REGINA *v.* KNIGHTSBRIDGE CROWN COURT, *Ex parte* INTERNATIONAL SPORTING CLUB (LONDON) LTD. AND ANOTHER

1981 May 12, 13, 14, 15; June 5

Griffiths L.J. and May J.

Judicial Review — Certiorari — Crown Court — Error on face of record — Oral judgment containing errors of law — Whether certiorari available

Gaming—Club—Gaming licence—Companies owning clubs found not to be fit and proper persons to hold licence—Appeal—Companies restructured—Whether restructuring of companies and change of club management relevant consideration—Gaming Act 1968 (*c.* 65), *Sch.* 2, *para.* 20

On a joint application to the gaming licensing committee by the Commissioner of Police of the Metropolis and the Gaming Board of Great Britain, the gaming licences of three London gaming clubs were cancelled on the ground that the companies owning the clubs were not fit and proper persons to hold gaming licences. The companies entered notices of appeal to the Crown Court and were thereby able to continue operating pending the appeals. Before the hearing of the appeals, the entire shareholdings of the companies were sold, and the purchasers replaced the old with new management and put in hand the necessary reforms. The companies under the new ownership pursued the appeals and contended that despite past misconduct they were now reformed by the complete change of shareholding and management and were, therefore, fit and proper persons to hold gaming licences. The Crown Court dismissed the appeals and a circuit judge sitting with licensing justices delivered a judgment giving the reason for the decision that the fitness of the companies was to be judged by their past misconduct.

On an application by two of the companies for an order of certiorari to quash the order of the Crown Court dismissing the appeals on the grounds, inter alia, that the judgment showed errors of law on the face of the record, and on a submission by the Gaming Board that the record consisted only of the formal order of the court and that the judgment formed no part of the record: —

Held, (1) that in the growth of administrative law over the past four decades, the concept of the record had been broadened so as to include documents embodying the reasons for the decision of an inferior tribunal; that since judges and tribunals were expected to give reasons for their decisions and the practice of the Divisional Court to consider the document recording the reasons for a decision had been given parliamentary approval by the Tribunal and Inquiries Acts 1958 and 1971, it would be unreasonable and contrary to the developing practice of the court to exclude documents recording reasons of tribunals to which the Acts did not apply; and that, accordingly, the record of the Crown Court for the purposes of the prerogative order of certiorari included the transcript of the oral judgment (post, pp. 313C–D, 314D–F, H—315A, D–F, 316A).

Reg. v. *Supplementary Benefits Commission, Ex parte*

Singer [1973] 1 W.L.R. 713, D.C. and dictum of Lord Denning M.R. in *Reg.* v. *Preston Supplementary Benefits Appeal Tribunal, Ex parte Moore* [1975] 1 W.L.R. 624, 628, C.A. applied.

Overseers of the Poor of Walsall v. *London and North Western Railway Co.* (1878) 4 App.Cas. 30, H.L.(E.) considered.

(2) Granting the applications, that the question for the Crown Court was whether at the time of hearing the appeal the companies were fit and proper persons to hold a licence and, therefore, the restructuring of the companies was a matter to be taken into account and that, accordingly, the transcript of the judgment of the Crown Court showed an error of law in failing to consider that matter; that although it was possible that the Crown Court would have come to the same decision if it had taken into account the restructuring of the companies, the companies should not be denied a rehearing and, therefore, the court would exercise its discretion to quash the decision of the Crown Court leaving the applicants to pursue their appeals against the orders of the licensing justices cancelling their licences (post, pp. 317A–B, 318D–E, 319A–B, C–F).

The following cases are referred to in the judgment:

Baldwin & Francis Ltd. v. *Patents Appeal Tribunal* [1959] A.C. 663; [1959] 2 W.L.R. 826; [1959] 2 All E.R. 433, H.L.(E.).

Gaming Board of Great Britain v. *Victoria Sporting Club* (unreported), October 17, 1980, Judge Friend.

Overseers of the Poor of Walsall v. *London and North Western Railway Co.* (1878) 4 App.Cas. 30, H.L.(E.).

Racecourse Betting Control Board v. *Secretary for Air* [1944] Ch. 114; [1944] 1 All E.R. 60, C.A.

Reg. v. *Chertsey Justices, Ex parte Franks* [1961] 2 Q.B. 152; [1961] 2 W.L.R. 442; [1961] 1 All E.R. 825, D.C.

Reg. v. *Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.).

Reg. v. *Justices for Court of Quarter Sessions for the County of Leicester, Ex parte Gilks* [1966] Crim.L.R. 613, D.C.

Reg. v. *Knightsbridge Crown Court, Ex parte Ladup Ltd.* (unreported), March 18, 1980, D.C.

Reg. v. *Leeds Crown Court, Ex parte Bradford Chief Constable* [1975] Q.B. 314; [1974] 3 W.L.R. 715; [1975] 1 All E.R. 133, D.C.

Reg. v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796, C.A.

Reg. v. *Preston Supplementary Benefits Appeal Tribunal, Ex parte Moore* [1975] 1 W.L.R. 624; [1975] 2 All E.R. 807, C.A.

Reg. v. *Supplementary Benefits Commission, Ex parte Singer* [1973] 1 W.L.R. 713; [1973] 2 All E.R. 931, D.C.

Rex v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1951] 1 K.B. 711; [1951] 1 All E.R. 268, D.C.; [1952] 1 K.B. 338; [1952] 1 All E.R. 122, C.A.

South East Asia Fire Bricks Sdn. Bhd. v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1981] A.C. 363; [1980] 3 W.L.R. 318; [1980] 2 All E.R. 689, P.C.

