THE HIGH COURT

[2017 No. 193 MCA]

BETWEEN

TAHIR NAZIR AND SYEDE NAZIR

APPELLANTS

AND

SULTANA ANWAR

RESPONDENT

DECISION of Mr Justice Donald Binchy delivered on the 24th day of April, 2018

1. This is an appeal brought by the appellants against decisions of the Employment Appeals Tribunal (the "EAT") dated 22nd May, 2017 and made pursuant to the provisions of the Payment of Wages Act (1991) and the Terms of Employment (Information) Act 1984-2014. Both of these decisions are contained in one document, and so I will refer to it hereafter as the "Decision", although it refers to decisions made by the EAT pursuant to two statutory claims. Separately, the appellants have also appealed, to the Circuit Court, a decision of the EAT made on the same date pursuant to the Unfair Dismissal Acts 1977-2007.

2. The respondent, who is a cousin of the first named appellant, claims that she worked as a domestic worker for the appellants between 18th March, 2009 and 10th August, 2011. She claims that she was required to do general housekeeping duties as well as looking after the three children of the appellants. She claims that she was required to work seven days a week and never had a day off. She further claims that she was required to work from 7.00am until between 11.00pm and 12 midnight. She claims that she was promised pay of €100.00 per week, but that instead she was paid €150.00 each month. According to the Decision, she expected to get a three and half year visa, but it does not say if she expected the employer to obtain that visa, or intended applying for the same herself.

3. According to the Decision, the respondents deny that the appellant ever worked for them, and claim that the respondent asked if she could come to visit. The appellants say that they already had a babysitter for their three children. The first named appellant said that he signed papers so that the respondent could obtain a visitor's visa. Also according to the Decision, the first named appellant said that after a few months the respondent began looking for work in local shops. Subsequently, the appellants claim that they were informed by one of her brothers that the respondent was to be married. The appellants claim that the respondent then left their home without telling them, but later came back for a period.

4. In the Decision, the EAT notes that there is a major conflict of evidence and it resolved that conflict of evidence in favour of the respondent. The following is the text of the Decision against which the appellants now appeal:-

> "While accepting that there are difficulties with both versions of events, the Tribunal preferred the evidence of the appellant [in these proceedings the respondent] and found that she had been the respondents' [in these proceedings the appellants'] domestic worker and that she was in effect constructively dismissed. The Tribunal accepts that the appellant worked a very large number of hours each week, and that these were the normal hours of the employment, and is mindful of Sections 7 and 17 of the Unfair Dismissals Act as amended. In particular, the Tribunal also has regard to SI 287 of 1977 in relation to the calculation of a week's remuneration for the purposes of s. 7 of the Act. In making an award, the Tribunal takes into account that the national minimum wage in 2011, when the appellant's employment ceased was €8.65 per hour.
>
> The appellant is awarded the sum of €64,771.20 under the Unfair Dismissal Acts 1977 to 2007 in relation to her financial loss attributable to the dismissal. The appellant's appeal under the Payment of Wages Act 1991 for ten days pay succeeds and she is awarded the sum of €674.70.
>
> The appellant's appeal under the Terms of Employment (Information) Acts 1994 to 2012 also succeeds and she is awarded the sum of €1,349.40 being four weeks' wages."

5. In the notice of motion appealing the Decision, the appellants seek to set aside the determination of the EAT (insofar as it relates to the decisions made under the Payment of Wages Acts 1991 and the Terms of Employment (Information) Act 1994-2014), on the following grounds:-

