Licensing Review Investigative Report

Date: 25th May 2020

Business Name: Jaflong Restaurant

Business Address: Jaflong Restaurant
51 Market Square
Bicester
OX26 6AJ

References: CPCT Reference: 319292
Application Reference: AR22

Instruction

1. Immigration Compliance has been instructed by Mr Shakur Ali of Jaflong Restaurant to support the premises licensing review hearing which is to be considered by the licensing committee. Mr Ali has requested that the documents, submitted by the Home Office in support of the review hearing, are investigated and a subsequent report completed.

2. Immigration Compliance is an investigative consultancy, owned and operated by Mr Kevin Barker. Mr Barker previously served as an Immigration Officer for 10 years, and has provided expert consultancy to UK business for the past 5 years. Mr Barker has a wealth of experience which has been gathered from roles in borders (Heathrow Airport), intelligence (Heathrow Airport & nationwide), surveillance officer (nationwide), Maritime Anti-Smuggling Unit (nationwide) and immigration enforcement (South West Immigration Compliance & Enforcement).

Report Evidence (Documents & Information Used)

3. The report outlined below has been formed only from the limited information that has been released through the civil penalty procedural documents and the redacted Cherwell District Council Public Document Pack.

4. To corroborate the facts of the report, reference has been made to the following statutory documentation:

   i. Home Office Guidance (General Instructions)
   ii. Illegal working penalties: codes of practice for employers, 2019
   iii. Immigration Act 1971
   iv. Immigration Asylum & Nationality Act 2006
   v. Immigration Act 2016
   vi. Licensing Act 2003
   vii. Police and Criminal Evidence Act (PACE) Code B
   viii. Powers of Entry: Code of Practice
   ix. Civil Service Code

Report Summary

5. The redaction of the Home Office report and related witness statements makes it extremely difficult to ascertain which individuals were suspected of illegal working and the evidence linked to those individuals.

6. Although in-depth and comprehensive, much of the information presented in the 'Premise Licence Review' document, produced by the Home Office, is factually incorrect or irrelevant to the case in hand.

7. A number of discrepancies have been identified within the Premise Licence Review document.

8. The witness statement's produced by immigration officers involved in the operation lack detail, and often fail to expand on, and/or evidence, the statements made by the officers. The investigation does not appear to remain impartial. Interviews were not conducted fairly and evidence was not accurately recorded.

9. No matter how evidence was obtained, there is evidence before the committee that has been presented by the Home Office of illegal working.

10. Although a significant number of procedural improprieties have been identified in relation to the conduct of the immigration enforcement officers, it is accepted that this would not be the only factor in determining the outcome of these proceedings.

Chronology

11. Intelligence was received by Immigration Enforcement stating that illegal workers had been employed at Jaflong, 521 Market Square, Bicester, OX26 6AJ.

12. On 11 October 2019, Immigration Enforcement, accompanied by a Cherwell District Council Licensing Officer, conducted an illegal working enforcement operation at the Jaflong business premises.

13. Two individuals found during the operation were alleged to be employed by Mr Ali and a referral notice was served upon the alleged employer for a potential illegal working civil penalty of £40,000.

14. Mr Ali responded to the Home Office 'request for information'.

15. After considering the facts of the case the Home Office consequently issued the liable party with a reduced penalty amount of £20,000, this reduction was made on account of the following facts:

    - This was the liable party's first breach of section 15 of the Immigration Act 2006
    - The liable party had displayed 'active co-operation' with the Home Office

16. The Home Office (Immigration Enforcement), as a responsible authority, then made an application to review the premises licence on the grounds that the licence holder had failed to meet the licensing objective of the prevention of crime and disorder.

The Civil Penalty Notice

17. Section 15(2) of the 2006 Act prescribes that the Secretary of State may give an employer who acts contrary to section 15 a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum.

18. The word 'may' infers a level of discretion available to the Secretary of State, as to whether a civil penalty should be served at all.

19. The Civil Penalty Compliance Team (CPCT) are responsible for the administration of the illegal working civil penalty scheme. This team considers the merits of the evidence presented by officers following an operation, and makes the decision as to whether a civil penalty should be imposed.

20. It is evident that in most cases the threshold for the imposition of a civil penalty is extremely low (given that the burden of proof for this civil matter is 'on the balance of probabilities') and any imposed penalty may then be challenged by way of an objection and further appeal by the liable party if deemed necessary and proportionate.