The following additional cases were cited in argument:

Anisminic Ltd. v. *Foreign Compensation Commission* [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.).

Attorney-General v. *British Broadcasting Corporation* [1981] A.C. 303; [1980] 3 W.L.R. 109; [1980] 3 All E.R. 161, H.L.(E.).

Boulter v. *Kent Justices* [1897] A.C. 556, H.L.(E.).

Company, In re A [1981] A.C. 374; [1980] 3 W.L.R. 181; [1980] 2 All E.R. 634, H.L.(E.).

Hanks v. *Minister of Housing and Local Government* [1963] 1 Q.B. 999; [1962] 3 W.L.R. 1482; [1963] 1 All E.R. 47.

Pearlman v. *Keepers and Governors of Harrow School* [1979] Q.B. 56; [1978] 3 W.L.R. 736; [1979] 1 All E.R. 365, C.A.

Reg. v. *Midhurst Justices, Ex parte Thompson* [1974] Q.B. 137; [1973] 3 W.L.R. 715; [1973] 3 All E.R. 1164, D.C.

Reg. v. *Patents Appeal Tribunal, Ex parte Swift & Co.* [1962] 2 Q.B. 647; [1962] 2 W.L.R. 897; [1962] 1 All E.R. 610, D.C.

Reg. v. *Southampton Justices, Ex parte Green* [1976] Q.B. 11; [1975] 3 W.L.R. 277; [1975] 2 All E.R. 1073, C.A.

Rex v. *Hyde Justices* [1912] 1 K.B. 645, C.A.

Rex v. *Manchester Justices, Ex parte Lever* [1937] 2 K.B. 96; [1937] 3 All E.R. 4, D.C.

Rex v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, P.C.

Rex v. *Newington Licensing Justices* [1948] 1 K.B. 681; [1948] 1 All E.R. 346, D.C.

APPLICATION for judicial review.

The applicants, International Sporting Club (London) Ltd. and Palm Beach Club Ltd., applied for judicial review by way of certiorari to quash a judgment given by Knightsbridge Crown Court (Judge Friend and justices), on March 9, 1981, dismissing an appeal from a decision of the Gaming Licensing Committee for the South Westminster Division of Inner London made on September 24, 1980, cancelling the gaming licences granted under Part II of the Gaming Act 1968 in respect of the International Sporting Club, the Curzon House Club and the Palm Beach Club. The grounds on which relief was sought were (1) that the Crown Court had failed to determine the appeal according to law; (2) that the Crown Court, in the "speaking order" which was constituted by or included in its judgment, held contrary to law (a) that the question whether the applicants were fit and proper within the meaning of paragraph 20 (1) (*b*) of Schedule 2 to the Gaming Act 1968 ought to be determined by exclusive consideration of past misconduct of the applicants and that there should be excluded from consideration any reformation or change in ownership and management of the applicant companies, (b) that the court should take into account, in determining whether the applicants were fit and proper and whether discretionary power ought to be exercised, the extraneous and erroneous consideration that the sale of shares in a company owning a licence, and in particular if such licence was under threat of cancellation, was contrary to public policy or wrong or an unacceptable means of obviating or evading the control or operation of the Gaming Act 1968, and (c) that the jurisdiction of the Crown Court on appeal was punitive and not merely regulatory; and (3) that the failure or refusal by the Crown Court to

A determine whether the applicants were fit and proper persons at the date of the hearing of the appeal constituted a failure or refusal to exercise the jurisdiction of the court.

The facts are stated in the judgment of the court.

Gavin Lightman Q.C. and *David Tudor Price* for International Sporting Club (London) Ltd. The decision of the Crown Court ought to be quashed B by reason of (a) error on the face of the record and (b) as made in excess of jurisdiction.

As to (a) the judgment of the Crown Court giving its reasons for its decision either constitutes the record or constitutes part of the record. Since the formal order of the court does not in terms dismiss the appeal but refers to the appeal having been dismissed when the judgment was delivered, the judgment alone and not the formal order constitutes the record. If this is C not correct, the reasons given constitute part of the record: see *Reg.* v. *Chertsey Justices, Ex parte Franks* [1961] 2 Q.B. 152; *Reg* v. *Justices for Court of Quarter Sessions for the County of Leicester, Ex parte Gilks* [1966] Crim.L.R. 613, and *Reg.* v. *Leeds Crown Court, Ex parte Bradford Chief Constable* [1975] Q.B. 314.

The modern practice is to include the reasons for a decision as part of D the record: see *Reg.* v. *Supplementary Benefits Commission, Ex parte Singer* [1973] 1 W.L.R. 713; *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] A.C. 663; *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574 and *Reg.* v. *Preston Supplementary Benefits Appeal Tribunal, Ex parte Moore* [1975] 1 W.L.R. 624.

Rex v. *Newington Licensing Justices* [1948] 1 K.B. 681 was to the effect that no decision had in fact been made by the licensing justices and E accordingly no order for certiorari could be made. The dictum of Singleton J. at p. 690 that no order for certiorari could be made where the decision was given orally, is wrong. The conservative approach to determining what constitutes the record, manifested in the cases cited in *Reg.* v. *Knightsbridge Crown Court, Ex parte Ladup Ltd.* (unreported), March 18, 1980, is out of accord with modern practice and authority for relaxing the rules F governing the grant of relief in the field of administrative law to be found in the decision in *Reg.* v. *Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1981] 2 W.L.R. 722.

If error does appear on the face of the record, the fact that the Gaming Act 1968 provides that the decision of the Crown Court is final is no ground for refusing certiorari: see *Reg.* v. *Medical Appeal Tribunal, Ex parte* G *Gilmore* [1957] 1 Q.B. 574 and *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1981] A.C. 363.

