



**IN THE SENIOR JUDGES' COURT OF THE SOVEREIGN BASE AREAS OF
AKROTIRI AND DHEKELIA**

SITTING AT EPISKOPÍ

Judicial Review 1 of 2013

**Coram: The Hon. Mr Justice AR Collender Q.C., Presiding Senior Judge
The Hon. Mrs Justice A Robinson, Senior Judge
The Hon. Mr Justice C Burn, Senior Judge**

[REDACTED]

Claimant

-and-

The Administrator of the Sovereign Base Areas of Akrotiri and Dhekelia

First Defendant

**The Attorney General and Legal Adviser
Sovereign Base Areas of Akrotiri and Dhekelia**

Second Defendant

**Dr Christos Clerides for the Claimant
Mr Michael Hadjiconstantas for the Defendants**

26 February 2014

JUDGMENT

The Hon. Mr Justice AR Collender Q.C.

This is the judgment of the Court.

INTRODUCTION

1. This is a claim for judicial review by the Claimant of a decision by the Administration of the Sovereign Base Areas of Akrotiri and Dhekelia ("the SBAs") whereby they refused to amend legislation fixing opening hours for licensed premises in the SBAs so as to equalise them with licensed premises in the Republic of Cyprus ("The Republic").
2. As a preliminary, the Court notes that the claim is brought against the Administrator and the Attorney General of the SBAs. This appears to be because the decision letter dated 14 May 2013, was written by the Attorney General and complaint is made that he had no power to make the decision enunciated in the letter. However, it is clear to the Court that the letter was written on behalf of the Administrator who is the effective Defendant to this claim and by which name, hereafter the Court will refer to the Administrator.
3. The Claimant is the owner, licensee and manager of the long established public house, "██████████". He has sought for many years to extend his licenced hours, and latterly, to bring them into line with those permitted within the Republic. Although extensions have been granted by the Defendant over the years, he has consistently refused to extend the hours to mirror those applicable within the Republic. The most recent refusal was given by the letter of 14 May 2013.
4. The Claimant contends that the current legislative scheme governing the granting of liquor licences within the SBAs, by reason of its failure to mirror that within the Republic, is contrary to the Claimant's rights under the Treaty of Establishment and associated exchange of notes and is, further, a breach of his human rights. The Claimant also claims damages. On 26 September 2013, the Court gave directions that if liability is established, a hearing on quantum should take place at a later date.
5. In summary the Defendant's position is:
 - 1) This challenge is ostensibly brought against a recent letter but in truth the challenge is brought against a much earlier decision in respect of which a court of competent jurisdiction has already ruled that no extension of time should be granted;

- 2) The challenge is procedurally an abuse of process because it is an attempt to re-litigate decided issues and/or it is a collateral attack upon earlier decisions;
- 3) In any event, the challenge is substantively without any legal merit.

THE FACTUAL BACKGROUND

6. The Claimant's public house is situated at [REDACTED] Street, in the village of Akrotiri, on the outskirts of Limassol. [REDACTED] Street is the main road leading from Limassol down the Akrotiri peninsula to the village of Akrotiri and the UK RAF base. In broad terms, the public house is in an area of mixed residential and commercial use, including a number of establishments providing a variety of refreshments.
7. The Claimant has been the proprietor of the public house for many years; certainly since 1997.

The SBAs

8. The SBAs consist of two areas of the former Colony of Cyprus. They were created in 1960 pursuant to the Cyprus Act 1960 and the Treaty of Establishment by which the majority of the land of Cyprus was ceded by the UK Government to the Republic.
9. Around the time of drafting the Treaty, the UK Government, by means of an exchange of notes made certain commitments concerning the Administration of the SBAs. These commitments are commonly referred to as "Appendix O", they being contained in an Appendix so named in a draft of the Treaty. However, that Appendix was not an Appendix to, nor was it any part of the final Treaty. (See *Area Officer of Akrotiri v Demetriades* Case no. 9 of 2010 at paragraph 11.)
10. The note, signed by Sir Hugh Foot, as the representative of the UK Government dated 16 August 1960 included a declaration by Her Majesty's Government regarding the Administration of the SBAs ("The Declaration") stating that the main objects to be achieved were:

"(1) Effective use of the Sovereign Base Areas as military bases.

(2) Full cooperation with the Republic of Cyprus.

(3) Protection of the interests of those resident or working in the Sovereign Base Areas."

11. Paragraph 2 of the Declaration, inter alia, stated:

Her Majesty's Government further declare that their intention accordingly will be -

"(I) Not to develop the Sovereign Base Areas for other than military purposes.

(II) Not to set up and administer "colonies".

~~(III) Not to create custom posts or other frontier barriers between the Sovereign Base Areas and the Republic.~~

(IV) Not to set up or permit the establishment of civilian commercial or industrial enterprises except in so far as these are connected with military requirements, and not otherwise to impair the economic, commercial or industrial unity and life of the Island.

...(VI) Not to allow new settlement of people in the Sovereign Base Areas other than for temporary purposes."

12. Paragraph 3 of the Declaration, inter alia, stated:

"With these purposes in mind, and subject to their military requirements and security needs, Her Majesty's Government make the following declaration of intention -

(1) Freedom of access

Cypriots (and others resident in the Republic) will have freedom of access and communications to and through the Sovereign Base Areas, and of employment and cultivation in the Sovereign Base Areas and freedom of navigation and fishing in the territorial waters thereof.

(2) Legislation

The laws applicable to the Cypriot population of the Sovereign Base Areas will be as far as possible the same as the laws of the Republic.

(3) Protection of Cypriot Rights

The rights of Cypriots (and others resident in the Republic) and Cypriot communities and corporations in regard to property will be fully protected....."

13. Receipt of the Declaration was acknowledged on the day it was sent by Archbishop Makarios and Dr Kutchuk, they being respectively the President and Vice - President of the Republic.

14. The constitutional structure of the SBAs is defined by the Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960. This provides, inter alia, by Article 2 that there shall be an Administrator of the SBAs who shall be a serving officer of Her Majesty's Forces and by Article 4 that he shall have the power to make laws for the peace, order and good government of the SBAs.
15. The law applicable in the SBAs, which have the status of a British Overseas Territory, consists of ordinances and secondary legislation of the SBAs as well as UK Statutes and Orders of Her Majesty in Council which are applicable either to Her Majesty's Overseas Territories generally or specifically to the SBAs. The common law of England and the doctrines of equity apply as well except where other provision has been or shall be made by an ordinance.

Liquor licencing in the SBAs

16. Since 1999, the Republic has regulated opening hours by primary legislation. Opening hours for premises similar to those of the Claimant vary between the winter and summer season and vary between weekdays and weekends, to give closing times of 2.00 a.m. (weekdays) and 3.00 a.m. (weekends) in the winter and 2.30a.m. (weekdays) and 3.30 a.m. (weekends) in the summer.
17. The licensing laws in the SBAs are regulated by both primary and secondary legislation and the opening hours are more restricted than those of the Republic. SBA law Cap. 144 provides that:

"(1) All premises or places in respect of which a retailers licence is issued under the provisions of this Law shall be opened and closed as the Governor may, either generally or with regard to any particular area, direct by an order published in the Gazette.