21. In this case a civil penalty notice was 'given' to Jaflong Restaurant Ltd on 11 November 2019. The decision to serve the notice was based upon evidence in the form of interview records made by officers during the operation. The evidence arising from these interviews is challenged by the liable party and was to form the basis of their objection against the imposed penalty.

The Objection against the Imposed Civil Penalty

22. Section 16(1) of the 2006 Act prescribes that an employer to whom a penalty notice is given may object on three grounds –

    a) that they are not liable to the penalty

    b) that they are excused payment by virtue of section 15(3) of the 2006 Act (a statutory excuse)

    c) that the amount of the penalty is too high

23. The 2006 Act is not prescriptive as to rule out any relevant matter as to why the liable party may object to the imposition of a penalty.

24. On consideration of the liable party's objection, the Secretary of State has the authority to reduce or cancel the imposed penalty.

25. If, following consideration of the objection, the Secretary of State maintains the penalty, the liable party is afforded a right of appeal. Section 17 of the 2006 Act prescribes that an appeal shall be a re-hearing of the Secretary of State's decision to impose a penalty and invites the court to consider 'any matter they deem relevant'. Therefore, any ground to object cannot be considered irrelevant without the courts consideration.

26. An ‘information response’ was submitted by Mr Ali, as requested by the Civil Penalty Compliance Team (CPCT), and the Home Office consequently reported that he was actively co-operating with the Home Office investigation.

27. Mr Ali instructed his accountant, Rosemount Accountancy Ltd, to submit an objection against the imposed penalty on the grounds that they were not liable to the penalty. Unfortunately, unbeknown to Mr Ali, the accountancy firm did not submit the objection within the statutory time frame. It follows that the penalty was left unchallenged and the fine of £20,000 was maintained.

28. The civil penalty statutory framework dictates that Mr Ali has no further remedy for appealing the imposed penalty.

Illegal Working Penalties: Codes of Practice for Employers, 2019

29. The relevant illegal working penalties code of practice is issued under section 19 of the 2006 Act to specify the factors to be considered by the Home Office in determining the amount of the civil penalty for employing an illegal worker.

30. This Code, and the civil penalty regime, only applies to employers who employ staff under a contract of employment (a contract of service or apprenticeship). “It does not apply to those who undertake work who do not fall within these categories”. The Secretary of State clearly recognises that there are ‘workers’ who are not employed under a contract of employment for whom the penalty would not apply.

31. Section 16(5)(a) of the 2006 Act prescribes that where the Secretary of State considers a notice of objection he shall have regard to the code of practice under section 19 only in so far as the objection relates to the amount of the penalty.

32. Significantly, the code states, “the code does not impose any legal duties on employers, nor is it an authoritative statement of the law”. This statement clearly confirms that there is no legal duty for any employer to check the ‘right to work’ status of any of their employees and therefore, in isolation, the employer would face no charge for failing to conduct such checks.

The Evidence

33. The Home Office evidence supporting this licence review is based solely upon ‘interview records’ from, Jewel Miah and Mohammed Moyna, two individuals believed to have been working upon the business premises.

34. On page 90 of the Premises Licence Review Hearing Report, an Immigration Officer witness statement identifies a ‘male [Jewel Miah] found in the kitchen wearing dirty chef whites and black trousers’. The male stated that he worked as a kitchen porter. However, there does not appear to be, and is certainly no record of, any further questioning to establish the name of the employer or the employment status of this male. Determining employer-employee relations is an important part of the civil penalty process, indeed this licensing review, yet the specific factors and circumstances surrounding the male’s employment were not explored or recorded in any detail during the investigation.

35. The officer [at 34] further presents that Jewel Miah stated that his employer was aware that he was unlawfully present in the United Kingdom. No further questioning

has been presented to evidence how the un-named employer would have reasonable cause to believe that this individual was unlawfully present.

36. On page 95 of the Premises Licence Review Hearing Report, an Immigration Officer witness statement identifies a male [Mohammed Moyna] who, when interviewed via an official interpreter (Big Word), stated he had worked at the business for 6 months as a chef. This male named Shokor Ali as the 'boss' and, significantly, states that he did show his passport copy to Mr Ali before he was offered the job. This evidences that Mr Ali did make efforts to comply with the illegal working penalties code of practice (which although he is not legally obliged to comply with does illustrate due diligence). Again, this significant fact was then left without further investigation at the time to establish if this due diligence would confer a statutory excuse or mitigate any imposed penalty.

