Neutral Citation Number: [2014] EWHC 3236 (Admin)

Case No: CO/3807/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2014

Before :

MR JUSTICE GREEN

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Between :

Gibraltar Betting & Gaming Association Ltd	**Claimant**
- and -	
(1) The Secretary of State for Culture, Media & Sport	**1st Defendant**
(2) The Gambling Commission	**2nd Defendant**
- and -	
(1) The Government of Gibraltar	**Interested Parties**
(2) The Gibraltar Gambling Commissioner	

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Dinah Rose QC, Brian Kennelly and **Jessica Boyd** (instructed by **Olswang LLP**) for the **Claimant**
Kieron Beal QC and Oliver Jones (instructed by **The Treasury Solicitor**) for the **1st Defendant**
Adam Lewis QC and Tom Cleaver (instructed by **The Gambling Commission Legal Department**) for the **2nd Defendant**
Lord Pannick QC and **Ravi S Mehta** (instructed by **Mishcon De Reya**) for the **1st Interested Party**
Charles Brasted (instructed by **Hogan Lovells International LLP**) for the **2nd Interested Party**

Hearing dates: 23rd & 24th September 2014

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Approved Judgment

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Mr Justice Green :

A. Introduction, issues and conclusion

(i) The Parties

1. The Claimant is the Gibraltar Betting and Gaming Association Limited ("GBGA" or "the Claimant"). It is a Gibraltar-incorporated trade association which represents the collective interests of international online gambling operators licensed or intended to be licensed in Gibraltar. The members are predominantly companies incorporated within Gibraltar. Its members, some of whom are familiar British names, provide gaming services to consumers in the UK. One of its members, Yggdrasil Gaming Limited ("Yggdrasil"), is situated, registered and licensed in Malta. It offers services to other gambling operators situated in Malta which in turn provide gambling services including to British customers. Yggdrasil is in the process of applying to be licensed in Gibraltar in order that it may provide business-to-business services to operators licensed in Gibraltar and providing services elsewhere.

2. The First Defendant is the Secretary of State for Culture, Media and Sport ("Secretary of State" or "First Defendant") and is responsible for policy making and legislative proposals with respect to gambling, racing and entertainment licensing. For the purposes of this case the Secretary of State appears in order to defend the Act of Parliament from this challenge. The Second Defendant is the Gambling Commission ("GC"). The GC was established pursuant to the Gambling Act 2005 ("GA 2005"). It is statutorily required to regulate commercial gambling in Great Britain and to exercise the powers granted to it by statute.

3. Her Majesty's Government of Gibraltar ("HMGoG"), and the Gibraltar Gambling Commissioner ("GGC"), have appeared as Interested Parties in this litigation.

(ii) Claimant's challenge

4. This is a challenge to the legality of and Act of Parliament. The Claimant challenges the legislative framework introduced by the Gambling (Licensing and Advertising) Act 2014 ("GLAA 2014") which amends the GA 2005. The Government described the changes as "*fundamental*" in its 2011 Impact Assessment. It entails a change from a system of regulation based upon place of supply to one based upon place of consumption. Under the old system the GC regulated operators who had equipment in the UK but not those that did not. These latter operators were not ignored but were permitted to advertise within the UK upon the basis (a) that they were from the EEA; or (b) that they were from Gibraltar; or (c) that they were based in States whose regulatory regimes the UK Government approved of (the so-called "White Listed states").

5. Under the old system the GC ultimately regulated between 15-20% of operators who supplied internet gambling to customers within the UK. Many of the larger operators had, in the wake of the introduction of the GA 2005, relocated to offshore jurisdictions such as Gibraltar or Malta. Indeed, approximately 55% of the operators providing on-line gambling in the UK are based in Gibraltar and are regulated there.

6. In about 2010 the Government began to consult over changes to the regime in view of concerns about its inability to exercise universal regulation. The exact reasons given for this have been the subject of intense debate in the course of this case. I will return to these later. Under the new regime the pivot for regulation is the place of consumption. Any operator either based in the UK or who operates facilities which could, in effect, be accessed in the UK is required to be licensed by the GC.

