Downing.

An initial ruling was required on the admissibility under Regulation 18 of The Hearings Regulations of an email from PC Rohomon which had been served on the council on 14th October 2020, but which was not included in the agenda papers and had not been served on Ms Clover until yesterday evening. The Sub-Committee determined not to allow it.

Ms Clover then indicated that she would not be challenging any of the evidence and sought instead to make legal submissions. She challenged the legality of the issuing of the Certificate under s.53A of The Licensing Act 2003 and signed by The Chief Superintendent.

In essence, she made three main submissions about the legality of the certificate:

i) In respect of the definition of 'serious crime' under s.81 of The Regulation of Investigatory Powers Act 2000 she maintained that no person if prosecuted for public nuisance (which carries a maximum sentence of life imprisonment) would reasonably expect to receive a sentence of 3 years' imprisonment in view of the fact that Parliament had built financial penalties only into the Covid-19 Regulations.

ii) Ms Clover maintained further that the WMP could not show that the activities had in fact had the effect of endangering lives, and that consequently the certificate had been issued unlawfully.

iii) The review should have been a standard review and not an expedited review.

Whilst these submissions were of academic interest, the Sub-Committee took the view that they had no bearing on its task today. The Sub-Committee was of the view that it was bound by the High Court decision in ***Lalli v Metropolitan Police Commissioner [2015] EWHC 14 (Admin)*** in which Deputy High Court Judge John Howell ruled on three occasions in his judgment (paragraphs 62, 70 and 75) that:

"the licensing authority is obliged to conduct the summary review even if it considers that the information available to the officer when he gave the certificate did not establish that the premises were associated with serious crime or serious disorder". (62)

"*In my judgment Parliament intended that the licensing authority should be entitled to treat an application for a summary review made by the chief officer of police as valid if it is accompanied by a certificate that apparently meets the requirements of section 53A(1) and has not been quashed. It is not obliged to consider whether or not it is liable to be quashed."(*70)

"In my judgment, therefore, the licensing authority was not obliged to consider whether or not Superintendent Nash was entitled to give the certificate that he did on the basis of the information then available to him". (72).

The Sub-Committee therefore had to accept the certificate on its face and apply its mind to its duty under s. 53B (8) and (9):

(8)At the hearing, the relevant licensing authority must—

(*a)consider whether the interim steps are appropriate for the promotion of the licensing objectives; and*

(b)determine whether to withdraw or modify the steps taken.

(9)In considering those matters the relevant licensing authority must have regard to—

(a)the certificate that accompanied the application;

(b)any representations made by the chief officer of police for the police area in which the premises are situated (or for each police area in which they are partly situated); and

(c)any representations made by the holder of the premises licence.

Ms Clover made a further submission under the Public Sector Equality Duty created by the Equality Act 2010 and maintained that WMP had targeted three premises for enforcement which were owned or operated by members of the black community. Carl Moore who drafted the application on behalf of the operator gave no notice this point would be taken. WMP and the LSC were taken by surprise. Statute compels the LA to hold a hearing within 48 hours to determine whether interim steps should continue pending review. Today was the last day on which a hearing could take place. In response, PC Rohomon explained that there had been a lot of engagement with these and the other two premises identified (including the case of Petite Afrique which the Sub-Committee was due to hear next). He said that they had tried to engage with them and that race was not in their consideration. They were looking only at public safety. It just happened that these premises were Afro Caribbean operated.

It was the view of the Sub-Committee that its duty under the Public Sector Equality Duty created by the Equality Act 2010 had been discharged, given the time available. The Sub-Committee had regard to the protected categories under The Equality Act 2010; the Sub-Committee was informed of '*The Brown Principles'* and accepted the assurances of the officer. It may be that when this matter comes before the LSC for the full review hearing on 23rd October 2020, PC Rohomon will have more information available in respect of other premises that he has visited and their cultural background.

Other than to make her submissions on the legality of the certificate, Ms Clover made no submissions in respect of the lifting of the interim steps.

Members heard the submissions of West Midlands Police, namely that in August 2020, when the new arrangements for reopening were being publicised and the lockdown was being eased for licensed premises such as pubs and bars, the Police had observed a general failure by the Nakira premises to follow the Government Guidance. Upon visiting the premises at around 05.00 hours on 22nd August 2020, Police found that loud music was playing at a volume which made conversation difficult, and also observed that there was no social distancing or limitation of numbers of patrons to allow for safe operation as per the Covid-19 requirements. 50 to 60 people were estimated to have been inside, with a further 15 to 20 outside. The Police ascribed these failures to unsatisfactory management by the premises licence holder and the designated premises supervisor.

The explanation given by the premises was that the people in the premises on 22nd August had in fact been "staff", who had been "carrying out maintenance work". This explanation was not accepted by the Police Officers who attended at 05.00 hours and witnessed that the large numbers of people at the premises were dressed for a night out, and loud music was playing.

It was also observed by Police that the premises licence holder was even in breach of an existing condition on the licence, namely that any operating beyond 04.00 hours must be notified to Police in advance. The Police were therefore concerned that the premises licence holder was being reckless in its style of operating, and was endangering public health by risking the spread of Covid-19.

A further visit on 26th September at 00.40 hours found the premises to be trading, in direct defiance of the order from HM Government that all premises serving food and drink must close by 22.00 hours. Around 20 to 30 people were found inside the premises, and social distancing was not being observed.

The Police explained that the premises' decision to trade in this unsafe manner, which was not compliant with the Government Guidance, was an overt risk to the health of individuals, families and local communities, at a time when the country is experiencing a national emergency. The Covid-19 virus is a pandemic which has required all licensed premises to act responsibly and in accordance with both the law and the Government Guidance when trading, in order to save lives. It was therefore a flagrant risk to public health for any licensed premises to breach the Government Guidance by trading in an unsafe manner.

Attempts by the Police to advise those at the premises had not been successful. Police had requested that the premises supply the Covid-19 risk assessment which is a mandatory requirement under the Government Guidance; this had not been forthcoming. The recommendation of the Police was therefore that the Sub-Committee should suspend the licence pending the review hearing.

All in all, the Sub-Committee considered the licence holder to have failed to take its responsibilities seriously.

The Sub-Committee therefore determined that it was appropriate, given this unchallenged evidence, that the interim step of suspension should remain in place in order to address the immediate problems with the premises, namely the likelihood of further serious crime. It also determined that the interim step of removing the DPS should remain. It was the view of the Sub-Committee that he was unable to run these premises according to law.

The Sub-Committee determined that the removal of the designated premises supervisor was a very important safety feature given that it was this individual who was responsible for the day to day running of the premises, i.e. the decision to defy the Government Guidance in order to trade as usual. Therefore the risks could only be properly addressed first by the suspension of the Licence, and secondly by the removal of the DPS, pending the full Review hearing.

In reaching this decision, the Sub-Committee has given due consideration to the City Council's Statement of Licensing Policy, the Guidance issued by the Home Office in relation to expedited and summary licence reviews, the Public Sector Equality Duty created by the Equality Act 2010 and the submissions made by the Police and by those representing the premises licence holder at the hearing.

All parties are advised that there is no right of appeal to a Magistrates' Court against the Licensing Authority's decision at this stage.

The meeting ended at 1100 hours.

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CHAIRMAN