37. Officer reports illustrate that the authorities were aware of the fact that Dill Ali, the son of the owner, was temporarily managing the premises due his father's poor health. However, Dill Ali was not questioned during the operation regarding any of the individuals alleged to have been employed at the premises. This resulted in Dill Ali being unable to establish the facts of the individual's presence upon the premises.

38. There has been no disclosure of any notes or recorded interviews which may verify the exact words spoken during the questioning of any of the above individuals; therefore, I am unable to make any further assessment on the evidence presented.

Procedural Improprieties

39. The documents investigated during this report have highlighted a significant number of procedural failures on behalf of the immigration authorities. This report highlights some of the more significant improprieties for consideration in connection with the licence review.

40. Entry to the business premises was gained by use of section 179 of the Licensing Act 2003 ('the 2003 Act'). Immigration Enforcement Guidance (General Instructions) prescribes that,

> "As a matter of policy, the power [section 179] must only be used where there is intelligence in relation to illegal working and related offences taking place in connection with the licensable activity."

The intelligence provided by the Home Office within the report makes no connection to a licensable activity. In fact, the intelligence provided within the licence review application merely asserts that there were "immigration offenders present". Contrary to Home Office policy, the threshold for the use of section 179 of the 2003 Act does not appear to have been met.

41. During the operation, Immigration Officers had no statutory power to search the premises. Notably, section 180 of the 2003 Act confers a power of entry and search to a police constable if they have reason to believe that an offence under the 2003 Act has been, is being or is about to be committed. Significantly, section 180 would only confer a power to search in connection with a breach of the 2003 Act, and is not conferred on immigration officers - it follows that once entry has been made by an immigration officer, then any further search and engagement must be conducted under separate statutory powers. There is no evidence of any statutory search power being exercised during this operation.

42. The 2003 Act does not legislate for the use of any associated immigration powers of search, seizure or arrest. Consequently, a search of the premises and/or the 'rounding-up' of individuals must be individually recorded and justified by those using any separate powers.

43. Page 18 of the Premises Licence Review Hearing Report, at 1.33, notes that the OIC (Officer in Charge) conducted 'a thorough walkthrough of the premises and accommodation above'. This is not a statutory power conferred upon an immigration officer.

44. Page 18 of the Premises Licence Review Hearing Report, at 1.31, notes that the OIC conducted a 'health and safety sweep' of the premises. This is not a statutory power conferred upon an immigration officer and is contrary to the use of section 179 of the 2003 Act which stipulates that the entry must be for the purpose of seeing whether an offence under any of the Immigration Acts is being committed in connection with the carrying on of the activity.

45. As soon as officers moved the intended search outside of the statutory definition, entry to, and the search of, the business premises falls outside of the statutory power conferred by section 179 of the 2003 Act.

46. The unlawful search of premises is contrary to Code B of the Police and Criminal Evidence Act (PACE), which states in relevant part:

    1.3A "Powers to search and seize must be used fairly, responsibly, with respect for people who occupy premises being searched"

    1.5 "If the provisions of PACE and this Code are not observed, evidence obtained from a search may be open to question."

47. In addition to PACE Code B, the Secretary of State has also issued a code of practice for the use of powers of entry – the 'Powers of Entry: Code of Practice'. A relevant person (in this case an immigration officer) must have regard to this code when exercising any functions to which the code relates. During the operation officers appear to have acted contrary to the code, which states:

    1.1 "the Code is admissible as evidence in any such proceedings and any failure by a relevant person to have regard to the Code may be taken into account."

    11.1 "Where it is proposed to exercise a power of entry without seeking consent, and without a warrant, authorised persons must follow the conditions set out in statute granting them entry."

    17.2 "Whilst exercising powers an authorised person should not exercise any powers other than those granted under legislation and should be clear about what associated powers may be exercised (such as powers to inspect, search, seize or survey) and exercise those legally and fairly.

48. Immigration Officers must also follow a strict professional code to uphold and promote the reputation of the Home Office. Under section 5(8) of the Constitutional Reform and Governance Act 2010 the 'Civil Service Code' forms part of the terms

and conditions of service of any civil servant covered by the code. The code stipulates that all officers should act with integrity, honesty, objectivity and impartiality.

