



Neutral Citation Number: [2024] EWCA Civ 1387

Case No: CA-2023-001721

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT MIDDLESBROUGH
His Honour Judge Mark Gargan
K00MB343

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE ZACAROLI

Between:

**AKBARS RESTAURANT (MIDDLESBROUGH)
LIMITED**

Appellant

- and -

**THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

Mr Sohail Mohammed (instructed by **Kingston Law Limited**) for the **Appellant**
Mr Zane Malik KC and **Ms Iulia Saran** (instructed by **the Government Legal Department**)
for the **Respondent**

Hearing date: 5 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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Lord Justice Zacaroli:

1. This appeal concerns the validity of a civil penalty notice issued by the Secretary of State for the Home Department (the “SSHD”) under s.15 of the Immigration Asylum and Nationality Act 2006 (the “2006 Act”). The principal issue raised is whether, in view of the requirement under s.15(6)(a) that it must “state why the Secretary of State thinks the employer is liable to the penalty”, the penalty notice is invalid if it does not identify which of the grounds in s.15(1) (specifying the circumstances in which a person subject to immigration control has no right to work) applies.
2. The appeal, brought with the permission of Nugee LJ dated 11 December 2023, is against the order of HHJ Gargan sitting in the County Court at Middlesbrough dated 21 August 2023.
3. At the hearing of the appeal, we announced our decision to dismiss the appeal with reasons to follow. These are my reasons.

The legislative framework

4. In order to understand the factual background, it is helpful first to set out the relevant provisions of the 2006 Act.
5. Under s.15(1) of the 2006 Act,

“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.”
6. Where an employer acts in contravention of s.15, the SSHD may give him a notice requiring him to pay a penalty: s.15(2).
7. By s.15(3), an employer is excused from paying a penalty if it shows that it complied with any prescribed requirements in relation to the employment. That includes, relevantly, the Immigration (Restrictions on Employment) Order 2007, which sets out the documents an employer is required to produce and the checks it must undertake, in order to be excused from paying a penalty under s.15 of the 2006 Act.
8. By s.15(6):

“A penalty notice must –

(a) state why the Secretary of State thinks the employer is liable to the penalty,

(b) state the amount of the penalty,

(c) specify a date, at least 28 days after the date specified in the notice as the date on which it is given, before which the penalty must be paid,

(d) specify how the penalty must be paid,

(e) explain how the employer may object to the penalty or make an appeal against it, and

(f) explain how the Secretary of State may enforce the penalty.”

9. Section 16(1) enables an employer to object to the penalty, by service of a notice of objection on the SSHD, on the grounds that it is “not liable to the imposition of a penalty,” it is excused payment by virtue of s.15(3), or the amount of the penalty is too high. The SSHD must then consider the notice of objection, and either cancel it, reduce it, increase it, or take no action: s.16(4).

10. An employer may appeal against the penalty on the same grounds on which it can object to it: s.17(1). By s.17(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).”

Summary of the facts

11. On 13 March 2023, the SSHD issued a civil penalty notice under s.15(2) of the 2006 Act to the appellant, Akbars Restaurant (Middlesbrough) Limited (“Akbars”).

12. Under the heading “You are liable for a civil penalty”, the notice stated that the SSHD had concluded that Akbars had breached s.15 of the 2006 Act “by employing (an) adult(s) subject to immigration control who has a) not been granted leave to enter or remain in the UK, or b) their leave to enter or remain in the UK is invalid or has ceased to have effect, or (c) who is subject to a condition preventing them from accepting the employment in question.”