(2) In any order made under subsection (1), the Governor may authorise the Commissioner to extend, by special permit under his hand, the time during which any premises or place on which intoxicating liquors are sold by retail may remain open on any night specified in such special permit on payment of such fee... as may be prescribed by the order."

18. The relevant order is the Sale of Intoxicating Liquors (Retailers Closing Hours) Order 1966 ("The 1966 Order") as amended in 2000. This provides that the basic closing hours for premises such as those of the Claimant are 12.30 a.m. (weekdays) and 1.00 a.m. (weekends) in the winter and 1.00 a.m. (weekdays) and 1.30 a.m.

(weekends) in the summer. Since October 2000, the days and seasons mirror those in the Republic.

19. In addition to the basic opening hours contained in the legislation of the SBAs, the SBA Administration may, pursuant to Cap. 144 sections 8(2) and paragraph 6(6) of the 1966 Order, grant special permits extending opening hours on particular days at particular premises.
20. Between 2000 and 2005 the applications and grants were sporadic and the discrepancy between the hours granted and those applicable in the Republic were not uniform. Since 2005 however the Claimant has regularly applied for, and been granted, special permits to extend his licencing hours. The net effect of the extension by special permit is that since 2005 the opening hours in both winter and summer have been shorter than licensing hours in the Republic by half an hour for the weekday nights and by one hour for the weekend nights; a total weekly shortfall of opening hours in the SBA of four and a half hours as compared to the Republic.

The History of the Claimant's applications in respect of the licencing of the

21. By a letter dated 5 October 2000 the Claimant asked the Defendant's Fiscal Officer to remain open until 2:30 a.m. on week nights and until 3:30 a.m. for the weekend nights. This was refused by the Fiscal Officer in a letter dated 12 October 2000, which stated:

"The Chief Officer has recently examined the question of the opening hours of restaurants and pubs in the Sovereign Base Areas (SBAs) and has decided not to replicate the opening times applicable to such premises in the Republic as we neither have, nor wish to develop a tourist industry in the SBAs. However he has decided that SBA legislation should fall into line with that of the Republic in the definition of summer and winter periods and to allow a small extension of opening hours without an extension permit."

22. This change was effected by an Order dated 26 October 2000, which amended the 1966 Order.
23. Since 2005, the Claimant has made numerous applications for extensions to the closing hours for his public house. In these applications the Claimant did not suggest that the Defendant was acting in breach of a duty to grant extensions such that the

opening hours of the premises were in line with those of the Republic, or to amend SBA licensing law so that it was the same as the licensing law of the Republic, or that the Ordinance and 1966 Order under which the special hours permits were granted was itself unlawful.

24. By a letter dated 7 June 2010, Dr Clerides, on behalf of the Claimant, wrote to the Defendants, inter alia, as follows:

"2. Our client's pub is not allowed to work and sell liquor during the same hours that other pubs of the Republic are allowed. For this reason our clients seek authorization to open their premises during the same hours that similar premises are permitted to remain open for in the Republic. Such requests have not to date met with success. We now renew this request."

(The suggestion that this was a renewed request which had been made before, was rejected by the Senior Judges' Court at paragraph 36 in a judgment given on 15 March 2012. That is a ruling that, in argument before this Court Dr Clerides accepted.)

25. The letter referred to the obligations of the Defendant as a result of the 1960 settlement, the Treaty of Establishment and the Declaration as reinforced by Protocol 3 of the Treaty of Accession to the European Union signed on 16 April 2003 by the Republic of Cyprus and the European Convention on Human Rights that was extended to the SBAs from 1 April 2004.

26. The letter detailed the licencing regime in the Republic. At paragraph 5 it stated:

"There is thus an economically significant difference in permitted opening hours for relevant establishments between the Republic of Cyprus and the Sovereign Base Areas and one that is believed to be contrary to the obligations of the Sovereign Base Authorities."

27. By a letter dated 14 September 2010 the Area Officer for the SBA's responded. After noting the opening hours provided by the 1966 order, as amended and extensions granted by special permit the letter states:

"3. You should note that the extensions of opening hours, referred to in the previous paragraph, have been granted to your clients, and to other Akrotiri publicans, upon their written request, every period, (including the current one) since 2005, following consultations between my Office, the Akrotiri community Council and the SBA Police. The aim was to permit – if possible – such reasonable extensions, so as to minimise the difference between RoC and SBA closing hours, but without compromising the wider interests of Akrotiri village, and good order in the community."

4. In the light of the above, and having regard to -

(1) The residential locality of the [REDACTED] pub and the desire of neighbouring households for relative peace and quiet after midnight,

(2) The potential for nuisance and public upset in the early hours of the morning, and

(3) The policy of the SBAA not to have, or develop, a tourist industry in the Areas.

I have considered your client's request and decided that there have been no changes in the circumstances which have lead me to approve their current extension of hours permit. Consequently, I must refuse the request, on grounds that any further extension of the closing times, not only of the [REDACTED] but of any Akrotiri based pub, would be against the wider public interest and potentially prejudicial to good order in the community."

28. At paragraphs 5-9 the letter sets out the SBA's response to the Claimant's suggestion that it was under legal obligation to mirror the Republic's provisions on licensing hours. The Area Officer denied that there was any such legal obligation and gave three separate reasons: the commitments set out in the Declaration were political commitments not legal obligations; if there were any obligations arising out them, these would be owed to the Government of the Republic and did not give rise to any legal rights on the part of individuals; and in any event the commitment to mirror the legislation was not an absolute one but only to mirror legislation in the Republic, "as far as possible". The reasoning for having separate opening hours from the Republic was that:

"8....on balance, extant SBA legislation on this matter fully satisfied both the SBAA's policy not to have, or develop, a tourist industry in the Areas (stemming from HM Government's appendix 'O' commitment not to develop the Areas for non-military purposes), and local needs, in the sense that it allowed reasonable opening hours for licenced premises, which could potentially be extended to almost match those applying in the RoC, provided the interests of nearby residents and the wider community could also be safeguarded (stemming from another HM Government's Appendix 'O' commitment, namely to protect the interests of those resident and working in the areas).

29. The letter concluded:

"9. The policy position therefore remains unchanged and the SBAA has no intention to amend extant SBA legislation in any way so as to introduce, in the Areas, the extended opening hours that apply to pubs, and other places of entertainment, in the Republic".

30. On 23 March 2011, the Claimant started proceedings by Writ of Summons under Order 2, rule 1 of the Civil Procedure Rules.