7. The Claimant challenges the new scheme. It is important from the outset to be clear about what is, and what is not, being challenged. It is not contended that any particular or specific component of the new regime is illegal. There is no specific condition that is to be imposed in a licence that is impugned. It is not, for example, said that there is no legitimate reason for demanding that licensees retain records, or provide regulatory returns, or pay fees, or respond to investigatory requirements etc. The challenge is taken up at the macro-level. The new regime in its entirety is unlawful because it is adopted for an improper purpose and in its implementation will not achieve any legitimate objective. The new regime will in actual fact undermine consumer protection and create perverse incentives which will encourage the uptake of unlicensed gambling. It is unnecessary and excessive in view of the fact that a less extreme and more proportionate alternative exists (in particular the so-called "passporting proposal" advanced by the Claimant) which would, more than adequately, meet any legitimate objective which the Government and Parliament could have for the regulation of gambling and would obviate all of the costs and burdens and inefficiencies of the new regime. Finally, it is submitted that the scheme is discriminatory in that it treats all operators alike even though there are clear and objective differences between them which Parliament has failed to take into account or pay due regard to. In particular it is said that off-shore on-line service providers are already subject to (extensive) regulatory burdens in their primary place of operation and Parliament has failed to take account of the risk of duplicated or unnecessary regulation in relation to those operators. This root and branch challenge is launched under Article 56 of the Treaty on the Functioning of the European Union ("Article 56 TFEU") which prohibits restrictions upon the provision of services between Member States unless they are proportionate and non-discriminatory.

8. The stance adopted by the Claimant is reflected in the all embracing nature of the declaratory relief sought which is that:

> "The New Licensing regime is unlawful, in that it is a disproportionate restriction on the freedom to provide services guaranteed by Article 56TFEU"

The Claimant also seeks a supplementary declaration that the decision of the Minister and the GC to adopt the new regime and reject the passporting proposal is irrational in domestic law:

> "The decision of the Minister and/or the GC to adopt the New Licensing regime, and to refuse to adopt the passporting proposal was irrational".

9. The Defendants, of course, reject these criticisms. They submit that the Claimant has mischaracterised the new regime, that the new rules are reasonable and proportionate and not discriminatory and that the passporting proposal would be cumbersome and

bureaucratic and, in any event, simply does not meet the concerns and objections that the Government and Parliament maintained to the old regime and which have led to the decision to introduce the new regime. They submit that in adopting the regime in the circumstances which prevail Parliament and the executive enjoy a wide margin of discretion to choose the appropriate method of regulation both under EU and domestic law. They also raise two important points of principle. First that the scope of protection afforded by Article 56 TFEU does not extend to an organisation such as the Claimant, which is a trade association and not a person providing services between Member States and that therefore the Claimant has no *locus* to bring the claim under Article 56 TFEU. Secondly, the provision of services between Gibraltar and the United Kingdom constitutes the provision of services within a single Member State and that any restrictive effects are "purely internal". It is submitted that for this reason also Article 56 TFEU is not engaged.

(iii) The expedited nature of the claim

10. This claim for judicial review has come before the Court on a highly expedited basis. The Bill received Royal Assent on 14th May 2014. The Commencement Order was made on 10th September 2014 and the principal provisions of the Act, amending the GA 2005, were scheduled to come into force on 1st October 2014. The Claim Form seeking judicial review was served on 13th August 2014. An application for urgent consideration was also made on 13th August 2014. Over the course of the ensuing two weeks the First and Second Defendants acknowledged service and served Summary Grounds of Resistance. The application came before Hickinbottom J on paper who granted permission to apply for judicial review on 12th September 2014. Detailed directions were given for the service of documents with the substantive hearing expedited and set down to be heard on 23rd and 24th September 2014. For reasons that I will return to later, it is necessary to record that Hickinbottom J concluded that whilst some grounds were stronger than others he was of the view that the case was arguable in its entirety. Further, he did *not* order the determination of any preliminary issues, for instance as to the *locus* of the Claimant to bring the claim.

11. The parties thereafter engaged in a Herculean effort to compile what turned out to be a very substantial body of documentary and witness statement evidence in readiness for the hearing. Inevitably, given the acute time constraints involved, applications were made during the hearing before me to adduce new evidence and I allowed new documents, statistics and witness statements to be admitted. I should add that I did not perceive any of the parties to be materially disadvantaged by the process. This is not least because the arguments advanced, in particular by the Claimant, are not new. They reflect submissions made over the course of a lengthy legislative process which included a consultation exercise and detailed pre-legislative scrutiny by a committee of the House of Commons which heard evidence in oral and written form from all sides of the debate. I would add that I am grateful to all counsel who appeared for the concise yet vigorous submissions made which assisted me significantly.

12. The scale and complexity of the issues arising meant that the production of written reasons for my decision was inevitably going to take me beyond the 1st October 2014 date for the new measures to come into force. I floated the idea with the parties that I would, if it was felt absolutely necessary, declare the result at a point prior to 1st October 2014 when I was sufficiently certain about my conclusions, with reasons to follow. Upon consideration, the Secretary of State indicated that his preferred course

was to delay the coming into effect of the legislation by one month until 1st November 2014 thereby giving me time to complete this judgment.

