Hilary Term
[2010] UKSC 5
On appeal from: [2008] EWCA Civ 1187

JUDGMENT

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)
(No. 2)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Mance

JUDGMENT GIVEN ON

4 February 2010

Heard on 28 January 2010

Appellants A, K, M and
Raza Husain

(Instructed by Birnberg Peirce and Partners)

Respondent
Jonathan Swift
Andrew O'Connor
(Instructed by Treasury Solicitor)

Appellant G
Alex Bailin

(Instructed by Tuckers)

Respondent HAY
Raza Husain

(Instructed by Birnberg Peirce and Partners)

LORD PHILLIPS, with whom Lord Rodger, Lord Walker, Lady Hale, Lord Brown and Lord Mance agree.

1. When judgment was given on 27 January 2010 an issue arose in respect of the order that the court proposed to make. The court has held that the TO and article 3(1)(b) of the AQO were ultra vires. This means that the restrictions imposed on individuals pursuant to these Orders have been imposed without authority and are of no effect in law. Because this has not been appreciated there has been compliance with these restrictions, not least by third parties, including banks holding funds of those purportedly affected by the Orders. Thus the Orders have, in practice, achieved the effect that the Treasury intended when making them.

2. The Treasury is anxious that this state of affairs should persist until the invalid restrictions can be replaced by restrictions that have the force of law. To this end Mr Swift has submitted that the court should suspend the operation of the orders that it proposes to make declaring the TO and article 3(1)(b) of the AQO ultra vires and quashing them, in the case of the former for a period of 8 weeks to 25 March 2010 and in the case of the latter for a period of 6 weeks to 11 March 2010.

3. This submission is a variation and extension of a limited suspension to the operation of its orders that Lord Hope had proposed that the court should make in paragraph 84 of his judgment. I had concurred in this proposal, but having considered the matter further I have concluded that it would not be appropriate to suspend any part of the court's order.

4. Mr Swift submitted that this court has power to suspend the effect of any order that it makes. Counsel for the appellants conceded that this was correct and that concession was rightly made. The problem with a suspension in this case is, however, that the court's order, whenever it is made, will not alter the position in law. It will declare what that position is. It is true that it will also quash the TO and part of the AQO, but these are provisions that are ultra vires and of no effect in law. The object of quashing them is to make it quite plain that this is the case.

5. The effect of suspending the operation of the order of the court would be, or might be, to give the opposite impression. It would suggest that, during the period of suspension of the quashing orders, the provisions to be quashed would remain in force. Mr Swift acknowledged that it might give this impression. Indeed, he made it plain that this was the object of seeking the suspension.

6. Mr Swift's submissions are described in the dissenting judgment of Lord Hope. He did not suggest that the court could or should give temporary validity to the unlawful provisions. He did not suggest that the court could or should purport prospectively to overrule them. He did not suggest that suspension was necessary in order to permit action by the executive which might otherwise appear to be flouting the decision of the court, as it was in *Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region,* Final Appeal Nos 12 & 13 of 2006 (Civil) 12 July 2006. He did not suggest that the suspension would have any effect in law.

7. Mr Swift urged the court to suspend the operation of its judgment because of the effect that the suspension would have on the conduct of third parties. He submitted that the banks, in particular, would be unlikely to release frozen funds while the court's orders remained suspended. I comment that if suspension were to have this effect this would only be because the third parties wrongly believed that it affected their legal rights and obligations.