31. In those proceedings he sought declarations to the effect that the SBA legislation was unlawful by reason of its incompatibility with the Claimant's rights under the Treaty of Establishment, the principle of equal treatment and property rights under the Human Rights Ordinance and the Protection of Property Ordinance. The Claimant also sought damages and injunctive relief.
32. It is accepted by the Defendant that in the course of those proceedings, amongst the documents disclosed by the Claimant, to him, were:
- (1) A letter dated 27 July 2011 from the Claimant to Mr Clerides, stating that:

"...there are four communities adjacent to the area of Akrotiri which are: area of Asomatos with [REDACTED], area of Episkopi with [REDACTED], [REDACTED] area of Erimi with [REDACTED] and last the area of Kolossi with [REDACTED] and [REDACTED]."
 - (2) A certificate from the Community Council of Akrotiri also dated 27 July 2011 noting that the Council had no objection to the Claimant's public house having licencing hours congruent with those in the Republic and
 - (3) Two letters dated 3 August 2011 from private individuals living in Akrotiri to like effect to the certificate noted at (2) above.
33. The Claimant's claim by writ was struck out by the Senior Judge's Court in [REDACTED] v *The Administrator of the Sovereign Base Areas of Akrotiri and Dhekelia* Civil Action No. 1/2011, in a judgment dated 14 October 2011. The Court held that the activities under challenge were statutory public activities and any challenge should have been brought by way of judicial review. The grounds to make the application first arose in 2000 and the Court found that it would be an abuse of process to allow the claim to proceed by way of Writ of Summons so long after the potential grounds first arose.
34. An appeal by the Claimant against that judgment was dismissed by the Senior Judges' Court in the Judgment of 15 March 2012, to which reference has already been made.
35. The appeal Court considered whether it should nonetheless extend time and permit the claim to be brought as an application for judicial review. The Court stated that to allow an extension of time back to 2001 in respect of the decision of the Fiscal Officer 11 years ago was *"beyond any reasonable circumstance."*(Paragraph 56)

Insofar as bringing a late challenge to the September 2010 decision was concerned, the Claimant had made a conscious decision to bring proceedings by writ and in all the circumstances of the case it would not be fair or just to allow a challenge to that decision to proceed. (Paragraphs 57 and 58)

36. On 30 May 2012 Dr Clerides on behalf of the Claimant wrote an important letter in this litigation to the Defendant. The material part of the letter reads as follows:

"This application is not for a special permit in order to extend the opening hours of the establishment in question, the ██████████ in Akrotiri with regard to a particular date or dates but is more general and principled. This application is for an order for appropriate legislative action in order to equalize the situation with that in effect in the Republic of Cyprus. This is required by the Declaration by Her Majesty's Government of the United Kingdom concerning the Administration of the Sovereign Base Areas. This document was contained in an exchange of notes between the contracting states being the United Kingdom and the Republic of Cyprus...and incorporated as Appendix O to the Cyprus Constitution.

In particular, the following are requested:

- 1) *That the opening hours of the ██████████ forthwith be the same as those obtaining from time to time in the Republic of Cyprus:*
- 2) *That such action be effected by legislative amendment and not by subsidiary orders which necessarily incorporate a discretion which may be exercised in a manner contrary to international requirements:*
- 3) *The need to pay any fees for the extra hours to equalize the situation with the Republic of Cyprus be forthwith abolished."*

37. This letter was copied by Mr Clerides to the Attorney General of the SBA. The letter was not acknowledged or answered when it was first sent. Reminders were sent by Dr Clerides office on 19 October 2012 and 21 May 2013. Whatever the reason for the delay in dealing with this letter it cannot be laid at the door of the Claimant or his advisers.

38. By letter dated 14 May 2013, the Attorney General replied on behalf of the Defendant to the letter first sent almost a year before stating:

"The Administration's policy on opening hours for licensed premises in the SBAs and its obligations under the Declaration by Her Majesty's Government of the United Kingdom concerning the Administration of the SBAs (known as Appendix O), were set out in Mr ██████████ letter to you dated 14 September 2010. The policy remains unchanged and I would adopt and endorse Mr ██████████ observations in paragraph 6 of that letter about the extent of the Administration's obligations under Appendix O.

Accordingly, the Administration does not intend to amend SBA legislation so as to introduce the extended opening hours for licensed premises and other places of entertainment pertaining in the Republic."

39. The Court knows nothing as to any enquiries conducted or of the matters considered by the Defendant before that letter was written. The Defendant has chosen not to file any evidence in these judicial review proceedings.
40. However, it is clear that when the letter of 14 May 2013 was written material changes in respect of the SBAs were afoot. On 24 May 2007 the Standing Committee of the EU Parliament noted that the inhabitants of the SBAs complain about the restrictions imposed on land use and welcomed the fact that the British authorities have recently engaged in consultations aimed at aligning the planning and zoning rules applied to the non-military parts of the SBAs with those in the Republic.
41. Further, the Court has before it a print out from a web-site of a Cyprus on line news magazine published on 24 November 2010, that notes the following:
- "A SPOKESMAN for the [Cyprus] Interior Ministry yesterday informed the House Commerce Committee that the two sides had reached a technical agreement, which is soon expected to be ratified by the Foreign Ministry and the Bases.*
- After 50 years of the Bases' presence in Cyprus, the residents in communities within them will have the right to develop, manage, and make use of their properties, just like the rest of the Cypriot public."*
42. On 14 February 2014, that precluded agreement was signed by the Governments of the Republic and the United Kingdom and is entitled:
- "Arrangement between the Governments of the Republic of Cyprus and the Government of the United Kingdom of Great Britain and Northern Ireland relating to the regulation of development in the Sovereign Base Areas". ("The 2014 Arrangement")*
43. The 2014 Arrangement contains some five pages of detailed text as to what has been agreed. At its heart is an agreement to modify the principles set out in the Declaration so as to allow increased flexibility for the development of private property by those resident in the non-militarised parts of the SBAs whilst at the same time safeguarding the UK's effective operation of the SBAs to meet its military needs.

44. The Preamble states inter alia, the following:

"CONSIDERING that certain elements of the Declaration, including in relation to non-military development, need to be adjusted to give better effect to the main objects of the Declaration."

45. Under the terms of the 2014 Arrangement the two Governments will cooperate to define planning zones and planning policies. The procedures normally applied in the Republic will be applied. In particular, Section 6 inter alia, states:

"...the establishment within the SBAs of civilian commercial or industrial enterprises will be allowed where consistent with the planning zones and planning policies set out in section 1 and with any other relevant law in the SBAs."

Further, restrictions on the sale of land within the SBAs are relaxed.

46. Section 11 provides as follows:

"11. (a) The Declaration by Her Majesty's Government (my emphasis) regarding the Administration of the Sovereign Base Areas, which was the subject of an exchange of notes between the Governments on 16th August 1960, will continue to the extent that its provisions are not incompatible with those of the present Arrangement.

(b) This Arrangement is not to be interpreted so as to conflict with any international obligations of the United Kingdom of Great Britain and Northern Ireland in respect of the SBAs.

(c) Except where otherwise expressly provided or where the context so requires, terms defined in the Treaty of Establishment have the same meaning when used in this Arrangement."

47. Thus, tourism and tourist development will now be allowed in the non-military parts of the SBAs in accordance with planning zones to be established. This is a significant change since 2010. It is likely that the effect of the 2014 Arrangement will be that substantial parts of the territory within the SBAs will be allowed to develop and tourist development is no longer excluded.

48. It is clear that negotiations for this 2014 Arrangement must have been well advanced by the time that the letter of 14 May 2013 was written on behalf of the Defendant and indeed the evidence indicates that agreement in principle was reached as long ago as November 2010.