49. It is submitted that to knowingly act outside of, or beyond, statutory powers and to knowingly breach prescribed guidance and codes, is contrary to the published Civil Service Code, in that:

    (a) Officers have failed to act in a way that deserves and retains the confidence of all those with whom you have dealing;

    (b) Officers have failed to deal with the public and their affairs fairly;

    (c) Officers have failed to act with honesty by setting out the facts and relevant issues truthfully;

    (d) Officers have failed to carry out their responsibilities in a way that is fair, just and equitable.

50. In this case officers appear to have acted outside of this important, contractual, agreement.

Inconsistent Information (Encounters & Illegal Workers)

51. There are significant inconsistencies between accounts, reports and witness statements relating to the number of individuals encountered and the consequent actions relating to those individuals.

52. The application for review (completed by Immigration Enforcement) illustrates that there were **7** members of staff on site, **5** were suspected of working illegally and two (**2**) of the encountered males were arrested for immigration offences.

53. The Premise Licence Review Document [page 15 at 1.3] illustrates that **4** people were found to be working illegally at the premises and **3** individuals were arrested for being in the UK with no valid leave.

54. The Premise Licence Review Document [page 17 at 1.21] illustrates that officers identified **4** males in total who were of interest to the Home Office two (**2**) were detained and three (**3**) were instructed that they had no permission to work and were escorted from the premises. In addition to the fact that these figures simply do not add up, immigration officers have no statutory power to remove individuals from premises without arrest.

55. The OIC debrief [page 29] illustrates that **7** individuals were encountered, **2** of whom were ‘cleared’, **1** individual was escorted from the premises and **2** individuals were arrested. There is no recorded outcome for 2 of the individuals.

Premise License Review Document (Home Office)

56. It is my understanding that the licensing authority’s role when determining such a review is not to establish the guilt or innocence of any individual but to ensure the promotion of the crime prevention objective. However, the Home Office have drafted

a report focused on determining guilt and drawing comparisons with previous cases to justify their recommendation for revocation.

57. My observations in this section consider the legal facts which have been highlighted by the Home Office within their Premise License Review Document. Some of the statements made are factually incorrect, some cannot be proven and some are irrelevant to the case in hand. I bring these facts to the attention of the committee to ensure a balanced representation, upon which an informed decision may be made.

58. At 1.1 on page 15, it would appear that no investigation has been conducted in relation to the allegation of tax fraud. At 1.19, we are informed that the allegation is anonymous and consequently untested and therefore should not be relied upon.

59. At 1.6 on page 15, the Home Office highlights the circumstances of an immigration enforcement visit conducted in 2011, however, no reference is made to any individuals who were found to be working illegally (this report [at 15] establishes that the Home Office have indicated that this case is the liable party's first and only breach of section 15 of the 2006 Act).

60. At 1.7 on page 15, the Home Office makes reference to a further enforcement operation in 2013. The report infers that no individuals were found working illegally during this operation (Home Office evidence [at 15] suggests that no illegal workers were found).

61. At 1.7 on page 15, a link is inferred between a name given via an allegation in 2003 and an individual encountered at the premises during the 2019 operation. The name could simply be a common name, but due to redaction and without an additional date of birth we are unable to ascertain if this is indeed the same individual. Officers do not seem to have explored this inferred link during the operation. Again, the report makes no reference to this individual working illegally at the premises in 2019 (Home Office evidence [at 15] suggests that he was not working illegally).

62. At 1.8 on page 15, the Home Office imply that Mr Ali has a disregard for immigration law and lack of employment judgement on how to conduct the correct right to work checks. The Illegal working penalties: codes of practice for employers 2019, makes it very clear that an employer is not legally obliged to conduct a right to work check on any potential employee.

63. At 1.9, 1.10, 1.11 on page 15, significant reports relating to the condition of the premises are brought within the review document. However, an immigration officer is not afforded any powers to investigate health and safety risks or fire regulations.

64. At 1.9 on page 15, it is reported that the fire service were called to attend and assess the premises. Dill Ali reports that the Fire Service did attend later that same evening. Dill Ali states that the fire officers conducted an assessment but did not provide a report or request any remedial action. I am informed (in lieu of any formal report) that the response from the Fire Service was that the premises were safe to continue operating.

65. At 1.12 on page 16, the report highlights that Mr Ali was served with a civil penalty which remains outstanding. Dill Ali submits that the business accountant was instructed to make an objection but failed to do so.