The judgment of the Crown Court discloses error in its insistence that in determining the fitness of a licensee, only his past record should be considered and nothing else. The question of fitness must be determined in H the light of circumstances existing at the time of the appeal and in particular the character and reputation of the shareholders and directors at that time and the question whether at the time of the hearing they have the capacity and intention to run the casino properly.

As to (b), an error of law by the Crown Court involved the failure to take into account relevant considerations and thus constituted an excess of jurisdiction: see *Reg.* v. *Southampton Justices, Ex parte Green* [1976] Q.B. 11. Such an error of law by an inferior court such as the Crown Court (including four lay members) exercising an administrative function invalidates its decision even if not open to challenge on the ground of error of law on the face of the record.

Mark Cran for Palm Beach Casinos Ltd. The submissions on behalf of International Sporting Club (London) Ltd. are adopted. The question raised was whether a casino owner with a cancellation of licence pending should be able to sell at a commercial value. These were casino premises in Mayfair owned by Coral Leisure Group Ltd. Pending the appeals, Coral Leisure Group Ltd. could continue to make a profit. The Crown Court said that if the clubs were sold at a commercial value it was a way of enabling the wrongdoer to benefit.

It was an issue of fact whether an applicant was a fit and proper person. A company, unlike an individual, can change its character. The structure of the Gaming Act 1968 is such that a transferee, whether licensee or shareholder in a licence holding company, cannot escape the wrongdoings of the past. Therefore it is entirely proper for a court to disregard past wrongdoings in deciding the issue of whether an applicant is a fit and proper person at the date of the hearing. There was no circumvention of the Act. If there was circumvention of the Act, the court did not consider if in relation to this applicant there had been any circumvention.

On the exercise of the discretion, the court took the view that there was a means of benefiting the wrongdoer as a general policy rather than considering whether the wrongdoer had in fact benefited in this case. Past misconduct was only evidential. The Crown Court had also failed to consider whether it was in the interests of the public that casino licences should go into the hands of reputable operators as soon as possible.

John Marriage Q.C. and *Timothy Cassel* for the Commissioner of Police of the Metropolis. Before the licensing justices, the Commissioner of Police put forward evidence and argument but the matter of disqualification was left entirely to the court. The Commissioner did not comment on the bona fides of the new management. He was only interested to see that the premises were policed and that there were no criminal offences taking place on them. To achieve that end, the Commissioner worked very closely with the Gaming Board. The new management of the clubs took over and started running them immediately without even a day's pause to reorganise them.

As a matter of policy, the licensing justices and the Crown Court had to ensure that discipline was restored and enforced after past misconduct. The judgment of the Crown Court must be regarded in the light of licensing policy generally. The enforcement of discipline in a gaming club requires an effective sanction against a management company guilty of misconduct. That sanction is the cancellation of the management company's licence. The sanction is devalued if the company can be sold for a high price, as it can if the new owners and management are able to have the licence restored. The applicants are seeking to make use of a lacuna in the law

A which would weaken the cancellation of a gaming licence as a sanction for breaches of the law.

As to the general nature of licensing law, licensing questions are not matters of inter partes applications. They are questions of importance to the public. [Reference was made to *Boulter* v. *Kent Justices* [1897] A.C. 556 and *Rex* v. *Hyde Justices* [1912] 1 K.B. 645.]

B In order to quash a decision by way of certiorari it is not sufficient to find an error on the face of the record. There must be an abuse of the court's jurisdiction by which the court wrongfully extends or limits the area in which it is entitled to reach decisions. A wrong decision in law is not of itself an abuse of the court's jurisdiction. [Reference was made to *Rex* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128.]

C *Simon Tuckey Q.C.* for the Gaming Board of Great Britain. The record must be strictly construed and cannot extend beyond the formal order dismissing the appeals. The reasons contained in the judgment of the inferior court form no part of the record unless that court chose to embody those reasons in the order. Only then would it exist as a document which the inferior court keeps as a formal record of its proceedings. The record must not be given an arbitrary significance and cannot extend to include D any other document. What is quashed on certiorari is the record which the inferior court has in its physical custody.

Certiorari will lie only where an inferior court has acted without jurisdiction or has exceeded its jurisdiction. Certiorari will not lie on the ground merely that an inferior court made an error of law: see *Racecourse Betting Control Board* v. *Secretary for Air* [1944] Ch. 114. A judge's E mistake is not an error of law on the face of the record. An error on the face of the record must be palpable and apparent. On an application for certiorari a court should take care not to go behind the face of the record and decide a point of mixed fact and law.

Cur. adv. vult.

June 5. GRIFFITHS L.J. read the following judgment of the court. F Between 1974 and 1979 Coral Leisure Group Ltd. controlled and managed three London gaming clubs; they were the International Sporting Club, the Curzon House Club and the Palm Beach Club. The clubs were very badly run and with scant regard to the provisions of the Gaming Act 1968. Eventually they were all raided by the police in November 1979 and thereafter the Commissioner of Police of the Metropolis and the Gaming Board G of Great Britain joined in applications to the Gaming Licensing Committee for the South Westminster Division to cancel the gaming licences of the three clubs.

In each case the gaming licence was held by a limited company. They were International Sporting Club (London) Ltd., Curzon House Club Ltd. and Palm Beach Club Ltd. Coral Casinos (U.K.) Ltd., a wholly owned sub- H sidiary of Coral Leisure Group Ltd., owned the whole of the share capital of the International Sporting Club Ltd. and Curzon House Club Ltd., and Coral Leisure Group Ltd. itself owned two-thirds of the share capital of Palm Beach Club Ltd., the remaining one-third being owned by Gordon

Hotels Ltd. Coral Casinos (U.K.) Ltd. were responsible for the management of each of the clubs.