8. The ends sought by Mr Swift might well be thought desirable, but I do not consider that they justify the means that he proposes. This court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment. Accordingly, I would not suspend the operation of any part of the court's order. That order should provide as follows:

> THE COURT ORDERS that
>
> (1) the appeals of Mohammed Jabar Ahmed, Mohammed Azmir Khan and Michael Marteen and of Mohammed al-Ghabra as regards the Terrorism (United Nations Measures) Order 2006 (S.I. 2006/2657) be allowed
>
> (2) it be declared that the Terrorism (United Nations Measures) Order 2006 is ultra vires and the Order quashed
>
> (3) the appeal of Mohammed al-Ghabra as regards the Al-Qaida and Taliban (United Nations Measures) Order 2006 (S.I. 2006/2952) be allowed to the extent that it be declared that article 3(1)(b) of the Order is ultra vires and the Order quashed
>
> (4) the appeal of HM Treasury be allowed to the extent only of setting aside the declaration made by Mr Justice Owen on 10 July

2009 in the Administrative Court of the Queen's Bench Division of the High Court

(5) the respondent pay, or cause to be paid, to the appellants, Mohammed Jabar Ahmed, Mohammed Azmir Khan and Michael Marteen, their costs in the House of Lords, the Supreme Court, the Court of Appeal and the Administrative Court, to be subject to detailed assessment if not agreed

(6) the parties in the appeal of R (on the application of Hani El Sayed Sabaei Youssef) *v*. HM Treasury and in the appeal of HM Treasury *v*. Mohammed al-Ghabra make written submissions on costs in the House of Lords, the Supreme Court, the Court of Appeal and the Administrative Court by 18 February 2010

(7) there be a detailed assessment of the publicly funded costs in all three appeals.

LORD HOPE, dissenting

9. I have the greatest possible respect for the views of my colleagues and for the reasons which Lord Phillips has set out so carefully in his judgment. I regret however that I am unable to agree with what he proposes. As the issue is important, was not the subject of any decision by the House of Lords and has not previously been considered by this Court, I should like to explain in my own words why I am of that opinion.

10. In para 84 of my judgment which was given on 27 January 2010 I said that I would suspend the operation of the orders that I would make as regards article 3(1)(b) of the Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952) ("the AQO") in the case of Hani El Sayed Sabaei Youssef (referred to previously as HAY in these proceedings) for a period of one month. This was to enable the Treasury, if so minded, to take the steps that were needed to give effect to the obligation by which the United Kingdom is bound by article 25 of the Charter of the United Nations pending the proceedings that are currently being taken by the United Kingdom for him to be de-listed by the United Nations Security Council 1267 Committee. Lord Phillips said in para 156 that, for the reasons that I gave, he agreed that the operation of the order in HAY's case should

be suspended for one month from the date of judgment. Lord Mance said in para 249 that the declaration that he would make that article 3(1)(b) of the AQO was invalid generally should be subject to a stay of one month on its operation on respect of HAY. There was no dissent from this proposal, although Lord Brown did not agree with the view of the majority that article 3(1)(b) of the AQO was ultra vires.

11. In accordance with Supreme Court Practice Direction 6.8.3 the parties were provided in advance with a copy of the Court's judgment and a draft of the orders that the Court proposed to make. Written submissions on behalf of the Treasury, Mohammed al-Ghabra (referred to previously as G) and HAY were shown to the Court before it sat to deliver the judgment. Counsel for HAY did not object to the proposal that the operation of the Court's order in his case should be suspended for a period of one month. Mr Husain adhered to this position on HAY's behalf when the proposed orders were discussed in more detail the day after judgment was given. He informed the Court that his position was one of neutrality. He then said that, on instructions, he agreed with Mr Swift for the Treasury that the judgment was not self-executing and that the Court had power to suspend the operation of the orders that it proposed to make in his case. He said that HAY welcomed the opportunity that the Court's judgment gave for the orders that the Treasury proposed to make to receive proper Parliamentary scrutiny, and that he would prefer a stay to a resort to emergency legislation without such scrutiny to cover the period until the steps that were necessary to achieve this could be taken. His attitude may well be: better the devil you know than the devil you don't. But, whatever his reasons, it is clear that HAY's position is that he does not oppose the order that I was proposing. Had the matter rested there, I would have been satisfied that the order that I was proposing should be made.