66. At 1.15 on page 16, the Home Office asks the committee to consider the failure to heed prior warnings and advice. What advice and support has been given to the

business? Do the Home Office have any record of official warnings or any advice or support given to the employer?

67. At 1.15 on page 16, the Home Office request to revoke the premises licence as a 'deterrent to others' appears to lack impartiality and detracts from the specific and individual evidence of the case, instead focusing on the message that revocation would give to others.

68. At 1.19 on page 16, the intelligence does not support the use of section 179 powers. Immigration Enforcement General Instructions states:

> "As a matter of policy, the power must only be used where there is intelligence in relation to illegal working and related offences taking place in connection with the licensable activity, irrespective of whether the ICE team is completing a solo or joint visit."

In the quoted intelligence there was no connection made to any licensable activity.

69. At 1.22 on page 17, the report suggests that previous visits identified illegal workers, however, the bullet points contained within the paragraph do not evidence that illegal workers were encountered during any of the operational visits. Again, this information contradicts the Home Office statement within the civil penalty notice that this is the employer's first breach of section 15 of the 2006 Act.

70. At 1.31 on page 18, the report evidences a 'health and safety sweep of the premises', such a search would be conducted outside of any statutory powers and would constitute an unlawful search.

71. At 1.33 on page 18, the report makes reference to the OIC conducting a thorough walk through of the premises and accommodation above, such a search would also be conducted outside of any statutory powers.

72. At 1.36 on page 18, Reference is made to potential contact with 'public protection' but it is not made clear if contact was actually made. There is no evidence of any further visit/site inspection conducted?

73. At 2.1 on page 21, the Home Office reports that illegal workers were engaged in activity on the premises on three separate occasions. This statement is not specifically evidenced within the report and is contradicted by the fact that the recently imposed civil penalty was reduced due to the fact that "this was the liable party's first breach of section 15 of the Immigration Act 2006".

74. At 2.1 on page 21, the Home Office asserts that "it is a simple process for an employer to ascertain what documents they should check before a person can work". The illegal working penalties: codes of practice for employers 2019, does give guidance on the type of documents which are acceptable to provide an employer with a statutory excuse against a civil penalty. However, the code also states that,

> "It will not be possible to conduct an online right to work check in all circumstances, as not all employees, or prospective employees, will have an immigration status that can be checked online at this stage."

Hence, the difficulty arises when the potential employee cannot provide any document which evidences a right to work in the UK (i.e. the document is lost or stolen). In such circumstances, unless the individual has an outstanding application

with the Home Office or status which can be checked online, the authorities offer no support in checking an individual's right to work. In these circumstances the Home Office stance is non-committal and they advise that if the individual is employed you do so at your own risk.

75. At 2.1 on page 21, the Home Office suggest that the offence of illegal working can only be committed with the co-operation of a premise licence holder or its agents. Co-operation suggests that an employer is complicit in the crime and engages an individual in work knowing that an individual has no legal status to conduct such work. The fact that an employer is not obliged by statute to check an individual's right to work implies that an employer could, unbeknown to them, quite lawfully and genuinely employ an individual who has no right to work in the UK, such action would not necessarily determine that they were complicit with the act of illegal working. The first that many employers are aware of an individual's immigration status is when an immigration operation takes place upon their business premises. The offence of illegal working is committed by the individual who is working without permission or in breach of their restrictions. The offence of illegal working is not committed by the employer.

76. At 2.3 on page 22, the Home Office suggest that a warning or 'other activity' ('other activity' is undefined) would be inappropriate and move to make this review application. This would seem contrary to paragraph 11.10 of the guidance issued under section 182 of the 2003 Act, which promotes that where possible the responsible authority should advise the licence or certificate holder of the steps they need to take to address those concerns. Co-operation at a local level in promoting the licensing objectives should be encouraged and reviews should not be used to undermine this co-operation.

77. At 3.1 on page 22, the report suggests that an employer engages in criminal activity by employing illegal workers. It is a legal fact that the employer does not commit a criminal offence by employing an illegal worker, this is a civil offence (contrary to section 15 of the 2006 Act) dealt with by way of a civil penalty.

78. At 3.4 on page 22, the Home Office suggests that since 2006, employers have had a duty to complete checks to ensure that employees and potential employees are not disqualified from working. There is no legal duty imposed upon an employer to conduct such checks and the 2006 Act made no amendments to this fact.