49. A press publication put before us date 16 January 2014 notes that the SBAs Administration welcomed the Agreement, stating:

"Meanwhile the Sovereign Base Area Administration has also welcomed the agreement. It said it was delighted to announce that the UK Government has signed an arrangement with the Republic of Cyprus Government that will allow residents an increased flexibility to develop private property within the British Sovereign Base. This arrangement will give greater freedom to residents that live within the bases whilst at the same time safeguarding the UK's effective operation of the Bases to meet its military needs. The signing of the arrangement illustrates the excellent co-operation between the two Governments to ensure the effective operation of the Bases" it said.

50. The present application before the Court for judicial review was filed on 6 August 2013.

THE ISSUES FOR DETERMINATION

SHOULD THE COURT PERMIT THIS APPLICATION FOR JUDICIAL REVIEW TO PROCEED?

51. There is no doubt that the Claimant raised the argument that the difference in opening hours between licensed premises in the Republic and SBAs was unlawful in Dr Clerides letter dated 7 June 2010. Indeed, Dr Clerides accepted as much. However, he submitted that the letter dated 30 May 2012 was the first time the Claimant had specifically made the three point request in that letter, including a request to amend SBA legislation, and that circumstances had changed since 2010, relying on negotiations leading up to the 2014 Arrangement. Accordingly the Court should treat the letter dated 30 May 2012 as a new request rather than an attempt to revitalise the application made on 7 June 2010.

52. Insofar as the Court considered there had been any delay, he submitted that the issues raised in the case are of general importance. The merits were not considered by the Court in the previous challenge which was dismissed on appeal on procedural grounds only. (See paragraph 45 of the judgment given on 15 March 2012) The Court should exercise its discretion to ensure that the substantive issues are resolved. Further, there was no question of this being an attempt to re-litigate an issue already decided, because there has been no adjudication on the merits of the challenge.

53. Mr Hadjiconstantas submitted that rule 6(1) of the Judicial Review Procedure Rules provides that any claim must be submitted promptly and in any event not later than three months after grounds to make the application first arose. Grounds first arose to challenge the Defendant's refusal to extend the opening hours of the [REDACTED] in 2000 and grounds first arose to challenge the refusal to amend the SBA legislation to bring opening hours of licensed premises into line with those in the Republic in 2010. In the Court's appeal decision of 15 March 2012 it had specifically considered whether or not to permit the writ action challenging the 2010 decision to continue by way of judicial review and had refused to do so on the grounds that the claim was brought out of time. The present challenge is a further three years out of time and it would be an abuse of process to allow it to be brought now. It is not open to a litigant to re-open an issue already litigated by a court of competent jurisdiction, see for example *Johnson v Gore Wood & Co* [2001] 1 All ER 481 at page 490. He did not go so far as to suggest that a strict "issue estoppel" arose.
54. He submitted that the 2014 Arrangement was made after the 2013 decision and until finalised it would have been mere speculation to rely on the negotiations. Further, until the planning zones are actually fixed no rights will be created. He also relied upon the principle that fresh evidence will not be admitted upon a judicial review other than in certain limited categories which do not apply in this case, see *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 All ER 788 at p.797.
55. The requirement for leave to be granted to bring judicial review proceedings is set out in s.10 of the Courts (Judicial Review) Ordinance 2004 which provides as follows:
- "10 (1). No application for a judicial review order under the judicial review procedure, other than a habeas corpus order shall be heard unless the leave of the court has been obtained in accordance with rules of court. Without prejudice to the generality of the court's powers to refuse leave, or to refuse relief after granting leave –*
- (a) the court shall not grant leave unless it considers that the plaintiff has a sufficient interest in the matter to which the application relates;*
 - (b) the court shall not grant leave where it considers that the plaintiff should have pursued an alternative remedy;*
 - (c) the court shall not grant leave where it considers that the plaintiff could have pursued a right of appeal instead of judicial review, unless it considers the circumstances to be exceptional; and*
 - (d) the court may refuse leave where it considers that there has been undue delay in issuing proceedings and that the granting of the relief sought would*

be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration

Subsection 1 (d) is without prejudice to any enactment of rule of court which has the effect of limiting the time within which an application for judicial review may be made”.

56. Paragraph 6 of the Judicial Review Procedure Rules 2007 provides as follows;

6(1) *“The claim form must be filed-*

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the application first arose....”

57. Mr Hadjiconstantas accepts and the Court agrees that the Claimant has a sufficient interest, and has no opportunity for alternative relief, as he has tried to pursue his claim by action and the Court decided that it was appropriate to pursue the matter by Judicial Review.

58. Mr Hadjiconstantas also accepts and the Court also agrees that on the facts no question of substantial hardship or substantial prejudice to any other person will arise, or that it would not be contrary to good administration to grant relief; in particular the Court notes the delay on the part of the Defendant in replying to Dr Clerides letter dated 14 May 2012.

59. As the Court has already stated, the request in 2010 to change the opening hours of the Claimant's public house to the same as those in the Republic had not been made before. Accordingly, grounds to challenge a refusal to do so could not have arisen before that date. The Court notes that although the letter dated 7 June 2010 did not specifically ask for the SBA legislation on the opening hours of licensed premises to be amended, the letter clearly asserts that the legislation was unlawful as being contrary to the Declaration and human rights law. Further, it was understood as such by the Defendant because the reply dated 14 September 2010 specifically considers whether there was any obligation, in general, on the Defendant to mirror the Republic legislation on the opening hours of licensed premises and gives detailed reasons for rejecting that proposition. Accordingly, although the request dated 30 May 2012 may have been more specific, insofar as this claim simply challenges the refusal to amend the SBA legislation to bring it into line with

that in the Republic on the grounds set out in the 14 September 2010 letter, which were essentially repeated in the 14 May 2013 letter, the grounds for making the application first arose on 14 September 2010. If that were the case the Court would not be inclined to extend the time within which to bring a challenge.

60. In the appeal decision dated 15 March 2012, the Court emphasised the public interest in decisions being challenged at the earliest opportunity in order to achieve certainty and within the time limits set out in rule 6 of the Judicial Review Procedure Rules. As a consequence the Court refused to extend the time by allowing the writ action to continue as a judicial review of the decision dated 14 September 2010. The Claimant's request dated 30 May 2012 was not made until one year eight months after that and these proceedings were not begun until 6 August 2013, i.e. nearly three years later. It is fair to observe that at least part of that delay was due to the fact that the Defendant took just short of a year to reply to that letter. No explanation whatsoever has been given for the delay which is attributable to the Claimant.
61. In the Court's judgment it would be quite wrong to allow the Claimant to circumvent a decision given by the Court both at first instance and upheld on appeal to the effect that even the earlier action was so far out of time that it should not be allowed to continue by way of judicial review. To do so would be, in effect, to allow a further appeal to the Court which does not exist.
62. The Court accepts that it has a discretion to extend time where the matters raised are of general importance and agrees that the issues raised in this challenge are of some consequence not only to the Claimant but generally. However, the delay in this case is extensive, in the order of years, and far longer than in any of the cases Dr Clerides relied upon. Further, in none of those cases had the issue of whether time should be extended already been decided by a court of competent jurisdiction.
63. However, this challenge is not based simply on the reasoning set out in the letter dated 14 September 2010 or the grounds raised in the previous action. There have been a number of changes of circumstances since 14 September 2010 which are relied upon by the Claimant. Since that decision there is not only a lack of evidence of any problems being caused as a result of late opening of the Claimant's pub but

positive evidence from the Akrotiri Community Council and residents that there is no objection to opening hours mirroring those of the Republic.