12. But the matter does not rest there. Mr Swift for the Treasury asks the Court to suspend the operation of the order for the quashing of the Terrorism (United Nations Measures) Order 2006 (SI 2006/2657) ("the TO 2006") for a period of 8 weeks to 25 March 2010 to enable the Treasury to address the effects of the Court's judgment in relation to that Order by introducing primary legislation for consideration by Parliament. He also asks the Court to suspend the operation of the orders that it proposes to make in relation to the AQO for a period of 6 weeks to 11 March 2010, not the 4 weeks that I had suggested, and that it should extend this suspension to the order that quashed the AQO generally, not just in the case of HAY as I had suggested. This was to enable the Treasury to made an order under section 2 of the European Communities Act 1972 containing enforcement measures in support of Council Regulation (EC) No 881/2002 implementing UN resolutions under Chapter VII of the Charter of the United Nations for the freezing of the funds and economic resources of persons associated with Osama bin Laden, Al Qaeda or the Taliban. In each case the suspension is sought for the purpose of enabling steps to be taken to ensure that the United Kingdom remains in

compliance with its international obligations under the UN Charter. These applications have made it necessary for the Court to look more closely at the question whether it has power to make orders of that kind and, if so, whether it should do so in this case.

13. Before considering these issues I should mention some other matters by way of background. The Court was told that at present 13 persons remain designated under the TO 2006. There are also 25 persons or entities who remain designated under the Terrorism Order 2001 and 21 persons who have been designated under the Terrorism Order 2009. As I indicated in para 84 of my judgment, I had assumed that the existence of the 2009 Order under which A, K, M and G were re-designated had removed the need for a short period to be given for the Treasury to address the consequences of the Court's judgment in regard to the TO 2006. On the facts that are now before the Court the web created by these Orders is more far-reaching than I had imagined. As for the AQO, the court was told that 18 persons including G and HAY, and 4 other entities present in the United Kingdom who are named on the Consolidated List, have been designated by the 1267 Committee. The United Kingdom will be in breach of its obligations under UN Security Council Resolution 1904/ 2009, which replaced Resolution 1822/2008 with effect from 17 December 2009, and under EC Regulation 881/2002 if effect is not given to these designations in domestic law.

14. Having regard to these obligations, in a letter dated 9 October 2009 copies of which were sent to the other parties' solicitors, the Treasury sought a widening of the opportunity that is provided by Practice Direction 6.8.3, which enables judgments to be released to counsel, solicitors and in-house legal advisers six days before the delivery of the judgment. Permission was sought for the judgment in this case to be released also to 38 named individuals in relevant government departments and an unspecified number in the Security Service, to allow for contingency planning to safeguard national security should the Treasury be unsuccessful in the appeals. As this was an open letter, the reasons for this request were not fully explained. But the point was made that operational concerns might arise in the form of an increased risk of previously frozen funds being withdrawn from unfrozen bank accounts and diverted for terrorist purposes or being used as a conduit to this end. It was made clear at the same time that the Treasury would, for operational reasons, strongly oppose provision of the embargoed judgment to A, K, M, G and HAY for any period additional to the 24 hours provided for in the Practice Direction. The Court was not willing to accede to this request. But the reasons why it was made have not gone away.

15. I was aware of the Treasury's request when I proposed in my judgment that the order quashing article 3(1)(b) of the AQO should be suspended for one month in HAY's case. It is worth noting also that in *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225, para 373, the

European Court of Justice recognised that the immediate effect of its decision would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by Regulation 881/2002 which the Community was required to implement because, for example, steps might be taken to prevent any further measures freezing funds from being applied to them. So it delayed effect being given to its judgment by three months. The risk of serious and perhaps irreversible damage to efforts to defeat international terrorism in our case too must weigh heavily with this Court in deciding what it should do to meet the concerns that have been expressed by the Treasury. This is not simply a matter of meeting international obligations. The national interest in resisting threats to our own security is just as important.

