



Neutral Citation Number: [2021] EWCA Civ 1181

Case No: B2/2020/1742

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIS HONOUR JUDGE GREGORY
IN THE COUNTY COURT AT LIVERPOOL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2021

Before:

LADY JUSTICE KING
LORD JUSTICE LEWIS
and
SIR STEPHEN RICHARDS

Between:

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT
- and -
OUEDRANI**

Appellant

Respondent

Myles Grandison (instructed by **Government Legal Department**) for the **Appellant**
The respondent did not appear and was not represented

Hearing date: 27 July 2021

APPROVED JUDGMENT
SUBJECT TO EDITORIAL CORRECTIONS

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 29th December 2020.

LORD JUSTICE LEWIS:

INTRODUCTION

1. This is an appeal against part of an order made by HHJ Gregory sitting in the County Court at Liverpool. The judge allowed an appeal against a civil penalty notice requiring the respondent to pay a sum of £20,000 in respect of the employment of two illegal immigrants and reduced the penalty to £15,000. The judge also ordered that the appellant, the Secretary of State, issue a fresh civil penalty notice in the sum of £15,000 and specify a new date by which the respondent could pay the penalty at a reduced amount in order to benefit from a fast payment option. That part of the judge's order was intended to enable the respondent to obtain a 30% discount by paying the reduced penalty within 21 days of the issuing of a fresh penalty notice. The sole issue on this appeal is whether the judge had power to make such an order.

THE LEGAL FRAMEWORK

2. The Immigration, Asylum and Nationality Act 2006 ("the Act") introduced a system of civil penalties for employers who employed illegal immigrants. Section 15 of the Act provides, so far as material, that:

“(1) It is contrary to this section to employ an adult subject to immigration control if–

(a) he has not been granted leave to enter or remain in the United Kingdom, or

(b) his leave to enter or remain in the United Kingdom–

(i) is invalid,

(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or

(iii) is subject to a condition preventing him from accepting the employment.

(2) The Secretary of State may give an employer who acts contrary to this section a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum.

(3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment.

.....”.

3. One of the circumstances in which the employer is excused from paying a penalty is if the employer has conducted reasonable checks on the right of the employee to work and has retained a record of the date on which the checks were made: see articles 4 and 6 of the Immigration (Restrictions on Employment) Order 2007.

4. There is provision for an employer to make an objection to the Secretary of State about a penalty notice. The right to object, and the powers and duties of the Secretary of the State on considering an objection, are set out in section 16 which provides, so far as material, that:

“(1) This section applies where an employer to whom a penalty notice is given objects on the ground that—

- (a) he is not liable to the imposition of a penalty,
- (b) he is excused payment by virtue of section 15(3), or
- (c) the amount of the penalty is too high.

(2) The employer may give a notice of objection to the Secretary of State.

.....

(4) Where the Secretary of State receives a notice of objection to a penalty he shall consider it and—

- (a) cancel the penalty,
- (b) reduce the penalty,
- (c) increase the penalty, or
- (d) determine to take no action.

(5) Where the Secretary of State considers a notice of objection he shall—

- (a) have regard to the code of practice under section 19 (in so far as the objection relates to the amount of the penalty),
- (b) inform the objector of his decision before the end of the prescribed period or such longer period as he may agree with the objector,
- (c) if he increases the penalty, issue a new penalty notice under section 15, and
- (d) if he reduces the penalty, notify the objector of the reduced amount.”

5. There is provision for a further appeal to a court. That is regulated by section 17 of the Act which provides that:

“(1) An employer to whom a penalty notice is given may appeal to the court on the ground that–

- (a) he is not liable to the imposition of a penalty,
- (b) he is excused payment by virtue of section 15(3), or
- (c) the amount of the penalty is too high.

(2) The court may–

- (a) allow the appeal and cancel the penalty,
- (b) allow the appeal and reduce the penalty, or
- (c) dismiss the appeal.

(3) An appeal shall be a re-hearing of the Secretary of State's decision to impose a penalty and shall be determined having regard to–

- (a) the code of practice under section 19 that has effect at the time of the appeal (in so far as the appeal relates to the amount of the penalty), and
- (b) any other matters which the court thinks relevant (which may include matters of which the Secretary of State was unaware);

and this subsection has effect despite any provision of rules of court.

.....

(6) In this section “*the court*” means–

- (a) where the employer has his principal place of business in England and Wales, the county court

.....”

