[2015] SC (Bda) 58 Civ (17 August 2015)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No.321

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE LIQUOR LICENSE ACT 1974

AND IN THE MATTER OF DECISIONS BY THE COMMISSIONER OF POLICE TO REFUSE PERMISSION TO THE APPLICANTS TO OPERATE CROWN & ANCHOR TABLES AT CUP MATCH 2015 AND TO REFUSE TO PROVIDE REASONS FOR THAT DECISION

BETWEEN:

(1) KENITH CLIFTON BULFORD

(2) JOHN BERNELL JEFFERIS

Applicants

-v-

THE COMMISSIONER OF POLICE

Respondent

REASONS FOR DECISION

(in Court)[1]

[1] The hearing of the Applicants' Originating Notice of Motion was administratively listed as an 'open' Chambers matter but ought to have been, as Mr. Mussenden clearly anticipated, formally listed in Court. The Judgment was circulated without convening a hearing to save time and costs.

Date of Decision: July 29, 2015

Date of Reasons: August 17, 2015

Mr. Larry Mussenden, Mussenden Subair Limited, for the Applicant
Mr. Brian Myrie, Attorney-General's Chambers, for the Respondent

Introductory

1. The centrepiece of the annual 'Cup Match' holiday in Bermuda is an annual cricket match inaugurated in 1902 as part of Bermudian descendants of slaves' celebration of Emancipation on August 1, 1834. In an unusually philosophical radio commercial for a local supermarket chain ('Lindos') which ran over this year's holiday period, the spirit of Cup Match was defined as "*a spirit of restorative justice for all those in our community who have been marginalised.*"

2. Cup Match takes place on the grounds of one or other of two traditionally Black working men's clubs. It is a festive occasion now attended by thousands of locals and visitors with diverse backgrounds. It is also an occasion where various vendors, typically small-scale entrepreneurs, are able to enjoy a prominence and access income-generating opportunities that may be shut off to them for most of the rest of the year. A major attraction away from the cricket field at Cup Match is popular dice-based game of chance known as 'Crown & Anchor'. The game is played at multiple tables under a large tent and is colloquially referred to as the 'Stock Market'.

3. Against this background, the Applicants, each of whom it must be noted was earlier this year acquitted in separate high profile criminal trials, applied on July 28, 2015 for leave to seek judicial review of the Respondent's decision on July 24, 2015 ("the Decision") to refuse them[2] permission to operate Crown & Anchor tables under a concession operated by Fun Tyme Entertainment Limited. I considered the application in electronic form and granted leave without a hearing via email on July 28, 2015 and the application was fixed for hearing on the afternoon of July 29, 2015, the day before Cup Match.

4. The essence of the complaint was that the Commissioner of Police had no lawful authority under the Liquor License Act 1974, when deciding whether or not to grant a Crown & Anchor permit, to deselect table operators proposed by the permit applicant either:

    (a) on character grounds and/or by reason of previous convictions at all;

[2] The application related to the 1st Applicant's two helpers was, sensibly, not pursued at the hearing.

(b) on the grounds of convictions which were spent under the Rehabilitation of Offenders Act 1976; and/or

(c) on the basis of undisclosed reasons based on confidential Police intelligence.

5. The Applicants sought Orders, *inter alia*, quashing the Decision and ordering the Respondent to grant approval to the Applicants to operate Crown & Anchor tables at Cup Match 2015. I granted that application on July 29, 2015 and now give reasons for that decision.

The leave application

6. The Notice of Application for leave to apply for Judicial Review complained that the Decision was wrong in law for a variety of reasons. The primary single complaint was that the in the absence of reasons, having regard to the absence of any statutory procedure for the grant of Crown & Anchor permits, the Decision was irrational and/or procedurally unfair.

7. The leave application was supported by the First Affidavit of Kenith Bulford which averred that "Fun Tyme" was an operator of a Crown & Anchor concession for Cup Match and he had an agreement with Fun Tyme to operate tables under their concession. On July 26, 2015 he was informed by Fun Tyme that the Respondent had refused permission for him to operate the tables. A similar account was set out in the First Affidavit of John Jefferis. The Applicants each estimated, based on past experience, the one table per day at Cup Match would generate between $40,000 and $50,000.

8. On the afternoon of July 27, 2015, after email chasing from the Applicants' attorneys, the reasons (which are set out in my ruling on the leave application below) for refusing to approve the nomination of the Applicants as table operators were provided. These were coherent reasons but I was unable to identify the statutory source of the power being exercised. The Application referenced the Liquor License Act 1974. But that Act merely contained the following provision definition in section 1:

> " *'unlawful game' means any game of chance or of mixed chance and skill for winnings in money or moneys' worth*—
>
> *(a)which involves playing or staking against a bank, whether the bank is held by one of the players or not; or*
>
> *(b) in which the chances, whether by reason of the nature of the game or the*

manner in which it is conducted, are not equally favourable to all the players; or

(c)in which the stakes or any part thereof are disposed of otherwise than as payment to a player in winnings; or

(d)which is played by means of a mechanical slot machine, <u>but does not include</u>—

….

