OUTER HOUSE, COURT OF SESSION

[2025] CSOH 5

P1047/24

OPINION OF LORD BRAID

In the Petition of

HIS MAJESTY'S SECRETARY OF STATE FOR BUSINESS AND TRADE

Petitioner

for

a disqualification order in terms of section 8 of the Company Directors Disqualification Act 1986

in respect of

QIQING HE

Petitioner: Massaro; TLT LLP

14 January 2025

Introduction

[1] The petitioner seeks a disqualification order under section 8 of the Company Directors Disqualification Act 1986 in respect of the respondent, Qiqing He, who was until 30 May 2022 the sole director of a company, Q Q Holburn Limited, incorporated in Scotland on 16 October 2019 as a private company limited by shares. The company's main area of business was that of "take-away food shops and mobile food stands" and it traded as a takeaway restaurant. The company was dissolved on 19 March 2024. The petition has been served on the respondent but no answers have been lodged.

The statutory framework

[2] Section 8 of the 1986 Act provides:

> **"Disqualification of director on finding of unfitness**
>
> (1) If it appears to the Secretary of State that it is expedient in the public interest that a disqualification order should be made against a person who is, or has been, a director or shadow director of a company, he may apply to the court for such an order.
> (2) The court may make a disqualification order against a person where, on an application under this section, it is satisfied that his conduct in relation to the company (either taken alone or taken together with his conduct as a director or shadow director of one or more other companies or overseas companies) makes him unfit to be concerned in the management of a company.
> […]
> (3) In this section 'the court' means the High Court or, in Scotland, the Court of Session.
> (4) The maximum period of disqualification under this section is 15 years."

[3] Section 12C(4) of the Act enjoins the court, when considering whether to make a disqualification order, and if so, what the length of that order should be, to have regard to the matters set out in paragraphs 1 to 4 of schedule 1 to the Act. That schedule includes, in paragraph 1, the extent to which the director was responsible for the causes of any material contravention by a company of "any applicable legislative or other requirement"; and, in paragraph 4, the nature and extent of any loss or harm caused, or any potential loss or harm which could have been caused, by the person's conduct in relation to a company.

The conduct giving rise to unfitness: employment of illegal workers

[4] The conduct which is said to render the respondent unfit to hold office as a director is that he caused the company to breach section 15 of the Immigration, Asylum and Nationality Act 2006. In brief, he was responsible for the company failing to comply with its statutory obligations under that Act, in that the company, through him, and at a time when he was a director employed three workers who did not have the appropriate permission

and/or documentation to work in the UK, nor any lawful right to work in the UK. Following a Home Office visit to the company's premises on 30 September 2022, a civil penalty of £30,000 was imposed on the company, subsequently mitigated to £15,000 due to the company's co-operation with the Home Office investigation, but even that reduced sum was not paid prior to the company's dissolution.

[5] Section 15 of the 2006 Act provides that an employer must not 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 is invalid, or has ceased to have effect, or is subject to a condition preventing him from accepting the employment. Section 15(3) provides that an employer may be excused from paying a penalty where he has complied with prescribed requirements. Those requirements are set out in the Immigration (Restrictions on Employment) Order 2007/3290. That order provides that an employer should carry out checks to satisfy itself of a prospective employee's status. The 2007 Order also requires that the employer keep copies of original documents which it has reviewed in undertaking those checks, for a period of not less than 2 years after the employment has come to an end. In certain circumstances, confirmation of a person's permission to work through the "Employer Checking Service" administered by the UK Visas and Immigration is a precondition to the defence. The 2006 Act provides that if an employer does not carry out these checks and employs a worker who does not have the lawful right to work in the United Kingdom, they may be required to pay a civil penalty.

[6] The Home Office visit uncovered three persons employed at the company's premises (out of a total staff of four) who had no lawful right to remain or work in the United Kingdom. The interview records, and other information subsequently provided by the company are to an extent inconsistent. The first of those persons, HH, told the Immigration

Officers who interviewed him that he had been working for around 2 months, as a cook, earning £400 per week, which he received from the manager, whom he identified as the respondent. He was also given free accommodation. He was paid "cash in hand" and did not pay tax, nor have a National Insurance number. It was the respondent who had given him his job. The company later stated, in its response to an Information Request by the Home Office, that Mr H's employment began in August 2022. The respondent, when interviewed said that Mr H had been working at the premises for 2 years. He accepted that he did not ask Mr H for any evidence of his right to work in the UK. On the basis of the information provided by the company and by the respondent, the respondent was a *de jure* director at the time he employed Mr H.

[7] The second person interviewed by Immigration Officers was YL. She told Immigration Officers that she had been working at the premises for over a year, as a kitchen assistant. She was paid £400 per week, with free accommodation. She was not required to provide any documentation evidencing her right to work, and her employer knew that she was not allowed to work, in the UK. She said the job was given to her by HH (which if true, places his employment at least as far back as October 2021). The company, in its said response, said that Ms L's employment commenced in July 2021. The respondent, at interview, said that Ms L had been working in the premises for 2 years, and that he knew that she probably had no right to work in the UK and did not ask her of any evidence of her right to do so.