6. Section 19 of the Act provides for the Secretary of State to issue a code of practice specifying the factors to be considered by him in determining the amount of a penalty. That code must be laid in draft before Parliament. The current code is the “Code of Practice on Preventing Illegal Working: Civil Penalty Scheme for Employers” (“the Code”) which was laid in draft before Parliament in December 2018 and made in January 2019.

7. The Code deals with a number of matters. It explains that an employer found employing an illegal worker may be issued with a civil penalty notice, and sets out factors relevant to the calculation of the amount to be paid under that notice. The Code explains that the Secretary of State provides a fast payment option which reduces the amount of the civil penalty payable by 30% if payment in full is received within 21 days of the date of the civil penalty notice. The Code also provides that an employer will continue to be eligible for the fast payment option if the employer objects to a notice. The material provisions of the Code provide as follows:

“Fast Payment option

We have a fast payment option which reduces the amount of your civil penalty by 30 per cent if we receive payment in full within 21 days of the date of the civil penalty notice. The reduced penalty amount and the final date by which you must pay it will be clearly shown on your civil penalty notice.

If you object to your penalty before the deadline specified in your civil penalty notice, you will continue to be eligible for the fast payment option. If you are still required to pay a penalty following your objection, you will be given a fresh notice which specifies a new date by which you may pay your penalty at the lower amount.

If you have been found to be employing illegal workers within the previous three years, you are not eligible for this reduced payment after the first penalty notice or offence.”

8. The arrangements providing for a fast payment option only apply in relation to the issuing of the civil penalty notice or a decision by the Secretary of State on an objection to the notice. There is no provision for a discounted payment in the Act, nor in the Code, if the employer does not pay the full amount within 21 days of the issuing of notice of a decision on an objection but decides, instead, to appeal to a court. If the court on appeal upholds the penalty in whole or in part, the employer will not have an option to make a discounted payment.
9. The reasoning underlying the fast payment option is explained in the witness statement of Charlotte Barton. Her evidence is that the offering of a significant discount to those who pay within 21 days of the giving of the notice enables the Secretary of State to recover at least the reduced sum at an early stage and reduces the costs involved in seeking to recover the full amount by means of debt recovery. Ms Barton explains that the fast payment option is also considered to be more cost effective than arranging for payments by instalments. She explains that the fast payment option was not made available to those who appealed the penalty to the court as the Secretary of State would have to respond to the appeal and incur legal costs in doing so and would not recover any interest on any sum payable under the penalty notice in respect of the period when the Secretary of State was seeking to recover the debt.

THE FACTUAL BACKGROUND

The Investigation

10. On 12 October 2019, immigration officers went to the Little Mo's Pizza Shop in Liverpool. Officers encountered two individuals, Mr Belghmaidi and Mr Sakhri working for the respondent, Mr Ouedrani. Both of the individuals were in the United Kingdom illegally (a claim for asylum by each of them having been previously rejected).
11. Mr Belghmaidi admitted to the immigration officers that he had worked at the premises for about a month as a cook and cleaner. He worked eight or nine hours a day, five days a week, and was paid £70 a day in cash. He told the immigration officers that he had shown his French identity card to Mr Ouedrani before he started work. In fact, the French identity card produced by Mr Belghmaidi was a counterfeit document. Mr Ouedrani said that he had made checks that Mr Belghmaidi had the right to work on 25 February 2019, that is before Mr Belghmaidi started work on 4 March 2019, but he was not able to produce records demonstrating the date on which such checks were made.
12. Mr Sakhri admitted to officers that he worked at the premises and was paid £40 or £50 a day in cash, plus free food and drink. He was given the job by the respondent and had not shown him any documentation.

The Penalty Notice and Objection

13. The Secretary of State issued a civil penalty notice on 7 November 2019 and that was given to the respondent on 11 November 2019. The penalty amount was stated to be £20,000. The penalty breakdown showed that the amount comprised a sum of £10,000 for each of the two workers involved. The notice stated that the penalty would be discounted by 30% to £14,000 if the penalty was paid within 21 days, that is on or before 2 December 2019.
14. The respondent objected to the notice. The objection was considered by the Secretary of State who decided, on 7 January 2020, to maintain the penalty notice unchanged.