<u>(iv)the game known as crown and anchor if played on the premises of any licensed club in accordance with the conditions of a permit issued by the Commissioner of Police</u>.

9. I accordingly resolved the ex parte application for leave (in respect of which no hearing had been requested) as follows:

"*Dear Acting Registrar,*

Please communicate the following decision to the Applicants' counsel and have a copy of this email placed on the file.

The application (which I have reviewed electronically) is a bit confused procedurally, but has obviously and understandably been prepared in haste. The so-called Ex Parte Summons for an injunction is duplicative of the Form 86 which is the correct means of commencing the application. No injunctive relief appears to be sought.

It appears that the real relief sought on an urgent basis is:

(a)leave to seek judicial review;

(b)an expedited substantive hearing of the application for judicial review;

(c)an order of mandamus compelling the Commissioner to issue a permit.

The only ground for seeking this relief articulated in the Notice of Application is (or appears to me to be) that the Commissioner has acted irrationally and

/or unjustly in refusing the Applicants a permit to operate Crown and Anchor tables without giving reasons.

The Affidavit of the First Applicant exhibits an email from Superintendent Howard to Mr. Mussenden sent on July 27, 2015 at 4.25 pm (in response to an earlier email from Mr. Mussenden seeking reasons for the impugned decisions) stating as follows:

> *'In considering applications for the game of 'Crown & Anchor', the Commissioner of Police must consider the antecedents of each person, which includes whether the person has been convicted of offences under the Criminal Code, Misuse of Drugs Act or other offences of which violence or dishonesty was an element. If the Commissioner is not satisfied of the character or competence of an applicant, that person will not receive approval to operate or service a Crown & Anchor Table.'*

This email explains by necessary implication that the Applicants have been refused a permit on character or competence grounds. It does not specify which grounds in circumstances where if the Applicants evidence is accurate competence could not be a valid refusal ground.

In the absence of particulars of the specific grounds for refusing each Applicant (the 2nd Applicant claims to have operated a Crown and Anchor Table at an Eastern Counties match earlier this month), the application is marginally arguable.

It is unclear to me from the reasons thus far given what statutory power the Commissioner is exercising in granting or refusing permits to operate Crown and Anchor Tables. Reference is made in the Notice of Application grounds to section 1(1)(iv) of the Liquor Licensing Act, the definition section, which explains that operating a Crown & Anchor Table with a permit from the Commissioner shall not constitute an "unlawful game". However, on a quick review of that Act and the Betting Act, it is unclear what the source of the substantive power to issue such permits is.

Without fuller reasons it is impossible to confirm the legality of the refusals and it follows that leave to seek judicial review must be granted.

I would further direct that a Notice of Originating Motion be filed and issued and served on the Commissioner forthwith returnable for tomorrow afternoon at 2.30 (or such other time as may be directed by the Registrar) and abridge the time for such service, subject of course, to hearing counsel for the Commissioner."

The inter partes hearing

<u>The Commissioner's evidence</u>

10. The Commissioner of Police himself swore an Affidavit in response to the application. He explained that his authority to refuse the Applicants permission to operate Crown & Anchor tables derived from section 1 of the 1974 Act. He explained that the application for a permit came from the St. George's Cricket Club ("the Club") which used an agent 14/68 Entertainment Ltd. (trading as Funtyme Entertainment- "the Agent"). He exhibited a form of contract between the Agent and operators which was to be entered into "*provided this application is approved by the Bermuda Police Service in accordance with Section 1 of the Liquor License Act 1974.*"

11. He also exhibited a "*Crown & Anchor Permit*", which referenced section 1 of the 1974 Act and set out the following "*requirements*":

> "*1. Full details of Applicant: Name, Date of Birth, Address and Occupation. (As402 check).*
>
> 2. *Time, Date & Venue of the event. If on Public Grounds; a copy of Parks approval.*
> 3. *If Liquor is to be sold; a copy of the occasional Liquor Licence.*
> 4. *If there will be amplified music: a Noise Permit may be required.*
> 5. *Number of Patrons/Guests anticipated at the event.*
> 6. *Name of Security Firm proving security and number of Guards, (recommended 1 guard to 50 patrons).*
> 7. *Full details of Vendors who will be managing the Crown & Anchor Tables for Criminal Records Checks. Names, DOB, Address and Occupation.*

8. *Once approved by the Commissioner of Police, a fee of $1,500 will be required.*"

