Neutral Citation Number: [2019] EWCA Civ 1393

Case No: A2/2018/0337

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HH JUDGE EADY QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE DAVIS
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

IVY OKEDINA	**Appellant**
- and -	
JUDITH CHIKALE	**Respondent**

- -
- -

Ms Laura Prince and **Ms Emma Foubister** (instructed by **Divinefield Solicitors**) for the **Appellant**
Mr David Reade QC and **Mr Grahame Anderson** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Respondent**

Hearing date: 11th April 2019

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. Both parties in these proceedings are Malawian nationals. The Appellant, Mrs Ivy Okedina, and her husband have lived in the UK, where both have businesses, for some time. In July 2013 she brought the Respondent, Ms Judith Chikale, to whom I will refer as "the Claimant", to this country to work for her as a live-in domestic worker. She had previously worked for her and her sister in Malawi looking after their parents. The Appellant applied for a domestic worker visa for the Claimant, giving a good deal of false information: the visa was granted for a six-month period, expiring on 28 November 2013.

2. Following the expiry of her visa the Claimant remained in the UK and continued to work for the Appellant. The Appellant, who kept the Claimant's passport, told her that the necessary steps were being taken for her visa to be extended, and she left matters entirely in the Appellant's hands. The Appellant did indeed make an application for an extension, in the Claimant's name and forging her signature, on the false basis that she was a family member. That application was refused, and an appeal to the First-tier Tribunal, lodged by the Appellant in the Claimant's name but without her knowledge, was eventually dismissed in January 2015.

3. The Claimant continued to work for the Appellant and her family until 18 June 2015. During the entirety of her employment she was required to work seven days a week, for very long hours, and was paid only some £3,300. She was dismissed summarily, and ejected from the house, after she asked for more money.

4. In July 2015 the Claimant brought proceedings in the Employment Tribunal ("the ET") against the Appellant complaining of unfair and wrongful dismissal; unlawful deductions from wages, by reference both to the terms of her contract and to the National Minimum Wage Regulations 1999 ("the NMWR"); unpaid holiday pay; breaches of the Working Time Regulations 1998; failure to provide written particulars and itemised payslips; and race discrimination. Following the distinction recognised by the Supreme Court in *Hounga v Allen* [2014] UKSC 47, [2014] ICR 847, all those claims except the discrimination claim can be characterised as "contractual", in the extended sense that they either are made under the contract of employment or arise out of it; the discrimination claim, by contrast, is in respect of a statutory tort.

5. The claim was heard in London South before a tribunal chaired by Employment Judge Elliot over three days in October 2016. The Claimant was represented by Mr David Reade QC, instructed by Freshfields Bruckhaus Deringer: he and they (and also Mr Graham Anderson, whom he leads before us) have acted for her throughout the proceedings on a pro bono basis. The Appellant was represented by a solicitor.

6. The only relevant issue in the ET for our purposes was whether the Appellant could raise a defence of illegality in respect of the period after 28 November 2013. It was her case that as from that date the contract was illegal, or illegally performed, because the Claimant no longer had leave to remain and that accordingly any contractual claim was unenforceable.

7. By a judgment with written reasons sent to the parties on 21 October 2016 the Tribunal rejected the illegality defence. It upheld the Claimant's contractual claims, in the extended sense noted above, but dismissed the discrimination claim. A remedy hearing took place in May 2017 and the Appellant was ordered to pay the Claimant £72,271.20. Of that amount some £64,000 was in respect of unlawful deductions from wages.

8. The Appellant appealed against the liability decision to the Employment Appeal Tribunal ("the EAT"). The appeal was permitted to proceed only on a single ground relating to the ET's reasoning on the illegality issue. It was heard by HHJ Eady QC on 30 November 2017, together with an appeal against a refusal by the ET to reconsider its original decision. The Appellant was represented by Mr Joseph England of counsel. By a judgment handed down on 15 January 2018 Judge Eady dismissed both appeals.

9. This is an appeal against that decision in so far as it relates to the original ET decision. The Appellant's original grounds of appeal were not drafted by lawyers. The application for permission to appeal was considered by Lewison LJ. He carefully analysed the various ways in which the illegality defence appeared to have been put and gave permission limited to a single question, which he formulated as follows:

> "… limited to the question whether the effect of sections 15 and 21 of the [Immigration Asylum and Nationality Act 2006] precludes an employee from pursuing contractual claims or claims arising out of a contract of employment where those claims arise at a time when the employee's leave to remain has expired."

He directed the Appellant to file amended grounds and a skeleton argument limited to that issue.

10. The Appellant did not originally comply with that direction, but she belatedly instructed solicitors, and I gave permission to file amended grounds and skeleton argument out of time. The skeleton argument was drafted by Ms Laura Prince and Ms Emma Foubister of counsel. They have represented the Appellant before us. The written and oral submissions of both parties' counsel were of very high quality.

11. Mr Reade observed that the Appellant's amended grounds and skeleton argument departed in some respects from how the case had been put in the ET and the EAT. He made it clear that he took no point on that, but it means that it is more useful to proceed directly to an explanation of the issue as it now stands rather to explain at this stage the reasoning of the tribunals below.

12. The essential starting-point is to recognise that there are two distinct bases on which a claim under, or arising out of, a contract may be defeated on the ground of illegality. These are nowadays generally referred to as "statutory" and "common law" illegality. Put very briefly:

    (1) Statutory illegality applies where a legislative provision either (a) prohibits the making of a contract so that it is unenforceable by either party or (b) provides that it, or some particular term, is unenforceable by one or other party. The underlying principle is straightforward: if the legislation itself has provided

that the contract is unenforceable, in full or in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute.

