



BIRMINGHAM CITY COUNCIL

LICENSING SUB COMMITTEE C

FRIDAY 16th OCTOBER 2020

**LA REFERENCE (PETITE AFRIQUE), 160 HOCKLEY HILL,
BIRMINGHAM B19 1DG**

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 Mr Rodrigue Tankeu in respect of Petite Afrique (La Reference) at 160 Hockley Hill, Birmingham B19 1DG, 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 26th October 2020.

and

- that the interim step of the removal of Rodrigue Tankeu 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 were 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 Sub-Committee’s deliberations. For the purpose of this hearing it 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 were Carl Moore and Rodrigue Kouamo Tankeu.

Gary Grant of counsel represented West Midlands Police. Also in attendance were 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 two further statements from officers who had visited the premises on the dates mentioned. These statements were served by WMP in the early hours of this morning on Ms Clover and officers of the council. The Sub-Committee determined not to allow them to be admitted. WMP may of course rely upon them at the forthcoming review hearing.

Ms Clover then indicated that she would be challenging some of the evidence, as well as making legal submissions on the legality of the issuing of the Certificate under s.53A of The Licensing Act 2003 and signed by The Chief Superintendent.

In respect of the evidence Ms Clover submitted that:

Mr Tankeu was a former student at Coventry. The police had targeted a number of premises in operations. In early August PS Giess had visited the premises. Reference had been made to the police's 4Es principle (Engage, Explain, Encourage, Enforce). In Ms Clover's submission the officer was only concerned about the pool table which she says was not part of the Guidance at the time. She alleges that the officer came back in September and said that the pool table needed to be removed. It was said that Mr Tankeu complied even though this was "not a proper request to be made". No advice was given on the Guidance or the regulations. On 4th September 2020 PC Reader visited; he 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. PC Reader said that he would come back. The fact that the outside shutters were down was a good thing. Ms Clover said that it was "dissuasive". The SIA security had left the premises. Mr Tankeu was not serving drinks. He was dealing with customers. He is himself SIA registered. The CCTV showed 32 people in the premises at 22.23 hours. They were leaving. Some were wearing masks; some were not. There was table service. He did his best with the Covid-19 Guidance and regulations which are complicated. He does not accept that he was ignoring advice. He did as he was told, by removing the pool table (for example). It was not accepted that there was a breach of conditions.

In respect of the legality of the certificate Ms Clover submitted that whilst the maximum penalty for public nuisance at common law was life imprisonment, this was not so in the context of a summary review and would not attract a sentence of 3 years.

Ms Clover then addressed the other limbs of s.81 of The Regulation of Investigatory Powers Act 2000 which provides the statutory definition of "serious crime":

- *Results in substantial financial gain*; Ms Clover said that the premises was operating at less than half its capacity of 150 and had taken a huge financial hit.
- In respect of *Conduct by a large number of persons acting in pursuit of a common purpose* Ms Clover said that the WMP would have to show that they were all acting together to endanger the health of others.

She then repeated her point about the unlikelihood of anyone (as yet unidentified) receiving a 3 year custodial sentence.

Ms Clover said that she was not saying that the LSC had no jurisdiction, otherwise “we would not be here”. She continued: “If you are saying that you are bound by the certificate of the senior officer and that you cannot go behind that, then I would like to see that in your reasons”.

Ms Clover maintained that **Lalli** could be distinguished, but did not explain how.

Ms Clover said that “it was for the committee to decide what serious crime is and it can reject the certificate qualitatively”.

Whilst these submissions were of academic interest, the Sub-Committee took the view that they had no bearing on its task today. It was of the view that we were 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 the 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.

Mr Tankeu, in response to questions from Members, said that he had 60-80 covers inside, and that he had removed some tables and chairs to promote social distancing. He said that on 26th September 2020 he had 32 “in the book” and maybe about 45 in total. Not too busy. All guests are requested to take a seat. If anyone comes in they are told to take a seat. He tells them that it is table service only, but that some come to the bar anyway. He tells these to go away and that they will be served at the table. Some stand up to go to the toilet, and some stand up to pay their bill. He said that his clientele was primarily from Africa.

Ms Clover raised an argument under the Public Sector Equality Duty created by the Equality Act 2010 maintaining that WMP had targeted 3 premises that were owned or operated by members of the black community. These arguments were never raised in the written application before the Sub-Committee.