> "(a) the Employment Appeals Tribunal fell into an error of law in its analysis and application of the evidence to the relevant law;
>
> (b) that the Employment Appeals Tribunal fell into an error of law in making unsustainable findings of fact and/or findings of fact for which there was no supporting evidence;
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> (c) that the Employment Appeals Tribunal fell into an error of law in finding that an employment relationship existed between the appellants and the respondent;
>
> (d) that the Employment Appeals Tribunal fell into an error of law in finding that the respondent was entitled to any relief from a Statutory Tribunal, because if she was employed, which is denied she was in fact working under an illegal contract;
>
> (e) that the Employment Appeals Tribunal fell into an error of law in failing to consider the entirety of the circumstances of the matter and failed to properly consider or apply the correct interpretation and intention of legislation protecting the payment of wages of workers and provision of employment contracts under the relevant acts and the Constitution; and
>
> (f) that the Employment Appeals Tribunal fell into an error of law in setting aside that decisions of the Rights Commissioners [sic] and each of the appellants' cases."

6. The notice of motion is grounded upon the affidavit of the first named appellant of 20th June, 2017. This short affidavit deals almost entirely with matters of fact with which this Court is not concerned since, although brought before the Court by way of notice of motion, this is an appeal from the Decision on a point of law only. However, in para. 9 of his affidavit, the penultimate paragraph of the same, the first named appellant identifies the two issues of law which he claims arise from the EAT decision:-

> "(1) whether the respondent was an employee of the appellants at the relevant period [sic]; and
>
> (2) if she was an employee whether she should be able to avail of the statutory scheme for employees at all when in the relevant period she was engaged in an illegal contract of employment."

7. The first named appellant avers that when these claims were heard at first instance before a Rights Commissioner on or about 23rd May, 2015, they were dismissed because the respondent accepted that she did not have a valid work permit at the time that she claimed to be employed by the appellants. The respondent then appealed that decision to the EAT.

8. The respondent delivered a replying affidavit on 11th July, 2017 which again deals almost exclusively with matters of fact. In para. 6 thereof she avers that her contract of employment with the appellants was not for an illegal purpose and was not therefore an illegal contract for the purposes of these proceedings. Accordingly, the respondent avers that the EAT did not err in law in finding that the respondent was entitled to statutory relief.

Submissions of the Parties

Submissions of the Appellants

9. The appellants submit that the EAT failed in the Decision to deal at all with the legality of the contract that it found the parties had concluded. It is submitted that the failure of the EAT to address this issue is inexplicable in circumstances where the Rights Commissioner had dismissed the claim of the respondent for this very reason i.e. that the contract was illegal and therefore unenforceable.

10. The appellants also contend that the finding of the EAT that the parties had entered into a contract of employment that enjoyed the protection of legislation was wrong in law and fact having regard to the dispute on the facts between the parties and the absence of any corroborative documentary evidence to support the existence of an employment contract, as well as the illegal status of the respondent in the jurisdiction.

11. The appellants rely on s. 2 of the Employment Permit Act 2003 (as amended by s. 2 of the Employment Permit Act 2006) which states:-

> "A foreign national shall not —
>
> (a) enter the service of an employer in the State, or
>
> (b) be in employment in the State,
>
> except in accordance with an employment permit granted by the Minister under section 8 of the Employment Permits Act 2006 that is in force.
>
> (1A) Subsection (1)(b) applies whether the employment concerned results from —
>
> (a) the foreign national's being employed in the State by a person,
>
> (b) his or her being employed by a person outside the State (the 'contractor') to perform duties in the State, the subject of an agreement between the contractor and another person, or
>
> (c) any other arrangement."

12. This section was the subject of some scrutiny in the decision of Hogan J. in the case of *Hussein v. The Labour Court* [2012] 2 I.R. 704, upon which the appellants also rely. Noting that s. 2(3) of the Act of 2003 (as inserted by s. 2 of the Act of 2006) makes it an offence to contravene subs. (1) or (2), Hogan J. in that case held that:-

> "The very fact that the Oireachtas must be taken to have intended that a non-national employee to whom the prohibition applies (i.e., non-EU and non-EEA nationals) automatically commits an offence if he or she does not have a work permit irrespective of the reasons for that failure necessarily has implications so far as the civil law is concerned, in that such a contract of employment must also be taken to be void."