(2) Common law illegality arises where the formation, purpose or performance of the contract involves conduct that is illegal or contrary to public policy and where to deny enforcement to one or other party is an appropriate response to that conduct. The nature of the rule has long been controversial, but the controversy has been resolved by the decision of the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. The majority of the Court adopted an approach based on an assessment of what the public interest requires in a particular case, having regard to a range of factors. At para. 101 of his judgment Lord Toulson, with whom the majority agreed, said:

> "One cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality."

Patel v Mirza is not directly concerned with statutory illegality, though there are references to it in Lord Toulson's judgment – particularly at para. 40 and the beginning of para. 109 (pp. 484-5 and 501 G-H).

The formulations in the first sentences of (1) and (2) above are gratefully adopted (with slight editing) from section 44 of Professor Burrows' *Restatement of the English Law of Contract.*

13. Traditionally employment lawyers have tended to refer to the judgment of Peter Gibson LJ in *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99 as the authoritative statement of the distinction between the two kinds of illegality (see paras. 30-31 (p. 108 E-H)), with statutory illegality being referred to as the second category of illegality and common law illegality as the third[1]. Peter Gibson LJ identifies the touchstone for the availability of a defence in "third category" cases as being that the employee has knowingly participated in the illegal performance of the contract – so-called "knowledge plus participation" (para. 31, quoting Scarman LJ in *Ashmore, Benson, Pease & Co Ltd v. A V Dawson Ltd* [1973] 1 WLR 828).

14. The Appellant's grounds of appeal rely on both forms, but in her submissions before us Ms Prince focused almost entirely on statutory illegality. Any defence of common law illegality faces the obvious difficulty of the Claimant's lack of knowledge, because she was unaware that her visa had not been extended after 28 November 2013; and, to anticipate, I believe the ET was right to reject it. This feature

[1] I need not trouble with why the Court recognised three categories rather than two.

distinguishes her case from most of the reported cases involving illegality in the employment field. Typically the employee is well aware of his or her immigration status, though they may seek to conceal it from the employer. Here the boot is on the other foot: it is the Appellant who concealed from the Claimant the fact that her visa had not been extended. That is why only the absolute bar created by statutory illegality can give the Appellant any defence.

THE STATUTORY ILLEGALITY ISSUE

THE BACKGROUND LAW

15. We were referred to a good deal of authority about the circumstances in which a contract is to be regarded as prohibited within the meaning of the statutory illegality rule. The basic principles emerging from those authorities are not in doubt, and I can take them relatively shortly.

16. I start with a point about terminology. In alternative (a) in the formulation at para. 12 (1) above I refer to the question being whether the statute "prohibits the making of a contract so that it is unenforceable by either party". The language of "prohibiting" the contract is found in several of the authorities, but other language is also used, including whether the contract is "illegal" or "forbidden" or whether there is an intention to "nullify" the contract or render it "void". These are all expressions of the same concept, namely that the statute intends to deprive the contract of any legal effect, with the result, reverting to Professor Burrows' phraseology, that it is unenforceable by either party.

17. The question whether the statute has that effect depends purely on its proper construction. As Devlin J put it in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, at p. 287:

> "The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is conclusive."

In *Archbolds (Freightage) Ltd v S. Spanglett Ltd* [1961] QB 374 this Court endorsed that approach. At p. 390 Devlin LJ added to what he had said in *St John Shipping*, "one must have regard to the language used and the scope and purpose of the statute". Both cases were followed and applied in *Hughes v Asset Managers Plc* [1995] 3 All ER 669.

18. The example of an express prohibition most often cited is *Re an Arbitration between Mahmoud and Ispahani* [1921] KB 716. In that case an Order had been made under the Defence of the Realm Regulations providing that no person should without a licence "buy or sell or otherwise deal in" various foodstuffs. The defendant buyer reneged on a contract to buy a quantity of oil. When the seller sued, the buyer took the point that he had no relevant licence and that the contract was accordingly unenforceable. This Court held that the contract was unenforceable. As Bankes LJ put it at p. 724, the Order expressly "makes it illegal, *on the part both of the buyer and of the seller*, to enter into a contract prohibited by the clause [emphasis supplied]": see, to the same effect, *per* Scrutton LJ at pp. 727-9 and Atkin LJ at p.

731.[2] It was common ground that the seller was in fact unaware that the buyer had no licence, but that made no difference: if the contract was prohibited by statute that is an absolute bar to its being enforced.

19. More commonly, however, the statute contains no express prohibition of the kind found in *Mahmoud and Ispahani* and the issue is whether such a prohibition must be implied. It follows from the basic principle stated in *St John Shipping* that that issue must be resolved according to the ordinary methods of statutory interpretation. But some points emerge from the authorities to which we were referred which are of relevance to the construction exercise in the present case.

20. The first point is that in the absence of an express prohibition a court should only find that Parliament has intended to prohibit a contract of a particular kind, or in particular circumstances, where the implication is clear. In *St John Shipping* Devlin J said, at p. 288:

> "A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or 'necessary inference,' as Parke B. put it [in *Cope v Rowlands* (1836) 2 M&W 157], that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract."