12. The permits were apparently expressly issued on terms that there will be "*Criminal Record Checks*", but no higher level of scrutiny. The Commissioner also exhibits the Applicants' Criminal Record Office ("CRO") forms. He then deposes in paragraph 13 of his First Affidavit that permission for them to operate tables was refused firstly on the grounds of their antecedents, but also:

> "*(ii) Confidential information which has been gathered by the BPS as to the First and Second Applicants unsatisfactory character such as affiliation with criminal gangs, controlled drugs, violence and dishonesty.*
>
> *The confidential information is sensitive based on past and current investigation investigations and the BPS is not willing nor believe it necessary to release further information.*"

13. It is a matter of public record that the 1st Applicant was alleged to be a senior gang leader in a major money laundering trial where he was acquitted and the 2nd Applicant was charged with involvement in a major drugs conspiracy of which he was acquitted. So the fact that they are both regarded as persons of bad character by the Police is neither a surprise nor a secret. The question which this ground of objection immediately raised was whether this type of character objection is a consideration which the 1974 Act, by necessary implication, empowers the Commissioner to take into account in the far from angelic social and legal context of Crown & Anchor permits.

14. This question at the end of the day occupied centre stage; because Mr. Myrie was forced to concede, in light of Mr. Mussenden's piercing analysis of his clients' CRO forms, that all of the convictions were spent convictions for the purposes of the Rehabilitation of Offenders Act 1977. Mr. Myrie was nevertheless reluctant to concede that it followed that the Commissioner was not entitled to take such convictions into account.

The arguments of counsel

15. The first issue in controversy was whether the Applicants had sufficient interest to seek judicial review. Mr. Mussenden submitted that this Court should adopt the modern liberal approach to standing reflected in the House of Lords decision in *R-v-Inland Revenue Commissioners, ex parte the National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617 and applied by this Court in *Ming and Coleman-v-Commissioner of Education and Minister of Education* [2012] SC (Bda)

39 Civ (1 August 2012)[3]. Mr. Myrie countered with the argument that the Respondent dealt exclusively with the Agent, which alone had the right to challenge any decision made in relation to the permit process. In any event, the Applicants by seeking to become operators had contractually agreed that their ability to exercise these rights was conditional upon the Respondent carrying out the necessary vetting.

16. Mr. Mussenden's primary submission was that section 1 of the Liquor License Act 1974 could not be construed as empowering the Respondent to impose conditions on Crown & Anchor permits which dealt with matters such as previous convictions at all. The statute only contemplated, by necessary implication, regulation of matters such as hours of operation and alcohol use. Moreover, where public authorities were given the power to withhold licenses from undesirable persons, the usual legislative approach was for Parliament to make this power explicit. The Applicants' counsel referred, by way of illustration, to:

    (a) section 70 (2) of the Gambling Act 2005(UK): Commission explicitly empowered to have regard to integrity, competence and financial and other circumstances of applicants;

    (b) section 7 of the Pedlars Act 1894: discretion granted to justices of the peace to refuse certificates to applicants who were "*not fit and proper persons*";

    (c) section 10 of the Betting Act 1975: the licensing authority expressly authorised to have regard to applicant's character while persons convicted of offences of dishonesty were explicitly disqualified from obtaining a license;

    (d) sections 8, 10 and 12 of the Liquor License Act itself: although the licensing authority is given "*an absolute discretion with respect to the grant or transfer of a license*" (section 7), reasons for refusal must be given. Persons convicted of specified types of offences are explicitly disqualified (section 10). Interested persons and the Commissioner are empowered to object to the grant of licenses, but they must give notice of the grounds of their objection to the licensing authority and the applicant (section 12).

17. Mr. Myrie submitted that whatever drafting weaknesses there might be with the permit-granting power in section 1 of the 1974 Act, it had to be accepted that this was the source of the relevant power. He invited the Court to construe the provision as broad enough (and deliberately so broad) to enable the Commissioner to impose the

[3] [2012] Bda LR 48.

permit conditions which had been imposed for many years without challenge. When I put to him that it was unsatisfactory in this context for the Commissioner to seek to justify disqualifying the Applicants on the basis of confidential intelligence, Mr. Myrie submitted that the Court should accept on its face what was asserted by the Commissioner in good faith: *Breen-v-Amalgamated Engineering Union* [1971] 2 Q.B. 175. He also submitted that there was a basis for accepting without further enquiry objections based on confidential intelligence material, citing *R-v- Secretary of State for the Home Department, ex parte Adams* [1995] All ER (EC) 177.

Findings: the Applicants' standing to seek relief

18. The objections which were raised to the Applicants' right to seek judicial review mirrored private law principles of privity of contract. It was essentially contended that because the Commissioner 'contracted' with the Agent, and the Agent in turn contracted with the Applicants, the Agent alone had the standing to challenge validity of any conditions imposed by the Commissioner on the grant of a permit to the Agent.

