

**BEFORE BIRMINGHAM CITY COUNCIL’S**  
**LICENSING SUB-COMMITTEE**

**A Summary Premises Licence Review under S.53A-D of the Licensing Act 2003**

**THE CHIEF CONSTABLE OF WEST MIDLANDS POLICE**  
**(“WMP”)**

**Applicant**

**- v -**

**RODRIQUE KOUAMO TANKEU**  
**(t/a “PETITE AFRIQUE BAR & RESTAURANT”**  
**previously “ LA REFERENCE”)**  
**160 Hockley Hill, Birmingham B1 19 1DG)**

**Premises Licence Holder**

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**WMP WRITTEN SUBMISSIONS**  
**ON FACTS & LAW**  
**For Review Hearing on 26 October 2020**

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*[Page references in square brackets are to the Agenda Papers p.1 - 106]*

**INTRODUCTION**

1. “Petite Afrique” (formerly known as “La Reference”) is a bar and restaurant in Hockley Hill, Birmingham. Since a transfer of the licence in May 2020, Mr Rodrique Tankeu has been both the Premises Licence Holder and Designated Premises Supervisor (“DPS”). He opened his newly-branded premises after the national lockdown on hospitality premises was lifted on 4 July 2020.

2. Since July, WMP officers have visited the premises on five occasions in line with the 4E's approach: engage, explain, encourage, enforce. In the first four of these visits Mr Tankeu was given advice and assistance on how to comply with the duties on him, as the licence holder, to provide a COVID-secure environment for his customers and staff and so help to protect the wider community. These included three visits from Sgt Nick Giess.
3. It was only after the fifth visit, when the venue was found to be operating after the 10pm curfew, in breach of COVID regulations and also failing to take proper account of guidance in order to provide a COVID-secure environment, that WMP instigated this summary review.
4. At the very best Mr Tankeu takes a criminally lax approach to compliance. It is more likely that he really does not care about it, save as a "tick-box" exercise to placate the authorities when they scrutinise his operation.
5. Mr Tankeu is either unwilling or incapable of abiding by the law and implementing COVID-secure measures in Petite Afrique. Either way, WMP have no confidence that - were this sub-committee to permit him to re-open the venue as a licensed premises - he would operate it in a manner that promotes the licensing objectives and is compliant with the new 3-Tier COVID related regulations now in force.
6. The COVID measures, both in regulations and guidance, are intended to secure the health and safety of Petite Afrique's staff, customers and the wider community by reducing the opportunities for a potentially fatal respiratory infection to spread during a national pandemic that has already resulted in over 43,000 deaths in the UK.
7. This is not a case involving a one-off inadvertent or unavoidable minor breach of technical requirements due to the COVID-19 pandemic. Nor is the behaviour exhibited the result of an innocent misunderstanding of complex legislation or changing rules by a well-meaning operator doing his very best in difficult circumstances. Indeed, these breaches have occurred despite engagement, advice and warnings from the authorities.
8. Rather, the breaches here are the result of deliberate, reckless or, at the very least, grossly negligent actions by the operator in order to further his commercial interests. He has operated without paying any serious regard to the wider consequences to the community of his actions during a national pandemic. Therefore, West Midlands Police ("WMP") consider this as a serious matter that undermines the licensing objectives.

9. Mr Tankeu appears to be exert little effective managerial control over this premises and his customers.
10. It is significant that WMP's application for review has received support from Birmingham's Licensing Enforcement, Director of Public Health, and Environmental Health teams acting as responsible authorities.
11. The sub-committee is entitled to take robust, appropriate and proportionate steps, warranted in the public interest, that achieve the twin aims of:
  - a. Preventing this operator from further undermining the licensing objectives, and
  - b. Deterring similar behaviour by this operator or others.<sup>1</sup>
12. As a consequence, WMP invite the sub-committee to revoke the premises licence<sup>2</sup>.
13. Should the sub-committee take that step, then WMP would ask that, additionally, the sub-committee suspends the premises licence as an interim step pending any appeal.<sup>3</sup>

## **FACTUAL TIMELINE & SUPPORTING WMP DOCUMENTS**

### ***8 August 2020***

14. In the early hours of 8 August, Sgt Nicholas Giess was deployed as an (acting) Inspector on Operation Reliant, which is WMP's response to licensing issues during the pandemic (among other things). WMP made a number of visits to licensed premises. Another operator raised concerns about the way Petite Afrique was operating and so police paid the venue a visit.
15. When they arrived, they witnessed a mix of people standing and others seated. A few women were dancing. The music was very loud to the extent that the officer had to shout to be heard when he spoke to Mr Tankeu. It appeared that the venue was operating in a pre-pandemic fashion.