Hogan J. was particularly influenced by the fact that s. 2 (subs. 4) provided a defence to an employer charged with an offence under s. 2, but did not provide any equivalent defence to an employee.

13. The appellants further rely upon the decision of the EAT in the case of *Morais v. Neylons Mason Services Ltd. (t/a Neylons Facilities and Management Services)* [unreported decision of the EAT dated 7th April, 2015] in which the EAT dismissed proceedings brought by a Brazilian cleaner, considering itself bound by the decision of Hogan J. in *Hussein*.

14. While the decision in *Hussein* was overturned on appeal to the Supreme Court, the appellants submit that the decision of the Supreme Court did not address the issue of the illegality of the claimant's contract in that case, but was decided on other grounds and, accordingly, the decision of Hogan J. remains good law and the only relevant authority in this jurisdiction as regards the effect of illegality on an employment contract.

15. Finally, the appellants rely on the Employment Permits (Amendment) Act 2014 (the "Act of 2014"). This Act, *inter alia*, amends the Employment Permits Act 2003. Section 4 of the Act of 2014 inserts new ss. 2B and 2C after s. 2A of the Act of 2003 as follows:-

> "4. The Act of 2003 is amended by inserting the following sections after section 2A:
>
> "Civil proceedings

2B. (1) This section applies to a foreign national who, in contravention of section 2(1) —

(a) had entered the service of an employer in the State, or

(b) was in employment in the State,

without an employment permit granted by the Minister under section 8 of the Act of 2006 that was in force and who is no longer in such service or employment.

(2) Where an employer referred to in section 2(1)(a) or, in the case of employment referred to in section 2(1)(b), a person referred to in section 2(1A)(a) or a contractor referred to in section 2(1A)(b) —

(a) has not paid a foreign national to whom this section applies an amount of money in respect of work done or services rendered during the period for which the foreign national was in the employment or service without an employment permit, or

(b) has paid an amount of money that was, having regard to the work done or services rendered during such period, an insufficient amount of money,

the foreign national or, in accordance with subsection (5), the Minister, may institute civil proceedings for an amount of money to recompense the foreign national for such work done or services rendered.

(3) Where, in proceedings under subsection (2), a court before which the proceedings are brought is satisfied that the foreign national took all steps as were reasonably open to him or her to comply with section 2(1), it may make an order that in recompense for such work done or services rendered an amount of money shall be paid to the foreign national by the employer who employed the foreign national, or, as the case may be, the person referred to in section 2(1A)(a) or the contractor referred to in section 2(1A)(b).

(4) The amount of money to be paid, pursuant to an order under subsection (3), to a foreign national in recompense for work done or services rendered shall be—

(a) in a case where no amount of money was paid in respect of work done or services rendered during the period for which the foreign national was in the employment without an employment permit, an amount equal to the greater of —

(i) an amount calculated by reference to the national minimum hourly rate of pay, or

(ii) an amount equal to an amount of pay for the work done or services rendered which is fixed under or pursuant to any enactment,

or

(b) in a case where an amount of money was paid in respect of work done or services rendered during the period for which the foreign national was in the employment without an employment permit, an amount equal to the difference between—

(i) the amount paid, and

(ii) an amount equal to the greater of—

(I) an amount calculated by reference to the national minimum hourly rate of pay, or

(II) an amount equal to an amount of pay for the work done or services rendered which is fixed under or pursuant to any enactment.

(5) The Minister may, at his or her discretion, institute civil proceedings under subsection (2) in the name, and on behalf, of the foreign national with the consent of that foreign national.

(6) Subject to subsection (10), proceedings under this section shall not be brought after the expiration of 2 years from the day on which the foreign national ceased his or her employment or service with the employer, a person referred to in section 2(1A)(a) or contractor referred to in section 2(1A)(b).

