

IN THE BIRMINGHAM CITY
COUNCIL BUSINESS
MANAGEMENT
(MISCELLANEOUS
APPEALS) SUB-
COMMITTEE

BETWEEN:-

(1) SABER NAZARY

Appellants

(2) QASIM ARYUBI

-and-

BIRMINGHAM CITY
COUNCIL

Respondent

DECISION AND REASONS OF THE SUB-COMMITTEE

Before: Chairman Cllr A Buchanan, Cllr N Ali, and Cllr C Jones

Legal adviser to the Sub-Committee: Ms. P. Bhomra

Mr. Verdryn of counsel for the Respondent

Messrs De Mello and Muman of counsel for Aryubi and Nazary respectively

These are the reserved reasons for the decision given on 24 November 2015 to terminate the stallholder licences of the appellants.

1. The sub-committee considered the bundle of documents filed by the parties in the appeal, considered Mr. Verdryn's skeleton argument, and noted that the appellants had not filed skeleton arguments.
2. The sub-committee heard from: Mr Verdryn, and Messrs De Mello and Muman who made submissions.
3. The Council Business Management (Miscellaneous Appeals) Sub Committee (the "CBMC") noted the background to the matter.

4. On 24 January 2014 West Midlands Police, accompanied by Home Office Immigration Officers, raided the Retail Market.
5. During that raid police officers arrested a number of illegal migrant workers, who were not entitled to be present or work in the UK, on the suspicion they were working for Mr Aryubi and Mr Nazary.
6. West Midlands Police informed the department of Environmental Health (North) that 7 illegal migrant workers had been detected from or in the vicinity of stalls B9 & B11 (operated as a single stall licensed to Mr Aryubi), and stall B22 (licensed to Mr Nazary).
7. On 14 February 2014 Mark Croxford, Head of Environmental Health (North) decided to terminate Mr Aryubi's and Mr Nazary's market traders licences following receipt of this information, because he believed that illegal migrant workers had been employed on the stalls.
8. Mr Aryubi and Mr. Nazary appealed Mark Croxford's decision to Jacqui Kennedy the Director of Regulation and Enforcement. Ms. Kennedy upheld the decision to terminate the licences, but gave her own reasons following a re-hearing she conducted.
9. Messrs Aryubi and Nazary brought judicial review proceedings and obtained an Order for interim relief on 15 May 2014 restoring the market traders licences in the interim. The appellants have, therefore, been entitled to trade for the period of over 18 months whilst these proceedings have been ongoing.
10. At a judicial review heard by Hickinbottom J on 17 March 2015, the High Court quashed Ms. Kennedy's decision. The High Court remitted the case back to Birmingham City Council for the appeal against Mark Croxford's decision to terminate the stallholder licences to be re-heard.
11. Therefore, the CBMC had been convened, upon the direction of the High Court, to hear this appeal.

12. The appeal was conducted by way of re-hearing. Any new evidence could be taken into account if relevant to the issues in the appeal.
13. The CBMC took advice from the committee lawyer about the legal background to the appeal.
14. The issue was whether, on the balance of probabilities, the evidence showed that Messrs Aryubi and Nazary had employed illegal migrant labour on their stalls.
15. If the CBMC was not satisfied that illegal migrant labour had been employed then the CBMC should allow the appeal and restore the licences.
16. If the CBMC was satisfied that illegal migrant labour had been used, the next question was: Did that amount, under the rules, to serious misconduct?
17. If the CBMC was satisfied that there had been serious misconduct, should the CBMC suspend the licences for up to 3 months, or terminate the licences?
18. The CBMC heard, albeit briefly, from two witnesses, Mark Croxford and Dave Corner for the Respondent Departments in the form of responses to questions posed by the CBMC. Mr Verdun, on behalf of the Respondent, presented his submissions, relying on his skeleton argument supplied to the CBMC in advance of the hearing.
19. Mr De Mello and Mr Muman made submissions on behalf of the Appellants. They had not supplied skeleton arguments and sought to raise new issues and material in the course of the hearing. Much of this material had not been provided to the CBMC or to Mr Verdun in advance of the hearing. No application was made to adjourn.
20. The CBMC heard representations about the evidence adduced in the judicial review, and about Chapter 13 of the Immigration, Asylum and Nationality Act 2006. The CBMC was also directed to the judgment of Moses LJ in *Shah Nawaz Pola and The Crown (Health and Safety Executive)* [2009] EWCA Crim 655. The CBMC did not find these unannounced arguments helpful as they did not assist in determining the issue to be resolved – whether the appellants had used illegal

migrant labour on their market stalls, and the consequences that would flow if the CBMC found that they had.