The power to suspend

16. Mr Swift submitted that it was clear, as a matter of simple vires, that the court had power to make the orders he seeks. Rule 29 of the Supreme Court Rules 2009 (SI 2009/1603) states that the Court has all the powers of the court below, and section 40(5) of the Constitutional Reform Act 2005 gives the Court power to determine any question necessary to be determined for the purposes of doing justice in an appeal. CPR 40.7(1) provides:

> "A judgment or order takes effect from the day when it is given or made, or such later date as the court may specify."

This rule reflects the well-established principle that it is the order that the court makes that disposes of the proceedings and provides the basis for an appeal, not the issuing of the reasons for it in the form of the court's judgment: *Lake v Lake* [1955] P 336; *Re Mathew* [2001] BPIR 531 per Lawrence Collins J at 532A-G. Examples of the application of that principle can be found in this case, as Mr Swift pointed out. They can be seen in the orders that Collins J made suspending the effect of his judgment pending appeal to the Court of Appeal and in the orders made by the Court of Appeal pending applications for leave to appeal to the House of Lords. The situation in which the Supreme Court finds itself is different, as there is no further right of appeal. This has a bearing on the question whether the orders that it proposes to make should be suspended. But I do not think that the Court lacks the power to specify a later date for the taking effect of the orders it proposes to make should it consider that it should do so.

17. There was some discussion in the course of the hearing of the question whether the Court should declare that the orders that it proposed to make should have effect prospectively only. The usual rule, of course, is that an order quashing

an order or other measure as ultra vires operates retrospectively as well as prospectively. The question whether there was power to place temporal limitations on the effect of its judgments was considered by the House of Lords in *In re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680. The focus in that case was on the prospective overruling of decisions on points of law. The House held that it had jurisdiction to make such an order, although it declined to do so on the facts of that case. In *A Time for Everything under the Law: Some Reflections on Retrospectivity* (2005) 121 LQR 57, 77 Lord Rodger of Earlsferry acknowledged that prospective overruling might be particularly useful in cases involving the application of Convention rights.

18. The situation in this case is quite different. For the reasons that the Court has given, the TO 2006 and article 3(1)(b) of the AQO were ultra vires and void from the moment that the Orders were made. It would be entirely contrary to the reasoning on which that conclusion is based for the ruling to be applied only to the future and not to the past. But I do not think that it is necessary to explore the point further because Mr Swift, very properly, made it clear that the Treasury were not seeking prospective overruling in this case. He accepted that the Court's orders, when made, will apply retroactively as usual. What he is seeking is simply a delay in the date as from which that consequence will take effect. That being so, I would hold that the Court has power to make the orders that he seeks. I do not think that there is any difference of view between us on that point. The more difficult question is whether it should do so. The view of the majority, as Lord Phillips has explained, is that this would not be appropriate.

Should the power be exercised?

19. The first question that needs to be considered is the effect, if any, that suspension would have in practice. It would be wrong to regard the suspension as giving any kind of temporary validity to the provisions that are to be quashed. As Mr Justice Bokhary PJ said in *Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region*, Final Appeal Nos 12 & 13 of 2006 (Civil), 12 July 2006, para 63, there is no shield from legal liability for functioning pursuant to what has been declared to be ultra vires during the period of the suspension. Mr Swift did not seek to argue the contrary. He made it clear that the Treasury accepted that suspension would do no more than delay the taking effect of the Court's orders, which would then operate retrospectively as from the specified date. It would have no effect whatever on remedies for what had happened in the past or during the period of the suspension.

20. It was suggested in the course of the hearing that this was an absurd result. After all, now that the Court's judgment has been made public everyone knows what the Court proposes to do. The prohibitions that the Orders have imposed will

remain in place, but to use them as a fetter on the designated person's access to funds would be contrary to what is now known to be the law. Any person who contravenes the prohibition in article 7(1) of the TO 2006 in the meantime would on paper be committing a criminal offence. But that would be a pointless restriction. Mr Swift's answer was that, while technically that was so, it would be obvious by the time any prosecutions were brought that the Order was ultra vires. So any prosecutions that might be brought for what was done during this period would not be proceeded with. I agree that to prosecute would plainly be a waste of time and public money. So, to the extent that it may be thought to prolong the effect of the criminal sanctions, it can be seen that nothing would be gained by a suspension.