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<sup>1</sup> In relation to licence review decisions also serving the purposes of deterrence, see *East Lindsey District Council v Abu Hanif* [2016] EWHC 1265 (Admin) (per Jay J at §16 and 18) and *R (Bassetlaw District Council) v Worksop Magistrates' Court* [2008] EWHC 3530 (Admin) (per Slade J at §32)

<sup>2</sup> Pursuant to s.53C(3)(e) of Licensing Act 2003 (LA2003)

<sup>3</sup> S.53D(3)(d) LA2003

16. Sgt Giess spent about 15-20 minutes speaking with Mr Tankeu who had the music turned down. Mr Tankeu asked anyone who was stood up or dancing to sit down. They went in the back office area where the officer explained that Mr Tankeu needed to keep the music at a much quieter level so that people did not have to shout as this reduced the risk of COVID infection spreading.
17. The high sound levels of the music was of particular concern to WMP as the Government guidance had issued in July, designed to assist bar and restaurant operators to operate in a COVID-19 secure manner, which stated:<sup>4</sup>
- “All venues should ensure that steps are taken to avoid people needing to unduly raise their voices to each other. This includes, but is not limited to, refraining from playing music or broadcasts that may encourage shouting, including if played at a volume that makes normal conversation difficult. This is because of the potential for increased risk of transmission particularly from aerosol transmission.”*
18. An extract from the relevant COVID Guidance (dated 3.7.20) is attached.
19. Sgt Giess asked about a Risk Assessment, which operators are required by law to undertake. However, Mr Tankeu had not conducted one at that point.
20. There were about 50-60 people inside. Sgt Giess advised Mr Tankeu about the need to ensure social distancing. At that time there was no social distancing measures in place. There was a discussion about the use of the pool table (for the purposes of this review hearing WMP do not rely on issues relating to use of the pool table, save in so far as it impacts on social distancing measures and the effectiveness of the overall COVID-secure measures taken).
21. Sgt Giess explained that the licensing team were there to assist and to contact them if he needed support.
22. At this time the COVID infection rate in Birmingham was rising. The City was on the government’s watch-list of areas that may need to be subjected to a local lockdown if the infection rates increased with devastating economic consequences. Hence, it was particularly important for hospitality operators to responsibly implement COVID-secure measures.

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<sup>4</sup> “Keeping workers and customers safe during COVID-19 in restaurants, pubs, bars and takeaway services”, 3 July 2020, § 4.5, p.26 (HMG). This Guidance has since been updated (most recently on 15 October 2020), but in all versions operators are advised to reduce loud music levels to avoid people having to shout in order to have a conversation.

23. This visit is evidenced in the witness statement of Sgt Giess at [p.85-87].

***15/16 August 2020***

24. Over the weekend of 15/16 August, Sgt Giess paid another visit to Petite Afrique. He was disappointed to find that, despite his earlier advice, he could not see evidence of any additional efforts by Mr Tankeu to make the venue COVID-secure.

25. The venue was busier than the earlier visit with about 80 customers inside. People were dancing together which potentially impacted on social distancing (and risked the venue being characterised as a prohibited nightclub or similar dance venue). A birthday party was taking place. Social distancing was not being encouraged by staff and tables were still too close to each other.

26. Once again, the music was so loud that Sgt Giess had to shout to make himself heard. There was no evidence of improvement in the way the venue was being operated. In fact things appeared to be worse.

27. This visit is evidenced in the witness statement of Sgt Giess at [p.86-87].

***28 August 2020***

28. As part of Operation Reliant, Sgt Giess attended Petite Afrique in the early hours of 28 August. The bar was busy again with some 80-100 customers. The music was still being played too loudly when the officer attended. People were dancing.

29. Sgt Giess spoke to Mr Tankeu and asked him why the music had been so loud given the earlier advice. Mr Tankeu said that the DJ must have turned it up and he “had not noticed”. He also said it was difficult to stop his customers from dancing.

30. Mr Tankeu produced a generic *blank* risk assessment form that had not even been completed. He promised to email a Risk Assessment to the Sergeant.

31. Later that day Mr Tankeu did email through a Risk Assessment, which the experienced police officer (and a trained Risk Assessor) described as “*completely inadequate and sub-standard*”. He viewed it, with some justification, as “*the worst attempt at a COVID Risk Assessment that I have seen*”.
32. This visit is evidenced in the witness statement of Sgt Giess at [p.87-89]. The (generic) Risk Assessment Mr Tankeu emailed through is at [p.91-106].