19. This point, in very general terms, was entirely valid. There are certain aspects of the permit granting process, and the requirements specified by the Commissioner for applying for a permit, which persons in the position of the Applicants might well have no obvious need to challenge. As a general rule, moreover, jurisdiction cannot be conferred by consent; nor is it ordinarily possible to contract out of fundamental rights. But even if the contractual analysis were to be taken to its logical conclusion, the Respondent's own standard permit form only asserted the right to carry out a criminal records check, not any broader form of character assessment.

20. However, the appropriate analytical frame is to apply the judicial review standing test. And the recognised modern judicial review standing test is a flexible one, merely requiring the applicant to show "*sufficient interest*". It is flexible because, even though most judicial review applicants are in practice seeking to advance some personal interest unique to them, the overarching purpose of judicial review is to further the interests of good administration and the rule of law for the benefit of the public as a whole, rather than to advance the private interests of the individual applicant. This is why I stated in *Ming and Coleman-v-Commissioner for Education* [2012] Bda LR 48, in a passage upon which Mr. Mussenden aptly relied:

> "*31.The modern approach in any event is to take a liberal approach to standing assuming an arguable case for obtaining public law relief can be made out on the merits of the case. As Lord Diplock, one of the founding fathers of modern judicial review, opined in Inland Revenue Commissioners-v-National Federation of Self-Employed and Small Businesses Ltd. [1998] 1 All ER 93 at 107:*

> *'It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge… '*"

21. Order 53 rule 3(7) of this Court's Rules provides: "*The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates*". Our Order 53 is derived from an equivalent English rule introduced in England and Wales in 1977, and is in the same terms as Order 53 rule 3(5) of the English Rules. Lord Diplock in *Inland Revenue Commissioners-v-National Federation of Self-Employed and Small Businesses Ltd.* [1981] 1 All ER 93 (at 105d-f) assigned the following meaning to the term "*sufficient interest*" in Order 53 rule 3:

> "*My Lords, the expression 'person aggrieved' is of common occurrence in statutes and, in its various statutory contexts, has been the subject of considerable judicial exegesis. In the past, however, it had also sometimes been used by judges to describe those persons who had locus standi to apply for the former prerogative writs or, since 1938, prerogative orders. It was on this somewhat frail ground that it was argued that the distinction drawn in the Arsenal Stadium case between Mr. Ende's grievance as a ratepayer and his grievance as a taxpayer was relevant to the question whether the Federation as representing taxpayers was entitled to locus standi in the instant case. However this may have been before the new Order 53 was made, the draftsman of that order avoided using the expression "a person aggrieved", although it lay ready to his hand. He chose instead to get away from any formula that might be thought to have acquired, through judicial exposition, a particular meaning as a term of legal art. The expression that he used in rule*

3(5) had cropped up sporadically in judgments relating to prerogative writs and orders and consisted of ordinary English words which, on the face of them, leave to the court an unfettered discretion to decide what in its own good judgment it considers to be 'a sufficient interest' on the part of an applicant in the particular circumstances of the case before it. For my part I would not strain to give them any narrower meaning." [emphasis added]

22. Applying these principles to the facts of the present case, it was difficult to see how it could sensibly be concluded that potential Crown & Anchor table operators lacked sufficient interest to challenge the legality of the purported exercise of a statutory power which, if valid, would have the effect of depriving them of extremely valuable contractual rights and/or commercial opportunities. I accordingly had little difficulty in concluding that the Applicants had sufficient interest to challenge the legality of the Respondent's right to determine that, in effect, they were not fit and proper persons to operate Crown & Anchor tables at Cup Match.

Findings: the scope of the Respondent's discretion to impose conditions on the grant of permits under section 1 of the Liquor License Act 1974

Overview of the permit-granting power

23. The power granted by the definitions section of the 1974 Act to the Commissioner of Police to grant permits in relation the playing of Crown & Anchor is as broadly drafted a discretionary power as one can imagine. At first blush, it does not look like a discretionary power at all. It looks like a definition drafted in contemplation of a more substantive provision defining the scope of the permit-granting power to be included in the body of the Act; a substantive provision which, for reasons unknown, was never drafted.

24. I felt compelled to accept Mr. Myrie's sage submission that we had to "live with" section 1. It was not properly open to the Court to find that no power to issue permits existed at all simply because it was difficult to make sense of why the relevant power had been legislatively enacted in a peculiar way. I recently accepted the same broad submission which was understandably couched, in the context of a case which was not listed on an impromptu basis, in more legalistic terms:

> "32. *Mr. Perinchief submitted that while the application of the statutory provisions might be difficult, there was no ambiguity in the meaning of the words in their statutory context. Secondly, he submitted that the legislative intention of conferring on the Minister a role in the grant of Bermudian status under section 20B was clear. Overriding this clear legislative intention, by ignoring the statutory words in question because of difficulties in interpretation, was not justified in light of the canon of construction ut res magis valeat quam pereat (it is better for a thing to have effect than to be made void): Buckley-v-Law Society (No. 2)[1984] 1 WLR 1101.*"[4] [emphasis added]

[4] *Minister for Home Affairs-v-Carne and Correia* [2014] Bda LR ; (2014) 84 WIR 163.