21. Mr Swift insisted that a suspension would nevertheless have practical effect. This was because it would not be ignored by the banks and other institutions, which would continue to give effect to the prohibitions and obligations in the TO and the AQO until they were directed otherwise by an order of the Court. That, he indicated, is how these institutions conduct their affairs in practice and what they could be expected to do in this case. Judging by the grounds that the Treasury gave for seeking a relaxation on the embargo under the Practice Direction, this is a matter of far greater significance to combating international terrorism than breaches of the prohibitions by individuals such as the friends and family members of those who have been designated. For obvious reasons the Court has not been given any detailed information about the whereabouts or amounts of the funds that may be in the hands of the financial institutions, of the damage that would be caused to the national interest if the institutions were to feel able to release them or disregard the conditions that may have been attached to any licences that may have been issued to them without notifying the Treasury or whether or not that damage would be irreparable. Nor has it been given any indication by the financial institutions themselves, who have not been named, that they would not release any funds during the period of the suspension. But I think that it would be wrong for the Court not to accept Mr Swift's assurance that in this respect suspension would achieve something that would be of real practical value.

22. Although the situation now is different from that which the courts below faced when they suspended the effect of their orders, it is comparable in this respect. We have recognised that the breaches of fundamental law which render the Orders in question ultra vires are capable of being remedied. In their case there was the possibility of their decisions being reversed on appeal. In our case there is the possibility – indeed more than that, the likelihood – that the remedial measures will be approved by Parliament. If that were not so, there would be no grounds for any delay in making the orders that are needed to give effect to the court's judgment. As it is, it would seem that there is everything to be said for not letting the cat – whose dimensions and capacity to inflict damage we can only guess at – out of the bag in the meantime. I think that the national interest, as well as respect

for our international obligations, requires the Court to do what it can to see that this does not happen.

23. There was also some discussion at the hearing of measures that the Treasury might itself take to achieve the same result. In para 176 of the judgment Lord Rodger said that in his opinion section 1(1) of the United Nations Act 1946 would authorise Her Majesty to make an Order in Council, even with the far-reaching effects that are to be seen in the current Orders, provided it only had a limited life-span and was replaced as soon as practically possible by equivalent legislation passed by Parliament. Mr Swift said that the Treasury had given some thought to this suggestion but had concluded, after studying the judgment as a whole, that it would not be appropriate for it to adopt it. Emergency legislation by Parliament is also in theory not impossible. But that would mean achieving the desired result by two Acts of Parliament in quick succession, not one.

Conclusion

24. There is an obvious attraction in putting the orders that the Court proposes to make into effect as soon as possible. There is perhaps a risk, as Lord Phillips has said, that suspension would tend to obfuscate the effect of the Court's judgment. But I would not myself regard that as a decisive factor in deciding where the balance of advantage lies. The judgment itself has been promulgated, and the Treasury accepts that suspension would have no effect whatever on its effect once the period of suspension has been lifted. Furthermore, the steps that the Treasury proposes to take to comply with the international obligations are now known. So it is possible to assess the advantages of a suspension as against the disadvantages. The periods proposed are short – indeed they have been shortening by the day as time has gone by since the judgment was issued. In view of the way the financial institutions can be expected to respond to a suspension, it cannot be said that this would be of no practical value. On the contrary, not to suspend could result in damage to the effectiveness of the measures that the international obligations require which might well be, as the ECJ indicated in *Kadi*, serious and irreversible. Bearing in mind too, as Mr Swift concedes, that suspension would have no effect whatsoever on remedies for what had happened in the past or during the period of the suspension, I consider that the balance lies in favour of suspension in the terms requested by the Treasury.

25. I would therefore have directed that the order quashing the TO 2006 should not take effect until 25 March 2010 and that the orders quashing article 3(1)(b) of the AQO should not take effect until 11 March 2010.