

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

HEARING ON: 12TH OCTOBER 2015 at 10:00 am

IN THE MATTER OF APPEAL BROUGHT BY:

(1) Mr SABER NAZARY

(2) Mr QASIM ARYUBI

SKELETON ARGUMENT FOR THE RESPONDENT DEPARTMENT

References are to the paginated documents in form: "[Page number § paragraph (if any)]"

1. Mr Nazary and Mr Aryubi appeal the termination of their licences to operate stalls in the Bull Ring Open Market, notified by letters of 14th February 2014 [51]-[54]. The decisions were taken by Mr Mark Croxford as Head of Environmental Health (North) & Birmingham City Markets following a meeting with them the same day [57]-[59]. The meeting had been called following a West Midlands Police raid on the Market stalls of Mr Nazary and Mr Aryubi on 24th January 2014 in which 7 people were arrested for working illegally. One was subsequently released, but the others were detained [74] whilst their status and removal from the country was under consideration. Mr Croxford had been satisfied that a minimum of 5 people were employed on the stalls concerned without the right to work, he was satisfied that "there was a lack of honesty in the meeting" because Mr Nazary and Mr Aryubi confirmed checks made regarding qualification for lawful employment but had nevertheless employed the individuals concerned, and he was concerned at the impact of the matter on "the reputation of Birmingham City Council and the Traders of the Bull Ring Market" [59]. Mr Croxford's decision was appealed to Mrs Jacqui Kennedy, and she upheld his decision but for her own reasons following a re-hearing.

Her decision was quashed by Order of the Honourable Mr Justice Hickinbottom in the High Court [39]-[41] following a hearing on 17th March 2015. His judgment is lengthy [41]-[48], but sets out that [47]: "it was incumbent upon Mrs Kennedy to make a finding of fact on the central issue before her, namely whether the employees were illegal workers ..." [47 §23]; "She could not make a decision to terminate the licences in these disciplinary hearings based as they were upon the proposition that the Claimants had employed illegal workers without bringing her mind to bear upon, and making a clear finding of fact in respect of that issue" [47 §24]. He found she had not done this and so he quashed the decision accordingly. He declined to make a decision in substitution for that of Mrs Kennedy, though:

"The appeal body in this case was entitled, and indeed bound, to make findings of fact in relation to the core issue. In my judgment this Court cannot - and, certainly, should not - make those findings. That is a task properly for the appeal body on the basis of the evidence it considers appropriate to hear. Consequently, this matter must be remitted to the Council, so that the matter can be referred to an appropriate appeal body which can make those findings and can, upon the findings it makes, make a decision as to which of the three options open to it under the 2006 Regulations is appropriate." [47 §§26-27]

The options in question being to allow the appeal and restore the licences, to suspend the licences for a period not exceeding 12 months, or to terminate the licences [36 §11.3]. The Sub-Committee's hearing is the appeal anticipated by the High Court Judge. It is properly a complete re-hearing (as the Sub-Committee rules require [8 §4.6]) and hence the original reasoning of Mr Croxford is immaterial. The department maintains that he reached the correct result, and that the Licences were and should remain properly terminated.

2. The Department notes the Sub-Committee Rules. It is contended that "Serious Misconduct" [6 §2.27] includes employment of people not entitled to work in the United Kingdom. Not only is it unlawful to employ such people, but also checks by an employer should be made sufficient to be sure that this does not take place (see, for example, Section 15 and following of the Immigration, Asylum and Nationality Act 2006). The employment of such people in a public market brings the market and the market operator into disrepute (in this case the Bull Ring and the Council,

respectively). It also invited the disruption that eventuated in this case on 24th January 2014, with at least 8 police officers attending and making arrests during business hours. The Sub-Committee will be invited to solicit the views on this assessment of what constitutes serious misconduct from Mr Nazary and Mr Aryubi, but it is anticipated that they would be unlikely to disagree with the Council's assessment.