79. At 3.6 on page 22, the Home Office submits that it has considered and rejected conditions as an alternative to revocation. Suggesting that paragraph 1.16 of the guidance issued under section 182 of the 2003 Act, which states that, "Licence conditions should not duplicate other statutory requirements or other duties or responsibilities placed on the employer by other legislation", render such conditions inadequate. However, the illegal working penalties: codes of practice for employers 2019, states that, "the Code does not impose any legal duties on employers". This would suggest that a condition imposing a right to work check to be completed by the employer would not be a duplication of other legislation. Furthermore, it states at paragraph 2.6 of the guidance issued under section 182 of the 2003 Act, "licence conditions that are considered appropriate for the prevention of illegal working in licensed premises might include requiring a premises licence holder to undertake right to work checks on all staff employed at the licensed premises or requiring that a copy of any document checked as part of a right to work check are retained at the licensed premises". Therefore, the imposition of such conditions would be commensurate with licensing guidance.

80. At 3.7 on page 23, the Home Office implies that conditions requiring an employer to undertake checks are already mandated and required under the 2006 Act, this is simply not true.

81. At 3.13 on page 24 the criminal behaviour outlined in this paragraph is conducted by the individual working illegally. These illegal workers are seldom prosecuted, instead they are leaned upon to provide evidence in the pursuance of civil penalties and instigation of licence reviews. The employer is seen as an easy target to impose penalties upon (on the balance of probabilities) yet the lack of prosecution for those found working illegally fails to create a deterrent for those actually breaching criminal law.

82. At 3.17 on page 24, the Home Office suggests that an employer may be prosecuted for 'wilful ignorance' or 'where no documents are requested'. In fact, a right to work check is not a statutory requirement; therefore, the failure to request documents would not present grounds for prosecution. Furthermore, section 21(1A)(b) of the 2006 Act prescribes that the person must have 'reasonable cause to believe that the employee is disqualified from employment by reason of the employee's immigration status'. Wilful ignorance may not meet the threshold for prosecution.

83. At 3.21 - 3.25 on page 25, the Home Office reiterate the simplicity of right to work checks and the support given to employers. As highlighted in paragraph 73 of this report, support for those who are faced with individuals who cannot prove their right to work in the UK is non-existent. The Home Office openly admit that not all employees, or prospective employees, will have an immigration status that can be checked online. The Windrush Generation are just one example of a number of individuals in the UK who are unable to evidence their right to work. Government websites, checklists and google searches are a great support when individuals are complicit with requests for documentation; however, the support is severely lacking in respect of individuals who present with no documentation and no outstanding Home Office application.

84. At 3.28 on page 26, the report makes reference to the Home Office code of practice on preventing illegal working (2014), this code has been replaced by the current Code of practice on preventing illegal working: Civil penalty scheme for employers (2019) which came into force for any case considered on or after the 28th January 2019.

85. At 3.31 on page 26, the Home Office make reference to the offence of illegal working under 24B of the Immigration Act 1971. This offence of illegal working is committed only by the individual who is working illegally not the employer. In the present case, the Home Office have brought no charges for the offence in breach of 24B of the 1971 Act. Any prosecution under section 24B may only be investigated by specialist investigative officers.

86. At 3.32 on page 26, the Home Office suggests that an employer's failure to check right to work documentation is an act of facilitation. Facilitation of an offence suggests that an individual makes it easier for the offence to be committed. UK legislation does not legally compel employers to check an individual's right to work status; therefore, the lack of any documentation check by the employer alone cannot constitute facilitation of the criminal offence. Such an accusation would suggest that UK law itself facilitates the offence by not imposing a statutory duty on the employer to check an individual's right to work.

87. At 3.34 on page 29, the Home Office considers that a warning given by Immigration Enforcement would be inappropriate. In relation to a warning given prior to an enforcement operation I completely agree; however, this does not prevent warnings being given post enforcement visit to facilitate change, and to build local relationships. This active co-operation in promoting the licensing objectives at a local level would also be commensurate with the guidance issued under section 182 of the 2003 Act.

88. At 3.35 on page 29, the Home Office suggests that a warning after an enforcement visit would be no deterrent. This statement cannot be determined without first attempting to remedy the issue by way of a warning.