(iv) Summary of issues

13. The issues as they have arisen can be summarised as follows:

i) **Issue I: Whether the measures are disproportionate, discriminatory or irrational:** Is the new regime in violation of Article 56 TFEU upon the basis that it is disproportionate and/or discriminatory? Further, was it irrational and unlawful under domestic law for the First and Second Defendant to reject the Claimant's "passporting proposal"?

ii) **Issue II: Whether the Claimant has *locus* to seek a judicial review**: Does the Claimant have the right to invoke before the High Court the directly effective right contained within Article 56 given that it is a trade association which, itself, does not provide services in the United Kingdom but, rather, provides representational services to its members which are predominantly Gibraltar based gambling operators? The Defendants say Article 56 TFEU can be invoked in judicial review proceedings only by a person who actually provides cross-border services.

iii) **Issue III: The constitutional relationship between the UK and Gibraltar**: What is the proper analysis of the relationship between the UK and Gibraltar? Is a restriction imposed by the UK on the provision of services from Gibraltar to the UK a purely internal matter, or a restriction on trade between one Member State (the UK) and a third territory or is it even a restriction on trade between two different Member States? The answer to this first question informs the related question: To what extent does Article 56 TFEU apply to restrictions on trade which do not occur between Member States?

(v) Conclusion/Outcome

14. In relation to the issues arising I have concluded that the Claimant has not established that the new regime is unlawful under EU law or domestic law. It is neither disproportionate, nor discriminatory, nor is it irrational. The new regime serves a series of legitimate objectives. There is no reason to doubt Parliament's judgment that it will achieve a reasonable degree of effectiveness and there is no proper basis for concluding that it is or will be discriminatory in its effects. Further, I reject the submission that the new regime will create perverse incentives and lead to the creation of an illicit market of unscrupulous service providers. I also reject the submission that the passporting proposal would meet the legitimate objectives of Parliament or prove effective or achievable without significant bureaucracy and extra cost. My conclusions in relation to the decision of Parliament to adopt the new legislative regime apply equally to the position of the GC in relation to implementation.

15. I have, in arriving at this conclusion on the EU law grounds, applied a test of *manifest in/appropriateness.* But I have also concluded that had I applied any more intensive or intrusive standards of judicial review (whether under EU or domestic law) I would have come to the same conclusion. The Government addressed itself to all of the

relevant considerations, it has explained its policy in terms that are logical and rational, and it had a sufficient basis of evidence or concerns for its position to be warranted. There are no errors or flaws in that logic or in the procedures which led to the adoption of the final policy conclusion. This, in my judgment, is a clear cut case.

16. As to the other two issues (*locus* and the constitutional status of Gibraltar) the outcome of these additional issues has no bearing upon the conclusion in this case which is that the challenge fails. They were however advanced by the Secretary of State as fundamental and threshold objections to the entire challenge. I have decided therefore that I should address them fully. My conclusions on these are as follows.

17. First, so far as *locus* is concerned I have concluded that on the facts of this case the Claimant did have the right to bring this claim and I would not have refused appropriate relief purely upon the basis of lack of a sufficient interest.

18. Secondly, in relation to the constitutional position as between the United Kingdom and Gibraltar I have concluded that Gibraltar is not to be treated as the same Member State as the UK for the purpose of Article 56 TFEU. Equally, Gibraltar is not a Member State in its own right so a restriction on trade between itself and the UK is not one on inter-Member State trade. Gibraltar is a territory with a different legal and political status to that of the UK as is made clear in Article 355(3) TFEU. However, the conclusion that Gibraltar and the UK are legally separate does not mean that a restriction on the provision of services between the two territories is without more a restriction engaging Article 56 TFEU. Whether there is such a consequence is a question of fact which focuses upon whether any of the restrictions are capable of exerting a spin-off, indirect, effect on inter-Member State trade. In the event, whilst I have expressed scepticisms as to whether such an effect could in fact arise, it has not been necessary to form a decided conclusion on this.

19. The end result is that the claim does not succeed.

B. The regulatory regime under challenge

(i) Introduction

20. I turn now to consider the new regime which is the subject matter of the Claimant's challenge. It is necessary to describe the scheme in its entirety because the Claimant's challenge is to the whole scheme and not to certain parts only. In this section I have set out my views, *en passant*, on some of the complaints made by the Claimant about the structure of the new regime. In particular I have set out conclusions on: the extent to which the regime may be subsequently revised to take account of new developments, the extent to which the scheme permits the GC to exercise discretion and flexibility, and, the burden of fees.

21. The GA 2005 is subject to amendment by virtue of the GLAA 2014. In the text below I will, for the sake of convenience, refer to the GA 2005 albeit in its amended form.

(i) The Gambling Act 2005 (GA 2005) and relevant changes brought about by the Gambling (Licensing and Advertising) Act 2014 ("GLAA 2014")