(7) Proceedings under this section shall not be brought in respect of any work, or services, done or rendered more than 6 years prior to the day on which the foreign national ceased his or her employment or service with the employer, a person referred to in section 2(1A)(a) or a contractor referred to in section 2(1A)(b).

(8) Subsection (7) shall apply to proceedings under this section whether the work was done or the services were rendered before or on or after the coming into operation of section 4 of the Employment Permits (Amendment) Act 2014.

(9) Without prejudice to subsection (6), proceedings under this section shall not be brought where—

(a) the foreign national, in respect of any right of action he or she may have and whether such right of action arises pursuant to any enactment or otherwise, has

(i) instituted proceedings in relation to the same, or substantially the same, work done or services rendered as referred to in this section, or

(ii) otherwise commenced an action or other claim in relation to the same, or substantially the same, work done or services rendered as referred to in this section,

and

(b) those proceedings have, or that action or claim has, not been finally determined or have, or has, not been discontinued before being finally determined.

(10) Where—

(a) before the day on which this section comes into operation a foreign national had instituted proceedings or otherwise commenced an action or other claim for work done or services rendered that are, or is, wholly or substantially in respect of work done or services rendered—

(i) during the period in which the foreign national was in the service of an employer in the State, or in employment in the State, without an employment permit referred to in subsection (1), and

(ii) for which he or she has not been paid or has been paid an insufficient amount of money,

and

(b) the foreign national—

(i) has, on or after the day on which this section comes into operation, discontinued the proceedings, action or claim before those proceedings are, or that action or claim is, finally determined, or

(ii) has not, when those proceedings are, or such action or claim is, finally determined, been awarded any amount of money in recompense for such work done or such services rendered,

the foreign national may institute proceedings under this section not later than 2 years from the day on which the proceedings were, or the action or claim was, discontinued or on which such determination was made in respect of such work done or such services rendered during a period of 6 years prior to the day on which he or she ceased his or her employment or service with the employer, a person referred to in section 2(1A)(a) or a contractor referred to in section 2(1A)(b).

(11) In proceedings instituted by the Minister under this section the court shall not award costs in favour of the foreign national but may award costs in favour of the Minister.

(12) The amount of money paid to a foreign national pursuant to an order under subsection (3) shall not be treated as reckonable emoluments within the meaning of the Social Welfare Consolidation Act 2005 for the purposes of that Act.

(13) In proceedings instituted by the Minister pursuant to subsection (5), the foreign national shall not be liable for costs but the court before which the proceedings are brought may order that any costs that might otherwise have been awarded against the foreign national shall be paid by the Minister.

(14) Subsection (5) shall not be in derogation of any right of a foreign national to institute proceedings under this section on his or her own behalf.

(15) In this section—

'Act of 2006' means the Employment Permits Act 2006;

'enactment' has the meaning assigned to it by the Act of 2006;

'national minimum hourly rate of pay' has the meaning assigned to it by the Act of 2006."

16. It is submitted on behalf of the appellants that while these amendments enable a foreign national who has worked in the State without a work permit to institute civil proceedings claiming compensation in respect of work done or services rendered, the amendments do not confer any jurisdiction on any of the statutory bodies such as the EAT to hear complaints by foreign nationals who are working without a work permit. Moreover, in order to succeed with such an action, the claimant must demonstrate to the Court that he took all steps as were reasonably open to him to comply with the requirement to hold a work permit.

Submissions of the Respondent

17. It is submitted on behalf of the respondent that it is not open to this Court on an appeal on a point of law from a decision of the EAT to make any new findings of fact or to interfere with findings of fact as found by the EAT. It is submitted that this Court is restricted to examining and determining a point of law, which in this case is whether an undocumented employee who has an implied contract of employment has employment rights under the Payment of Wages Act 1991 and the Employment (Information) Acts 1994-2012.

