THE INFORMATION TRIBUNAL
(NATIONAL SECURITY APPEALS)
(Sir Anthony Evans, President
James Goudie QC
Kenneth Parker QC)

BETWEEN

MOHAMED AL FAYED Appellant

- and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS Respondents

DECISION

1. We were appointed members of the Data Protection Tribunal (now renamed the Information Tribunal) under section 6(4) of the Data Protection Act 1998 ("the Act") and designated by the Lord Chancellor to hear national security appeals, pursuant to Schedule 6 para.2(1).

2. This appeal was brought by Mohamed al Fayed ("the Appellant") under section 28(4) of the Act.

3.The Security Service ("the Service") (commonly known as "MI5") and the Secret Intelligence Service ("SIS")(commonly known as "MI6") are Data Controllers for the purposes of the Act. The Appellant requested them to disclose any of his personal data which they hold.

4. The Service and SIS claimed exemption from the provisions of the Act on the ground that exemption was required for the purpose of safeguarding national security (section 28(1) of the Act). They relied upon a certificate signed by the first Respondent dated 22 July 2000 and on two certificates signed by the second Respondent, both dated 30 July 2000, all issued pursuant to section 28(2) of the Act.

5. Section 28(4) of the Act provides that any person directly affected by the issuing of such a certificate may appeal to the Tribunal against the certificate. The Appellant admittedly is a person entitled to exercise the right of appeal.

6. By section 28(5) -

> "28(5) If on an appeal under subsection 28(4), the Tribunal finds that, applying the principles applied by the court on an application for judicial review, the Minister did not have reasonable grounds for issuing the certificate, the Tribunal may allow the appeal and quash the certificate."

7.The issue on the appeals, therefore, was whether the Respondents had reasonable grounds for issuing the certificates on which the Service and SIS relied.

8. The hearing of the appeals was arranged for 29 October 2001 but by Direction of the President on 25 October 2001 it was adjourned until 11 December 2001. On that day, both parties appeared before us, represented by counsel, Mr. Roche for the Appellant and Mr. Tam for the Respondents.

9. By that date, however, the nature of the proceedings had changed dramatically. The first Respondent`s certificate was quashed by order of this Tribunal dated 1 October 2001 in the appeal of Norman Baker MP against the first Respondent in other proceedings. The same certificate was relied upon by the Service in those proceedings also. On 7 December 2001 the

Treasury Solicitor informed the Appellant`s solicitors that the second Respondent "intends to withdraw his certificates, both dated 30 July 2000", and we were told at the hearing that on 8 December both of his certificates were "revoked" by the second Respondent.

10. The parties appeared before us on 11 December when the only contentious matter remaining was the question of costs. The Appellant claimed his costs of the appeal; the Respondent contended that we had no jurisdiction to make a costs order in the Appellant`s favour. Mr. Tam`s submission was that the subject-matter of the appeal no longer existed. The Home Secretary`s certificate had been quashed by the Tribunal, in the Baker appeal, and the Home Secretary accepted that decision for the purposes of this appeal. The Foreign Secretary`s certificates had been revoked. The Tribunal therefore had no jurisdiction, except to dismiss the appeal. If this was done, the Tribunal had no power to make a Costs Order against the Respondents.

Costs jurisdiction

11. This is contained in Rule 28 of The Data Protection Tribunal (National Security Appeals) Rules 2000 ("the Rules") -

> "28 - (1) In any appeal before the Tribunal, including one withdrawn under Rule 13 above, the Tribunal may make an order awarding costs -

(a) in the case of an appeal under section 28(4) of the Act -

(i) against the appellant and in favour of the relevant Minister where it considers that the appeal was manifestly unreasonable;

(ii) against the relevant Minister and in favour of the appellant where it allows the appeal and quashes the disputed certification, or does so to any extent;

(b) [concerned with section 28(6) appeals]; and

(c) where it considers that a party has been responsible for frivolous,vexatious, improper or unreasonable action, or for any failure to comply with a direction or any delay which with diligence could have been avoided, against that party and in favour of the other."