#### ***4 September 2020***

33. WMP officers attended the venue as part of Operation Reliant on 4 September at around 22:55hrs. This venue was causing WMP particular concern due to the way it had been operating in the past.
34. The music inside was, once again, being played very loudly.
35. Customers were in the premises drinking at tables. PC Reader asked Mr Tankeu to come outside so he could talk to him. Mr Tankeu told the officer that “*the music was just being tested and wasn’t normally that loud*”. In light of previous experiences, the officer found that an improbable coincidence (and in the bodycam footage Mr Tankeu does not sound very convincing when he says it). As indicated above, he had previously been advised on several occasions about playing loud music. Mr Tankeu also said he “*definitely*” understood that music should not be played that loudly.
36. WMP invite the sub-committee to consider why would Mr Tankeu be playing music so loudly, as a “test” whilst customers were inside - at 22:55hrs - rather than carrying out the test when the premises was closed to the public in the normal way? WMP suggest Mr Tankeu was not giving a straight answer about the music system being “tested” at this late hour.
37. The installation and use of a noise limiting device, set at a pre-set volume level, is a condition on the Premises Licence, see [p.40]. The officer asked Mr Tankeu whether he had a noise limiter device fitted. He replied “*I think we have one*”. He did not appear to fully understand what a noise limiter was (“*well the music comes out clearly*”). He then told the officer “*they told me they had one last time, when I had the talk with the DJ. I don’t know whether he said it’s broken or something like that. I’ll have to double check within him today, if it’s fixed*”.

38. This exchange was recorded on the officer's bodycam [see statement of PC Reader at p.82-83]<sup>5</sup>. There was no mention during this conversation of an engineer being on site sorting out the noise limiter or music equipment, as one would expect Mr Tankeu to have mentioned to the officer at the time when the issue of the noise limiter was raised.

39. In contrast, at the interim steps hearing on 16 October 2020, Mr Tankeu told the licensing sub-committee (through his Counsel and as recorded in the Decision Notice<sup>6</sup>) that on this date:

*“PC Reader did not enter the premises, but he voiced the opinion that the music was too loud. **Mr Tankeu explained that an engineer was on site putting a new noise limiter back on the wall.** It was denied that he said that he had no noise limiter”.*

40. Mr Tankeu repeats this claim in his own witness statement dated 26 September at [p.69, §3]:

*“Pc Reader told me that the music was too loud. I informed him that the sound engineers were on site and were testing the equipment.”*

41. However, as indicated, the recording of that exchange suggests otherwise. Although Mr Tankeu gave an (implausible) excuse to officers for the high sound levels (the music was being “tested”), he did *not* indicate that an engineer was on site installing a new noise limiter.

42. The bodycam footage also shows that PC Reader *did* fully enter the premises. He went up to the bar area to call on Mr Tankeu. In contrast in Mr Tankeu's witness statement placed before this sub-committee he states that the officers “*did not go round the premises, they stood right at the entrance and then went back out*”.<sup>7</sup>

43. Regrettably, it appears that Mr Tankeu has tried to mislead this sub-committee and has been caught out by the bodycam recording. The sub-committee may wish to take this into account when assessing the credibility of Mr Tankeu when he makes claims about other relevant matters in these review proceedings. WMP suggest that if Mr Tankeu is prepared to lie about relatively small matters, then he is also prepared to lie about the larger ones.

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<sup>5</sup> And the bodycam footage has been served on all parties if the sub-committee wish to view it.

<sup>6</sup> At p.17. Emphasis added.

<sup>7</sup> See §3 of Mr Tankeu's witness statement at [p.71]

44. This visit is evidenced in the statements of PC Reader at [p.76] and [p.82-83] as well as in the bodycam footage from this police visit.

### ***26 September 2020***

45. (The nationwide 10pm curfew on venues “carrying on” as bars or restaurants had come into force on 24 September).
46. On 26 September officers were again deployed on Operation Reliant. They drove past Petite Afrique at 22:20hrs and noticed a large number of vehicles outside. The metal shutters were half way down covering the main doors.
47. PC Reader entered the premises a few minutes later (around 22:23-22:24hrs)<sup>8</sup>. He found approximately 40 people, including staff, still inside the venue. This was well after the curfew hour. Social distancing measures were not in place. Customers were talking loudly, standing around and drinking at tables.
48. When police attended someone shouted inside the venue. When customers saw the police they quickly began to leave (suggesting they were fully aware they should not still be in the venue at that time). Officers took the view that, if they had not turned up, these customers would simply have remained in the venue for some time yet.
49. Mr Tankeu was present clearing tables. He came up to speak to the officers. He said he had been trying to get people to leave since 21:45hrs but they would not listen to him and “*didn’t want to go*”. He confirmed that his SIA security staff had left at 22:00hrs.
50. Even if the sub-committee were to take Mr Tankeu’s account at face value, the following points are apparent, and they suggest that he is not an operator who can be trusted to promote the licensing objectives and operate in a COVID-secure fashion in the future:
- a. He has little or no control over the operation of his premises or his customers;
  - b. If his customers do not “listen to him”, then how is it supposed they would listen to him in the future if he was permitted to re-open?

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<sup>8</sup> See CCTV footage for timings.