21. The next point clearly made in the authorities is that it does not necessarily follow from the fact that one party is prohibited from entering into a contract, and/or made subject to a penalty if they do so, that Parliament intended to "prohibit" the contract itself in the relevant sense of rendering it unenforceable *by either party*. Whether that was the intention must depend on a consideration of all relevant factors including matters of public policy.

22. That point is most clearly stated in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216. This was concerned with the enforceability of contracts of insurance entered into by underwriters who were said not to have the necessary authorisation under the Insurance Companies Act 1974. Section 2 (1) of the Act provided that no unauthorised person "shall carry on … insurance business of [the relevant kind]". Section 11 (1) provided that a person who carried on business in contravention of the relevant part of the Act was guilty of an offence. Section 83 defined the business in question as "the business of effecting *and carrying out* contracts of insurance [emphasis supplied]": the precise language of the definition is important, as will appear below. The issue of illegality did not in the event fall for decision because the decision of the Commercial Court that the underwriters did not have the necessary authorisation was overturned. It was, however, fully considered because of its importance to the insurance industry, and the

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[2] The Order also provided that any infringements constituted criminal offences, but the Court made it clear that that was not necessary to its reasoning: see *per* Bankes LJ at p. 724 and Atkin LJ at p. 731.

leading judgment of Kerr LJ is to all intents and purposes authoritative. At pp. 267-273 he reviewed the previous authorities about statutory illegality, including *St John Shipping* and *Archbolds*. He quoted statements in them to the effect that where a statute imposes penalties on one party for entering into a contract it does not follow that the public interest requires the statute to be construed as rendering the contract itself void, which might cause serious injustice to the other party. There was plainly such a risk on the facts of the instant case. At pp. 273-4 he said:

> "The problem is … to determine whether or not the Act of 1974 prohibits contracts of insurance by necessary implication, since it undoubtedly does not do so expressly. In that context it seems to me that the position can be summarised as follows:
>
> (i) Where a statute prohibits both parties from concluding or performing a contract when both or either of them have no authority to do so, the contract is impliedly prohibited: see *In re Mahmoud and Ispahani* and its analysis by Pearce L.J. in *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd.*, with which Devlin L.J. agreed.
>
> (ii) But where a statute merely prohibits one party from entering into a contract without authority, and/or imposes a penalty upon him if he does so (i.e. a unilateral prohibition) it does not follow that the contract itself is impliedly prohibited so as to render it illegal and void. Whether or not the statute has this effect depends upon considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations. The statutes considered in *Cope v. Rowlands* and *Cornelius v. Phillips* fell on one side of the line; the Foods Act 1984 would clearly fall on the other[3]."

He goes on to consider on which side of the line the relevant provisions of the 1974 Act fell. I will have to come back to that later, but at this stage I am concerned only with the identification of the correct approach.

23. Kerr LJ's reference to the consequences for innocent parties reflects a point made in several of the authorities. In *Hughes v Asset Managers* (above) the claimant investors sued on a contract made by a stockbroker who did not have the licence required by the Prevention of Fraud (Investments) Act 1958; dealing without such a licence was an offence. Saville LJ said, at p. 674b:

> "It … must be remembered, as Kerr LJ pointed out in [*Phoenix*], that rendering transactions void affects both the guilty and the innocent

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[3] I need not elucidate these particular references, save to note that *Cornelius v Phillips* [1918] AC 199 was a case under the Moneylenders Act 1900. In such cases the public interest clearly favoured the conclusion that a loan entered into by an unlicensed moneylender was unenforceable: it was not the borrower who would suffer.

> parties. The latter, just as much as the former, cannot enforce a void bargain or obtain damages for its breach."

The Court held that the public interest did not require the Court to construe the statute as rendering contracts made with an unauthorised dealer a nullity: it was sufficiently vindicated by the criminal sanction. Hirst LJ said, at p. 675f:

> "I think the public interest under this statute was fully met by the exaction, in appropriate cases, of the quite severe penalties prescribed by s 1(2) of the 1958 Act. I would therefore hold that these contracts are not impliedly forbidden by the statute … ."

There are similar observations in the judgment of Devlin LJ in *Archbolds*: see at p. 390.

24. In *Archbolds* Pearce LJ makes the related point that declining to nullify the contract does not mean that it will be enforceable by a party who knowingly acts in breach of the statutory prohibition, because the defence of common law illegality will still be available. As he puts it at p. 387:

> "If the court too readily implies that a contract is forbidden by statute, it takes it out of its own power (so far as that contract is concerned) to discriminate between guilt and innocence. But if the court makes no such implication, it still leaves itself with the general power, based on public policy, to hold those contracts unenforceable which are ex facie unlawful, and also to refuse its aid to guilty parties in respect of contracts which to the knowledge of both can only be performed by a contravention of the statute … or which though apparently lawful are intended to be performed illegally or for an illegal purpose … ."

THE RELEVANT STATUTORY PROVISIONS

25. The Appellant's statutory illegality case depends on the two provisions identified by Lewison LJ in giving permission, namely sections 15 and 21 of the Immigration, Asylum and Nationality Act 2006. They form part of a group of sections headed "employment". I take them in turn.

26. Section 15 provides for a civil penalty to be imposed on an employer in the circumstances specified. So far as material, and as it stood at the material times, it reads:

> "(1) 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.
>
> (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.
>
> (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.
>
> (5)-(7) …"

Sections 16-20 provide for a number of ancillary matters.