12. Three preliminary observations -

(1) Rule 13 permits the withdrawal of an appeal by the Appellant, but there is no corresponding provision in the Rules whereby the Respondent Minister may indicate that an appeal is no longer opposed;

(2) Neither party suggested that the Tribunal has power to make a Costs Order outside the scope of Rule 28; and

(3) Neither party suggested that the disciplinary power contained in Rule 28(c) might be exercised in the present case.

13. If the Tribunal had the same general costs discretion that belongs to the High Court, it might be possible in circumstances such as arose here for the Court to make 'No Order on the appeal' save as regards the parties` costs. The Appellant did not contend for this solution in the present case, because the express power to make a costs order against the Minister is limited by Rule 28(1)(a)(ii) to cases "where it allows the appeal and quashes the disputed certification, or does so to any extent".

14. The Appellant contended, therefore, that the appeal should be allowed and a costs order made against the Respondents. The Respondents contended that the appeal must be dismissed and that no costs order could be made.

History of the proceedings

15. In the circumstances, this can be stated briefly. The question under section 28(4) of the Act was whether the respondent Ministers had reasonable grounds for issuing their certificates, which were dated 22 July 2000 and 30 July 2000 respectively. The former, issued by the Home Secretary, was the same certificate that was quashed by the Tribunal in the Baker appeal on 1 October 2001. Following that decision, the Appellant`s solicitors asked the Treasury Solicitor whether the Respondents accepted that "the certificates relied on so far as concerns our client should also be formally quashed", failing which they would seek a formal ruling to that effect (letter dated 19 October 2001). After an order made by the President dated 30 October 2001, and after some delay for which he apologised, the Treasury Solicitor responded as follows -

"1. I can confirm that the [Home Secretary] accepts for the purposes of this appeal that his certificate dated 22 July 2000 is quashed.
2. I reiterate my affirmation that the [Foreign Secretary] intends to withdraw his certificates, both dated 30 July 2000. In these circumstances, the question of the quashing of his certificates does not arise.

Both the Home Secretary and the Foreign Secretary will shortly be issuing new certificates applicable to Mr. Al Fayed; the Tribunal and his solicitors will be informed as soon as the certificates have been issued." (letter dated 7 December 2001)".

16. New Certificates were issued by the Foreign Secretary on the following day, 8 December 2001, relating to SIS and GCHQ respectively, and they were produced at the hearing. Each included -

"This certificate in all respects supersedes the [certificate dated 30 July 2000] and [that] certificate is hereby revoked".

17. The Home Secretary issued a new certificate dated 10 December 2001 but this was not produced at the hearing. This certificate does not refer to its predecessor which was quashed.

18. The parties` respective positions in the light of these developments were stated, before the hearing, as follows -

Treasury Solicitor
"The Respondents now submit that as the certificates against which this appeal was made will no longer be in force, the appeal itself should either be withdrawn or dismissed. The Respondents, therefore, consider that no other directions are necessary." (letter dated 7 December 2001)

Appellants
".....we intend to seek the following:
(a) an Order allowing our client`s appeals in the matter;
(b) an Order quashing the relevant certificates in our client`s case; and
(c) an Order awarding our client his costs in relation to the appeals." (letter dated 10 December 2001)

Submissions

19. Mr. Tam, for the Respondents, submitted that the Tribunal had no jurisdiction to make the orders sought by the Appellant. He accepted that the appeal proceedings remained in being, but the only order which the Tribunal could properly make was one dismissing the appeals. This was because the appeals "ceased to have effect" when the administrative act with which they were concerned was itself, as here, either annulled by a Court or revoked by the decision maker. He relied upon the judgment of the Court of Appeal in Hawa Massaquoi v. Secretary of State for the Home Department [2001] Imm AR 309 (20 December 2000).