3. The Department further maintains that employment of staff that had no right to work in the United Kingdom breaches paragraphs 2(k) and 2(l) of the respective licences [23 §§2(k)(l)] which require compliance with "statutory requirements and regulations" and with the Council's Market Rules and Regulations (2006) ("the 2006 Regulations" below). Statutory requirements have not been met, as the employment of people without the legal right to work in the United Kingdom is plainly unlawful. The 2006 Regulations are broken by such employment amounting to serious misconduct [28] & [35 §10]. Mr Croxford applied Regulation 10 when he conducted his disciplinary hearing subject to this appeal on the basis of just such serious misconduct and it is contended that this is procedurally correct.
4. The central issue, as identified by the High Court Judge, is whether Mr Nazary and Mr Aryubi did employ people on their stalls who were not entitled to work there. The Department will assert that the evidence for this is over-whelming:
 - (a) There is the evidence of the co-ordinating police officer, PC Roobottom [65]-[66] who details the raid on the two stalls concerned and who personally arrested two men, one of which was working behind Mr Nazary's stall. He confirms a total of seven arrests were made on the raid on the two stalls and none of the seven had the right to work.
 - (b) Mr Dave Corner, Senior Officer for Street Trading & Subsidiary Markets, was also present and witnessed six men arrested working on stalls, and a seventh identified as having been working but then in the aisle between the stalls.
 - (c) Ms Teena Oulaghan, an immigration officer, confirmed that all of the seven men arrested were illegally present in the UK and none had the right to work [73]-[74].
 - (d) Mr Croxford reports the information he collected on the raid [55]-[56]; [61].

His account of seven arrests and only one person out of these released, is corroborated by the other evidence. Whilst his description of the arrests on the day appears to be hearsay (albeit from market officers who were present at the police raid), he gives a first-hand account of what Mr Nazary and Mr Aryubi said of their own involvement and admissions from them in respect of employment of three of the men arrested.

- (e) It will be noted that the High Court Judge summarised the case for Mr Nazary and Mr Aryubi as being that each stall had only two employees on it and all four employees were arrested. They accepted that two men living with one employee were also arrested. Mr Nazary and Mr Aryubi claimed that only the four men employed were working and they had the right to work [43 §§7, 8 & 11]. Given that the evidence is that 7 people were arrested and none had the right to work, the recorded High Court description of events given by Mr Nazary and Mr Aryubi is very dubious.

5. Mr Nazary and Mr Aryubi have submitted no documents or witness statements, even though they are represented by Carltons' Solicitors. Carltons appear to dispute the Sub-Committee's jurisdiction, asserting a new decision ought to be made at first instance. This is an incomprehensible objection in light of the decision of the High Court Judge that the previous appeal (only) is quashed. The Department has maintained throughout that the decision of Mr Croxford is subject to appeal and cannot be enforced accordingly: it is for the Sub-Committee to decide the outcome now. In these circumstances, the apparent refusal of Mr Nazary and Mr Aryubi to engage in the process of appeal to date is a matter for them and their advisors only. On the material properly submitted to the Sub-Committee the conclusion that Mr Nazary and Mr Aryubi were engaged in serious misconduct in their employment of persons not entitled to work in the United Kingdom is fully made out on the balance of probabilities and, given the damage this does to the proper conduct of the market, and the reputation of the market and the market operator, it is entirely appropriate to terminate the licences of Mr Nazary and Mr Aryubi accordingly.

ANTHONY VERDUYN

Counsel

BIRMINGHAM CITY COUNCIL BUSINESS
MANAGEMENT (MISCELLANOUS
APPEALS) SUB-COMMITTEE

HEARING ON: 12TH OCTOBER 2015

IN THE MATTER OF APPEAL BROUGHT
BY:

(1) Mr SABER NAZARY

(2) Mr QASIM ARYUBI

**SKELETON ARGUMENT FOR
THE RESPONDENT DEPARTMENT**

Signed:



Dated 7th October 2015

St Philip's Chambers
55 Temple Row
Birmingham
B2 5LS

Birmingham City Council
Legal & Democratic Services
P.O. Box 15992
Birmingham
B2 2UQ

Ref.: LS/CVL/MD/134714