89. In support of their recommendation for revocation, the Home Office cite two pieces of case law, East Lindsey District Council v Abu Hanif, [2076] EWHC1265 and R (Bassettlaw District Council) v Worksop Magistrates' Court, [2008] WLR (D) 350.

90. The Home Office suggests that East Lindsey District Council v Abu Hanif, [2076] EWHC1265 is indistinguishable from the case before you, however, there are significant differences, as follows:

    a) The respondent, Mr Abu Hanif accepted that he:

        i) employed Mr Miah without paperwork showing a right to work in the United Kingdom;
        ii) paid Mr Miah cash in hand;
        iii) paid Mr Miah less than the minimum wage;
        iv) did not keep or maintain PAYE records;
        v) purported to deduct tax from Mr Miah's salary; and
        vi) did not account to HMRC for the tax deducted.

    The above facts have not been investigated or evidenced in the case before you.

    b) Mr Hanif is purported to have had knowledge that there were problems previously at other premises with overstayers.

    In the case before you, although immigration offenders have been encountered previously at the premises, the Home Office confirm that the liable party has not previously breached section 15 of the 2006 Act (i.e. has not been found employing illegal workers).

    c) In the cited case, at paragraph 9A, Mr Justice Jay commented, "the prosecuting authority however appear to have taken a different view in offering the civil penalty."

    It must be clarified that the civil penalty regime and the criminal prosecution for knowingly employing an illegal worker are completely separate statutory provisions. They are not a sliding scale akin to a speeding fine where the offence can be dealt with by way of a fixed penalty for minor offences or prosecution for more serious offences. For the Home Office to bring about a prosecution case against any employer the operation must be conducted as a prosecution case from the very beginning and would be led by an immigration CFI (Criminal and Financial Investigation) team. The reason for this is that the burden of proof for a prosecution case is higher than that required for the service of a civil penalty.

d) In the cited case, Mr Justice Jay stated that Abu Hanif had, “exploited a vulnerable individual from his community by acting in plain, albeit covert, breach of the criminal law”.

In the case before you it has not been established that Mr Ali has breached any criminal law, indeed Mr Ali has been left without the opportunity (albeit not through any fault of the authorities) to object to the imposition of the civil penalty for a breach of section 15 of the Immigration Act 2006 (a civil matter).

91. Significantly, at paragraph 20 of the cited case, Mr Justice Jay concurs that every case must turn on its own facts. This judgement suggests that the decision made in the East Lindsey case cannot result in the same outcome without consideration of the specific facts of the case before the committee. This is further supported by the revised guidance issued under section 182 of the 2003 Act, which states at 1.17: that:

- each application must be considered on its own merits,
- this is essential to avoid the imposition of disproportionate and overly burdensome conditions on premises where there is no need for such conditions.
- Standardised conditions should be avoided and indeed may be unlawful where they cannot be shown to be appropriate for the promotion of the licensing objectives in an individual case

92. The cited case R (Bassettlaw District Council) v Worksop Magistrates’ Court, [2008] WLR (D) 350, illustrates that both punitive and remedial measures are options for the committee to consider. However, this is already made clear within the guidance issued under section 182 of the 2003 Act.

93. The Home Office implies that, given the circumstances of the case before you, guidance issued under section 182 of the 2003 Act determines revocation as the only reasonable option available to the committee. This outlook opposes many points made within the cited case, specifically:

- The requirement to consider necessity and proportionality;
- Remedial action taken should be directed generally to the causes and should always be no more than a necessary and proportionate response;
- The step or steps taken must be the minimum intervention necessary to achieve the aim.

94. Again, I bring to the attention of the committee the following paragraphs of the revised guidance issued under section 182 of the 2003 Act, which suggest that conditions added to a licence are a legitimate option when considering the promotion of the licensing objectives in relation to criminal matters, including illegal working –

Paragraph 2.2 states, in relevant part,

> “In the exercise of their functions, licensing authorities should consider adding relevant conditions to licences where appropriate”.

Paragarph 2.3 states,

> “Conditions should be targeted on deterrence and preventing crime and disorder including the prevention of illegal working in licensed premises”

Paragarph 2.6 states,

> “Licence conditions that are considered appropriate for the prevention of illegal working in licensed premises might include requiring a premises licence holder to undertake right to work checks on all staff employed at the licensed premises”.

Declaration

95. This report includes all matters relevant to the issues on which my expert knowledge is given. Those facts that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

Report of: Kevin Barker
Immigration Compliance