13. It stated that the penalty was in the amount of £15,000. Under the heading “Your penalty breakdown”, it identified the relevant employee as Naresh Veldi, and stated the penalty reason as “no right to work”. Under the heading “Evidence of (a) breach(es) of the law” it referred to interview records, photographic evidence and to an attached statement of case which “sets out the reasons for the breach for each worker and the supporting evidence.”
14. The statement of case set out the circumstances in which Mr Veldi was encountered in the kitchen of the restaurant, and the evidence given by him and his manager on the basis of which the SSHD had concluded that Mr Veldi worked under a contract of employment. It stated that the Home Office records showed that Mr Veldi did not have the right to work in the UK, and that Akbars had not established a statutory excuse because it could not provide evidence of having conducted a right to work check.
15. The penalty was calculated at £15,000, noting that this had not been reduced by reason of any of the three mitigating factors considered.
16. On 6 April 2023 Akbars sent a notice of objection, contending that: (1) the employee was “lawfully present in the UK and had no condition preventing him from taking employment”; and (2) no information request had been received, so Akbars had been denied the opportunity to mitigate the penalty.
17. On 26 April 2023 the SSHD issued an objection outcome notice, informing Akbars of her conclusion that it remained liable for the penalty. It stated that “Home Office systems confirm that [Mr Veldi] had no right to work in the UK at the time of employment with Akbar Restaurant”.
18. On 12 May 2023, Akbars filed an appellant’s notice with the County Court. No point was taken at that stage that the penalty notice was defective. The grounds, set out in the accompanying skeleton, were instead that Mr Veldi had the right to work in the UK because he had applied for leave to remain before the expiry of his last granted leave to remain. Complaint was made of the fact that the SSHD had not provided any evidence of Mr Veldi’s alleged lack of right to work.
19. In an email from Akbars’ solicitors to the Government Legal Department (“GLD”) of 4 July 2023 it was said that the grounds of appeal centred around “your client’s imposition of the civil penalty pursuant to section 15(1)(b)(iii) of the [2006 Act]”.
20. In fact, nothing in the penalty notice indicated that this was the basis on which the penalty was granted. The emails in response from a junior employee at the GLD, however, erroneously repeated that characterisation of the notice. Thus, on 10 July 2023, an email from the GLD said; “We have now taken instructions from SSHD position to stand by the penalty notice issued pursuant to section 15(1)(b)(iii) of the [2006] Act”. The email nevertheless went on to say that the SSHD stood by the decision because Mr Veldi “did not have permission to work in the UK for a period including when he was encountered by immigration officials at the Appellant’s premises.” It explained that Mr Veldi’s immigration history was explained in greater detail in the SSHD’s evidence. That evidence was served on 21 July 2023. It set out the fact that Mr Veldi’s leave to remain had ceased to have effect at the time of the

inspection such that he did not have permission to work in the UK and was an “overstayer”.

21. On 8 August 2023, Akbars’ solicitors emailed the GLD to say that, having considered the evidence, it appeared that the penalty notice had been issued on the basis of section 15(1)(b)(ii), i.e. that leave to enter or remain in the UK had ceased to have effect. The email went on to say that the penalty notice stated that Mr Veldi was “subject to a condition preventing him from accepting employment”, that the same had been confirmed in correspondence on 10 July 2023, and that the civil penalty was defective and invalid for non-compliance with the 2006 Act.
22. The GLD, in an email of 11 August 2023, denied that the penalty notice was defective. It stated: “Both section 15(1)(b)(ii) where the Appellant’s leave to remain in the UK has ceased to have effect and the Appellant was subject to a condition preventing him accepting employment, namely section 15(1)(b)(iii) apply.”
23. That was, on its face, confusing, since the two options are mutually exclusive. The email went on, however, to make it clear that the ground relied on was that Mr Veldi was an overstayer. It pointed out that the penalty notice and objection outcome notice stated that Mr Veldi had “no right to work”, whereas if the employee was working in breach of conditions, the penalty reason box would have stated “Working in breach”. It referred to the historical position that Mr Veldi’s leave to remain had been subject to conditions, but that at the time he was found to be working in Akbars, he did not have permission at all, being an “overstayer”.

The appeal to the County Court

24. In its revised skeleton argument submitted to the County Court, Akbars first took, as a preliminary point, the contention that the penalty notice was defective because it failed to specify a “statutory reason”, as set out in s.15(1) of the 2006 Act. The reason given by the SSHD in the penalty notice was “no right to work”. That was said to be entirely distinct from a person who was either unlawfully present in the UK or whose leave to remain had expired.
25. The skeleton then asserted that the SSHD had clarified, unequivocally, in correspondence that the penalty had been issued pursuant to s.15(1)(b)(iii), but that she had sought to change her position in the evidence subsequently served, which relied on s.15(1)(b)(ii). Akbars contended that, the SSHD, having first stated that she relied on s.15(1)(b)(iii), could not resile from that; a penalty notice could not be amended, and the SSHD would therefore have to withdraw the penalty and issue a new one.