27. Section 21 provides for a criminal offence. Its terms were amended with effect from 12 July 2016, but at the material times it read (so far as relevant):

> "(1) A person commits an offence if he employs another ('the employee') knowing that the employee is an adult subject to immigration control and that –
>
> (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
>
> (2)-(3) …"

28. Section 25 defines some of the terms used in the preceding sections. For our purposes I need only note that it provides, at (c), that:

> "a person is subject to immigration control if under the Immigration Act 1971 he requires leave to enter or remain the United Kingdom."

29. In the course of her oral submissions Ms Prince acknowledged that her stronger case was on the basis of section 21: the fact that employing a person without the necessary immigration status is made a criminal offence is inherently a stronger indication that the contract of employment may be prohibited than the imposition of a civil penalty. Nevertheless she made it clear that she relied on both sections. Despite the conceptual difference between a civil penalty and a criminal offence, I will for convenience, save where it is necessary to distinguish, refer to the two sections as imposing "penalties" on the employer.

30. I should also note here the terms of section 24 (1) of the Immigration Act 1971. These are not relied on as founding any defence in this case, but they are relied on in some of the authorities to which I will have to refer later. As it stood at the material times (it has been amended since), the sub-section read, so far as material:

> "A person who is not a British citizen shall be guilty of an offence … in any of the following cases: —
>
> (a) if contrary to this Act he knowingly enters the United Kingdom in breach of a deportation order or without leave;
>
> (b) if, having only a limited leave to enter or remain in the United Kingdom, he knowingly either—
>
> (i) remains beyond the time limited by the leave; or
>
> (ii) fails to observe a condition of the leave;
>
> (c)-(f) … ."

As I have said, section 24 (1) has been relied on to raise an illegality defence to a contractual claim (and indeed to a claim in tort). In the case of heads (a) and (b) (i), any such defence should be characterised as one of common law rather than statutory illegality: the employment itself is not in breach of the provision but it cannot be performed except by the employee remaining in the UK in breach of it. But, where it is a condition of the leave to enter/remain that the employee should not work, being employed will be an offence under head (b) (ii) (at least if he or she acts knowingly). One reason why section 24 could not be relied on in the present case is that this was not a case of breach of a condition of leave; rather, the Claimant had no leave at all.

31. I should spell out that there was at the material time no equivalent to section 21 of the 2006 Act: that is, it was not an offence, as such, for a person without the necessary immigration status to work in the UK (though, as noted above, some such cases would fall within section 24 (1) (b) (ii) of the 1971 Act). That is no longer the case. With effect from 12 July 2016, i.e. after the period relevant to this case, a new section 24B has been inserted into the Immigration Act 1971, rendering it an offence for a person subject to immigration control to "work" (which includes, though it is not limited to, working under a contract of employment) when they are, and know or have reasonable cause to believe that they are, disqualified from working by reason of their immigration status.

THE APPELLANT'S CASE

32. Ms Prince acknowledged that neither section 15 nor section 21 in terms prohibits a contract of employment where the employee is subject to immigration control and has no current leave to remain: all that they expressly do is to impose a penalty on the employer for employing person. But she contended that in a case which attracted the operation of the sections the necessary implication was that the contract was "prohibited" and accordingly that it was unenforceable by either party. Her essential point was that although the legislation imposed penalties only on the employer it was plainly the statutory intention that any contract of employment with a person who had no leave to remain should be prohibited and that neither party could enforce it. There could logically be no distinction between the positions of the employer and the employee: if the former was prohibited from employing the latter, the latter must equally be prohibited from being employed by the former. As for the considerations relating to the protection of the innocent party emphasised in the authorities noted at paras. 22-24 above, those were apt to cases where the legislation in question was directed at the protection of parties dealing with a provider of services – she referred us to *Anderson Ltd v Daniel* [1924] 1 KB 138 – but they had no application in the present kind of case. There was no public interest in allowing employees with no immigration status to work, and typically (though admittedly not in the present case) the employee would be at least equally culpable with the employer.

33. In support of her submissions Ms Prince relied on a number of authorities, which I take in turn.

34. First, she relied on how Kerr LJ in *Phoenix* applied the principles which I have set out at para. 22 above to the facts of the particular case. As I have noted, section 83 of the 1974 Act defined the "business" which could not be carried on without authorisation as "the business of effecting *and carrying out* contracts of insurance". Immediately following the passage which I have quoted Kerr LJ continued:

> "(iii) The Insurance Companies Act 1974 only imposes a unilateral prohibition on unauthorised insurers. If this were merely to prohibit them from carrying on 'the business of effecting contracts of insurance' of a class for which they have no authority, then it would clearly be open to the court to hold that considerations of public policy preclude the implication that such contracts are prohibited and void. But unfortunately the unilateral prohibition is not limited to the business of 'effecting contracts of insurance' but extends to the business of 'carrying out contracts of insurance'. This is a form of statutory prohibition, albeit only unilateral, which is not covered by any authority. However, in the same way as Parker J. in [*Bedford Insurance Co. Ltd. v. Instituto de Resseguros do Brasil* [1985] Q.B. 966] I can see no convincing escape from the conclusion that this extension of the prohibition has the unfortunate effect that contracts made without authorisation are prohibited by necessary implication and therefore void. Since the statute prohibits the insurer from carrying out the contract — of which the most obvious example is paying claims — how can the insured require the insurer to do an act which is expressly forbidden by statute? And how can a court enforce a contract against an unauthorised insurer when Parliament has expressly prohibited him from

> carrying it out? In that situation there is simply no room for the introduction of considerations of public policy. As Parker J. said in the *Bedford* case, at p. 986A: 'once it is concluded that on its true construction the [Act] prohibited both contract and performance, that is the public policy.'