64. Secondly, the Court accepts that at least with the benefit of hindsight, as noted above, new circumstances, arguably relevant to a proper consideration of the application had developed or were developing certainly by the time of the Defendant's letter dated 30 May 2013, in the form of negotiations towards the 2014 Arrangement. These circumstances post date the 2012 decision and put a completely different perspective on the grounds relied upon.
65. ~~The Court does not consider that it is precluded from having regard to this fresh evidence.~~ The first ground upon which such evidence may be admitted is to show what material was before the decision maker (*See R v Secretary of State for the Environment ex p. Powis* [1981] 1 WLR 584). Although Dr Clerides frankly admitted that the Claimant was not aware of the negotiations towards the 2014 Arrangement, the Court is in no doubt that, in the light of the fresh evidence, the Defendant would have been well aware of them and therefore the fresh evidence demonstrates that this information was before the decision maker.
66. It is arguable that the Defendant should have re-considered his earlier decision and policy in the light of these fresh circumstances, which, in the Court's judgment alter the nature of the Claimant's claim such that grounds to make the application first arose on 14 May 2013 and time only ran for the purposes of a judicial review application from that date. It was not suggested that this application was not made in time, being made on 6 August 2013. Further, having regard to the fact that the merits of the previous challenge were never determined and that the fresh circumstances affect the reasons previously given for not aligning opening hours in the SBAs with those in the Republic, the Court considers it would be both undesirable and impracticable to restrict the current challenge to limited areas by granting leave on specific grounds only. The Court will therefore consider the challenge as a whole.
67. The Court therefore grants permission for a full hearing of this application.

THE SUBSTANTIVE MERITS OF THE JUDICIAL REVIEW APPLICATION

The policy challenge

68. Dr Clerides referred to the commitment in paragraph 3(2) of the Declaration that the laws in the SBAs will, as far as possible, be the same as the laws of the Republic and drew attention to the difference in opening hours of licensed premises in legislation and taking into account the special permits granted to the Claimant. He accepted that the Declaration did not give rights to individuals but submitted that it did impose a legal obligation on the Defendant, as was made clear by the 2014 Arrangement. Accordingly, the Defendant was bound to take it into account (and there is a legitimate expectation that he would follow it) when considering whether to equalise the opening times of licensed premises.
69. He submitted that the Defendant was obliged to reconsider the Claimant's request in 2012 in the light of the then existing circumstances. The repetition of the reasons given in 2010 did not address the issues. There was no evidence that later opening times would cause any problems. On the contrary, in 2011 and 2013 the Akrotiri Community Council had no objection to the Claimant's public house being granted the same opening times as applied in the Republic. The 2011 letters were known to the Defendant before the decision dated 14 May 2013. The hours applicable in the Republic did not distinguish between tourist and non-tourist areas and the Declaration had not, in fact, prevented commercial development from taking place in the SBAs. (See the observations of the Court in paragraph 13 of *Area Officer of Akrotiri v Demetriades* (Supra)). Further, the 2014 Arrangement demonstrated there was no proper basis for distinguishing between the SBAs and Republic so far as the opening hours of licensed premises are concerned.
70. Mr Hadjiconstantas submitted that the claim as framed was not susceptible to judicial review because it is a challenge to primary legislation which would usurp the functions of the Defendant. The Declaration does not give rise to any legal obligations, much less create any rights for individuals as it has not been incorporated into SBA law. Further, the commitment to have the same laws "as far as possible" has to be read in the context of the rest of the Declaration, including the purpose of the SBAs as military bases. The Claimant's complaints about the

substance of the decision amounted to no more than a disagreement on the merits and were not sufficient to show that the decision was *Wednesbury* unreasonable.

71. During the course of the hearing, Dr Clerides clarified that the Claimant was not seeking an amendment of CAP 144, s.8 of which gives the Governor (now Administrator) power to direct opening hours by order. The legislative amendment that the Claimant is seeking is to the 1966 Order, as amended in 2000. Therefore this is not a case where the Claimant is criticising a failure to amend primary legislation and Mr Hadjiconstantas accepted that, insofar as the challenge is to a failure to amend secondary legislation, the court has jurisdiction to consider it.
72. Further, in the Court's judgment it is not necessary to decide the potentially difficult question as to the precise legal status of the Declaration. Dr Clerides accepted that it does not give rights to individuals. His case was that the Defendant had failed to take it into account. However, that is manifestly not the case, as the letter dated 14 September 2010, on which the letter dated 14 May 2013 in turn relies, specifically refers to the Declaration and the commitment that legislation in the SBAs should mirror that in the Republic "*as far as possible.*"
73. The terms of the letter dated 14 September 2010 have already been set out. It asserts that the Declaration does not give rise to any legal obligations or give individuals any legal rights. However, it states clearly:
- "in any case, HM Government's commitment in relation to SBA legislation is not absolute, but only to mirror RoC legislation "as far as possible." The SBAA may therefore decide that SBA legislation should differ from RoC legislation for good policy reasons."*
- The good policy reasons relied upon were, in summary, to avoid the development of tourism in the SBAs and to safeguard the community.
74. It is undoubtedly the case that the Claimant disagrees with those policy reasons. The question for the Court is whether the Defendant's reliance upon them in the letter dated 14 May 2013 was lawful.

75. The well known principles upon which the Court may interfere in such a decision were laid down in the case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. A Court can only interfere if a decision, in the words of Lord Greene MR, at p. 229-30: "*is so unreasonable that no reasonable authority could ever come to it.*" Pertinent to the decision under review, exemplified by Lord Greene as decisions that would justify successful judicial review were decisions where "*wrong attention [was] given to irrelevant considerations, and failure to take into account matters which are bound to be considered.*" In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p.410 Lord Diplock said that a Court may only quash a decision and substitute its own decision if the Court holds that the decision was:

" so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

76. So far as the letter dated 14 May 2013 is concerned, no material has been placed before the Court to suggest that fresh enquiries were made or fresh consideration given as to any further information that might be available. In the absence of any such evidence and in the light of the contents of the letter, the Court can only deal with the case on the basis that the letter was written without any active re-consideration of the circumstances current at the time of the writing of the letter relevant to the proper exercise of the Defendant's power in relation to the opening hours of licensed premises; it was simply a re-iteration of the letter of 14 September 2010.
77. It is now clear that the matters noted above must have been common knowledge within the administration of the SBAs at the time that the letter was written. Further, the positive evidence in favour of equalizing opening hours in the form of the letters referred to above was also known to the Defendant. However, there is no evidence that the Defendant took into account any of the new evidence, in particular, the impending new arrangements and the modifications of policy which must by then have been well-developed. The evidence is that agreement, in principle, was reached in November 2010 and the Court does not accept that in May 2013 the outcome would have been mere speculation.