The judgment in the County Court

26. The judge dealt first with an application by the SSHD for relief from sanctions, for having failed to serve on Akbars an exhibit containing key documents (setting out the status of Mr Veldi’s application to be in this country). He granted relief, and permission to appeal against that decision was refused.
27. The judge noted that the SSHD contended that it was sufficient, to comply with s.15(6)(a) of the 2006 Act, for the penalty notice to specify that there was a breach of

s.15 for one or more of the reasons given in s.15(1). He then noted that counsel for Akbars did not seriously challenge that argument.

28. He then addressed the argument he understood counsel for Akbars to be pursuing, namely that the SSHD, having elected to proceed on the basis of a breach of s.15(1)(b)(iii), could not be allowed to succeed on any other basis.
29. He rejected that argument because:
 - (1) It was Akbars' solicitors who had "started to chase the wrong quarry" by looking only at s.15(1)(b)(iii), albeit it was right to say that a trainee solicitor within the GLD seemed to have accepted the proposition that the notice was issued pursuant to that provision; and
 - (2) There was no prejudice to Akbars in allowing the SSHD to rely on the penalty notice as drawn, and it was not unjust to allow the SSHD to do so.
30. The judge nevertheless reflected the fact that the SSHD's lawyers had mistakenly relied for a brief period on s.15(1)(b)(iii), among other things, in refusing to award the SSHD her costs.

The appeal to this court

31. Akbars sought permission to appeal on three grounds, but permission was only granted in respect of the second:

"The Judge erred in law in determining that:

 - i) The Respondent's civil penalty was compliant with section 15(6) of the 2006, with reference to section 15(1) of the 2006 Act. Notwithstanding the fact that the Respondent's civil penalty listed all statutory reasons (albeit in the alternative), and those statutory reasons are all mutually exclusive of one another, and/or
 - ii) The Respondent could change the basis/reason upon which it issued the Appellant with a civil penalty pursuant to section 15(6) of the 2006 Act, seven days before the substantive appeal hearing and without requiring her to re-issue the civil penalty."
32. The principal submission of Mr Mohammed, who appeared for Akbars, was that the penalty notice was invalid because it referred – under the heading "You are liable to a civil penalty" – to all of the grounds under s.15(1). He said that this was a fatal defect, which could not be cured by anything later in the notice. I have no hesitation in rejecting that submission. In determining whether the notice satisfies the requirement in s.15(6)(a), it is necessary to look to the notice as a whole. On the front page alone, it contains two references to the reasons for the notice being given: under the heading "penalty reason" and in cross-referring to the attached statement of case. There is no basis for requiring the reasons to be set out in any particular place on the notice.
33. Mr Mohammed's secondary submission is that, even read as a whole, the notice fails to distinguish between the grounds under s.15(1) and is defective for that reason. This

turns on what is meant by the requirement in s.15(6)(a) to state “why” the SSHD thinks that Akbars is liable to the penalty. Mr Mohammed’s interpretation requires the words “state why the SSHD thinks the employer is liable to the penalty” to be read as “state which of the grounds in s.15(1) the SSHD thinks applies”.

34. I do not think the subsection should be read in that restrictive way. The language of s.15(6)(a) is general and non-prescriptive. As a matter of ordinary language, a notice which identifies to the employer the facts and evidence on which the SSHD has reached the conclusion that a particular person, who does not have the right to work, is working under a contract of employment with the employer in breach of s.15(1) is a notice which states “why” the SSHD thinks the employer is liable to a penalty. Such matters are not required to be set out under any other provision in the Act, and they naturally fall within the umbrella of reasons why the employer is liable to a penalty.
35. It is true that the particular ground relied on by the SSHD under s.15(1) would also fall within that umbrella. It would require greater specificity in the wording of the subsection if, however, the intention was either that each and every reason which led the SSHD to her conclusion must be set out in the notice, or that – among the various reasons – at least the specific ground under s.15(1) relied on – must be set out.
36. Importantly, the subsection must be seen in light of the statutory scheme as a whole and its purpose. The purpose of this part of the 2006 Act is, as Mr Malik KC for the SSHD submitted, to discourage illegal employment of persons subject to immigration control. It does so by the provision of prescribed requirements (in the 2007 Order) and by excusing any employer who complies with them from a penalty, even if one of its employees does not in fact have the right to work in the UK. The onus is squarely placed on an employer, by s.15(3), to carry out necessary checks on those that it employs.
37. That reinforces the conclusion that a simple statement to an employer that one of the people working for it has no right to work is a sufficient statement of “why” the SSHD believes that the employer is liable to a penalty.
38. Mr Mohammed submitted that it was imperative that the penalty notice identified the precise reason why the relevant employee was not entitled to work, because, if not challenged within the requisite time period, the notice has the effect of a judgment and is enforceable accordingly, and without that precision the employer could not know whether to challenge it.
39. This submission fails, however, to take account of the onus placed upon the employer, both under s.15(3) and, on any appeal, under s.17(1) of the 2006 Act. The latter onus is to satisfy the court that the employer is not liable to the imposition of “a penalty”, in circumstances where (by s.17(3)) the court can take into account matters beyond those that appeared in the penalty notice, including matters of which the SSHD was unaware at the time of the penalty notice.
40. That means that if, for example, the SSHD had identified in the notice ground X as the reason why an employee was not entitled to work in the UK, but it later turned out that the correct reason was ground Y, the court could take this into account, and the employer could not establish that it was not liable to a penalty.