Ms Prince submitted that the position in the present case was analogous. To "employ" a person was, necessarily, not simply to enter into a contract of employment with them but to perform the contract, *inter alia* by paying wages. The Claimant was relying on an obligation on the part of the Appellant to do the very thing that the statute prohibited.

35. Secondly, she relied on *Mohamed v Alaga & Co* [2000] 1 WLR 1815. In that case the plaintiff had introduced clients to a firm of solicitors under an agreement whereby he would be paid half of the fees received. He brought a claim for payment under that agreement. The firm raised a defence of statutory illegality, relying on rule 7 (1) of the Solicitors Practice Rules (made under the Solicitors Act 1974) which provided that, subject to certain immaterial exceptions, "a solicitor shall not share or agree to share his or her professional fees with any person". The plaintiff, who was unaware of the effect of rule 7 (1), argued that the effect of the rule was not to render a claim under such an agreement unenforceable. This Court rejected that argument. The leading judgment was delivered by Lord Bingham CJ. He gave his reasons in a series of numbered points. Those relevant for our purposes read (p. 1824 A-C):

> "(4) By rule 7 solicitors are prohibited from sharing fees or agreeing to do so.
>
> (5) Thus there is a prohibition on the making by solicitors of agreements of the kind assumed to have been made in this case.
>
> (6) Although it is true that the prohibition is only imposed in terms on solicitors, and they alone are liable to imposition of a professional penalty for breach, a contract requires the concurrence of at least two parties and the effect of the prohibition, if observed, is to outlaw the making of such agreements.
>
> (7) There are substantial reasons why, in the public interest, such agreements should be outlawed, some of those reasons being described by Lightman J [in the decision appealed from].
>
> (8) It follows that it would defeat the public interest, which rule 7 in particular exists to promote, if a non-solicitor party to a fee-sharing agreement could enlist the aid of the court to enforce against a solicitor an agreement which the solicitor is prohibited from making.
>
> (9) If the court were to allow its process to be used to enforce agreements of this kind, the risk would inevitably arise that such agreements would abound, outwith the knowledge of the Law Society, to the detriment of the public."

Ms Prince relied particularly on point (6). She submitted that a contract of employment likewise requires the concurrence of at least two parties and that it followed that the effect of the prohibition was accordingly to prohibit the contract in its entirety.

36. Finally, Ms Prince referred us to a number of cases in which employees whose immigration status did not permit them to work had been held to be unable to enforce claims against their employers. In her oral submissions she acknowledged that none of them was in fact on all fours with the present case, partly at least because in all of them the employee knew that they were not entitled to work; but she drew some support from them as evidence that a strict approach is taken by the EAT and the Courts to the enforceability of contractual claims in this context.

37. In *Vakante v Governing Body of Addey and Stanhope School (no 2)* [2004] EWCA Civ 1065, [2005] ICR 231, an asylum-seeker entered into an employment contract in breach of a prohibition in the letter from the Home Office which regulated his position pending a decision on his claim. This Court upheld the dismissal of his claim of racial discrimination. The case proceeded on the basis that he was in breach of section 24 of the 1971 Act (see para. 30 above) and thus that there had been "illegal conduct": see para. 18 of the judgment of Mummery LJ (pp. 237-8). The specific provision of section 24 said to have been breached is not identified, but what matters is that the case was treated as one of common law illegality. That being so, it is of no direct relevance for our purposes.

38. In *Blue Chip Trading Ltd v Helbawi* UKEAT/0397/08, [2009] IRLR 128, a foreign student took on full-time employment in breach of a condition in his student visa that he should not work for more than twenty hours per week. He brought a claim under the NMWR. It seems from para. 30 of the judgment of Elias P in the EAT that the case was put primarily on the basis of common law illegality. At para. 32 of his judgment (pp. 130-1) Elias P said:

> "The question whether a contract is expressly or impliedly prohibited by the statute is not always an easy one to determine in particular circumstances. However, in this case it is the clear intention of Parliament to prevent a person from working save within the terms specified by the Secretary of State, and that analysis is consistent with the conclusion of the Court of Appeal in *Vakante*. In those circumstances, in my judgment when the claimant was exceeding the time stipulated he was doing the very thing which he was forbidden to do. Moreover, this was a feature of the contract. It was not just a matter of an occasional unlawful act committed in the course of performing an otherwise lawful contract."

It is clear that, however it had been put, Elias P treated the case as one of statutory illegality. The provision relied on appears from references earlier in the judgment to have been section 24 of the 1971 Act, and on the face of it the claimant would have been in breach of sub-section (1) (b) (ii). The application of the defence was therefore straightforward. But section 24 (1) is not relied on in the present case.

39. In *Zarkasi v Anindita* UKEAT/400/11, [2012] ICR 788, the claimant, who was Indonesian, obtained a passport in a false identity in order to obtain leave to enter the

UK from Indonesia to work for her employer as a domestic. She brought proceedings for unfair dismissal and unlawful deduction of wages by reference to the NMWR. The EAT (chaired by Langstaff P) upheld the employer's defence of illegality. As in *Vakante*, on which the EAT relied, the case was treated throughout as one of common law illegality, and no doubt for that reason no reliance was placed on any particular statutory prohibition: it was clear that the employee's conduct was illegal.