Whilst the Sub-Committee acknowledged that its duty under the Public Sector Equality Duty created by the Equality Act 2010 is a continuing one, it was of the view that if Ms Clover was going to take a PSED point, then it was incumbent upon her to have indicated that this was her position in the grounds of her application. 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.

The Sub-Committee was impressed by the number of visits that the police had made to the premises. It accepted the arguments of Gary Grant on behalf of WMP who submitted that the PSED duty was not engaged, and that the facts suggested the opposite: namely, that the police had bent over backwards to assist Mr Tankeu with advice and support.

In the view of the Sub-Committee, even if the PSED was engaged, the Sub-Committee had discharged our duty given the time available to it. It had

regard to the protected categories under The Act; it was informed of '**The Brown Principles**' and it accepted the assurances of the officer. It may be that when this matter comes before the LSC for the full review hearing on 26th October 2020, PC Rohomon will have more information available in respect of other premises that he has visited and their cultural background.

This Decision Notice will not rehearse all of the submissions of West Midlands Police. In broad terms, they were these: namely that from July 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 approach taken by West Midlands Police was to advise and offer guidance to licence holders and designated premises supervisors to assist them in following the new requirements.

However, this approach had not seemed to be working in terms of La Reference (Petite Afrique). Despite conducting numerous visits since the 4th July 2020, to explain the restrictions, Police had observed a general failure by the La Reference (Petite Afrique) premises to follow the Government Guidance. There were 5 visits in total from West Midlands Police - including three visits from the licensing Sergeant in August 2020.

Upon visiting the premises on the 4th September 2020, Police found that loud music was playing at a volume which made conversation difficult. The licence holder, who is also the designated premises supervisor, was unable to confirm whether a noise limiter (required as a condition of the licence) was in operation. He claimed that the music levels were simply "being tested" and would not usually be played at that volume.

On the 26th September the Police attended again, at 22.25 hours, only to discover that La Reference (Petite Afrique) was trading, in direct defiance of the order from HM Government that all premises serving food and drink must close by 22.00 hours. Around 40 people were found inside the premises, many of whom left hurriedly upon seeing Police arrive. Masks were not being worn by customers, and social distancing was not being observed.

The explanation given by the premises licence holder was that he had been trying to get customers to leave from 21.45 hours onwards, but the customers "would not listen to him, and did not want to go". This explanation was not accepted by the Police Officers once they examined the CCTV footage, which showed Mr Tankeu serving behind the bar shortly before 22.00 hours, not trying to get customers to leave. CCTV also showed that there was no table service in operation and customers were sitting at the bar

drinking. Social distancing rules were not being observed, and even some bar staff were not wearing masks.

The Police ascribed these failures to unsatisfactory management by the premises licence holder. The Police explained that the licence holder's 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 Police were therefore concerned that the premises licence holder was being reckless in his style of operating, and was endangering public health by risking the spread of Covid-19.

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 succeeded. Police had requested that the premises supply the Covid-19 risk assessment which is a mandatory requirement under the Government Guidance; the document supplied had been generic and the licence holder had stated that the document would be reviewed and updated on a weekly basis. All in all the Police had concluded that the licence holder was either unable or unwilling to comply with the Government Guidance; accordingly they had no confidence in him to trade safely. The recommendation of the Police was therefore that the Sub-Committee should suspend the licence pending the review hearing.

The licence holder did not attend the meeting of 1st October 2020 and did not send a representative. The Sub-Committee agreed with the Police that the licence holder had failed to take his responsibilities seriously. The Sub-Committee therefore determined on 1st October 2020 that it was both necessary and reasonable to impose the interim step of suspension to address the immediate problems with the premises, namely the likelihood of further serious crime.

There was some discussion towards the end of the instant hearing about whether the regulations required the closure of premises at 22.00. Regulation 4(A) of ***The Health Protection (Coronavirus restrictions)(No.2)(England) Regulations 2020*** states that "*a person responsible for carrying on a restricted business ...must not carry on that business....between the hours of 22.00 and 05.00*". The Sub-Committee took the view that Mr Tankeu was "*carrying on*" a restricted business outside of those hours.

The Sub-Committee therefore determined that it was appropriate 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, ie 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 on 26th October 2020.

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 Ms Clover, Mr Tankeu and Mr Grant 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.