21. The CBMC analysed the evidence presented to it.

22. The CBMC disregarded correspondence from other market traders concerning Mr Aryubi and Mr Nazary's practice of selling produce cheaper than others, as this was irrelevant for the purposes of the re-hearing.

23. The CBMC, believed the evidence of PC Roobottom, and Teena Oulaghan confirming that all 7 men arrested on 24 January 2014 were illegally present in the UK, without permission to work.

24. This contrasted with the appellants' evidence that fewer men were arrested on the day. The CBMC noted that the appellants' evidence that there had been fewer than 7 arrests was consistent, but that the number of actual arrests contended for by the appellants was inconsistent across evidence given to Mark Croxford and to Hickinbottom J.

25. Furthermore, the CBMC found that statutory identity checks that had been carried out by Mr Aryubi and Mr Nazary in the recruitment of employees to work at their stalls as shown in their evidence was not persuasive in light of the discrepancies picked out by Mr Verdun.

26. The CBMC did weigh Bernice Ellis' comments in the balance. This evidence showed that the market stalls of Mr Aryubi and Mr Nazary had been raided on two previous occasions by the UK Border Agency and West Midlands Police and a number of arrests had been made of permanent staff working behind the market stalls in question. This evidence was, on balance, of probative value, but not determinative of the case.

27. Mr. De Mello submitted that only limited evidence was available, and that there was no evidence that the illegal migrants were employed by the Appellants, consistent with the definitions of 'employee' and 'contract for service' he relied upon. Mr. De Mello also submitted that the Appellants had undertaken adequate

checks of the status of the illegal migrant workers and should not be held culpable following the completion of those checks.

28. Having considered Mr. De Mello's submissions on the definition of employee, and Mr. Verdun's submissions, including those on the quality of the checks carried out by the appellants, the CBMC preferred to use the ordinary everyday meaning of 'employee' as given in the Rules and Regulations 2006 which would be most readily understood by the man in the street.

29. Mr De Mello, in his closing submissions, also stated that the livelihood of the Appellants was at stake as they have families with children but did not go into great detail, or provide evidence.

30. As a result, the CBMC did not accept the evidence adduced on behalf of the Appellants and preferred the evidence supplied by the Respondent. The CBMC accepted the evidence of PC Roodbottom, Dave Corner (Senior Officer for Street Trading & Subsidiary Markets), Ms Teena Oulaghan, an immigration officer, and Mark Croxford's. The CBMC found on the balance of probabilities that the allegation made against both Mr Aryubi, and Mr Nazary of unlawful employment of illegal workers was proved.

31. The CBMC went on to consider whether the employment of illegal migrant workers would constitute serious misconduct.

32. The employment of illegal migrant labour is contrary to statute, in particular but not exclusively, s.15 and following of the Immigration Asylum and Nationality Act 2006. The use of illegal migrant labour potentially put the Appellants at a competitive advantage over other stallholders who use the local workforce, paying the national minimum wage, appropriate tax and national insurance. The use of illegal labour also potentially prevents those with the right to work in this country from accessing the full labour market. In addition, illegal migrant labour has the potential to be easily exploited owing to the vulnerable position the workers find themselves in. Therefore, the use of illegal migrant labour brings the Retail Market and the Respondent into disrepute, and is likely to cause significant disruption to the day to day activities of the market where the police or immigration officers have to raid stalls to detain illegal migrant workers.

33. Consequently, the CBMC found that the Appellants failed to comply with conditions 2(k) and 2 (l) of their stallholders licences thereby breaching Regulation 10 - 'Serious Misconduct' - of the Rules and Regulations (2006).
34. The CBMC went on to consider the consequences of the breaches.
35. The appeal would not be allowed, so there was no question of the appellants having their licences returned and permitting them to continue trading.
36. The breaches were very serious. Employing illegal migrant labour is a criminal offence. The reputation of the Market had been jeopardised. The appellants had had the benefit of a period of 18 months during the course of proceedings when they had been allowed to trade. The appropriate penalty was not a suspension of the licences, but to terminate them.
37. The decision was communicated to the appellants at the conclusion of the hearing before the CBMC on 24 November 2015. The CBMC stayed the implementation of the licence termination for seven working days. The decision comes into effect on 2 December 2015.
38. Having delivered the decision, and reserved the reasons, Mr. De Mello sought to re-open the matter of the appropriate sanction. Having already heard his submissions on this point, and in the absence of any good reason given to the CBMC to re-open the matter, the CBMC declined to hear from him again.

Signed:

Alan Bullock