40. Finally, there is *Hounga v Allen* [2014] UKSC 47, [2014] ICR 847. The claimant was brought by the respondents to the UK from Nigeria as a child to work as a live-in domestic. She obtained a visitor's visa on what she knew were false documents and remained after the visa expired. Unlike the Claimant in the present case she knew that she was not entitled to work. Following her dismissal she brought proceedings in the employment tribunal: some of her claims were contractual, in the broad sense identified above (see para. 4), but she also made a claim of race discrimination. In the ET her contractual claims were dismissed on the ground of illegality, and that decision was upheld in the EAT (UKEAT 0326/10). It appears from para. 33 of the judgment of Silber J in the EAT that the case was treated as one of common law illegality: unlike the present case, there was on the facts "participation plus knowledge". The claimant did not seek to appeal further in respect of those claims. Her discrimination claims, however, succeeded in the ET (at least in part). The EAT upheld that decision, but it was reversed in this Court. That was the only issue that came before the Supreme Court. It upheld the claimant's appeal on the basis that, in summary, because of her vulnerability as, in substance, a victim of trafficking, public policy did not require her claim to be disallowed.

41. The judgment of the majority was given by Lord Wilson. He distinguished between the contractual claims, which were not before the Court, and the (statutory) tortious claim, which was. As regards the former, he said, at para. 24 (p. 855 F-H):

> "The application of the defence of illegality to a claim founded on contract often has its own complexities. But, in that it was unlawful (and indeed a criminal offence under section 24(1)(b)(ii) of the Immigration Act 1971) for Miss Hounga to enter into the contract of employment with Mrs Allen, the defence of illegality in principle precluded her from enforcing it. In this regard a claim for unfair dismissal might arguably require analysis different from a claim for wrongful dismissal. But a claimant for unfair dismissal is nevertheless seeking to enforce her contract, including often to secure her reinstatement under it. In *Enfield Technical Services Ltd v Payne* [2008] ICR 1423, the Court of Appeal, while rejecting its applicability to the two cases before it, clearly proceeded on the basis that a defence of illegality could defeat a claim for unfair dismissal. This present appeal proceeds without challenge to the conclusion of the tribunal, upheld by the appeal tribunal, that the defence indeed precluded Miss Hounga's claim for unfair dismissal. Equally there is no challenge to the dismissal on that same basis of her claim for unpaid wages although the considerations of public policy to which I will refer from para 46 onwards might conceivably have yielded a different conclusion."

No doubt because the contractual claims were not before the Court, that passage is quite abbreviated, and it is, with respect, not entirely clear whether Lord Wilson positively accepted that a defence of illegality was well-founded as regards the contractual claims, and if so on what basis. The first half reads as if he did, at least as regards the wrongful dismissal claim, because it was "unlawful … for Miss Hounga to enter into the contract of employment with Mrs Allen". The reference is to statutory illegality: since the claimant had entered on a visitor visa her working was a breach of the conditions of leave to enter and consequently, as Lord Wilson identifies, a breach of section 24 (1) (b) (ii). But, after canvassing the possibility that a different approach might be justifiable as regards the unfair dismissal claim, in the final sentence he suggests that the defence might not apply even to the claim for arrears of pay, which are clearly contractual.

42. Lord Hughes, who gave the judgment of the minority, concurring in the result but for different reasons, observed at the end of para. 54 of his judgment (p. 865 E-F) that the claimant was right not to pursue an appeal against the dismissal of her contractual claims, adding at para. 59 (p. 2909C) that "her whole employment was forbidden and illegal". But, again, that issue was not before the Court, and Lord Hughes does not explain his reasoning further.

43. In fairness to Ms Prince, she did not place any great weight on *Hounga v Allen*, recognising that the issue of statutory illegality was not before the Court. I have only felt it necessary to consider the case in the little detail that I have because, given the ground-breaking nature of the decision in this field, practitioners are likely to wish to understand why in truth it does not directly assist in the present case.

DISCUSSION AND CONCLUSION

44. The starting-point must be the fact that we are not here concerned with a statutory provision, like that in *Mahmoud and Ispahani*, which says in terms that neither party may do the thing which is the subject-matter of the contract – in that case, buy/sell; in this case, employ/be employed. Neither section 15 nor section 21 of the 1996 Act says that no person shall be a party to a contract of employment where the employee does not have the appropriate immigration status, or that such a contract should be unenforceable by either party. They fall short of saying so in two respects. First, they do no more than provide for a penalty in the event of such employment. Second, they impose the penalty only on the employer. The authorities cited above make it clear that in such a case the legislature is not necessarily to be taken to have intended to prohibit the contract in the sense with which we are concerned: see in particular the passage from the judgment of Kerr LJ in *Phoenix* quoted at para. 22.

45. Although that starting-point is accepted by Ms Prince, its importance must not be overlooked. It is a healthy principle that Courts should be slow to give a statute an effect that is not expressly stated. Parliament should say what it means.

46. The question thus is whether an intention can be implied into section 15 and/or 21 that a contract of employment where the employee does not have the appropriate immigration status should be unenforceable by either party. In answering that question it is necessary, as Kerr LJ puts it under head (ii) in the passage cited from *Phoenix*, to have regard to "considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the

consequences for the innocent party, and any other relevant considerations". The test is of course one of necessity.