- c. Why would Mr Tankeu release his door supervisors at 22:00hrs when he still had plenty of people remaining in the venue who were using it as a bar/restaurant and were not listening to his (claimed) entreaties to leave so he could comply with the law? (It is a condition of the premises licence that SIA requirements need to be risk assessed before 11pm).<sup>9</sup>

- 51. WMP suggest that it is more likely that Mr Tankeu did not really mind if people remained in the venue after 22:00hrs. That is why he released his door supervisors. This displays a troubling disregard, and contempt, for the COVID regulations during a national pandemic.
- 52. It is unknown whether Mr Tankeu was collecting track and trace details from his customers as he was obliged to do.

### ***CCTV from 26 September 2020***

- 53. CCTV from this night has now been viewed by officers. A timeline is provided in PC Reader's detailed witness statement at [p.77-80]. These general conclusions can be drawn:
  - a. There appears to be little or no efforts made by staff to ensure groups abide by social distancing or the Rule of 6.
  - b. Individuals regularly mix with other groups – despite the demarcation strips on the floor and are unchallenged by staff when they do so.
  - c. With one or two exceptions, most the staff members, including Mr Tankeu himself, are not wearing masks even when in close contact with customers (they ought to be).
  - d. The bar area is congested with people standing up, some with drinks in their hand and others ordering from the bar whilst standing (they ought to order and be served whilst seated under the regulations).
  - e. Even after 22:00hrs customers drinking at the bar are left unchallenged and customers are served further drinks or takeaway food.

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<sup>9</sup> Condition 2c on [p.39]. After 11pm there is a requirement for at least 2 SIA door supervisors.

54. Specific observations suggesting the 10pm curfew was, at best, regarded with laxity by Mr Tankeu include:

- a. 21:49hrs - the large group in the booth are still pouring themselves glasses of wine/champagne from bottles in coolers on their table. Two males are standing by the table drinking. At least one walks off to chat to others standing by the bar holding drinks. Mr Tankeu returns to the bar.
- b. 21:49hrs – Mr Tankeu sells bottles of beer to two men who stand by the bar as they drink the beer.
- c. 21:52hrs - the disco lights go off and most the customers remain as before.
- d. 21:59hrs - staff are in very close contact with customers at the bar area who are paying by credit card/PDQ machine, none of whom are not wearing masks whilst this takes place (they should have been).
- e. 22:01hrs – Mr Tankeu is at the till. Three men remain at the bar with drinks right in front of him.
- f. 22:05hrs - most the customers remain in the venue drinking and chatting. There is no obvious sign staff are challenging them. A waitress brings what is thought to be a take-away food plate to a customer (this is not permitted and happens on other later occasions too). Males remain at the bar with drinks in front of them.
- g. 22:06hrs - a male is standing by the booth with a drink in his hand talking to the rest of the group. One member pours another drink from the bottles on the table.
- h. 22:08hrs – female staff member hands over a take-away food bag to a customer, takes cash from the customer and places it in the till.
- i. 22:10hrs – female staff member hands over a bottle of beer to male across the bar.
- j. 22:12hrs - Mr Tankeu (in a black shirt with white stripes) is seen talking to a male standing by the booth who hands him a series of (cash) notes. Mr Tankeu walks away and the male returns to talk to his friends with a drink in hand.

- k. 22:13hrs - a female comes out of the staff entrance and starts clapping as if to get people's attention. Another female has a white (food) bag in her hand and goes to sit down in the booth. Plates are collected from the table in the booth but customers remain seated whilst drinking. Mr Tankeu is standing next to the booth.
  - l. 22:15 – 22:23hrs – Mr Tankeu stands by the bar. He remains there for over 6 minutes making no attempt to get customers to leave. Several customers remain at the bar with drinks during this period.
  - m. 22:17-22:18hrs – two males, in two transactions, approach the bar and are supplied with drinks by the bar man. Credit card payment is taken from the second male (possibly by using mobile phone payment).
  - n. 22:19hrs – Mr Tankeu chats to a customer who is standing next to him. He takes a credit card payment from this customer.
  - o. 22:23 – Mr Tankeu goes over to the booth and removes the wine cooler containing bottles from the table. This sudden action coincides with the time police entered the premises. Customers rapidly leave.
55. The licence holder has also supplied a timeline of CCTV, including a view from outside the front door at [p.67-70]. It does not assist the licence holder's case very much as it records a considerable number of occasions when (unspecified) people are noted as *entering* into the premises from the *front* door after 10pm (e.g. at 22.11, 22.14, 22.15, 22.16, 22.17, 22.19, 22.21hrs on p.67).

### ***30 September 2020***

56. Chief Superintendent Green, on behalf of WMP, applies for a summary review and certifies that, in his opinion, the premises is associated with serious crime.
57. The application is at [p.6-7]. The accompanying certificate is at [p.10]

### ***1 October 2020***

58. The licensing sub-committee determined to suspend the premises licence and remove the DPS as interim steps pending the full review hearing. The operator did not attend that hearing.
59. The Decision Notice is at [p.11-13].