25. It followed from the decision to give effect to an unusually broad discretionary power, which left entirely open the question of what procedure should be followed for the purposes of the application, that this Court must be empowered to ascertain what procedural tools Parliament must be deemed to have intended to confer on the donee of the power to facilitate the effective exercise of the relevant power. In the same case, I stated as follows:

> "*62. This is another context in which the rule of construction relied upon by Mr. Perinchief, it is better for a thing to have effect than to be made void, applies with equal force. The extract from 'Bennion on Statutory Interpretation', 3rd Edition cited by counsel states in material part as follows:*
>
> > *'An important application of the rule is that an Act is taken to give the courts such jurisdiction and powers as are necessary for its implementation, even though not expressly conferred.'*"

26. The factual matrix of the present case involved the purported exercise of a statutory power which the Applicants tacitly complained interfered with their fundamental rights. Although the evidence was in documentary terms understandably somewhat unclear, it appeared to me that they likely had valuable contractual arrangements with the Agent, conditional upon the Respondent's favourable vetting decision, which arrangements would (if the negative decision was valid) effectively disappear. Moreover, the Applicants were Bermudians and belonged to Bermuda for the purposes of section 11 (5) of the Bermuda Constitution. Just over two weeks before the hearing of the present application, I had ruled in *Melvern Williams-v- Minister of Home Affairs* [2015] SC (Bda) Civ (15 July 2015) that persons who belong to Bermuda enjoy a fundamental right not simply to reside in Bermuda but also to make a living here. Accordingly, I considered that the permit-granting power should be construed so far as possible in a manner which was consistent with upholding rather than restricting the constitutional right of Bermudians to make a living in the country to which they belong. And the only potentially relevant (for present purposes) way in which section 11 of the Constitution permits laws to interfere with this fundamental right is if they fall within the following exception:

> "*(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*
>
> > *(a) for the imposition of restrictions on the movement or residence in Bermuda or on the right to leave Bermuda of persons generally or any class of persons that are reasonably required—*
> >
> > > *(i) in the interests of defence, public safety, public order, public morality or public health; or*

(ii) *for the purpose of protecting the rights and freedoms of other persons…*"

27. Finally, and more prosaically, by the end of the hearing I accepted that this Court ought not to completely overlook the point I initially poured scorn on when Mr. Myrie opened his response. This was the Commissioner's very practical retort that "no one has ever complained before". While this could never be an answer to the merits of a purely jurisdictional challenge, it was a consideration that should properly discourage the Court from adopting an overly critical appraisal of a system which has apparently been operated by various Commissioners, without controversy or formal legal challenge, for over 30 years. Accordingly, the only condition or requirement which was subjected to scrutiny was the criminal vetting one, and the following three questions of statutory interpretation arose for determination:

    (1) did section 1 empower the Respondent to carry out checks for criminal records on prospective Crown & Anchor table operators at all?

    (2) (assuming (1) were to be answered in the affirmative) did section 1 empower the Respondent to disqualify prospective Crown & Anchor table operators based on the existence of "spent" convictions notwithstanding the provisions of the Rehabilitation of Offenders Act 1977? and/or

    (3) did section 1 empower the Respondent to disqualify prospective Crown & Anchor table operators based on undisclosed secret intelligence ?

<u>Question (1): the validity of the criminal record checks power</u>

28. I disposed of the present application on the assumption that section 1 does empower the Respondent to carry our criminal record checks on would-be Crown & Anchor table operators. This assumption seemed to be justified for the following reasons:

    (a) section 1 empowers the Commissioner of Police to grant permits for a form of gambling which is otherwise unlawful if carried out on licensed premises. The power is contained in a provision defining "*unlawful game*". Section 40(1)(c) of the Act makes it an offence for a licensed person to permit "*the playing of any unlawful game on his licensed premises*";

    (b) gambling on licensed premises is an activity regulated by the Act. The Act expressly provides that both the licensee and any manager should be "*fit and proper persons*" (section 15(1)(a)(i),(ii)). Persons who are convicted of certain specified offences are disqualified from holding licenses (section 10(2)). It is consistent with the scheme of the Act for gambling activities to be permitted subject similar character criteria being applied to those in charge of such activities;

    (c) as criminal records are maintained by the Police, and the Commissioner likely carries out CRO checks in respect of would-be liquor license

holders, it would be consistent with the scheme of the Act if section 1 was to be construed as conferring by necessary implication the power to carry out similar checks on prospective operators of Crown & Anchor tables, each of whom would be a 'manager' in their own right;

(d) while it seemed odd that the Parliament had decided to appoint the Commissioner of Police to be a "Crown & Anchor Czar", it would be even odder to construe section 1 as not empowering him to object to either:

(i) the grant of a permit to an applicant with a criminal record; or

(ii) the operation of Crown & Anchor tables by persons with a criminal record.