The Appeal

15. The respondent appealed to the county court. There is an approved transcript of the judgment of the judge. The judge set out the background. He considered the various grounds of appeal against the issuing of the notice, all of which he dismissed. He was also invited to reduce the penalty in relation to Mr Belghmaidi as the respondent had been shown a convincing, albeit false, identity document by Mr Belghmaidi. The judge said that:

“26. I take into account the point that the document proffered by Mr Belghmaidi was convincing, or ostensibly genuine but a convincing fake, but I have to weigh on the other side of the equation against that the failure to make a contemporaneous record of the date upon which the check performed by Mr Ouedrani, the appellant was in fact undertaken. In the exercise of my discretion under section 17 of the 2006 Act, I am prepared to reduce the penalty in the case of Mr Belghmaidi by

£5,000, this to reflect the fact that the document he was shown, to all outward appearances at least, had the appearance of being a genuine document and he had at least the potential there to be misled as to Mr Belghmaidi's employability status and entitlement to work in this country.

"27. With regard to the other worker, Mr Sakhri, I do not propose to interfere with the penalty imposed in his case. It was appropriately and properly calculated by reference to the template provided in the code of practice where the calculation of penalties for transgression under this legislation. I reduce the penalty in respect of Mr Belghmaidi simply in the broad exercise of my discretion to reflect the fact that the document that was presented to the appellant in this particular case had all the appearances of being a legitimate document.

"28. So, for the reasons I have endeavoured to outline, the total penalty to be paid by Ouedrani is reduced in total by £5,000, this I say to reflect the effects of the deception in relation to the production of an ostensibly valid document. The balance of the appeal is dismissed and the appeal in respect of Mr Sakhri is dismissed."

16. The note made by the counsel then representing the Secretary of State records that, following that judgment, the judge said he would hope that, as Mr Ouedrani had exercised his right of appeal, that would not impact on his ability to reduce the sum by 40% (that must be an error and should be a reference to the 30% discount available under the fast payment option).

The Order

17. Counsel for the respondent prepared a draft order, the terms of which counsel representing the Secretary of State agreed. The order as made provides as follows:

"IT IS ORDERED THAT

The appeal against the penalty notice issued on 7 November 2019 is dismissed in relation to the penalty for Nr Nabil Sakhari allowed in respect of the penalty for Mr El Mahdi Belghmaidi on the ground the penalty was too high.

The Court had reduced the penalty for Mr El Mahdi Belghmaidi from £10,000 to £5,000.

The respondent shall issue a fresh civil penalty notice in the amount of £15,000 which specifies a new date by which the Appellant may pay his penalty at a reduced amount under the fast payment option.;

The Appellant shall pay 75% of the Respondent's costs as set out in the schedule dated 10 July 2020, amounting to £2,423.25

Dated 16 September 2020”

18. The Secretary of State does not object to, and there is no appeal against paragraphs 1, 2 or 4 of that order. The Secretary of State does appeal against paragraph 3. Counsel for the respondent had prepared a draft order following judgment, which included paragraph 3. Counsel for the Secretary of State had not objected to that proposed paragraph in advance of the order being made and had not taken instructions on it. When an official within the relevant department first saw the order after it was made, the official queried paragraph 3. Lawyers within the government legal department then considered the matter and considered that the part of the order did not appear to be consistent with the actual judgment of the judge. Attempts to resolve matters with those representing the respondent failed. An application to amend the order under CPR 40.12, which provides for the correction of errors in judgments and orders, was refused. The Secretary of State therefore appealed against paragraph 3 of the order to this court. Asplin LJ granted leave to appeal.

THE GROUND OF APPEAL AND SUBMISSIONS

19. There is one ground of appeal namely that the judge had no power to direct the appellant to serve a fresh civil penalty notice under section 17(2) of the Act.
20. Mr Grandison for the appellant (who did not represent the Secretary of State in the county court proceedings) submitted that the powers of the county court on an appeal are set out in section 17(2) of the Act. That section empowered the court to allow the appeal and cancel the penalty, or to allow the appeal and reduce the penalty, or to dismiss the appeal. The section did not empower the court when allowing the appeal and reducing the penalty to require the Secretary of State to issue a fresh notice. That would enable the employer to make a fresh objection against the re-issued notice under section 16 and to make a fresh appeal under section 17 of the Act and that was not intended. Mr Grandison also referred to obiter dicta of Beatson LJ in *Yadly Marketing Co Ltd v Secretary of State for the Home Department* [2017] 1 WLR 1041 dealing with the position of the Secretary of State dealing with objections to penalty notices.
21. Mr Grandison accepted that counsel then representing the Secretary of State had agreed the proposed terms of the order. He submitted that in so far as this amounted to a mistaken concession as to the power of the court to make such an order, it was right to permit the Secretary of State to depart from that concession on appeal, relying on the decision in *ICS Car SRL, Fanel Toia v Secretary of State for the Home Department* [2016] EWCA Civ 394.
22. The respondent did not appear and did not make any representations to this court.