### ***16 October 2020***

60. The licensing sub-committee considered a challenge to the interim steps by the premises licence holder. The operator attended the remote hearing represented by Counsel. The sub-committee determined that the suspension of the premises licence and removal of the DPS should continue pending the full review hearing. It was the view of the sub-committee that the operator “*was unable to run these premises according to the law*”.
61. The detailed Decision Notice is at [p.15-22].

## **COVID-19 RESTRICTIONS, REGULATIONS & GUIDANCE**

62. Since March 2020, Government restrictions on the hospitality trade imposed by Regulations, and measures recommended in guidance, have been altered on several occasions in response to the dynamic health challenges facing the UK during the COVID-19 pandemic.
63. A breach of the Regulations is a criminal offence and so engages the prevention of crime and disorder licensing objective.<sup>10</sup>
64. Regardless of the specific terms of COVID-related regulations (and whether or not there is a criminal breach), all licensed operators are subject to a more general legal duty under the Health and Safety at Work Act 1974 to protect the health, safety and welfare of their employees and other people who might be affected by their business<sup>11</sup>. This includes staff,

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<sup>10</sup> See *R(Blackpool Council) v Howitt* [2008] EWHC 3300 (Admin) in relation breaches of regulatory provisions (the smoking ban in pubs) engaging the crime and disorder objective.

<sup>11</sup> See s.2-4 of the Health and Safety at Work Act 1974.

customers and the wider community. Operators must do whatever is reasonably practicable to achieve this aim.

65. On 3 July 2020, in time for the re-opening of most hospitality premises, the Government published important updated COVID-secure guidance for restaurants, pubs, bars and takeaways: “*Keeping workers and customers safe during COVID-19 in restaurants, pubs, bars and takeaway services*”.<sup>12</sup>
66. Operators are expected to have *regard* to this guidance when complying with their legal duty to ensure that they provide a safe environment for staff and customers. There is no legal duty on an operator to comply with every word or, necessarily, every measure mentioned in such guidance. But the July guidance advises businesses on how to open safely and gives practical considerations of how this can be applied in the premises. In the words of the COVID guidance: <sup>13</sup>

*“Each business will need to translate this into the specific actions it needs to take, depending on the nature of their business, including the size and type of business, how it is organised, operated, managed and regulated. They will also need to monitor these measures to make sure they continue to protect customers and workers.... to help you decide which actions to take, you must carry out an appropriate COVID-19 risk assessment, just as you would for other health and safety related hazards.”*

67. In relation to restaurants, bars and pubs that provide entertainment, including recorded music, the July guidance sets out, at §4.5, a number of “Steps that will usually be needed”, namely:
- a. Determining the viability of entertainment and maximum audience numbers consistent with social distancing outside and within venues and other safety considerations.
  - b. Preventing entertainment, such as broadcasts, that is likely to encourage audience behaviours increasing transmission risk. For example, loud background music, communal dancing, group singing or chanting.
  - c. Reconfiguring indoor entertainment spaces to ensure customers are seated rather than standing. For example repurposing dance floors for customer seating.
  - d. Encouraging use of online ticketing and online contactless payments for entertainment where possible.

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<sup>12</sup> The July document has since been revised, most recently on 15 October 2020

<sup>13</sup> P.5 of 3 July 2020 guidance.

- e. Communicating clearly to customers the arrangements for entertainment and clearly supervising with additional staff if appropriate.
68. Responsible operators should pay serious attention to this guidance and take it into account when ensuring that their operation is run in a COVID-safe and secure manner overall.
69. As part of this process, operators are legally obliged to carry out a Risk Assessment.<sup>14</sup> Moreover, operators are expected to effectively *implement* the measures set out in their risk assessment.
70. The main point in this case is that when an objective observer looks at the overall steps taken (and not taken) by this operator in order to achieve a COVID-secure premises, they were wholly inadequate.
71. The following timeline sets out, in summary form, the most relevant restrictions applicable to licensed premises introduced from March 2020 and introduced by way of Regulations:
- a. **21 March**<sup>15</sup> – certain businesses including nightclubs, pubs, bars and restaurants were ordered by regulations to close (with some exceptions for takeaway/delivery of food and drink). (The **lockdown** relating to movement of persons began five days later on 26 March).
- b. **4 July**<sup>16</sup> – (“**Independence Day**”) save for nightclubs, discos, dance halls and similar venues (which open at night, have a dance floor or other space for dancing by members of the public and provide music for dancing), the hospitality industry was permitted to re-open. This included the re-opening of pubs, bars and restaurants. Extensive industry specific guidance was issued by the Government to assist licensed premises in drawing up their risk assessments. A number of measures were proposed to assist operators to provide a COVID-secure environment. These measures included social-distancing (2m or 1m with risk mitigation), reconfiguring seating and tables to maintain social distancing, reducing and managing queues, managing capacity levels in a venue to avoid over-crowding, hygiene and sanitation measures.

