ILPA's response to the ICIBI's Call for Evidence on the Home Office's use of Sanctions and Penalties

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Detailed responses

Illegal working civil penalty

Members have reported that these are used very often and have noticed that the SSHD tends to aim for the highest permissible penalty (rather than considering the degree of breach barring very broad criteria).

One member has provided the following example, along with recommendations for improvements:

Mr and Mrs A have run a restaurant since 2004. Immigration Enforcement entered the restaurant following receipt of a report about illegal workers. Mr and Mrs A were confident a mistake had been made and the officers appeared sympathetic to their situation. However, they discovered that one staff member had given false details when they hired him, and another had recently let his visa expire.

The family were under the common misapprehension that because the staff had provided valid National Insurance numbers there was no issue with their right to work. They believed, as many people do, that only

those with a right to work would have a National Insurance number and if there were any issues HM Revenue and Customs would have been aware and notified them.

The officers reassured Mr and Mrs A that all would likely be okay, especially because they had been so compliant with the investigation, but, ultimately, it was not up to them what happened next; they would report to the main office in Manchester where things would be taken forward. The couple subsequently received a £40,000 civil penalty notice a few weeks later for employing two illegal workers who did not have the right to work in the UK and failing to provide a statutory excuse against such a civil penalty notice.

The law on illegal working penalties

Section 15[1] of the Immigration, Nationality and Asylum Act 2006 sets out the circumstances in which a civil penalty can be issued:

> (1) It is contrary to this section to employ an adult subject to immigration control if—
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> (a) he has not been granted leave to enter or remain in the United Kingdom, or
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> (b) his leave to enter or remain in the United Kingdom—
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> (i) is invalid,
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> (ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or
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> (iii) is subject to a condition preventing him from accepting the employment.
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> (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.

The word 'may' has been highlighted because the discretionary nature of these penalties is important for reasons set out below.

[1] http://www.legislation.gov.uk/ukpga/2006/13/section/15

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

(4) But the excuse in subsection (3) shall not apply to an employer who knew, at any time during the period of the employment, that it was contrary to this section.

If an employer has conducted the appropriate right-to-work checks and retained the appropriate evidence, the employer will have an excuse not to pay any penalty issued. This becomes irrelevant if the employer knowingly employed someone who did not have the right to work.

The 2006 changes shifted the onus for immigration control from the state to the individual. Mr and Mrs A had researched their employment obligations in 2004 when setting up their business, and carried on. They had never sought advice on immigration-related duties as employers and held the view that someone would notify them of fresh legal obligations.

How is the penalty calculated?

Assuming the employer has not been found to have been employing illegal workers in the past three years (higher penalties apply if so), the starting penalty is £15,000 per illegal worker. This can be reduced if there are mitigating factors.

If the employer self-reported the illegal working, Home Office will reduce the penalty by just £5,000 per illegal worker.

If the employer actively cooperated with the investigation, the penalty can be reduced by a further £5,000.

If the employer ticked both of the above boxes, and provided evidence of effective right-to-work checking practices, then they might get off with a warning and no penalty. If not, they will be issued with a penalty. Fast payment of the penalty will result in a further 30% reduction. This means that the final penalty will fall somewhere between £3,500 - £15,000 per illegal worker, but this necessarily requires fast access to a large

amount of cash. Payment in instalments over a number of years is permitted but opting for this means that the 30% discount is not available.

Mr and Mrs A's penalty

Mr and Mrs A were initially given a £40,000 penalty, £20,000 for each illegal worker. The Home Office caseworker had forgotten to apply both the £5,000 per head reduction for this being the restaurant's first breach of the law, and the further £5,000 per head reduction for active co-operation.

It took many months of further correspondence between the restaurant and the Home Office to bring this down to the correct penalty which was £10,000 per head after discounts for no transgressions in the past three years and active co-operation. If Mr and Mrs A elected to pay in full within 21 days, they would benefit from the 30% faster payment reduction, dropping it down to a final figure of £14,000.

That is still an eye-watering amount for a small family-run business. The news of this civil penalty crushed them. Not many people have a spare £14,000 – £20,000, and Mr and Mrs A were no exception. They lodged an objection to this civil penalty, taking time to carefully explain that they had no way of knowing about these new obligations and had no idea they had been breaking the law. They explained that this type of penalty would cripple their business and force them to make tough choices in order to continue being able to pay their staff.

Unfortunately they acted without the benefit of legal advice and the Home Office did not uphold their objection. Their local MP asked the immigration minister to intervene but all he managed to elicit was a letter from the team in Manchester upholding the penalty and stating:

> 'We accept that [the employer] did not intentionally employ the two illegal workers but the civil penalty scheme is designed to encourage employers to comply with their legal obligations'.

By the time they did seek advice, they were too weary to fight in the courts or in the press. In the end Mr and Mrs A had to remortgage their home to pay the Home Office.

It is possible to appeal the Home Office's decision on the objection to the County Court, and a judge is able to reduce a penalty even to zero, or to cancel it altogether. Judges are not bound by SSHD policy when making this decision. However as with any such litigation, there is a costs risk which may deter those who are already facing financial pressure as a result of the penalty.