18. Insofar as the appellants seek to challenge the jurisdiction of the EAT to hear the respondent's claim, it is submitted that this amounts to a claim that the EAT acted ultra vires, and any challenge to the jurisdiction of the EAT to hear the claim should have been challenged by way of judicial review. Furthermore, it is submitted that there is no evidence that the appellants raised this issue at all before the EAT or that the EAT considered the issue and rejected an argument that it should not entertain the claim. It is submitted that the decision of the EAT indicates that the proceedings before it revolved around whether or not there was an employment relationship between the parties, and that the finding of the EAT that there was such a relationship is a finding of fact with which this Court may not interfere.

19. It is also submitted on behalf of the respondent that the appellants are seeking to re-visit the facts of the case in arguing that there was no documentary evidence of the relationship between the parties, and that this is not something which the appellants are entitled to do in an appeal on a point of law.

20. The respondent submits that the appellants were in breach of s.2 (2) of the Act of 2003 insofar as they employed the respondent

without obtaining an employment permit, and that the appellants are now relying upon their own default in an attempt to avoid their legal responsibilities to the respondent. It is submitted that the Act of 2014 has created a statutory recognition that undocumented workers may now institute proceedings to recover damages arising out of an employment relationship, and specifically acknowledges that work carried out by an undocumented worker even prior to the Act of 2014 may be the subject not just at proceedings under the Act, but also of other proceedings.

21. The respondent relies upon the decision of the Supreme Court in H*ussein v. The Labour Court* [2016] 1 I.R. 180. While the *ratio* of the Supreme Court in allowing the appeal had nothing at all to do with the law concerning the enforcement of illegal contracts, it is submitted that comments made by Murray J. *obiter* suggests that the Supreme Court might be willing to enforce an illegal contract in certain circumstances. The respondent cites the following passage from the decision of Murray J.:-

> "With so many regulatory measures in the modern economy concerning employment relationships and the supply of goods and services, the circumstances in which a contractual relationship which gives rise to some form of illegality might be considered a ground for not enforcing it, is a complex one. Traditional judicial dicta, in the older cases in particular, may have to be reviewed or nuanced in the light of the modern regulatory environment, and applied with the principle of proportionality in mind … I would, however, add, even though it is entirely hypothetical, that if the subject matter of the liability to be enforced involves something which was inherently immoral or inherently against the public interests, such as an agreement to rob or to distribute the proceeds of a robbery, then the issue of illegality and public policy would arise from a different perspective. Obviously, that is not the case and unlikely to be the kind of thing which would be attributed to a rights commissioner by statute to decide. In this case one is dealing with an inherently lawful subject matter, namely, the relationship of employer and employee, a relationship which the rights commissioner, in his determination, found to exist and give rise to a liability of the applicant."

22. It is submitted on behalf of the respondent that this Court is entitled in deciding this case to place some reliance on the approach of the Supreme Court in Hussein, and that since the Supreme Court held that the High Court had made findings of fact that it was not entitled to do in that case, then this Court should be wary about relying upon the decision of the High Court in *Hussein*.

23. The respondent also relies upon the decision of the Supreme Court of the United Kingdom in the case of *Hounga v. Allen* [2014] UKSC 47. That case involved a claim on the part of the plaintiff that the defendant had discriminated against the plaintiff on racial grounds, contrary to the Race Relations Act 1976 in the United Kingdom. The plaintiff had knowingly participated in unlawful arrangements in order to secure her entry into the United Kingdom and thereafter had worked for the defendant knowing that she was not entitled to do so. Notwithstanding the unlawful nature of her contractual arrangements with the defendant, the plaintiff succeeded. The respondent in these proceedings cites a number of passages from *Hounga* including a passage quoted from an earlier decision of the House of Lords, *Saunders v. Edwards* [1987] 1 WLR 1116 in which case Bingham L.J. stated:-

> "Where issues of illegality are raised, the courts have ... to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct. ... on the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn. Where the plaintiff's action in truth arises directly *ex turpi causa*, he is likely to fail ... where the plaintiff has suffered a genuine wrong, to which allegedly unlawful conduct is incidental, he is likely to succeed ..."