[8] The third employee was LJ. He first told Immigration Officers that he had arrived at the company's premises only on 29 September 2022. He had been paid in cash and given free accommodation and food, all by the respondent. He subsequently stated that he had been working at the premises since May 2022, being paid £550 per week. The respondent

had employed him and told him what tasks to do. He had not been required to provide any documentation before being offered the job. The company stated that Mr J's employment began in April 2022. The respondent stated at interview that Mr J had been working at the premises since 29 September 2022. He knew that Mr J did not have the right to work in the UK and did not ask for any evidence of his right so to work. He paid Mr J cash in hand.

[9] Although the company had itself co-operated with the Home Office investigation (through another director), the respondent himself had failed to engage and had not accepted responsibility for his actions, nor had he responded to the Information Request.

The petitioner's submissions

[10] Counsel for the petitioner submitted that, notwithstanding the discrepancies regarding dates of employment, it was clear (not least from what the respondent himself had said in interview) that the respondent was the person who hired the employees in question, and that he did so in the knowledge that they were not entitled to work in the UK, or at least suspecting that they were not. He was the person who paid them and told them what tasks to perform. At least until 30 May 2022, he had the sole responsibility to ensure that the company had appropriate processes in place to comply with legislative requirements, by correctly employing people and, when breaches were found, ensuring the company complied with the enforcement regime by way of meeting financial penalties imposed/agreed with the Home Office. However, he had failed to provide evidence that any such processes were in place. The respondent was the sole *de jure* director when at least Ms L and Mr J were hired, and, probably (depending on what view one took of the evidence) also Mr H. Even if not a *de jure* director by that time, he was in any event a shadow director, as the person who hired, paid and instructed employees.

[11] These facts justified a finding of unfitness against the respondent. The correct approach was that set out by ICC Judge Jones in *Secretary of State for Business, Energy and Industrial Strategy* v *Ali* (22 January 2019, unreported), quoted with approval by Mullen J in *Secretary of State for Business, Energy and Industrial Strategy* v *Yilmaz* [2019] EWHC 1764 (Ch) at [44]:

a. Did the company operate its business using illegal workers?

b. If so, did the director have personal responsibility for that, by his acts or omissions?

c. If so, should the court exercise its discretionary power to disqualify the director?

[12] As regards the length of any order, the case fell into the middle bracket (under reference to the well-known analysis in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164). Having regard to the following factors, a 7 year disqualification period was appropriate:

(i) the substantial number of illegal employees (compared with the total staff);

(ii) the company's failure to pay the civil penalty;

(iii) the evidence of deliberate (or at the very least, reckless) wrongdoing;

(iv) the respondent's failure to engage with the Secretary of State;

(v) the length of time for which the company paid employees cash in hand, from which the respondent personally benefitted as sole shareholder.

A 7 year order had been made in *Secretary of State for Business, Energy and Industrial Strategy* v *Malek* [20 April 2016], referred to in *Yilmaz* at paragraph 43, on similar facts to those here.

Decision

[13] The facts in this case are strikingly similar to those in *Secretary of State for Business and Trade* v *Azam* 2024 SLT 614, in which I imposed a disqualification period of 6 years. I refer to the approach I took in that case at paras [13] to [15], and to the authorities referred to therein, including *Mithani¸ Director Disqualification* Vol III, paragraph 760C. In brief, each case must be judged on its own facts. An objective standard of conduct must be applied. The period of disqualification selected should serve the dual purpose of protecting the public against the future conduct of companies by persons whose past records as directors of insolvent companies shows them to be a danger to creditors and others; and deterring the respondent, and others, from repeating such conduct in the future.

[14] For essentially the same reasons as in *Azam*, I am satisfied that a disqualification order falls to be made against the respondent. Applying the approach suggested by counsel for the petitioner, there is no doubt that the company operated its business using illegal workers, for which the respondent was personally responsible. The gravity of such conduct as the respondent's lies in the fact that it gives an unfair competitive advantage to the company; it gives an opportunity for the exploitation of migrant workers who are usually in a precarious state to begin with; and it exposes the company to a fine. On an objective view of the evidence, the respondent deliberately (or, at best for him, recklessly) breached immigration law for a period of at least one year, probably two. The company's business model, such as it was, appears to have been predicated on the employment of illegal workers, given that three out of the company's total staff complement of four were employed illegally. That had the potentially harmful consequences set out above, and demonstrates such a lack of probity on the part of the respondent as to render him unfit to be involved in the management of a company.

[15] I should mention the petitioner's argument that the respondent was a shadow director, defined as being a person in accordance with whose directions or instructions the directors of the company are accustomed to act (section 22(5) of the 1986 Act). I do not agree with the petitioner that the circumstances relied upon - essentially the hiring of, and giving instructions to, employees - of themselves justify that inference. However that is of no moment, given that it is likely that all three employees were employed by the respondent when he was a *de jure* director; and I do accept that it was the respondent who was responsible for instigating the company's "business model", which continued after he ceased to be a *de jure* director.

[16] As for the length of that order, I am conscious that in *Azam* the length of order imposed was 6 years. On the other hand, I was not invited to make a longer order in that case and the choice I was presented with was whether to place the case at the top of the lowest bracket or at the bottom of the middle bracket. Having regard in particular to factors (i), (iii) and (v) relied upon by the petitioner in this case, I am persuaded that the respondent's conduct can be regarded as more serious than that of Mr Azam, such as to justify a 7 year disqualification.

Disposal

[17] Accordingly, I will make a disqualification order in the terms sought for a period of 7 years, together with the ancillary orders sought. I will also find the respondent liable in the expenses of the petition.