78. We therefore have to judge the lawfulness of the Defendant's decision as communicated in May 2013 by determining the significance of the evidence which was not taken into account, having regard to the factors, stated by the Defendant, as being material to that decision.

79. The Court deals firstly with the objection based upon the stated aim of not to have, or develop, a tourist industry. This arises by implication from paragraphs 2 (i) and 2 (iv) of the 1960 Declaration:

"2. Her Majesty's Government further declare that their intention accordingly will be-

(i) Not to develop the Sovereign Base Areas for other than military purposes.

.....

(iv) Not to...permit the establishment of civilian commercial or industrial enterprises except insofar as these are connected with military requirements...."

80. That part of the Declaration was reversed by Section 6 of the 2014 Arrangement. Section 1 of that document brings to an end the policy that all of the land within the Areas should be treated as military land for the purposes of development (the effect of the Declaration provision), and sets a policy for the creation of planning zones, being all of the land in the Areas other than military sites. Section 6 then provides;

"..the establishment within the SBAs of civilian commercial or industrial enterprises will be allowed where consistent with the planning zones and planning policies set out in Section 1 and with any other relevant law in the SBAs."

81. The Court notes the mirroring of the wording "*civilian commercial or industrial enterprises*" used in both instruments.

82. In the past it may have been legitimate for the Defendant to consider that it was inappropriate to bring into line the opening hours applicable in the Republic by legislative change or otherwise to those applicable in the SBAs on the ground that the SBA should not be converted into tourist areas. The repetition of that policy,

when such a fundamental change as that allowed by the new arrangement envisaged was in play could not be given without a proper consideration of that change of arrangement. It was clear that the application and the decision under review were made two years after the original application of 7 June 2010 and the decision under review was reached three years thereafter, close to the signing of the Arrangement. The Defendant could not in May 2013 reasonably maintain his ground of objection to the Claimant's request without further consideration of the matter.

83. Finally on this issue, the Court also notes Dr Clerides argument that the closing hours in the Republic apply without distinguishing between tourist and non-tourist areas and therefore should not do so in the SBAs. We heard no evidence about this and consequently do not express a view on this issue.

84. The Court deals next with the objection based upon the safeguarding of the community. As we have already noted, the policy reasons given by the Defendant for declining to amend SBA legislation in order to allow licensing hours to mirror those of the Republic on this ground are variously described as *"the desire of neighbouring households for relative peace and quiet after midnight"* and *"the potential for nuisance and public upset in the early hours of the morning"*. Paragraph 4 of the 14 September 2010 letter concluded:

"I must refuse the request, on grounds that any further extension of the closing times, not only of the [REDACTED] but of any Akrotiri based pub would be against the wider public interest and potentially prejudicial to good order in the community".

Paragraph 8 of the letter simply refers again to *"the interests of nearby residents and the wider community."*

85. It is clear that the May 2013 reiteration of the policy not to legislate in order to harmonise SBA and Republic law in this specific regard was a restatement of the reasoning that to do so would compromise the wider public interest, and would *"potentially"* prejudice good public order. Paragraph 42 of the Defendants' Summary Grounds of Defence implies as much.

86. If "*the wider public interest*" means anything outside of the concept of public order it must, we think, refer to the policy not to allow tourist industry development, and that matter has already been dealt with in this judgment.
87. The question then remains, was any potential prejudice to good public order a legitimate justification for the continuation of the discrepancy between SBA and Republic law, in the light of the latest evidence existing in May 2013?
88. Dr. Clerides put forward letters from two residents of Akrotiri (one on the same street as the Claimant's premises) and a certificate from the Community Council of Akrotiri, all stating that there were no objections to the alteration in the law being sought. The Community Council specifically stated that it had no objection to the opening hours pertaining in the Republic being applied to the [REDACTED]. There is no suggestion that the position has since changed again. The Court was shown similar letters written in 2013.
89. Mr Hadjiconstantas obliquely suggested that because of their proximity to the front gate of Akrotiri Garrison the clientele of the Claimant's premises may include a significant proportion of service personnel, which may lead to a greater risk of public disorder. He also referred, in oral submissions, to communications passing from both the Akrotiri Garrison commander and the SBAs Police to the Administration. No such documentation was disclosed; the Claimant has not seen it. Mr Hadjiconstantas accepts that it cannot now be relied upon in any event, not least because he has no instructions from the Defendant to rely upon any such letters. The obvious inference from the mention and mere existence of such matters, however, is that concerns about the behaviour or potential misbehaviour of service personnel may have an effect upon the Defendant's decisions over licensing hours either at the [REDACTED] particularly, or in the SBAs generally.
90. This is an inference which the Court feels bound to draw, because there has been no other evidence put before this Court to explain or substantiate the assertion about potential prejudice to good public order.

91. This Court rejects the proposition that civilian licensing hours in the SBAs should be dictated by the need to regulate good service order and service discipline. Mr Hadjiconstantas was unable to identify, and this court is unaware of, any equivalent in other territories in which components of the British armed forces are based, save for local voluntary controls. It may be that the chain of command regulates the opening hours of any bars directly under its control. In the Court's judgment it would not be legitimate for a civil administration, to apply otherwise unjustifiable restrictions upon the civil population in order to bolster good service order and discipline. The obvious and correct way to respond to any local military concerns is to impose additional standing orders, rules or regulations upon those who are already subject to service law and to enforce them, not to enact legislation aimed at civilians.
92. Further, no reference was made in any of the correspondence from the Defendant to any specific incidents or specific matters which could at that time be answered, or addressed, by Mr [REDACTED] in response to this concern. Mr Hadjiconstantas was unable to point to any evidence which would justify the proposition that these licensed premises would be more susceptible to public disorder if they closed at (say on a winter weekend) 3.00 a.m. rather than at 2.00 a.m. or to evidence that premises in the Republic were currently more susceptible to public disorder by virtue of their longer opening hours than premises in the SBAs.
93. Since no evidence has been adduced to suggest potential disorder either generally in the SBAs or particularly in Akrotiri in the event of extending licensing hours, and there is positive evidence to the contrary, and because the Defendants could not legitimately resort to the need to maintain service discipline as a reason for declining to do so, the Court concludes that in relying upon the ground of "*potential prejudice to good order in the community*" the Defendant has failed to have proper regard to the evidence and taken into account an immaterial consideration when taking his decision in May 2013.
94. It follows that, for the reasons given, the Court determines that the decision dated 14 May 2013 is unlawful. However, the Court cannot accede to Dr Clerides submission that no reasonable authority could have arrived at the decision which the Defendant made here. The test of irrationality in *Wednesbury* is very high. Policy decisions are

for the decision maker and it would not be appropriate for the Court to prescribe what those should be in the light of current circumstances, both the 2014 Arrangement and the latest evidence from the community as to opening hours. It is not possible for the court to say that, if the Defendant properly directed his mind to the relevant considerations, a decision not to equalise the opening hours would be *"so outrageous in its defiance of logic... that no sensible person who had applied his mind to the question could have arrived at it."*

The human rights challenge

95. The Claimant's case is that the Defendant's decision is also a breach of his human rights, specifically a property right equating to article 1 of the First Protocol ("A1P1") and article 8, either individually or together with the prohibition on discrimination in article 14.