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<sup>14</sup> See regs 3-5 of the Management of Health and Safety at Work Regulations 1999

<sup>15</sup> The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020, replaced from 26.3.20 with The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 which also introduced the original “lockdown”.

<sup>16</sup> By way of amendment to the No.2 Regs.

- c. **14 September**<sup>17</sup> – the **Rule of 6** was introduced by regulations. Subject to a number of exceptions (including larger households), gatherings in pubs, bars and restaurants were limited to groups of 6 persons who could not mix with other groups.
- d. **15 September**<sup>18</sup> – special regulations relating to **Birmingham** were introduced in response to an increasing COVID-19 infection rate. These regulations placed restrictions on households mixing in private dwellings.
- e. **18 September**<sup>19</sup> – restaurants, pubs and bars were required to collect the contact details of their customers for **track and trace** purposes (with QR codes mandatory from 24 September). Further obligations<sup>20</sup> were placed on hospitality operators requiring them to take reasonable measures to ensure (subject to certain exceptions) that: (a) table bookings for a group of more than 6 persons are not accepted; (b) groups of more than 6 are not admitted to the premises; (c) mingling between groups is avoided; and (d) an appropriate distance is maintained between tables (i.e. 2m or 1 m if barriers, back to back seating, or other mitigation measures).
- f. **24 September**<sup>21</sup> – amended regulations placed further restrictions on restaurants, pubs and bars (among other venues) from 5am on 24 September. A **curfew** of 10pm-5am was introduced, during which hours businesses “*must not carry on*” that business or “*provide that service*”. (The curfew provisions are headed “*Restrictions on opening hours of businesses and services*”<sup>22</sup>). After 10pm a premises could still provide a delivery/drive-thru service for food or drink in response to orders but not a take-away service. In addition, for restaurant, pubs and bars that serve alcohol for consumption on the premises, they may only do so if the food or drink is ordered by, and served to, **seated customers** and the operator must take all reasonable steps to ensure the customers remain seated whilst consuming the food or drink<sup>23</sup>. From 24 September both customers and staff (likely to come into close contact with the public) in restaurants and bars were required to wear **face coverings** whilst indoors

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<sup>17</sup> The Health Protection (Coronavirus, Restrictions) (No.2)(England) Regulations 2020 (“the No.2 Regs”)

<sup>18</sup> The Health Protection (Coronavirus, Restrictions) (Birmingham, Sandwell and Solihull) Regulations 2020

<sup>19</sup> The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020

<sup>20</sup> The Health Protection (Coronavirus, Restrictions) (Obligations of Hospitality Undertakings) (England) Regulations 2020.

<sup>21</sup> By way of amendment to the No.2 Regs.

<sup>22</sup> Reg.4A of No.2 Regs

<sup>23</sup> Reg.4B of No.2 Regs

unless they had a “reasonable excuse”, e.g. to remove a mask where it is reasonably necessary to eat or drink. (Some persons are specifically exempted from the face-covering provisions including police officers, PCSO’s and local authority officers).<sup>24</sup>

- g. **28 September**<sup>25</sup> – further obligations were imposed on operators to take all reasonable measures to prohibit customers **singing in groups** of more than 6, or **dancing** on the premises, or playing recorded music at **sound levels** above 85db(A) at source.<sup>26</sup> (These measures were later revoked on 14 October 2020). With effect from this day the requirement on hospitality undertakings to take all reasonable measures to ensure “mingling” between groups did not take place was replaced with a requirement to take such measures to ensure no person in one group “joined” another.
- h. **14 October** – the new 3-Tier Regulations (Medium, High and Very High Alert Levels) were introduced.

## **LEGAL FRAMEWORK**

### ***Full summary review hearing***

72. This full summary review hearing is held under s.53C of the Licensing Act 2003 (LA2003).

73. The licensing authority must:<sup>27</sup>

- a. hold a hearing to consider the application for the review and any relevant representations; and
- b. take such steps as it considers appropriate for the promotion of the licensing objectives.