Question 2: the power to take into account spent convictions

29. Mr. Mussenden advanced the irresistible legal and factual argument that the Applicants' CRO forms disclosed only convictions which fell within the protective parameters of section 1 of the Rehabilitation of Offenders Act 1977. Section 1 provides that where a person has been convicted of offences which are not excluded from the operation of the Act (e.g. offences resulting in terms of imprisonment of more than three years and indeterminate sentences) and seven years has elapsed since his release from prison or conviction (whichever is the latest), those convictions shall be treated as "*spent*" and the person treated as "*a rehabilitated person*".

30. Mr. Myrie was forced to concede that the Applicants were according to the terms of the 1977 Act rehabilitated persons. Mr. Mussenden's ancillary submission, that it was accordingly not possible for the Respondent to reject the Applicants as Crown & Anchor table operators under section 1 of the 1974 Act, was equally compelling. He relied upon the following provisions, in particular, in section 4 the 1977 Act:

> "*4. (1)… a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction…*
>
> (4) *A conviction which has become spent or any circumstances ancillary thereto or any failure to disclose a spent conviction or any such circumstances shall not be a ground for dismissing or excluding a person from any office, profession, occupation or employment or from prejudicing him in any way in any occupation or employment.*" [emphasis added]

31. Unsurprisingly, Mr. Myrie was unable to advance any coherent case as to how these provisions could be said not to bind the Commissioner of Police in the exercise of his powers under section 1 of the Liquor License Act 1974. Accordingly, I was bound to find that the Applicants' criminal records afforded no lawful grounds for the Respondent rejecting them as prospective operators of Crown & Anchor tables.

Question 3: the power to take into account secret and undisclosed Police intelligence information

32. Accordingly, the last leg standing in the Respondent's case was the bold argument, which Mr. Myrie did not shrink from advancing, that the implied statutory power to vet persons proposed by the Agent as operators of Crown & Anchor tables at Cup Match included the power to rely upon secret and undisclosed Police intelligence information. I found that to be an astonishing proposition. After all, the only vetting power which was asserted in the Respondent's standard Crown & Anchor License form did not contemplate such an expansive vetting power in relation to table operators. It merely stated as follows:

> "7. *Full details of <u>Vendors who will be managing</u> the Crown & Anchor Tables for <u>Criminal Records Checks</u>. Names, DOB, Address and Occupation.*" [emphasis added]

33. The Act's scheme for the grant of licenses and the regulation of licensed premises is both detailed, rigorous and legalistic (the authority is chaired by the Senior Magistrate). This is doubtless because such premises are likely to be continuously operating and cumulatively serving large numbers of the public. When Crown & Anchor permits are granted by the Commissioner for Cup Match (and presumably County Matches as well), the applicants are seemingly the clubs, which are themselves licensees, acting through an agent. So the clubs as heavily regulated licensees have a vested interest in appointing responsible agents, and the agents have a vested interest in contracting with table operators who will not, ultimately, put the license of the clubs at risk. And the Crown & Anchor table operators, once on site, all have a vested commercial interest in maintaining an environment which attracts as many customers as possible and entices those customers to spend as much money as possible. The gaming activities in question are not permanent business establishments but occasional 'hustles', all taking place against the backdrop of a festive sporting event.

34. This context appeared to me to have a variety of inbuilt self-regulating features which diminished rather than intensified the need for such high-level vetting as would include secret intelligence information. Against this statutory and contextual background, in my judgment it was impossible to construe section 1 of the Liquor License Act as empowering the Commissioner of Police, by necessary implication, with the draconian power of preventing person with no or no admissible criminal records from operating Crown & Anchor tables at Cup Match. It seems to me that the circumstances in which statutory powers impacting on the citizen's fundamental right to make a living can be deployed by the State based on secret intelligence information gathered by the Police must, in a constitutional democracy (as opposed to a Police state) be very exceptional indeed.

35. Two possible examples which I canvassed with counsel in the course of the hearing were as follows. The Governor is about to appoint a judge, who once appointed will have full security of tenure and only be capable of being removed from office for serious misconduct which must be proven to the criminal standard of proof. He

requests the Police to carry out a security vetting. The judicial candidate would not be in the frame for appointment if he had a criminal record. The Governor must be able to have regard to secret intelligence material, although it is unclear to what extent he would be justified in acting upon it without satisfying himself that it is credible. A similar position would likely appertain in the case of the appointment of, in particular, a senior Police officer. It seemed to me to be ultimately obvious that the level of probity to be expected of occasional Crown & Anchor table operators was not so high as to justify the engagement of the State intelligence databases over and above the level of the criminal record check which was the only form of vetting explicitly referred to in the Respondent's own Crown Anchor Permit form.