96. The 1950 Convention for the protection of Human Rights and Fundamental Freedoms ("the Convention") was incorporated into SBA domestic law by Ordinance 9 of 2004 ("the Human Rights Ordinance"). Section 2 states:

"(1) In this Ordinance "the Convention rights" means the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the Convention, as read with Articles 16 to 18 of the Convention.

(2) The Articles are set out in Schedule 1."

Schedule 1 includes the articles listed in s.2(1) which includes articles 8 and 14 but does not include A1P1.

97. However, A1P1 was incorporated into SBA law by a separate Ordinance, 35 of 2004 ("the Protection of Property Ordinance"). Section 2 defines "the property right" as "the right to peaceful enjoyment of property as provided for in section 3". This states:

"(1) Every natural of legal person is entitled to the peaceful enjoyment of his possessions.

(2) No one shall be deprived of his possessions except –
(a) where such deprivation is in the public interest; and
(b) it is subject to the conditions provided for by law and by the general principles of international law.

(3) Subsections (1) and (2) shall not in any way impair the right of the Administrator to enforce such laws as he deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Thus, the wording of s.3 replicates the provisions of A1P1.

98. Dr Clerides submitted that the principle of equal treatment has been violated by an unnecessary and disproportionate restriction on the opening hours of the [REDACTED] without any justification contrary to s.3 of the Protection of Property Ordinance and article 14. The Claimant's right to sell alcohol by way of a licence in his public house is a "*possession*" for these purposes. By preventing the Claimant from opening the same hours as similar businesses in the Republic without proper justification the Defendant is interfering with this possession and discriminating against him contrary to article 14 and s.3.
99. Although the property right is included in a separate Ordinance from article 14, s.4 of the Protection of Property Ordinance applies ss.4 to 13 and Schedule 2 of the Human Rights Ordinance to the property right "*as if such right were a Convention right as defined by s.2*" of the Human Rights Ordinance. The effect of this is to incorporate the property right into the Convention rights protected by the Human Rights Ordinance. Therefore the prohibition on discrimination in article 14 also applies to the property right. Further, although the Republic and SBAs are subject to different legal jurisdictions, the circumstances of the SBAs are unique, or *sui generis*, as he put it, in that the Declaration requires the laws of the SBAs to be as far as possible the same as those in the Republic. Accordingly article 14 applies to the Defendant's decision.
100. In the event that submission was rejected, he submitted that there is a general common law principle that there should be equal treatment and relied upon the description of that right in Clayton and Tomlinson *The Law of Human Rights*, 2nd ed. Paragraphs 17.06 to 17.11.
101. In addition, he submitted that there was also a breach of article 8 in that the right to respect for a person's private and family life and home includes a person's business

premises and the restriction on opening hours was an unlawful interference with that right for similar reasons to those set out above.

102. Mr Hadjiconstantas did not accept that there had been any interference with the Claimant's 'possessions' for the purposes of s.3 of the Protection of Property Ordinance but submitted that, in any event, such interference was in accordance with the laws of the SBA and in compliance with the general principles of international law. Further, as to article 14, although s.4 of the Protection of Property Ordinance specifically applies certain provisions of the Human Rights Ordinance to the property right "as if such right were a Convention right", that does not include Schedule 1 in which article 14 lies. Accordingly, article 14 does not apply to the property right.
103. He also submitted that Claimant was attempting to use the laws of a different state as a relevant comparator in a discrimination claim which was not permissible. A contracting state can only be responsible for matters within its own jurisdiction.
104. As to article 8, he submitted that the imposition of opening hours on licensed premises does not engage the right to private and family life and a home.
105. It is convenient to deal first with the application, if at all, of article 14. We do not accept the submission that article 14 cannot apply to the property right. The wording of s.4(1) of the Protection of Property Ordinance is quite specific:
- "The following provisions of the Human Rights Ordinance 2004 shall apply, so far as relevant, to the property right as if such right were a Convention right as defined by section 2 of that Ordinance..."*
106. Section 2(1) of the Human Rights Ordinance defines Convention rights as articles 2 to 12 and 14 of the Convention. The Convention is defined in s.3(1) as "*the Convention for the protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4th November 1950*". Therefore, the Convention rights for the purposes of the Human Rights Ordinance are those articles of the Convention specified in s.2(1). However, for ease of reference, s.2(2) goes on to say that those articles are set out in Schedule 1 of Human Rights Ordinance. Accordingly, the omission of Schedule 1 from the list of provisions of the Human

Rights Ordinance in s.4(1) of the Protection of Property Ordinance is irrelevant. The effect of s.4(1) is that the property right is to be treated as a Convention right defined in s.2(1) of the Human Rights Ordinance for the purposes of the provisions of the Human Rights Ordinance listed in ss. 4(1)(a) to (k) of the Protection of Property Ordinance. The property right is therefore just as much a Convention right for these purposes as, for example, article 8, and article 14 may apply to it in principle.

107. However, in the Court's judgment, article 14 cannot be applied in the way the Claimant seeks to do in this case because, whatever rights or obligations the Declaration imposes, it does not affect the operation of article 14. Article 14 is given effect to in the SBAs by the interpretive obligation in Part II of the Human Rights Ordinance (in short, to read legislation in a way that is compatible with Convention rights) and the prohibition on public authorities acting in a way which is incompatible with a Convention right in Part III of the Human Rights Ordinance. By definition, article 14 prohibits discrimination between two separate but relevantly similar situations (where the discrimination does not have a legitimate aim and is disproportionate in its effect). A public authority has no power to regulate decisions in another legal jurisdiction nor can legislation in one jurisdiction have any effect on citizens of another jurisdiction. Therefore, article 14 can only apply to discrimination between two situations in one jurisdiction, not to laws or decisions in two different jurisdictions.

108. In *R(Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 the Claimant, a British citizen who lived in South Africa, alleged a breach of article 14 because the pension to which she was entitled, being a "possession" for the purposes of A1P1, was less than that of a pensioner living in the UK. The principles on which article 14 are based were described by Lord Hoffman in paragraph 10 as follows:

"The principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently, will be found, in one form or another, in most human rights instruments and written constitutions. They vary only in the generality with which the principle is expressed. Perhaps the broadest is contained in the 14th Amendment to the constitution of the United States: "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

It is clear from this passage that the right to equal treatment is a right to like treatment by the state as to the way it treats other like cases, not to like treatment as to the way a different state treats like cases.

109. Later in paragraph 14 Lord Hoffman said this:

"There is no doubt that Ms Carson is being treated differently from a pensioner who has the same contribution record but lives in the United Kingdom or a treaty country. But that is not enough to amount to discrimination. Discrimination means a failure to treat like cases alike."