20.Mr. Roche, for the Appellant, submitted that the Tribunal retained its discretion to make what was the only fair order in the circumstances, namely, allowing the appeals, with or

without a further order quashing the certificates, and making a costs order in favour of the Appellant. If the Respondents were correct, and they could deprive the Tribunal of its jurisdiction to do so by further administrative acts, then they might do that at a late stage in the hearing of a contested appeal, where the Tribunal was expected to quash a certificate, and thereby deprive an appellant of the costs order which would otherwise have followed in his favour. Mr. Tam accepted that that might be a possible consequence, if his submission was accepted. He reminded us, however, that the power to award costs against a party for unreasonable action, under Rule 28(1)(c) (see paragraph 11 above), might be exercised in (at least) an extreme case of such conduct.

21. It became clear that no costs order could be made unless the appeals were allowed (Rule 28(1)(a)(ii), paragraphs 11-13 above), and that the application for costs therefore made a substantive hearing necessary. Neither party sought to have the hearing adjourned for this purpose, nor did they adopt a suggestion made by the Tribunal that, if further appeals were likely against the new certificates issued or to be issued by the Respondents, the costs of this appeal could be reserved to be dealt with in those appeals in due course.

Authorities

22. Massaquoi (above) was an appeal against a deportation order made by the Home Secretary following the refusal of the appellant`s application for asylum. She had two rights of appeal. The first was against the decision to make the deportation order. This lay under section 15(1)(a) of the Immigration Act 1971. The second was under section 8(3)(a) of the Asylum and Immigration Appeals Act 1993, on the grounds that removal in pursuance of a deportation order would be contrary to the United Kingdom`s obligations under the Refugee Convention. Kennedy LJ observed -

> "It is important to note that the section 15 appeal challenged an existing decision, a past event, whereas the section 8 appeal involved consideration of a possible future event, albeit one which could not take place without a decision to make a deportation order." (para. 4 p.310)

Her appeal under section 15 succeeded but that under section 8 was dismissed. She was then granted exceptional leave to remain in this country for a period of four years. She sought to appeal against the section 8 decision so that she would have the status of a refugee when that period expired. The Immigration Appeal Tribunal held that this appeal must fail (para.7(4)). The Court of Appeal upheld the decision. Its conclusion was stated by Kennedy LJ as follows -

> "30. In my judgment the answer to this appeal is to be found in the wording of section 8(3). The decision to make a deportation order is not simply a condition precedent to an appeal. It is that decision which is the subject matter of the appeal, and if it has been withdrawn or quashed there is nothing left to argue about. It follows that the appellant`s success in her appeal under section 15 of the 1971 Act left the Immigration Appeal Tribunal with no alternative but to dismiss her appeal under section 8 of the 1993 Act." (p.317)

23. The parallel, Mr. Tam submitted, was exact. The certificates had been, respectively, quashed and withdrawn. The subject matter of the appeal was destroyed. There was nothing left to argue about, and the only proper order was one dismissing the appeal. Massaquoi was

Court of Appeal authority to that effect.

24. This submission, however, overlooks the distinction drawn between the two grounds of appeal, under sections 15 and 8, in the earlier of the two passages quoted above. The section 8 appeal was concerned, in part, with the validity of a possible future event. By striking contrast, the issue in an appeal under section 28(4) of the Data Protection Act 1998 is whether there were reasonable grounds for the issue of a Minister`s certificate; that is, a past event, analogous to section 15, which was clearly distinguished for that reason by the Court of Appeal.

25. There is, in addition, a line of authority which was not referred to in argument but which is certainly relevant to the matter we have to consider. Although, as a general rule -

> "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved",

nevertheless -

> "... litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved." (per Lord Bridge in Ainsbury v.Millington [1987] 1 WLR 379 at 381).

26. The court has this discretion to continue hearing a case where there may no longer be an active lis between the parties in the field of public law also: see R. v. Secretary of State for the Home Department, ex p. Salem [1999] 1 AC 450 at 456-7 and Secretary of State for the Home Department v. Abdi [1995] Imm AR 570. So, on an application to discontinue Judicial Review proceedings, where the decision complained of was abrogated so that the challenge to it became academic, the Court had power to make a costs order broadly reflecting the merits of the situation, although without indulging in an in-depth investigation of the substantive issues: that would "ordinarily" be a gross misuse of the court`s time (per Simon Brown J. in R. v. Liverpool City Council ex p. Newman and Others (1992) 5 Adm.L.R.669).