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<sup>24</sup> The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place)(England) Regulations 2020 (as amended)

<sup>25</sup> The Health Protection (Coronavirus, Restrictions) Obligations

<sup>26</sup> The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) Regulations (as amended)

<sup>27</sup> S.53C(2)

74. The steps available to the licensing authority are: <sup>28</sup>
- a. to modify the conditions of the licence (which includes changes to permitted hours);
  - b. to exclude a licensable activity from the scope of the licence;
  - c. to remove the designated premises supervisor;
  - d. to suspend the licence for a period not exceeding three months;
  - e. to revoke the licence;
75. Licensing authorities must carry out their functions under the Licensing Act 2003 with a view to the promotion of the licensing objectives.<sup>29</sup>
76. The licensing objectives, all of which may be considered at this full summary review hearing, are:
- a. The prevention of crime and disorder
  - b. The prevention of public nuisance
  - c. Public safety
  - d. The protection of children from harm.
77. Each is of equal importance and the promotion of the four objectives is a paramount consideration at all times.<sup>30</sup>
78. In the case of Petite Afrique, the police submit that all the objectives, whether directly or indirectly, are engaged.
79. Steps taken to achieve the promotion of the licensing objectives should be evidence-based, justified as being appropriate for the promotion of the licensing objectives and proportionate to what it is intended to achieve.<sup>31</sup>
80. In carrying out their licensing functions a licensing authority must have regard to the licensing authority's Statement of Licensing Policy and the Secretary of State's Guidance issued under Section 182 of the Licensing Act 2003 ("s.182 Guidance")<sup>32</sup>.

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<sup>28</sup> Section 53C(3)

<sup>29</sup> Section 4 LA03

<sup>30</sup> S.182 Guidance at paragraph 1.4

<sup>31</sup> S.182 Guidance at 9.43

<sup>32</sup> Section 4, Licensing Act 2003

81. In relation to “Reviews”, the s.182 Guidance recognises that:<sup>33</sup>

*11.1- The proceedings set out in the 2003 Act for reviewing premises licences and club premises certificates represent **a key protection for the community** where problems associated with the licensing objectives occur after the grant or variation of a premises licence or club premises certificate.*

82. Similarly, the s.182 Guidance points out, in the context of reviews arising in connection with crime, that the duty of a licensing authority is to make decisions in the interests of the wider community and not simply those of the individual licence holder:

*11.26- Where the licensing authority is conducting a review on the grounds that the premises have been used for criminal purposes, its role is solely to determine what steps should be taken in connection with the premises licence, for the promotion of the crime prevention objective. It is important to recognise that certain criminal activity or associated problems may be taking place or have taken place despite the best efforts of the licence holder and the staff working at the premises and despite full compliance with the conditions attached to the licence. In such circumstances, the licensing authority is still empowered to take any appropriate steps to remedy the problems. **The licensing authority’s duty is to take steps with a view to the promotion of the licensing objectives and the prevention of illegal working in the interests of the wider community and not those of the individual licence holder.***

83. Hearsay evidence is admissible<sup>34</sup> although the High Court has observed that:<sup>35</sup>

*“Some evidence such as gossip, speculation and unsubstantiated innuendo would be rightly disregarded. Other evidence, even if hearsay, might by its source, nature and inherent probability carry a greater degree of credibility. All would depend on the particular facts and circumstances.”*

84. Given these are administrative/civil proceedings, where a factual issue falls to be decided the standard of proof is the balance of probabilities.

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<sup>33</sup> Chapter 11 “Reviews”. Emphasis added.

<sup>34</sup> *Westminster v. Zestfair* [1989] 88 LGR 288

<sup>35</sup> *Leeds City Council v. Hussain* [2002] EWHC 1145 (Admin)

85. The promotion of the licensing objectives is ultimately a forward looking exercise. Deterrence is also a proper consideration. In *East Lindsey District Council v Abu Hanif* (Admin), a licensing case involving the employment of illegal workers, the High Court (Jay J) made important observations of more general application to licence review decisions:<sup>36</sup>

*“The question was not whether the respondent had been found guilty of criminal offences before a relevant tribunal, but whether revocation of his licence was appropriate and proportionate in the light of the salient licensing objectives, namely the prevention of crime and disorder. This requires a much broader approach to the issue than the mere identification of criminal convictions. It is in part retrospective, in as much as antecedent facts will usually impact on the statutory question, but importantly the prevention of crime and disorder requires a prospective consideration of what is warranted in the public interest, having regard to the twin considerations of prevention and deterrence.”*

86. Similarly, in *R (Bassetlaw District Council) v Worksop Magistrates’ Court* [2008] EWHC 3530 (Admin), the High Court considered a case where a licence review followed sales of alcohol to underage test-purchasers. Slade J (at §32), referred to deterrence as a proper consideration in the context of licence reviews.

### ***The Superintendent’s Certificate***

87. The Superintendent’s certificate that accompanied this application for summary review is at [p.10]. The application itself is at [p.6-9].
88. In *Lalli v Commissioner of Police for the Metropolis* [2015] EWHC 14, the High Court indicated that it is not for the licensing authority to go behind the Superintendent’s Certificate stating that, in his opinion, the premises is associated with serious crime or serious disorder or both.
89. In the course of his judgment, Mr John Howell QC, sitting as a Deputy High Court Judge, stated [at §62]:

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<sup>36</sup> [2016] EWHC 1265. See also *R (Bassetlaw District Council) v Worksop Magistrates’ Court* [2008] EWHC 3530 (Admin), when the High Court considered a case where a licence review followed sales of alcohol to underage test-purchasers. Slade J stated at §32: “... Where criminal activity is applicable, as here, wider considerations come into play and the furtherance of the licensing objective engaged includes the prevention of crime. In those circumstances, deterrence, in my judgment, is an appropriate objective and one contemplated by the guidance issued by the Secretary of State.”

