BIRMINGHAM CITY COUNCIL

LICENSING SUB COMMITTEE C

FRIDAY 16 OCTOBER 2020

NAKIRA, QUEENSGATE, 121 SUFFOLK STREET QUEENSWAY, BIRMINGHAM, B1 1LX

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, 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.

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.