The applications to cancel the licences were made upon three grounds; first, that the companies were not fit and proper persons to hold a gaming licence, secondly, that Coral Casinos (U.K.) Ltd. for whose benefit the clubs were operated, were not fit and proper persons to hold a licence and thirdly, that the clubs had been used for unlawful purposes.

The evidence took many days to hear and revealed a whole catalogue of wrongdoing. It is not necessary to enumerate all the various breaches of the Gaming Act 1968 that the companies had been committing; it will suffice to say that they were numerous, serious and extended over a number of years. The licensing committee on September 24, 1980, cancelled the licences on the ground that the companies were not fit and proper persons to hold gaming licences. It is conceded that that was a proper finding and a correct exercise of their discretion by the licensing committee on the material then before them.

The licensing committee did not make any specific finding on whether the clubs had been used for an unlawful purpose or purport to cancel the licence on that ground. No doubt it seemed to them unnecessary to do so. But had they wished to do so it appears that there was ample material upon which they could have acted. Nevertheless, although the committee invited submissions on the point, it did not exercise its discretion to disqualify the premises under paragraph 49 of Schedule 2.

On October 9 the companies entered notices of appeal. That meant that despite the fact that their licences had been cancelled the clubs could continue operating until their appeals were determined by the Crown Court: see Schedule 2, paragraph 44.

Before the hearing of the appeal there was much business activity. The two Coral companies sold out their entire interests in the three clubs, and handed over their management to the new owners. They sold the shares of the International Sporting Club Ltd. to A.V.P. Ltd., a wholly-owned subsidiary of Lonrho Ltd. They sold the shares of the Curzon House Club Ltd. to the Aspinal organisation. They sold the two-thirds share holding in Palm Beach Club Ltd. to Mecca Sportsman Ltd. By the time the appeal commenced on February 17, 1981, Coral Casinos (U.K.) Ltd. had ceased to have any interest in the ownership or management of any of the clubs, and the appeals were pursued by the new owners.

An appeal to the Crown Court is by way of rehearing. Mr. Marriage on behalf of the Commissioner of Police of the Metropolis opened the facts to the court, but he was not required to call any evidence because the transgressions of the three companies that had been proved before the licensing authority were admitted and it was also conceded that at the date of the hearing in September the companies were not fit and proper persons to hold a licence. Nevertheless, we are told it took Mr. Marriage a day to open the facts which gives some idea of the scale of the past wrongdoing.

The new owners of the clubs called a great deal of evidence in an attempt to satisfy the Crown Court that, whatever their past sins, the casino companies were completely reformed characters and were now fit and proper persons to hold gaming licences. Their argument was that, whereas

A it might be difficult for an individual with a bad record to persuade a court that he had completely reformed, a company was in a different position for it was as good or as bad as the people who controlled and managed it, and where there had been a complete change of shareholding and management there should be no impediment to holding that the company was now a fit and proper person to hold a gaming licence, if the shareholders and managements were now respectable and capable of the proper B management of a gaming club. But their argument did not prevail and the appeals were dismissed.

The hearing in the Crown Court was before a circuit judge sitting with four licensing justices. At the end of the hearing the judge gave a judgment in which he gave the reasons why the appeals were dismissed. He ended his judgment by saying:

C > " For those reasons, I think it is right that I should express our reasons and the appeal is dismissed. I could have said simply, ' The appeals are dismissed,' but I thought it right and proper that you should all know precisely why they are dismissed."

In these proceedings the International Sporting Club (London) Ltd. and the Palm Beach Casino Club Ltd. apply for orders of certiorari to quash the D orders of the Crown Court dismissing their appeals on the grounds that the reasons stated in the judgment show errors of law on the face of the record, alternatively, that the Crown Court exceeded their jurisdiction, or in the further alternative that the Crown Court failed to determine the question referred.

Mr. Tuckey on behalf of the Gaming Board, with the somewhat reluctant support of Mr. Marriage, has submitted that the judgment forms no E part of the " record " and that this court is entitled to look only at the formal order of the court and not at the reasons that the court gave for making the order.

If this submission is well founded, the supervisory power of this court to review the decisions of inferior courts for errors of law will be drastically curtailed. The " order " of the court rarely, if ever, contains the reasons that F led to the making of the order. The order merely recites the decision of the court, not its reasons. In the case of an appeal the order will normally say no more than " it is ordered that the appeal be dismissed " and then record any order as to costs. So, if it is only the order that constitutes the record, there will be scarcely any occasion when it will be possible to obtain an order for certiorari on the ground of error of law on the face of the record. In fact in the present case the order was drawn in a somewhat curious form; G it is dated March 9, 1981, and reads:

> " In the appeals of Curzon House Club Ltd., International Sporting Club (London) Ltd. and Palm Beach Casino Club Ltd. On March 9, 1981, when the appeals were dismissed the above-named appellants were ordered to pay one-third of the taxed or agreed costs of the respondents: (1) the Commissioner of Police [of] the Metropolis; H (2) the Gaming Board; and (3) licensing justices."

Mr. Lightman has argued on behalf of the applicants that the order does not record the dismissal of the appeals but by the use of the word " when "

refers to it only as a matter of history and that accordingly the only record of the dismissal of the appeal is to be found in the judgment, which, whatever the general rule, must in this particular case form a part of the record. We cannot accept this submission; we read the order as recording the dismissal of the appeal; if the general rule is found to be that the reasons contained in a judgment do not form part of the record they should not be admitted because of some slightly unusual wording used by a clerk in drawing the order of the court.