*“In my judgment 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.”*

And to similar effect [at §75]:

*“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. The licensing authority is not obliged to consider whether or not it is liable to be quashed.”*

90. The Court pointed out that the licensing authority’s own view as to whether the premises was “associated with serious crime or serious disorder” (even if different to the opinion of the senior police officer who signed the certificate) is not decisive on what steps are appropriate to take in order to the promote the licensing objectives as the summary review hearing. The Deputy High Court Judge stated [at § 63]:

*“The fact (if it be the case) that the licensing authority does not itself consider that any reasons provided for giving the certificate establish that there is an association between the licensed premises and serious crime or serious disorder is not of itself necessarily decisive for any decision about interim steps or for the determination of the summary review itself. The licensing authority may consider interim steps are necessary or appropriate for the prevention of crime and disorder (which is one of the licensing objectives) given further information provided, or representations made, by the chief officer of police or, when determining the summary review, by others... When doing so, as explained above, the authority may consider representations that do not relate to the crime prevention objective (as well, of course as those which do) and, as section 53C(2)(b) of the 2003 Act states, the authority must then take any steps as it considers appropriate for the promotion of the licensing objectives, not merely the crime prevention objective.”*

91. Finally, in the context of summary reviews, the Court in Lalli stated [at § 71]:

*“The statutory provisions describing the substantive functions of the licensing authority on receipt of the application for a summary review are focused solely on what may be necessary or appropriate for the promotion of the licensing objectives.”*

## *Public Sector Equality Duty*

92. At the interim steps hearing on 16 October 2020, Counsel for the licence holder invited the sub-committee to consider their obligations under the Equality Act 2010 and, in particular, the Public Sector Equality Duty (“PSED”) as contained in s.149.
93. WMP agrees that the PSED *is* engaged in these proceedings, as it is with every licensing determination by a local authority. WMP positively invites the sub-committee to consider their PSED when reaching their determination.
94. The PSED requires a public authority (which includes this licensing sub-committee), in the exercise of its functions, to have **due regard** to the need to:
- a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
  - b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
  - c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
95. The “protected characteristics” are: age, disability, gender reassignment, pregnancy and maternity, **race**, religion or belief, sex, sexual orientation.<sup>37</sup>
96. As in the interim hearing on 16 October, the sub-committee will wish to have regard to the “Brown Principles”.<sup>38</sup> In summary this means:
- a. Decision-makers must be made aware of their duty to have 'due regard' and to the aims of the duty.
  - b. Due regard is fulfilled before and at the time a particular policy that will or might affect people with protected characteristics is under consideration, as well as at the time a decision is taken.

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<sup>37</sup> S.149(7) of the Equality Act 2010

<sup>38</sup> Set out in *R(Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158

- c. Due regard involves a conscious approach and state of mind. A body subject to the duty cannot satisfy the duty by justifying a decision after it has been taken. Attempts to justify a decision as being consistent with the exercise of the duty, when it was not considered before the decision, are not enough to discharge the duty. General regard to the issue of equality is not enough to comply with the duty.
- d. The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision.
- e. The duty has to be integrated within the discharge of the public functions of the body subject to the duty. It is not a question of 'ticking boxes'.
- f. The duty cannot be delegated and will always remain on the body subject to it.
- g. It is good practice for those exercising public functions to keep an accurate record showing that they had actually considered the general equality duty and pondered relevant questions. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled the duty imposed by the equality duties.

- 97. In this case there is, at the time of writing, no evidence before the sub-committee suggesting that a decision to revoke the premises licence of the premises would have an adverse impact on any group of people with protected characteristics (e.g. the BAME community).
- 98. But, even if such evidence were to be produced, WMP submits that there is an overriding duty to promote the licensing objectives in an appropriate and proportionate manner in this case, having had due regard to the PSED. (Not least because the increased risks of COVID-19 infection as a result of acts and omissions by the operator impacts on all communities, including the BAME community who frequent the venue itself).
- 99. At the interim steps hearing on 16 October, there appeared to be an insinuation from the licence holder that WMP were unfairly and unjustifiably focusing their enforcement action on venues popular with the BAME community in Birmingham. That is denied. The statement of PC Abdool Rohomon (dated 20.10.20) deals with this issue at Agenda Papers [105-106].

## CONCLUSION

100. For these reasons WMP invite the sub-committee to revoke the premises licence of Petite Afrique and impose an interim suspension pending any appeal.

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