27 January 2010

PRESS SUMMARY

Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant) [2010] UKSC 2
On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 1187 and the Administrative Court [2009] EWHC 1677(Admin)

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lady Hale, Lord Brown and Lord Mance

BACKGROUND TO THE APPEAL

In response to various incidents of international terrorism, including the attacks on 9/11, the UN Security Council ("the UNSC") passed resolutions ("UNSCRs") requiring member states to take steps to freeze the assets of: (i) Usama Bin-Laden, the Taliban and their associates; and (ii) those involved in international terrorism. The UNSC established a list of persons whose assets member states were obliged to freeze ("the Consolidated List"). Those included in the Consolidated List are not informed of the basis for their inclusion or afforded the right to challenge the decision before an independent and impartial judge.

The Appeals concern the legality of the Terrorism (United Nations Measures) Order 2006 ("the TO") and the Al-Qaida and Taliban (United Nations Measures) Order 2006 ("the AQO"). The TO and AQO were made by Her Majesty's Treasury ("the Treasury") pursuant to s.1 of the United Nations Act 1946 ("the 1946 Act"), which authorises the making of such Orders in Council as are 'necessary or expedient' to give effect to UNSCRs.

The TO goes beyond the requirements imposed by the relevant UNSCRs by providing that a person's assets can be frozen on the basis of a '*reasonable suspicion*'. The AQO transposes the UNSCRs concerning the Taliban into domestic law. Crucially, if a person is named in the Consolidated List, the AQO provides that his assets in the UK will automatically be frozen. A person whose name is on the list has no right to challenge his listing before a court.

Freezing measures under the TO and AQO, which are not subject to any time limit, place very severe limitations on the ability of persons who have been designated to deal with their property. They have an extremely grave effect upon their freedom of movement, their liberty and private and family lives, and those of their families and their associates.

A, K and M were the subject of asset freezes under the TO. The effect on them and their families has been severe.

G and HAY are named in the Consolidated List and so were both automatically designated as subject to asset freezing by the AQO. G was included in the Consolidated List at the request of the UK, which continues to support his listing. HAY was added at the behest of an undisclosed UN member state.

The UK opposes his inclusion in the Consolidated List and is engaged, to date unsuccessfully, in efforts to de-list him.

The issue before the Court was whether s.1(1) of the 1946 Act gave the Treasury the power to make the TO and AQO, having regard to: (i) the gravity of the interference with fundamental rights which the asset freezes bring about; (ii) the fact that the TO allowed asset freezing on grounds of 'reasonable suspicion'; and (iii) the fact that the AQO entirely deprived those named in the Consolidated List of any right of access to a court.

Following the hearing in the case, the Treasury issued new designations in respect of A, K, M and G under the authority of the Terrorism Order (United Nations Measures) 2009 ("the TO 2009"). The terms of the TO 2009 are substantially similar to those of the TO.

JUDGMENT

The Supreme Court has unanimously held that the TO should be quashed as ultra vires s.1(1) of the 1946 Act. It also held by a majority of six to one (Lord Brown dissenting) that Article 3(1)(b) of the AQO must also be quashed as ultra vires. It was noted that if the designations in respect of A, K, M and G imposed subsequent to the hearing pursuant to the TO 2009 had been before the Supreme Court these too would have been quashed.

REASONS FOR THE JUDGMENT

General Remarks

Lord Hope (with the agreement of Lord Walker and Lady Hale) giving the leading judgment, noted the far-reaching and serious effect of the asset freezing measures on the individuals concerned and their families [paras [4], [38], [39] and [60]].

s.1(1) of the 1946 Act allows Orders in Council to be made without even the most basic Parliamentary scrutiny [paras [48]-[50]]. In the absence of Parliamentary control the Court must carefully examine such drastic measures [paras [5], [6] and [53]]. Australia and New Zealand gave effect to their UNSCR obligations by primary legislation that was subjected to the scrutiny and approval of their respective legislatures. Also, the Anti-terrorism, Crime and Security Act 2001 enacted an asset freezing regime that is significantly less onerous and attended by greater safeguards than the system established by the TO and AQO [paras [51]-[54]].

The legislative history of the 1946 Act demonstrates that Parliament did not intend that the 1946 Act should be used to introduce coercive measures which interfere with UK citizens' fundamental rights [paras [16] and [44]].

The principle of legality requires that general or ambiguous statutory words should not be interpreted in a manner that infringes fundamental rights [paras [45] and [46]], and s.1(1) of the 1946 Act must be interpreted in this light. Orders made under s.1(1) would therefore only be legitimate when the interference with fundamental rights to which they give rise is no greater than that which the underlying UNSCR requires [para [47]].

The TO

The relevant UNSCRs did not address the standard of proof for imposing asset freezes. The 'reasonable suspicion' standard in the TO must be assessed in light of the entire system that the TO establishes, particularly the seriousness of the interferences with fundamental rights that it effects [paras [58]-[60]]. By introducing a test of reasonable suspicion the Treasury exceeded the power conferred by s.1(1) of the 1946 Act [para [61]].

The AQO

Lord Hope noted that the effect of the AQO, in this case, did not rely upon a 'reasonable suspicion' criterion and that – in contrast to the TO – the AQO does not go beyond the relevant UNSCRs [para [64]]. But there are no means whereby G or HAY can challenge the decision to list them as terrorists, with the consequence that their assets are frozen automatically, before an independent and impartial judge [paras [77]-[80]]. Article 3(1)(b) of the AQO must therefore be quashed [paras [81] and [82]].

The Status of the Designations Against A, K, M and G pursuant to the TO 2009

The principal criticisms directed against the TO apply equally to the TO 2009 [paras [28]]. Had the TO 2009 been before the Court it would have been quashed [para [83]].

Other Comments

Nobody should form the impression that in quashing the TO and the operative provision of the AQO the Court displaces the will of Parliament. On the contrary, the Court's judgment vindicates the primacy of Parliament, as opposed to the Executive, in determining in what circumstances fundamental rights may legitimately be restricted [para [157] per Lord Phillips].

The features of the AQO that are characterised as objectionable are the ineluctable consequence of giving effect to the relevant UNSCRs – the same apparent deficiency would apply to primary legislation. Accordingly, the AQO should be upheld [paras [203]-[204] per Lord Brown (dissenting)].