36. What are the circumstances when the courts will accept without elaboration Police assertions based on information and belief and/or secret intelligence? The most obvious instances are normally based on express statutory authority. For instance, a search warrant may be issued based on reasonable grounds for suspecting various specified matters (Police and Criminal Evidence Act 2006, section 8). In appropriate circumstances, a court might be willing to issue a warrant based on secret intelligence information which is not or not fully disclosed. When objections to bail are raised, the courts might well be willing to accept, without more, objections based on undisclosed sources and information. The national security context is perhaps the most obvious setting in which the courts suspend normal rules of scrutiny in the wider public interest. One of the currently most controversial arenas is the admission of expert Police evidence as to gang membership in the course of criminal trials, a topic Mr. Mussenden pointed was being considered in relation to Bermuda by the Judicial Committee of the Privy Council.

37. In *Breen-v-Amalgamated Engineering Union* [1971] 2 Q.B. 175, the first of two cases referred to by Mr. Myrie, a Court of Appeal majority held, as a matter of construction of a trade union's rules, that a committee was not required to give reasons for its decision that a shop steward was not suitable to be re-appointed. This case involved the interpretation of the private rules of a private organisation, and did not involve access to employment rights under a public statute. But the decision was only upheld because, following a trial, it was established that the committee did not reject the candidate taking into account false allegations made against him which he was not given an opportunity to answer. This case merely confirms that, as a general rule, it is unfair to decline to appoint someone to an office on the grounds of secret prejudicial information, the complete reverse of what it was contended the Respondent was authorised by section 1 of the 1974 Act to do in the present case. In my judgment, the observations of Lord Denning in his dissenting judgment are more reflective of the principles which apply in the present context. Persons with no criminal records and experience of operating Crown & Anchor tables who have contracted with a licensee's agent to operate Crown & Anchor tables in my judgment have a legitimate expectation of being afforded an opportunity of enjoying their contractual rights. If they are refused an opportunity to do so by a statutory permit-granting authority, fairness requires that reasons will be given for that refusal. Lord Denning opined (at 191):

> "*If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing,*

or reasons given, then these should be afforded to him, according as the case may demand. The giving of reasons is one of the fundamentals of good administration."

38. The second case that the Respondent's counsel referred to in support of the proposition that public law decisions could be based on undisclosed reasons in appropriate circumstances did in fact involve the national security context: *R-v-Secretary of State for the Home Department, ex parte Adams* [1995] All ER (EC) 177. It involved an exclusion order against the leader of a political party in Northern Ireland made under the Prevention of Terrorism (Temporary Provisions) Act 1989. The relevant order was not made under an implied statutory power as in the case here, but an express power to make an exclusion order where the Secretary of State was "satisfied" that a person was either concerned in terrorism or was or might be attempting to enter Great Britain to commit acts of terrorism. The applicant challenged the legality of the exclusion order as contravening his free movement rights under the European Treaty, in part on grounds that no reasons had been given for the decision. The Divisional Court bench was comprised of Steyn LJ and Kay J (as they then were). Giving the judgment of the Court, Steyn LJ held that the underlying reasons for the exclusion order did not have to be given in that national security context:

> "*We asked Mr. Allen whether the Secretary of State must always give reasons under s 5. We gave the example of a case where the Secretary of State has before him the report of an informer about terrorist activities. With impeccable logic Mr Allen asserted that even in such a case the Secretary of State must always give some reasons. He acknowledged that the identity of the informer would have to be protected. But that protection cannot usually be ensured if the information which is disclosed condescends to dates and events. And anything less would amount to useless reasons. Taking into account the teleological approach of Community law, it would be unrealistic to insist on reasons which can serve no useful purpose. Having acknowledged the logic of Mr. Allen's submission, we have to say that his position appeared to us to be entirely unrealistic.*
>
> *But we consider that the answer to his submission is to be found in the Treaty. The rights under art 8a(1) are expressed to be 'subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give effect to it.' That brings into play, we hold, art 223, which provides that no member state shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. In addition, we hold, that if art 8a(1) is given a broad interpretation it is, in any event, subject to an implied derogation in respect of the interest of security of member states. The Council Directive (EEC) 64/221 of 25 February 1964, therefore becomes relevant. Articles 2(1) and 5 read as follows:*
>
> > *'Article 2*

(1)This Directive relates to all measures concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health . . . .

Article 6

The person concerned shall be informed of the grounds of public policy, public security, or public health upon which the decision taken in this case is based, unless this is contrary to the interests of the security of the State involved.'

That is the matrix against which we must consider the submission. And we must judge the matter in the light of affidavit evidence which comprehensively asserts that it would be contrary to the interests of the state to reveal the grounds on which the Secretary of State based his decision."