DISCUSSION AND CONCLUSION

23. First, section 17 of the Act sets out a detailed, and comprehensive, procedural code governing the powers of the court on dealing with an appeal against a penalty notice issued under the Act. Section 17(2) of the Act specifies the powers of the court in the following terms:

“(2) The court may–

- (a) allow the appeal and cancel the penalty,
 - (b) allow the appeal and reduce the penalty, or
 - (c) dismiss the appeal.”
24. There is no provision for the court to require the Secretary of State to issue a fresh penalty notice. In particular where, as here, the court intends to reduce the amount of penalty payable, the powers conferred by section 17(2)(b) are to allow the appeal and reduce the penalty. They do not extend to ordering the Secretary of State to re-issue a penalty notice.
25. Secondly, where Parliament wishes to confer a power to order the issuing of a fresh penalty notice, it does so expressly. Section 16(5) of the Act, dealing with the powers of the Secretary of State on considering an objection to a penalty notice, provides that the Secretary of State may:
- “(c) if he increases the penalty, issue a new penalty notice under section 15, and
 - (d) if he reduces the penalty, notify the objector of the reduced amount.”
26. There is no equivalent provision to section 16(5)(c) in section 17(2) of the Act. In the circumstances, the wording of the statutory scheme is clear. Section 17 of the Act does not provide a power to a court dealing with an appeal to require the Secretary of State to issue a fresh penalty notice.
27. The concern of the judge was to enable the respondent to take advantage of the fast payment option and obtain a 30% discount by paying the reduced amount of the penalty within 21 days of the issuing of a fresh notice. That is why paragraph 3 of the order requires the issuing of a fresh civil penalty notice and requires the notice to specify a new date by which the respondent had to pay his penalty at a reduced amount under the fast payment option. The Act, however, does not provide for an option of paying a discounted amount following an appeal. Nor does the Code provide for discounted payments if an employer chooses to appeal. The scheme simply does not provide for an option to make a fast payment following an appeal in order to obtain a discount. The premise upon which paragraph 3 of the order was made is, therefore, misconceived. In any event, the question is ultimately a matter of the proper interpretation of section 17 of the Act. For the reasons given above, the Act does not confer a power on the court when dealing with an appeal to require the Secretary of State to issue a fresh civil penalty notice.
28. For completeness, I note that, at the hearing, counsel for the appellant indicated that the Secretary of State had decided, in the exercise of her discretion, not to seek to recover more than 70% of the amount of the penalty, that is a total of £10,500 in any event in this case.
29. Mr Grandison also sought to withdraw what, in effect, he described as a mistaken concession on the part of counsel representing the appellant before the court below. Counsel had agreed a form of words for the order that the court below was invited to

make which proceeded on the assumption that the court did have power to order the appellant to issue a fresh penalty notice. Mr Grandison referred to the decision of this Court in *ICS Car*. There, it was common ground before a county court that Calais was not “a prescribed controlled zone outside the United Kingdom” within the meaning of section 32(10) of the Immigration and Asylum Act 1999. Before the Court of Appeal, the Secretary of State sought to withdraw what she described as a mistaken concession as Calais was a prescribed controlled zone within the meaning of the relevant statutory provision.

30. Simon LJ, with whom King and Gloster LJ agreed, reviewed the case law on the circumstances when it would be appropriate to allow a new point of law to be argued on appeal. In circumstances where the point did not affect the evidence, he concluded at paragraph 36 of his judgment that the “Court ought to proceed on the basis of the law as it is and not as it was wrongly supposed to be”. The same considerations apply here. The mistake about the scope of the power to order the issuing of a fresh penalty notice did not affect the evidence that was relied on before the judge. The result of the error is that the judge was persuaded by the parties to make an order that he had no power to make. In those circumstances, it is right that appellant be permitted to raise this issue on this appeal.

CONCLUSION

31. A court which allows an appeal and reduces the amount of a penalty specified in a penalty notice issued under section 15 of the Act has no power to order the Secretary of State to issue a fresh notice. I would allow the appeal and set aside paragraph 3 of the order of the judge.

SIR STEPHEN RICHARDS

32. I agree.

LADY JUSTICE KING

33. I also agree.