24. It is submitted that these comments are resonant of the approach suggested by Murray J. in his *obiter* remarks in *Hussein*. It is submitted that it is contrary to public policy to allow an employer, who has an obligation to ensure his employees have a work permit, to employ an undocumented worker and then to rely on the fact that the employee has no work permit to avoid his obligations under various employment statutes. This would serve to facilitate the abuse of vulnerable persons, and there is or should be a strong public policy to prevent or discourage such abuse. The respondent places some reliance on the UN protocol to prevent, supress and punish trafficking in persons ("the Palermo Protocol") which was referred to by the House of Lords in *Hounga*. The Palermo Protocol was ratified by Ireland on 21st June, 2010. The respondent notes that the definition in the Palermo Protocol of "trafficking in persons" is:-

> "The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercing, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability … for the purpose of exploitation. Exploitation shall include, at a minimum, … sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

25. While the respondent acknowledges that the EAT did not make a finding of fact that the respondent was trafficked, and it is not open to this Court to make any new findings of fact, such legislation should be taken into account when considering the public policy aspect of refusing all undocumented workers relief under Irish employment legislation.

26. Finally, the respondent submits that there is no specific provision either in the Payment of Wages Act 1991 or the Employment (Information) Acts, 1994-2012 prohibiting an undocumented employee from availing of the protections provided for employees under the legislation. Moreover, it is submitted that the Act of 2014 confirms that it is possible to be an undocumented employee and still be entitled to be protected from abusive work practices. It is further submitted that while the 2014 Act provides a specific remedy in permitting undocumented workers to issue court proceedings, it does not prohibit such workers from instituting proceedings in other forums. It is submitted that subs. (8) and (9) of s. 2B of the Act of 2003 (as amended by the Act of 2014) envisage that a claimant, despite being undocumented, may have other claims under other legislation.

The Decision

27. The Decision records that the respondent was represented at the hearing by a Ms Virginija Petrauskaite of the Migrant Rights Centre Ireland, and the appellants were represented in person. The Decision then goes on to refer to the decisions of the Rights Commissioner, and then proceeds to summarise the case advanced on behalf of the respondent, followed by the case advanced on behalf of the appellants, followed by the determination of the Tribunal. It is a short decision, running to a little over two pages. The summaries of the cases put forward by each of the parties focus entirely on matters of fact, and in particular the claim of the respondent that she was employed as a domestic worker by the appellants between 18th March, 2009 and 10th August, 2011, and the denial by the appellants that she was so employed, and the surrounding circumstances as contended for by each of the parties and as already summarised above. There is no mention anywhere in the Decision as to the legal status of the respondent, as to whether or not she had a work permit or as to any efforts made by either of the parties to obtain a work permit for the respondent.

The EAT notes that there was a major conflict in the evidence given by the parties. There does not appear to have been any documentation relied upon by the respondent in support of her claim, or at least none as referred to by the EAT. The EAT made the Decision based upon the oral testimony of the parties, preferring the evidence of the respondent to that of the appellants.

Discussion and Conclusion
28. The Decision is concerned entirely with matters of fact. Based on the evidence that it heard, it accepted the respondent's version of events and on that basis concluded that she had entered into an oral agreement with the appellants, and that she had been, in effect, constructively dismissed.

29. It is submitted on behalf of the appellants that the question as to whether or not the parties entered into an employer/employee relationship is a mixed question of fact and law, and that while this Court should afford the EAT curial deference in respect of questions of fact, it is not obliged to do so in relation to mixed questions of fact and law.