The historical review of the use of certiorari by the Court of Queen's Bench to exercise a supervisory jurisdiction over inferior courts and tribunals contained in the judgments of Lord Goddard C.J. and Denning L.J. in *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1951] 1 K.B. 711 and [1952] 1 K.B. 338 show how for over 100 years the use of certiorari to quash a decision for error of law on the face of the record fell into disuse. So far as criminal jurisdiction was concerned, it flowed from the decision of Parliament to put a stop to the over-formalistic approach of the lawyers which allowed the conviction by the lower court to be quashed for any defect in form in any of the documents that in the 17th and 18th centuries the Court of Queen's Bench required to be kept as part of the record of the inferior court. These included the charge, the evidence and the reasons for the conviction.

The result was that many convictions were quashed for want of form rather than merit. This unsatisfactory state of affairs was put an end to by the Summary Jurisdiction Act 1848 which prescribed a standard form in which convictions were to be recorded but which omitted any mention of the evidence or the reasons for the decision. Therefore, as the record no longer disclosed the reasons of the justices, there was nothing at which the court could look to see if they had made an error of law and certiorari fell into disuse save in those cases in which it was alleged that the court or tribunal had exceeded or abused its jurisdiction.

In so far as civil matters were concerned the Summary Jurisdiction Act 1857 enabled justices to state a case for the opinion of the court and this enabled the parties to have points of law decided without resort to certiorari.

So far had the jurisdiction to quash for error of law on the face of the record been forgotten that its very existence was denied by the Court of Appeal in *Racecourse Betting Control Board* v. *Secretary for Air* [1944] Ch. 114. But that case was decided without full citation of authority and was disapproved in *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1951] 1 K.B. 711; [1952] 1 K.B. 338 particularly by Lord Goddard C.J. who had been a party to the earlier decision of the Court of Appeal.

Once reborn, the jurisdiction has proved to be a most valuable development in our system of administrative law. In the ever increasing complexity of a modern society there has inevitably been a great increase in the number of tribunals required to regulate its affairs. Trained lawyers play their part in manning these bodies but it is neither possible because there are not enough lawyers, nor desirable because lawyers may lack the special expertise of people from other walks of life, that they should all be in the hands of the lawyers. Laymen play their part and will often outnumber and be

able to outvote the lawyers among them when it comes to making a decision. The citizen affected by these decisions is entitled to expect that they will be given in accordance with the law and, if the rule of law is to mean anything, a court manned by trained lawyers is required to speak with authority to correct the decision where it appears that it is founded upon error of law. This function is now performed in many cases by the Divisional Court of the Queen's Bench Division by the use of an order of certiorari to quash an erroneous decision; in other cases Parliament may often give a right of appeal to the High Court.

But before the Divisional Court can exercise its supervisory jurisdiction it must be able to see what the error of law is said to be. The document to which anyone would naturally expect it to look must surely be that which records the reasons given by the court or tribunal for its decision —in this case the transcript of Judge Friend's judgment.

In the collective experience of the members of this court and the very experienced counsel appearing before us it has been the practice of the Divisional Court under the presidency of successive Lord Chief Justices over the last four decades to receive the reasons given by a court or tribunal for its decision and if they show error of law to allow certiorari to go to quash the decision. The court has regarded the reasons as part of the record. They are sometimes referred to as a " speaking order." Many of the cases are, of course, unreported but examples of the court acting upon such reasons are to be found in *Reg.* v. *Chertsey Justices, Ex parte Franks* [1961] 2 Q.B. 152 (an oral judgment of justices); *Reg.* v. *Justices for Court of Quarter Sessions for the County of Leicester, Ex parte Gilks* [1966] Crim.L.R. 613 (an oral judgment of quarter sessions) and *Reg.* v. *Leeds Crown Court, Ex parte Bradford Chief Constable* [1975] Q.B. 314 (an oral judgment of the Crown Court in a liquor licensing appeal). *Reg.* v. *Supplementary Benefits Commission, Ex parte Singer* [1973] 1 W.L.R. 713 shows how far the modern practice has extended to include the reasons for a decision as part of the record. The applicant was aggrieved by a refusal of a grant of legal aid on the ground that the Supplementary Benefits Commission had determined his disposable income at greater than £950 per annum. Bridge J. giving the reserved judgment of the Divisional Court said, at p. 715:

> " There is no document before the court embodying the commission's determination, although that is the order sought to be quashed, because it was not communicated directly to the applicant but only to The Law Society. But on hearing of it the applicant wrote to the Department of Health and Social Security, as representing the commission, on June 15, 1972, expressing himself as ' completely mystified ' by the decision, setting out his financial circumstances, and asking that the matter might receive further consideration. The department replied on June 29, 1972, on behalf of the commission. ' A thorough re-examination,' the writer says, ' has been made of the basis of the determination already issued to The Law Society.' The letter proceeds to set out that basis, in other words, to disclose the reasons for the earlier determination, and concludes: ' I must confirm that the determination was correct.'
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> " Mr. Slynn, for the commission, has taken the point that the letter of June 29 is not part of the record relating to the determination

which is questioned; indeed, that there is no such record available for the court to consider. We cannot accept this submission. It seems to us that whenever a statutory body, having made a decision of a kind which can be questioned in proceedings for an order of certiorari, has subsequently chosen to disclose the reasons for the decision, whether it could have been compelled to do so or not, and however informal the document embodying the reasons, the decision with the added reasons becomes a 'speaking order' and if an error of law appears in the reasons certiorari will lie to quash the decision."