47. I start with the mischief which the statute is designed to prevent. I accept Ms Prince's submission that this case cannot be equated with cases of the *Phoenix* or *Hughes v Asset Managers* type, where a provision that the contract should be unenforceable would risk injuring the very class of person whom the statute is intended to protect. The provisions of the 2006 Act relied on are clearly not aimed at the protection of employees without immigration status. On the contrary, it is clear not only from the provisions in question but from the scheme of immigration control more generally that it is contrary to public policy for persons to be employed in the UK without the relevant immigration status: I will use the convenient shorthand "working illegally", but without prejudice to the issue whether "illegal working" is prohibited in the sense with which we are concerned.

48. However, that does not exhaust the public policy aspect. Although typically a person who is working illegally will know that they are doing so, that will not always be the case, as the facts of the present case illustrate. Most obviously, there is a well-recognised problem of vulnerable foreign nationals being brought to this country for exploitation of various kinds: usually, though this is not of the essence, they will be victims of trafficking within the meaning of the Anti-Trafficking Convention. Sometimes they will know that their presence and/or their employment is illegitimate, but sometimes they will be told, and believe, that it is legitimate when it is not. And even outside that context there may be circumstances where an employee is genuinely mistaken about his or her immigration status, sometimes because of their own mistakes but sometimes also because of their employer's (it is of course not unusual for larger employers to take responsibility for obtaining the necessary permissions for foreign employees). Nor will such mistakes necessarily be unreasonable: some aspects of the relevant rules are complicated or unclear, and wrong advice can be given, sometimes by the Home Office itself. In short, not all cases of illegal working involve culpability on the part of the employee.

49. It does not seem to me that public policy requires a construction of these sections which would have the effect of depriving the innocent employee of all contractual remedies against the employer in circumstances of that kind. The observations of Pearce LJ quoted at para. 24 above are apposite. We are only concerned here with whether the blunt weapon of statutory illegality requires to be deployed. The common law illegality rule remains available in cases in which the employee knowingly participates in the illegality in question; and that rule appears to give the courts and tribunals all they need in order to reach a proportionate result in a particular case.

50. What all that leads to is that I do not believe that it can be said that the undoubted public interest in preventing foreign nationals from working illegally requires sections 15 and 21 to be construed as evincing a clear statutory intention that contracts of the kind to which they refer should be unenforceable.

51. I turn to Ms Prince's arguments based on the authorities on which she relied.

52. As for *Phoenix*, there are three potential points of distinction from the present case. First, section 2 (1) of the 1974 Act contained an express prohibition on unauthorised

insurers carrying out contracts of insurance, albeit reinforced in section 11 by a criminal sanction, whereas here the Appellant's case has to be based on an inference from the existence of the criminal sanction alone. Secondly, Kerr LJ felt compelled, with avowed reluctance, to treat a prohibition on "carrying out" a contract of insurance as necessarily implying that the contract itself was prohibited: that phrase, he believed, connoted specifically the performance of the contract. I do not accept that the language of sections 15 and 21 of the 2006 Act is equally unambiguous: the act of "employing" need refer only to the fact of the contractual relationship and does not necessarily connote the performance of obligations under it. Third, liability under section 11 is strict, whereas liability under both section 15 and section 21 depends on culpability – in the case of section 21 straightforwardly on knowledge of the illegality, and in the case of section 15 on non-compliance with various procedures. I need not consider whether any one of those distinctions would be sufficient on its own, though I am inclined to think that at least the latter two would be. What matters is that when taken cumulatively they are in my view sufficient to mean that Kerr LJ's conclusion in *Phoenix* does not govern the present case.

53. As for *Mohamed v Alaga*, I do not believe that Lord Bingham's "point (6)" can be treated as enunciating a universal proposition that, because a contract requires the concurrence of at least two parties, any prohibition on one party entering the contract necessarily renders it unenforceable by the other. That would be wholly contrary to the authorities reviewed above, which require a case-by-case assessment of the public interest. It is clear that his proposition was directed to a contract of the kind in question, and that indeed appears from the following points (7)-(9) which directly address the public interest in that case.

54. I have already identified why the decisions referred to by Ms Prince concerning employees knowingly working illegally do not assist on her case of statutory illegality. Indeed *Hounga v Allen* might be thought to assist the Claimant. The final sentence of the passage from Lord Wilson's judgment quoted at para. 40 above appears to suggest that if the statutory illegality claim had been before the Court the strong public policy in favour of protecting victims of trafficking might have led it to conclude that the relevant statutory provision did not prohibit the contract.

55. Mr Reade made a further point of a different character. He pointed out that section 98 (2) of the Employment Rights Act 1996, which identifies the potentially fair reasons for the dismissal of an employee, includes at head (d) the case where:

> "… the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment".

He submitted that that showed that Parliament contemplated that a contract of employment would remain legally effective even if entered into in breach of a statutory prohibition. That is a fair point as far as it goes, but it cannot of course establish that that was the intention of the particular statutory provisions with which we are concerned here.

56. For those reasons I do not believe that sections 15 and/or 21 of the 2006 Act can be read as impliedly prohibiting contracts of employment, in the sense of rendering them

unenforceable by either party, where the employee does not have the requisite immigration status.