30. It is undoubtedly correct that the existence (or not) of an employment relationship is a mixed question of fact and law. So far as the factual element of the question is concerned however the findings of fact from which the EAT drew inferences of law (as to the existence of an employment relationship) are not findings which are open to review by this Court. The EAT heard the evidence of the parties and preferred the evidence of the respondent that she had been engaged by the appellants to provide domestic services and that she had done so. It also concluded that she had worked "a very large number of hours each week, and that these were the normal hours of the employment". In arriving at these conclusions, the EAT did so having heard the evidence of the parties, and these are conclusions on matters of fact with which this Court cannot and should not interfere. It is clear from the Decision that the EAT, faced with a significant conflict of evidence, and with no corroborating evidence produced by either side, found this a difficult matter to decide upon. But the absence of supporting documentation or other corroborative evidence, is not an uncommon feature of disputes, and, by itself, is not sufficient reason to dismiss a claim. Indeed , it may be said that it is the very absence of documentation that gives rise to so much litigation, leaving the courts or other tribunals to decide disputes or issues within disputes on the basis of parole evidence only. Having reached the conclusions that it did on the facts, there could hardly be any doubt that the EAT was justified, as a matter of law, in concluding that the parties had entered into an employment relationship. The appellants' first point of appeal (referred to at para.6(1) above) must therefore be dismissed.

31. That is the background against which I turn to consider the second issue of law relied upon by the appellants in this appeal. That is the failure by the EAT, in arriving at the Decision, to take into account that the contractual arrangements between the parties were unlawful, because the respondent did not have a work permit, and the contract between the parties was therefore void for illegality. Arising out of that, it is submitted, the respondent was not eligible to avail of the statutory scheme for employees. This issue was not addressed by the EAT at all in the Decision, which would suggest that the issue was not argued before the EAT. Indeed, it was not suggested at the hearing of this appeal that the issue was argued before the EAT. That this is so is somewhat surprising, to say the least, given that it formed the basis of the decision of the Rights Commissioner. It seems very likely that matters took this course because the appellants chose to represent themselves before the EAT, although they had had legal representation before the Rights Commissioner. But in any case, how can it be said that the EAT made an error in relation to a matter of law in circumstances where the error alleged was not the subject of any argument before the EAT and did not feature in its decision?

32. Moreover, the EAT did not make any finding of fact to the effect that the respondent did not have a work permit and was working illegally in the State. If it had made such a finding of fact, it may well be that it would have been obliged of its own motion to consider whether or not the contract between the parties was an illegal one and that the respondent should not therefore receive any benefits conferred by employment legislation. But none of this occurred.

33. Furthermore, while it was agreed for the purposes of this appeal that the respondent did not have a work permit, it is not apparent from the Decision that the EAT was aware that this was so, or was so informed by either of the parties. The decisions of the Rights Commissioner rejecting the claims of the respondent were clearly based upon a finding of the Rights Commissioner that the employment contract between the parties was illegal, and that the claims therefore should be dismissed in light of the decision of Hogan J. in *Hussein*. However, the hearing before the EAT is a full rehearing, and the Court was not informed whether or not the EAT has before it, is aware of or has any regard to the decision of the Rights Commissioner in its consideration of appeals such as these. If it were the case that the EAT was indeed aware of the decisions of the Rights Commissioner, and the reasons for his decisions, or if the EAT was made aware during the course of the hearing before it that the respondent did not hold a work permit, then it seems to me that as an organ of State, the EAT, when put on notice of the possibility that a contract between parties to a dispute may be an illegal contract, would have had a duty to consider the implications arising from that of its own motion, even if the parties failed to raise the issue. If, in such circumstances it had failed to do so, such failure may well be an error in law, amenable either to an appeal on a point of law or to judicial review. But since none of this has been established as having occurred in this case, no point of law on the issue arises for determination on this appeal.

34. All of that being the case, it seems to me that it is unnecessary to consider the very comprehensive arguments made by counsel for the parties regarding the enforceability of an unlawful employment contract, tempting and all as it is to do so. The appeal on the second issue raised by the appellants at para. 6(2) above must also therefore be dismissed, because the matters raised by the appellants in relation to this issue were not raised or adjudicated upon by the EAT, and there is nothing to suggest that it should have done so of its own motion.