In order to do justice the court has, in addition to regarding the reasons for a decision as part of the record, been prepared to regard other documents as part of the "record" where if read with the decision they will show that the tribunal has erred in law. In *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] A.C. 663 Lord Denning held that the decision of the superintending examiner and two patent specifications formed part of the record of the proceedings before a patents appeal tribunal. In *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574 the Court of Appeal held that the report of a medical specialist constituted part of the record. As Lord Denning M.R. said in *Reg.* v. *Preston Supplementary Benefits Appeal Tribunal, Ex parte Moore* [1975] 1 W.L.R. 624, 628: "The 'record' is generously interpreted so as to cover all the documents in the case."

Parliament has set its seal of approval on this practice of the court in the case of all those bodies to which the Tribunals and Inquiries Acts 1958 and 1971 apply. They are required to state their reasons and it is provided that the reasons constitute part of the record, and that certiorari will lie: see sections 12 and 14 of the Act of 1971.

We can see no sensible reason why the court should adopt a different approach to a decision of an inferior court or other quasi-administrative body such as licensing justices from that which it is required to adopt in the cases to which the Act applies. If we were now to hold that the practice of the Divisional Court over the past 40 years was wrong and that the court could look only at the order dismissing the appeal, we should be putting the clock back to the days when archaic formalism too often triumphed over justice.

The argument for the Gaming Board is that it is only if the inferior court chooses to embody its reasons in its order that it becomes part of the record, for only then does it exist as a document for which the Court of Queen's Bench can call and examine. So if at the end of the judgment giving the reasons the judge or chairman adds the words "and I direct that this judgment be made part of the order," the court may look at it but not otherwise. It seems to us that it would be a scandalous state of affairs that, if having given a manifestly erroneous judgment, a judge could defeat any review by this court by the simple expedient of refusing a request to make his judgment part of the order. That would indeed be formalism triumphant.

It may be said that the same end can be achieved by the court refusing to give any reasons, as Judge Friend said he was entitled to do in this case. However, it is the function of professional judges to give reasons for their decisions and the decisions to which they are a party. This court would look

A askance at the refusal by a judge to give his reasons for a decision particularly if requested to do so by one of the parties. It does not fall for decision in this case, but it may well be that if such a case should arise this court would find that it had power to order the judge to give his reasons for his decision.

The Commissioner of Police of the Metropolis took the same point on the scope of the record in *Reg.* v. *Knightsbridge Crown Court, Ex parte* B *Ladup Ltd.* (unreported), March 18, 1980. In his judgment Lord Widgery C.J. quoted extensively from some of the earlier authorities and expressed the view that they gave some support to the commissioner's submission; he then contrasted this to the modern practice of the court over which he had presided but in the event found it unnecessary to express any concluded view as he held that the Crown Court's reasons did not, in fact, disclose an C error of law.

There are undoubtedly passages in the older authorities that support the Gaming Board's arguments. It would appear that at the time when those cases were decided in the last century the Court of Queen's Bench would not look at the reasons of quarter sessions unless they had been formally recorded in their order: see in particular the speech of Lord Cairns L.C. in *Overseers of the Poor of Walsall* v. *London and North Western Railway* D Co. (1878) 4 App.Cas. 30.

But the courts must adapt their procedures to modern conditions. In the last century the facilities available for recording spoken reasons were not comparable to those which exist today. Shorthand had only recently been invented and there was no electronic recording apparatus with which many courts are now equipped. This court can now rely with confidence upon a E transcript of the oral judgment given by a lower court or tribunal as accurately setting out its reasons which may not have been the case 100 years ago. Furthermore, the recent decision of the House of Lords in *Reg.* v. *Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1981] 2 W.L.R. 722, concerned with the remedy of mandamus shows that administrative law is in a phase F of active development and that the judges will adapt the rules applying to the issue of the prerogative orders to protect the rule of law in a changing society. As Lord Diplock said, at p. 736: "Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today" and Lord Roskill said, at p. 751:

> ". . . in the last 30 years—no doubt because of the growth of central G and local government intervention in the affairs of the ordinary citizen since the Second World War, and the consequent increase in the number of administrative bodies charged by Parliament with the performance of public duties—the use of prerogative orders to check usurpation of power by such bodies to the disadvantage of the ordinary citizen, or to insist upon due performance by such bodies of their H statutory duties and to maintain due adherence to the laws enacted by Parliament, has greatly increased. The former and stricter rules determining when such orders, or formerly the prerogative writs, might or might not issue, have been greatly relaxed."

Although the old authorities do show a stricter approach to what constituted the " record," the modern authorities show that the judges have relaxed the strictness of that rule and taken a broader view of the " record " in order that certiorari may give relief to those against whom a decision has been given which is based upon a manifest error of law. We, therefore, hold that the reasons contained in the transcript of the oral judgment of the Crown Court constitute part of the record for the purposes of certiorari and we are entitled to look at it to see if they contain errors of law.

The statutory provisions governing applications to licensing justices for cancellation of a gaming licence and appeals from the decision of the licensing justices are contained in Schedule 2 to the Act. Paragraph 42 provides that the licensing justices may cancel the licence on any of the grounds specified in paragraphs 20 or 21. The grounds relevant to this application are those in paragraph 20 (1) (*b*) that the applicant is not a fit and proper person to be the holder of a licence under this Act and in paragraph 21 (1) (*e*) that, while the licence has been in force, the relevant premises have been used for an unlawful purpose or as a resort of criminals or prostitutes. In addition to cancelling the licence there is also a power to make a disqualification order prohibiting a licence being held in respect of the premises for a period not exceeding five years: see paragraph 49. Paragraphs 45 and 29 provide for an appeal to the Crown Court to be by way of a rehearing with a power to make any order that might have been made by the licensing justices, and provides that the judgment of the Crown Court shall be final. In passing we observe that the fact that the appeal is said to be final is no ground for refusing certiorari if error is found on the face of the record: see *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574 and *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1981] A.C. 363.