41. Mr Mohammed submitted in reply that although an appeal under s.17(3) is a re-hearing, it is a re-hearing of the SSHD's "decision". I understood him to be saying that, if the original decision was taken in reliance on ground X, it would not be open to the court to conduct a re-hearing of any other decision, e.g. one taken in reliance on ground Y. I reject that submission. The appeal is a re-hearing of the SSHD's decision to impose "a penalty", without limiting the parameters of that re-hearing to the decision to impose the particular penalty on the particular basis originally identified.
42. The fact that the question on appeal is whether the employer is not liable to, or is excused from, a penalty – irrespective of whether it is one based on the ground under s.15(1) originally relied on by the SSHD when issuing the notice – points away from reading s.15(6)(a) as creating a mandatory requirement to state in the notice which ground under s.15(1) is relied on by the SSHD.
43. In the alternative, Mr Mohammed submitted that the SSHD's decision to issue the penalty notice was based on s.15(1)(b)(iii), because that is what the GLD had unequivocally indicated in correspondence. He submitted that the judge was wrong to say that Akbars suffered no prejudice by the SSHD being permitted to rely on s.15(1)(b)(ii) at the hearing: Akbars suffered prejudice because it had understood that the penalty had been issued on the basis of s.15(1)(b)(iii). He submitted that the reason why the SSHD issues a civil penalty notice cannot change. To allow the SSHD to change the reason for issuing the notice would place the parties on an unequal footing; mean that the changed basis was not challenged on the appeal; create uncertainty for the court hearing the appeal; and impinge on principles of fairness and natural justice. Moreover, s.15 of the 2006 Act does not allow for civil penalty notices to be amended: the method of correction lies with withdrawal and re-issue.
44. These submissions fail at the first stage. While it is true that a junior employee within the GLD appears to have endorsed the characterisation put upon the notice by Akbars (that it was based on s.15(1)(b)(iii)), that fell far short of an unequivocal statement that the SSHD's decision had been taken on that basis. As I have indicated above, when reviewing the chain of email correspondence, notwithstanding the confusing references to s.15(1)(b)(iii), the emails from the GLD in July and August 2023 made it clear that the SSHD's conclusion that Mr Veldi had no right to work was because he was an overstayer, not because he had breached any conditions. That was, moreover, the position clearly taken in the evidence and submissions advanced on her behalf.
45. In any event, even if the SSHD had reached her original decision on the basis of s.15(1)(b)(iii), she would have been entitled to rely on a different basis on the appeal by virtue of s.17(3), as explained above. Insofar as Akbars objected that it was procedurally unfair to allow the SSHD to rely on s.15(1)(b)(ii) at the hearing of the appeal, the judge concluded that there was no prejudice to Akbars. Mr Mohammed has not pointed to any actual prejudice to Akbars arising from the uncertainty exhibited in the email correspondence from the GLD; there is no suggestion that it was not able to deal with the case based on s.15(1)(b)(ii) at the appeal hearing in the County Court. I consider that the judge's conclusion on that issue is unimpeachable.

Lord Justice Coulson

46. I agree.

Judgment Approved by the court for handing down.

Lord Justice Lewison

47. I also agree.