27. These authorities show that there are important reasons of public policy why, in certain circumstances, litigation may properly be continued even if the *lis* or subject matter of the proceedings itself is no longer a live issue between the parties. It is, therefore, unlikely that Parliament would intend that statutory tribunals should, as a matter of principle, be deprived of their jurisdiction to determine an appeal for that reason alone, in similar circumstances, when there is good reason for continuing the proceedings.

Conclusion

28. We can see no reason to doubt that we, as a statutory Tribunal with power to award costs to a successful appellant, are entitled to proceed to a decision on the issue raised by an appeal which is properly before us, notwithstanding that events subsequent to the bringing of the appeal may have rendered the issue 'academic` between the parties. A good reason for doing this exists when substantial i.e. not insignificant costs have been incurred and it would be unfair not to make a costs order which the Tribunal could make after hearing the appeal.

29. The power may not exist in a case where the supervening event not only has the effect of

making the issue academic between the parties but also prevents the claimant, or appellant, from establishing that he is, or was, entitled to succeed. But that is not the present case, because the issue raised under section 28(4) of the Act is the question whether the Minister "did not have reasonable grounds for issuing" the certificate which is challenged. That issue is entirely historical and it is unaffected by a subsequent revocation of the certificate or whatever other fate it may suffer, including being quashed in other proceedings by this Tribunal.

30. The situation as regards the section 8 appeal in Massaquoi, however, as Kennedy LJ pointed out, was different. Unlike section 15, that section was not concerned with a past event. We have said in the preceding paragraph that the power to make a costs order in favour of the appellant "may" not exist in the Massaquoi kind of case, because we are not presently convinced that no costs order could be made in such a case, where an appeal was properly brought but was rendered incapable of success by a subsequent event over which the respondent had some control. We note, moreover, that the line of authority to which we have referred in paragraph 25 (above) appears not to have been cited to the Court in Massaquoi. But the question does not arise for decision here.

31. We hold that the appeal against the certificates can and should be allowed. The certificate issued by the Home Secretary was quashed by the Tribunal after a full hearing in the Baker appeal, and it has not been suggested that any further issue or fresh evidence might be raised in this appeal. Moreover, the Home Secretary has accepted that the certificate is quashed "for the purposes of this appeal". The Foreign Secretary`s certificates were in the same terms and open to the same objections as the Home Secretary`s certificates, and again, it has not been suggested that any further issue or fresh evidence might be raised. The Foreign Secretary withdrew and revoked the certificates before the hearing of the appeal.

32. We adopt the same reasoning as in the Baker Decision, which in the circumstances we need not repeat here.

33. We have power to allow the appeal without quashing the certificates (cf paragraph 77 of the Baker Decision), and in the exercise of our discretion we determine that it is unnecessary for us formally to quash them here.

Discretion (Costs)

34. We consider that fairness requires that the Appellant should recover his costs of the appeal from the Respondents in the circumstances of this case. Relevant circumstances include -

(1) The appeal was properly brought before the Baker Decision was published;

(2) The certificate issued by the Home Secretary was quashed by the Tribunal after a full hearing in the Baker appeal;

(3) The Foreign Secretary, shortly before the hearing, withdrew and revoked the certificates issued by him which are challenged in this appeal;

(4) The Appellant`s solicitors invited the Respondents to withdraw their opposition to the appeal in the light of the Baker decision, soon after that decision was

published, but they did not receive a definite response until early December, only days before the date fixed for the hearing;

(5) The Appellant has succeeded in the appeal.

DECISION

We therefore hold and direct that the appeal is allowed and that the Appellant shall recover his costs of the appeal from the Respondents pursuant to Rule 28(a)(ii) of the Rules. The amount of costs shall be assessed if not agreed, pursuant to Rule 28(4), and we give leave to both parties to apply for further directions with regard to the scale of assessment, if such directions prove necessary. For the avoidance of doubt, the liability of the Respondents shall be joint and several.

Signed this 28th day of February 2002

The Rt.Hon. Sir Anthony Evans (President)

James Goudie QC

Kenneth Parker QC