We turn now to the judgment of the Crown Court. We would have expected the judge's judgment to have followed this basic outline: first, a consideration of and decisions upon whether it had been shown that the companies were not fit and proper persons to hold a licence (Sch. 2, para. 20 (1) (*b*)) or that while the licences had been in force the relevant premises had been used for an unlawful purpose (paragraph 21 (1) (*e*)); and secondly, assuming findings against the companies on either or both of these grounds, whether the court should exercise its discretion to cancel the licences.

At this point we should observe that, if the court concludes that the companies are not fit and proper persons to hold gaming licences, it is difficult to conceive of any grounds upon which it would be right to exercise a discretion not to cancel the licence. The judgment, after apparently holding that the companies, because of past misconduct are not fit and proper persons to hold a gaming licence, then devotes pages to the consideration of discretion; this suggests a confusion of thought in the approach of the court. The court made no finding as to whether or not the premises had been used for an unlawful purpose, though, subject to any argument that Mr. Lightman may hereafter wish to address on the subject, we should have thought that they clearly had been so used, as Mr. Cran conceded in the course of his argument.

A On the question of whether or not the companies are fit and proper persons to hold the licence it is conceded that this question must be determined in the light of the circumstances existing at the time of the appeal. Past conduct will, of course, be relevant as we shall discuss more fully hereafter. There are, however, other considerations which should be taken into account particularly when the licence holder is a limited company; for instance, whether the shareholding or management of the company remains B the same at the date of the material hearing as they were when the past misconduct occurred; the general character and reputation of the shareholders and directors of the company at the date of the hearing should be taken into account. So should any evidence that the " re-structured " licence holder has the capacity and intention to run the casino on different lines, or indeed that it may have already started to do so. It is conceded by the res- C pondents that a failure to take these very material matters relating to the restructuring of the companies into account when considering an application to cancel a licence would amount to an error of law.

This had already been decided in *Reg.* v. *Knightsbridge Crown Court, Ex parte Ladup Ltd.* (unreported), March 18, 1980 which we are told was cited to the Crown Court. Furthermore, it was apparently upon the basis D of the " restructuring " of the licence holder company that Judge Friend and the justices in *Gaming Board of Great Britain* v. *Victoria Sporting* Club (unreported), October 17, 1980, allowed the earlier appeal of the Victoria Sporting Club against the cancellation of their gaming licence. This makes it all the more difficult to understand why in the present case the Crown Court refused to consider the restructuring to be a relevant E consideration. That they did not do so is, we think, clearly demonstrated by the repeated assertion in the judgment that because of their past misconduct the companies were not fit and proper persons coupled with the refusal to make any finding on the Gaming Board's submission that even in their restructured form the companies were not fit and proper persons to hold a gaming licence. We cite two passages which clearly demonstrate the approach of the Crown Court: F

> " The respondents, and indeed the Gaming Board, have submitted to us that what is a fit and proper person can only be judged by past conduct because every person is a fit and proper person at one moment, and you have to look and see what they have done in the past to judge whether they are fit and proper persons, and it is on the evidence given G before the justices the Gaming Board and the respondents both submit to us that by reason of their past conduct they must be judged not to be fit and proper persons to hold a licence.
>
> " Well, there it is. We have come to the conclusion and we are quite satisfied that that is the only proper way to approach this matter. There has been considerable confusion in the hearing of this appeal H between International Sporting Club, which is now Lonrho, but that is not so, it is still International Sporting Club Ltd., and Curzon House is still Curzon House Club Ltd., and likewise, the Palm Beach is still Palm Beach Club Ltd., and each of these three companies is tainted,

each of them has misconducted its affairs in the past and it is only by past conduct that we can judge it, and accordingly we have come to the conclusion that they are not fit and proper persons to hold a licence because of the past misconduct."

Later the following passage appears:

"The Gaming Board also put forward various reasons why the three purchasers should not be allowed to hold the shares, Lonrho because they are, as I put it, thin on the ground in directive personnel, Aspinal because of the warning in the past and the manner in which the Aspinal club has been run, and Mecca because they had two directors on the board who ought to have moved off and done what they could to stop, or make inquiry into what was happening, and they were met with a blunt refusal to be of any assistance from the other directors appointed by Corals, got a firm no answer and were obstructed in every way. It may be that one or other or all of those matters have good foundation but we are not going to make any finding upon them. Our finding simply is this, that each of those casino limited liability companies has transgressed in the past, the present situation must be judged by the manner in which they have conducted themselves, and as I say, we find that they are not fit and proper persons."

Mr. Lightman conceded that past misconduct was a relevant consideration but submitted it was of marginal weight in a case such as this. Mr. Cran went further and submitted that it was irrelevant. We have no hesitation in saying that past misconduct by the licence holder will in every case be a relevant consideration to take into account when considering whether to cancel a licence. The weight to be accorded to it will vary according to the circumstances of the case. There may well be cases in which the wrongdoing of the company licence holder has been so flagrant and so well publicised that no amount of restructuring can restore confidence in it as a fit and proper person to hold a licence; it will stand condemned in the public mind as a person unfit to hold a licence and public confidence in the licensing justices would be gravely shaken by allowing it to continue to run the casino. Other less serious breaches may be capable of being cured by restructuring.