39. The legal context in that case was different in two fundamentally important ways. Firstly, the Secretary of State was given an express power to make an exclusion order on specified grounds from which the general basis of the reasons for the decision could easily be inferred. Secondly, the statute dealt with the prevention of terrorism, a specific and extreme threat to national security which is well recognised as requiring the use by the state of intelligence-driven covert law enforcement techniques. In this exceptional context, and still only guardedly, the courts have been willing to lower the level of scrutiny normally afforded to administrative decision-making. It is difficult to imagine a context more far removed from the context of regulating the occasional playing of Crown & Anchor under the Liquor Licensing Act than prevention of terrorism legislation.

40. In my judgment the power conferred on the Commissioner of Police under section 1 of the 1974 Act could not, as presently be drafted, be construed as a policing or national security power. I found it to be simply a regulatory power ancillary to the main object of the statute of regulating activities on premises licensed to sell alcohol which, coincidentally, was conferred on the Commissioner of Police. It was not a power found in the Police Act or a statute with a predominantly criminal character. Construing this power in a straightforward way, it was possible to conclude that Parliament by necessary implication should be deemed to have intended to confer the power to exclude persons with criminal records from operating Crown & Anchor tables.

41. On the other hand it would be a bridge too far to find that, by necessary implication, one must read into the permit-granting power the ability to deploy secret intelligence when vetting proposed table operators. That sort of power would more likely to be inferred in the context of reviewing the lawfulness of an arrest or a search, powers that properly fall within the domain of police operations which the courts are reluctant to trespass in.

42. It is entirely understandable that the Respondent, having regard to the very broad terms in which the relevant statutory power is drafted and the character of his office,

would have in good faith assumed that this was simply another area of policing operations in which traditional policing decision-making techniques could lawfully be used. On the other hand, the reliance in the present case on a far higher level of vetting than was contemplated in the Respondent's own Crown & Anchor Permit form, in the face of an unprecedented challenge to regulatory system which appears to generally work well, constitutes an impermissible form of "mission creep".

43. Mr. Mussenden placed my judgment in *Ming and Coleman-v-Commissioner for Education* [2012] Bda LR 48 before the Court. In that case, I referred to the following observations of Scott Baker JA (as he then was) in *Commissioner of Police-v-Allen* [2011] Bda LR 14:

> "*The Court always approaches judicial review applications in relation to police officers with caution. There is often a difficult boundary between those cases in which the Court will intervene and those in which it will not. For example, it will not intervene in operational decisions, but it will on occasion intervene in issues involving dismissal or discipline.*"

44. However, even operational decisions are not entirely immune from judicial review. In a case where I upheld a judicial review application challenging the legality of a search warrant, *Re Herrerro* [2004] Bda LR 9, I observed:

> "*99…The importance of ensuring substantive compliance with the law is perhaps greatest where popular support for a political "war" is at its highest, be it preserving precious property for Bermudians in the midst of an affordable housing crisis (as in the present case) or combating illicit drugs. As Lord Atkin observed in his famous wartime dissenting judgment in Liversidge-v-Anderson [1942] A.C. 206 at 225-246, only acknowledged to have been correct by the House of Lords in Rossminster nearly 40 years later:*
>
> > *'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified by law.'*"

45. Notwithstanding these high-flown sentiments, the present Judgment should not be taken to suggest that, even under section 1 of the Liquor License Act 1974, the Commissioner could never be legally entitled to rely solely upon secret intelligence in reaching a negative vetting decision. In the present case, the confidential material was merely being used in support of a finding that the Applicants were persons of unsuitable or unfit character. Taking judicial notice of the traditional ambiance of a Crown & Anchor tent, and respecting the legal and social policy underpinning the Rehabilitation of Offenders Act, such intelligence could probably only permissibly be

used to deselect a proposed table operator based upon "*defence, public safety, public order… or public health*"[5], but not "*public morality*" concerns.

46. If Parliament wishes to regulate Crown & Anchor operations at Cup Match and at other festive and occasional sporting events in such an intensive and rigorous way, in my judgment it can only do so through express rather than implied legislative powers. In the meantime, the Commissioner's existing policy of conducting criminal record checks on managing operators of tables is entirely unaffected by the present decision.

Conclusion

47. For the above reasons, on July 29, 2015, I granted the Applicants' judicial review application and, having quashed the relevant decisions, ordered the Respondent to approve the Applicants as Crown & Anchor table operators at Cup Match.

48. Unless either party applies to be heard as to costs within 21 days by letter to the Registrar, the Applicants shall be awarded their costs of the present application, to be taxed if not agreed.

Dated this 17th day of August, 2015 ______________________

IAN R.C. KAWALEY CJ

[5] Bermuda Constitution, section11 (2) (a) (i).