110. By this, Lord Hoffman meant 'a failure [by the same state] to treat like cases alike.'

~~There was no question of the pension that Ms Carson might have been entitled to if she were a citizen of South Africa being a relevant "like" case. On the contrary, in paragraph 27 when Lord Hoffman did consider and compare the position of pensioners in other treaty countries it was in the context of UK pensioners who benefited from reciprocal arrangements which the UK had been able to negotiate with those other countries. Put another way, the issue was whether UK pensioner comparators in treaty countries were being discriminated against contrary to article 14 by virtue of the arrangements which the UK had put in place, not the pension to which an equivalent citizen of that country would be entitled (see also paragraph 44 in the speech of Lord Rodger and paragraph 98 in the speech of Lord Carswell).~~

111. In the Court's judgment, to equate cases in the Republic with those in the SBA would be to extend the ambit of article 14 beyond the wording and intention of the Convention. It would have far reaching implications because, if Dr Clerides construction of article 14 is correct, it would apply not only to the opening hours of licensed premises but to the enjoyment by residents in the SBA of all the Convention rights defined in s.2 of the Human Rights Ordinance. Such a construction of article 14 would be contrary to the provisions of the Human Rights Ordinance for the reasons already given. If the Human Rights Ordinance had been intended to extend the ambit of article 14 to prohibit discrimination by the Administrator in the enjoyment of Convention rights by those in the SBA by reference to rights enjoyed by those in the Republic it could and should have said so.

112. Further, such a construction of article 14 would be fundamentally at odds with the Declaration. The intention that SBA laws be the same as those in the Republic is expressly subject to the proviso "*as far as possible*". What is or is not possible in this context is a matter for the Administrator who would undoubtedly have regard, amongst other things, to the first of the stated main objects of the Declaration to be achieved regarding the administration of the SBAs namely effective use of the SBAs as military bases. In circumstances where that object conflicts with the equalisation of laws there may well be discrimination between residents of the SBA as compared with residents of the Republic. If it was intended that, in making such decisions, the Administrator should be subject to article 14 of the Convention we would have expected that to be clearly articulated by law. It is not. That is not to say that the Administrator's discretion is unfettered. It must be exercised lawfully and for the reasons already given, we consider that the decision dated 14 May 2013 was unlawful.
113. It follows that in this case there is no discrimination for the purposes of article 14 because all licensed premises in the SBA are subject to the same legislative provisions so far as opening hours are concerned, namely paragraph 3 of the 1966 Order as amended in 2000.
114. As for Dr Clerides argument that there is in any event a general common law principle of equal treatment, this right is very limited. The authorities described in the passages of Clayton and Tomlinson on which he relied demonstrate that the right to equality is confined to cases where the discrimination could be said to be irrational or *Wednesbury* unreasonable. For the reasons already given, we do not consider that it is possible to characterise the Defendant's refusal to equalize the opening hours of licensed premises in the SBA and Republic in this way.
115. Turning to the argument that there has been a breach of the property right and article 8, it is important to understand the nature of the decision under challenge. The decision letter dated 14 May 2013 is a decision not to amend the legislation of the SBAs. Dr Clerides was at pains to point out that the Claimant's request dated 30 May 2012 was not for an extension of the opening hours of the [REDACTED] by special permit but a request that the opening hours be the same as those in the

Republic and that "such action be effected by legislative amendment and not by subsidiary orders which necessarily incorporate a discretion." That request was clearly understood by the Defendant in the response given on his behalf dated 14 May 2013 which states:

"Accordingly, the Administration does not intend to amend SBA legislation so as to introduce the extended opening hours for licensed premises and other places of entertainment pertaining in the Republic."

116. Dr Clerides clarified that the Claimant was not seeking an amendment of CAP 144, s.8, of which gives the Governor (now Administrator) power to direct opening hours by order. The legislative amendment that the Claimant is seeking is of the 1966 Order as amended in 2000. The discretion which he criticised was the grant of special permits to extend opening hours beyond those set out that Order. Thus the decision impugned is a decision not to amend the 1966 Order.

117. As the Court has already stated, the Human Rights Ordinance gives effect to the Convention Rights through the interpretive obligation in Part II and the prohibition on public authorities acting in a way which is incompatible with convention rights in Part III. As to Part III, Section 8 of the Human Rights Ordinance states that:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

118. Further, s.8(5) makes it clear that an act includes a failure to act. However, by s.8(3) "public authority" does not include:

"(i) the Administrator (or any person acting on his behalf) when he is exercising functions in his legislative capacity."

119. The phrase "functions in his legislative capacity" does not distinguish between primary and secondary legislation whereas other provisions of the Human Rights Ordinance do, for example s.5 which refers to primary and subordinate legislation. It is therefore clear that the phrase "functions in his legislative capacity" is not confined to making (or refusing to make) primary legislation but includes making (or refusing to make) subordinate legislation. Thus, a decision by the Administrator not to make subordinate legislation is not an act to which s.8(1) applies. The definitions in s.3(1)

of the Human Rights Ordinance make it clear that subordinate legislation includes any order made under primary legislation and thus includes a decision refusing to amend the 1966 Order. Therefore the decision in this case dated 14 May 2013 not to amend that Order is not an act to which s.8(1) applies.

120. In his written submissions, Dr Clerides also relied upon ss.5 and 6 of the Human Rights Ordinance which require legislation to be read compatibly with the Convention rights and make provision for a declaration that legislation is incompatible with a Convention right. However, he did not elaborate on these submissions orally, and we therefore deal with them briefly. The terms of s.3 of the 1966 Order, as amended, set out quite specific hours and it would be impossible to read any different hours into the order. More importantly, in the Court's judgment it cannot be said that the 1966 Order, as amended, is incompatible with the Claimant's Convention rights. To do so would involve deciding that, if the current SBA opening hours amount to an interference with the Claimant's property right or article 8 (which it is not necessary for us to decide), that could never satisfy the tests of fair balance and proportionality.
121. The fact that, in this case, the Court has concluded that the decision dated 14 May 2013 is unlawful by virtue of the Defendant's failure to have regard to a material consideration, does not mean that every (or any) decision not to equalise the opening hours would strike an unfair balance or be disproportionate. There is insufficient evidence before the Court which would enable us to go that far. Whether that would be the case in respect of a subsequent decision would depend on the justification put forward and the circumstances existing at the time.
122. For the reasons given the Claimant's arguments based on human rights grounds fail.

CONCLUSIONS

123. The Court holds that the decision dated 14 May 2013 is unlawful by reason of the Defendant's failure to have regard to the up to date evidence of the impending policy change in the 2014 Arrangement and the latest evidence as to potential prejudice to good order (or lack of it) and in the light of those changes to review the policy reasons for not aligning the opening hours of licensed premises in the SBAs with

those in the Republic. Further, the Court considers that, when assessing the issue of prejudice to good order, it is not legitimate for the Defendant to determine opening hours in civilian licensed premises that would otherwise be unjustifiable in order to bolster good service order and discipline.

124. The Court therefore makes an order quashing the decision dated 14 May 2013. The Defendant will have to re-consider the request made by the Claimant in the letter dated 30 May 2012 in the light of the circumstances pertaining at the date of the new decision, the Court's judgment and any further material the Claimant wishes to advance in support of his request. It is to be hoped that a further decision can be reached without any undue delay.

**The Hon. Mr Justice A R Collender Q.C.,
Presiding Senior Judge**

**The Hon. Mrs Justice A Robinson,
Senior Judge**

**The Hon. Mr Justice C Burn
Senior Judge**