It is also right that the licensing justices or the Crown Court on an appeal should have regard to the fact that it is in the public interest that the sanction of the cancellation of a licence should not be devalued. It is obvious that the possibility of the loss of the licence must be a powerful incentive to casino operators to observe the gaming laws and to run their premises properly. If persons carrying on gaming through a limited company can run their establishment disgracefully, make a great deal of money and then when the licence is cancelled sell the company to someone who because he is a fit and proper person must be entitled to continue to hold the licence through the company, it will seriously devalue the sanction of cancellation. But logically this is a consideration that falls to be taken into account when deciding whether or not to exercise the discretion to cancel and not at the point at which the court is considering whether or not one of the grounds for cancellation has been established. As we have already said,

A if the court concludes that even at the date of the rehearing and taking into account the restructuring the company is not a fit and proper person to hold a gaming licence, it is difficult to see how they could exercise their discretion otherwise than by cancelling the licence. On the other hand if because of the restructuring the court considered that the company was now a fit and proper person, but it also found that in the past the company had used the premises for an unlawful purpose, it would certainly be open to the court B in the exercise of its discretion to cancel the licence. A licensing authority is fully entitled to use the sanction of cancellation in the public interest to encourage other operators or would-be operators of gaming establishments to observe the law in the area of their jurisdiction.

It is clear from the judgment that these considerations weighed heavily with the court. It may be that, even if the court had been prepared to take C the restructuring into account, they would either have found that the company was not a fit and proper person or, alternatively, even if it was, that by reason of the past use of the premises for unlawful purposes the licence should be cancelled. Certiorari is a discretionary remedy and we have thought long about the question whether, even if the court had taken the restructuring into account, it would inevitably have ordered the cancellation D of the licence. We think that it might have done so. But taking into account that in *Gaming Board of Great Britain* v. *Victoria Sporting Club* (unreported) the same court allowed an appeal against cancellation after taking into account the restructuring of the company and the fact that neither the licensing justices nor the court saw fit to make an order pursuant to paragraph 49 of Schedule 2 disqualifying the premises, we have decided that it would not be right to deny these companies E a rehearing. If we did so we should be substituting our discretion for that of the Crown Court and that we are not permitted to do on an application for an order for certiorari. Therefore, somewhat reluctantly, because we do not look upon these companies as good Samaritans coming to the rescue of the gaming public as at one stage in the argument we were invited to do, but because as Mr. Lightman said everyone, including gaming companies, is F entitled to fair treatment under the law, we grant the applications and orders will go to quash the decisions of the Knightsbridge Crown Court. This means that the orders of the licensing justices cancelling the licences still stand. If the applicant companies wish to pursue their appeals, they should be expedited and heard by another judge sitting with a different panel of licensing justices.

G As we are of the view that the judgment forms part of the record and discloses error of law, it is not necessary for us to express our opinion on the alternative ground that the court exceeded its jurisdiction. To some extent the two points are inter-related because if the judgment is part of the record it is not necessary for this court to seek by subtle reasoning to find excess or abuse of jurisdiction in order to enable it to do justice by H quashing a decision founded on error of law. Upon this difficult question of jurisdiction we are at the moment divided. But as the point is not necessary to our decision we shall not set out on the necessary lengthy analysis to defend our respective positions. It is sufficient to say that if our decision on

the scope of the record is challenged it will be open to the applicant companies to seek to uphold the decision of this court on the ground that the Crown Court exceeded their jurisdiction.

Applications granted.

Solicitors: *Cameron Markby; M. J. Kusel & Co.; Solicitor, Metropolitan Police; Gregory, Rowcliffe & Co.*

[Reported by SHIRANIKHA HERBERT, Barrister-at-Law]

[COURT OF APPEAL]

REGINA *v.* OLUGBOJA

1981 May 19, 21; June 17

Dunn L.J., Milmo and May JJ.

Crime—Rape—Consent—Submission to sexual intercourse without force or threat of violence—Whether "consent"—Actus reus of offence—Sexual Offences Act 1956 (4 & 5 *Eliz.* 2, *c.* 69), *s.* 1—*Sexual Offences (Amendment) Act* 1976 (*c.* 82), *s.* 1 [1]

The defendant and the co-accused L met the complainant and K, at a discotheque and offered to take them home but, instead of taking them home, the defendant drove them to L's bungalow. They refused to go in and began walking away. The defendant went into the bungalow but L followed the girls and raped the complainant in the car. The three returned to the bungalow where L dragged K into a bedroom. The defendant then told the complainant that he was going to have intercourse with her. She told him what had happened in the car and asked him to leave her alone. He told her to take off her trousers. She did and he had intercourse with her. The defendant, who admitted having sexual intercourse with the complainant, was charged with rape. The judge directed the jury that, although the complainant had neither screamed nor struggled and she had submitted to sexual intercourse without the defendant using force or making any threats of violence, they had to consider whether the complainant had consented to sexual intercourse. The defendant was convicted.

On appeal against conviction:—

Held, dismissing the appeal, that, since the amendment of section 1 of the Sexual Offences Act 1956 by section 1 of the Sexual Offences (Amendment) Act 1976, the offence of rape was having sexual intercourse against the woman's consent; that the offence was not limited to cases where sexual intercourse had taken place as a result of force, fear or fraud and, therefore, the judge had properly directed the jury and left to them the question whether the complainant had consented to

[1] Sexual Offences (Amendment) Act 1976, s. 1: see post, p. 326A–B.