57. As I have already noted, the issues were rather different in the ET and the EAT than before us. In particular, the statutory illegality question was understood to depend on whether the contract was unlawful at its inception, a point which is not now pursued. However, in the EAT Judge Eady did also consider whether a defence of statutory illegality could be raised in any event. At para. 49 of her judgment she said:

> "… I would also agree with the Claimant that the statutory provisions relied on by the Respondent did not clearly invalidate any contract entered into in 2013. Legislation that provides for a potential criminal offence on the part of an employer (sections 15 and 21 IANA) says nothing about the validity of any contract entered into by that employer (a contract, moreover, that could be fairly terminated should it become apparent that the employee could not continue to work without contravention of a duty or restriction imposed by or under an enactment, see section 98(2)(d) ERA). And although I allow that regard should be had to the broader, underlying purpose of the prohibition in question (and thus to the Claimant's potential breach - by virtue of the Immigration Rules - of her leave to remain), that simply brings into play the balancing of public policy considerations (as allowed in *Hounga* and *Patel*), in a way that is entirely consistent with the ET's characterisation of this as a case falling within the third category in *Hall*; that is, a case where illegal performance of a contract may mean it cannot be enforced by a party who knowingly participated in the illegal performance."

58. Though more broadly stated – reflecting the very limited argument which it is clear she heard on the point – Judge Eady's conclusion, and the essence of her reasoning, is to the same effect as mine. Although a purist might say that the second half of the passage inappropriately conflates (a) the exercise required in deciding whether a statute implicitly prohibits a contract in the relevant circumstances with (b) the exercise required in deciding whether the contract is unenforceable at common law, the distinction is in truth largely at the level of theory, since the same underlying principles are involved. It is noteworthy that the language used in the penultimate sentence of Kerr LJ's "head (ii)" in the passage quoted at para. 22 above from *Phoenix* is very similar to that used by Lord Toulson at para. 101 of his judgment in *Patel v Mirza*: see para. 12 (2) above.

THE COMMON LAW ILLEGALITY ISSUE

59. Although, as I have said, Ms Prince focused primarily on statutory illegality, she did briefly develop an alternative submission based on common law illegality. The ET's reasons for rejecting the Appellant's common law illegality defence are given at para. 139 of its Reasons as follows:

> "We have found above that the claimant relied on the respondent to take care of her visa situation. We have also found that it entirely suited the respondent and her husband to keep the claimant away from the immigration appeal hearing because they were relying on false

> information. We also found above that she did not sign the application form. We therefore find that the claimant did not knowingly participate in any illegal performance of her contract and that following *Woolston Hall* … the illegality does not render the contract unenforceable."

60. In the EAT Mr England for the Appellant argued that that approach did not involve the kind of careful assessment of the public interest and of the requirements of proportionality required by *Patel v Mirza.* Judge Eady summarised his submissions at para. 25 of her judgment as follows:

> "… [I]n considering whether it would be disproportionate to refuse relief to the Claimant in the circumstances of this case - and having regard to the guidance laid down on this issue by Lord Toulson in *Patel* (see paragraphs 93 and 108): (i) here the contract was clearly contrary to immigration law and public policy in that field; (ii) the Claimant must be taken to have known that she was entering into a contract that was in breach of her visa requirements; (iii) the illegality was, further, central to the contract; (iv) denial of enforcement was serious but not in the same way as might be in other cases; and (v) would plainly further the purpose of the immigration provisions in issue; and (vi) would further act as an appropriate deterrent; as well as (vii) ensuring the Claimant did not profit from her illegal conduct; thereby (viii) maintaining the integrity of the legal system."

61. Judge Eady dealt with that case at para. 50 of her judgment as follows:

> "In this case, the ET found that the Claimant did not knowingly engage in any illegal performance of her contract of employment, and was thus not complicit in any illegality that arose after 29 November 2013 (see, e.g., ET at paragraph 139). In the circumstances, it was satisfied that the illegality identified by the Respondent did not render the contract unenforceable by the Claimant. Given that the Respondent was not given permission to appeal the ET's findings as to the Claimant's knowledge, the challenge to the ET's substantive Judgment must therefore be dismissed."

62. Ms Prince submitted that that was an inadequate answer to Mr England's point. Mr Reade submitted that it had not been necessary for the Tribunal on the facts of this case to carry out an elaborate analysis by reference to the particular factors enumerated; though he also submitted that if it had done so the result would have been the same. I agree on both points. In his judgment in *Patel v Mirza* Lord Toulson was attempting to identify the broad principles underlying the illegality rule. His judgment does not require a reconsideration of how the rule has been applied in the previous case-law except where such an application is inconsistent with those principles. In the case of a contract of employment which has been illegally performed, there is nothing in *Patel v Mirza* inconsistent with the well-established approach in *Hall* as regards "third category" cases. As Mr Reade put it, *Hall* is how *Patel v Mirza* plays out in that particular type of case. Accordingly the ET was quite right to treat its findings about the Claimant's "knowledge plus participation" as conclusive; and the EAT was right to endorse that approach.

DISPOSAL

63. I would dismiss the appeal.

Lord Justice Davies:

64. I agree entirely with the judgment of Underhill LJ.

65. In my view, the key to this case lies in the fact that s.15 and s.21 of the 2006 Act are directed at the employer. They are not, in my opinion, directed at the employee. I do not, in this regard, consider that the words "employ" and "employs", as used in those two sections respectively, are required to be taken as extending the unlawful conduct in question to employees who carry out their employment obligations. Cases such as *Phoenix* are accordingly distinguishable. On that basis, and given further the finding of fact in this case that the claimant did not know of the illegality, it follows that the defences based on statutory and common law illegality must both fail. Such a conclusion fortunately also accords with the merits of this particular case.

Lady Justice Nicola Davis:

66. I agree with both judgments.