Punishment, not prevention

Is the Home Office achieving its goal of compliance with legal obligations if small businesses such as this are unaware of them? During Theresa May's tenure as Home Secretary, the government doubled the civil penalty from £10,000 to £20,000.[2] But there was clearly an inadequate publicity drive to ensure that all businesses are aware of this regime and their duties, and especially those smaller businesses which are most commonly targeted. What use is doubling down on punishment when people are not aware of the crime?

The civil penalty scheme in Mr and Mrs A's case failed to prevent illegal working, but did cause a huge amount of emotional and financial distress. The cost of the fine was so high that they are now considering closing their business.

How can the system be improved?

A nationwide information campaign

If the objective is prevention of illegal working, the first step must be a comprehensive information campaign. The Home Office can and should collaborate with HM Revenue and Customs to send information to employers setting out their duties in relation to right-to-work checks. Prevention is the best medicine,

[2] https://www.gov.uk/government/news/tougher-penalties-to-combat-illegal-working

and if Mr and Mrs A had been armed with the knowledge that they needed to check their staff members' visas regularly, they would have done so.

Penalties are discretionary and should not be treated as mandatory

The Secretary of State **may** give an employer a penalty. It is not mandatory to issue a penalty. However, in Mr and Mrs A's case there was no acknowledgement of that discretion, and no willingness to treat this as anything but a mandatory penalty.

There is definitely room for improvement here. Someone sufficiently senior could have reviewed this particular case, interviewed the employers, and considered whether it was in fact in the public interest to issue a £20,000 penalty against them. Others may take a different view, but our member's view is that it was not appropriate in this case. Both offending workers had been apprehended and there was no risk of continuing harm. A stern warning to the employer would have been enough to ensure future compliance with right-to-work checks, perhaps with an unannounced follow-up inspection some months later.

Incentivise self-reporting

The £5,000 reduction in penalty for those who self-report is not an incentive to report a breach. Instead, it may act as an incentive to cover up that breach and attempt to avoid the rest of the penalty. Those who self-report for the first time and who have had no past breaches ought to be considered for a discretionary warning in lieu of a penalty for having the honesty to come forward.

Make the penalties affordable

A quick glance through the Home Office's latest statistics[3] on civil penalties will reveal what is already common knowledge amongst immigration professionals: the vast majority are levied against small businesses that operate on tight margins in cash-heavy sectors such as the food and beverage industry, nail

[3] https://www.gov.uk/government/collections/employers-illegal-working-penalties

bars, and car washes. Similarly, the ICIBI's report last year found that almost half of Immigration Enforcement raids were to restaurants and takeaways.[4]

Rarely can such a business sustain a massive civil penalty. More likely than not, they simply declare themselves bankrupt. This means nothing is recovered by the Home Office.

Perhaps if the penalties were less aggressive, there would be more chance of businesses actually paying them, and of working with the Home Office to remain in business and reform practices for the future. The system appears to be set up in a way that enforcement teams are effectively incentivised only to go after the low-hanging fruit with penalties rather than raise awareness and encourage better practices.

Landlords' civil penalties issued under the Immigration Act, and refusal or revocation of driver's licence, taxi licence, alcohol and late-night refreshment licence and Construction Skills Certification Scheme cards due to immigration status

One member reports that they have encountered both a landlord's civil penalty on one occasion and revocation of a driving licence on two or three occasions - but considers these to be very rare compared to the rate of those the member has encountered who are overstaying and renting.

Refusal or revocation of bank account, NHS, DWP or HMRC benefits due to immigration status

Members report that they have encountered all of these, particularly refusal of bank accounts. This can cause issues for example where a person has been awarded damages for unlawful detention, but is unable to open a bank account in order to actually receive payment and access the money. It is also an issue for victims of trafficking. HSBC has built a specific process in collaboration with some charities in order to assist with this. However, it is unclear whether other banks have any similar systems in place[5].

4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800641/An_inspection_of_the_Home_Office_s_approach_to_Illegal_Working_Published_May_2018.PDF para 3.8.

5 https://www.about.hsbc.co.uk/news-and-media/hsbc-uk-provides-support-for-survivors-of-human-trafficking

Penalties or sanctions issued to educational institutions, employers and community sponsors of Tier 2, 4 and 5 visas by UK Visa and Immigration

One member reported that they have encountered decisions to revoke a licence fairly often, but have not seen it done as financial penalty.

Clandestine entrants' civil penalty, Employer nudge letter, Compound penalty and fines in lieu of forfeiture issued by Border Force, Customs civil evasion penalties and wrongdoing/post audit excise penalties issued under the Finance Act 2003 and 2008, Other penalties issued by Border Force for specified breaches of Customs law, Civil penalty for noncompliance with biometric registration regulations, Notice of letting to a disqualified person, Director disqualification as a result of employing illegal workers

One member reports that they have never encountered any of these in their practice, even anecdotally, and that this leads them to suspect that they are relatively uncommon.

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