



4 February 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 5

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

On 27 January 2010, the Supreme Court gave judgment that the Terrorism (United Nations Measures) Order 2006 (“the TO”) and Article 3(1)(b) of the Al-Qaida and Taliban (United Nations Measures) Order 2006 (“the AQO”) were beyond the powers conferred by s.1 of the United Nations Act 1946 (“the 1946 Act”) and that they should be quashed.

The Treasury applied for an order that the effect of the Court’s judgment be suspended for periods of: (i) 8 weeks (until 25 March 2010) in respect of the TO; and (ii) 6 weeks (until 11 March 2010) in respect of Article 3(1)(b) of the AQO.

Suspension was sought in order to ensure that funds held by financial institutions on behalf of those individuals subject to asset freezes would not be released pending Parliament introducing new primary legislation to replace the TO and approving secondary legislation to replace Article 3(1)(b) of the AQO.

The Treasury submitted that refusing a suspension would give rise to the risk of those assets being disbursed and used for the purposes of terrorism, with the attendant risk of causing serious and irreparable harm to the national interest of the United Kingdom. It was accepted that: (i) from the date when the Court’s order became effective the TO and the Article 3(1)(b) of the AQO would be rendered void, (ii) suspending the Court’s order would not confer temporary validity on the Orders, (iii) the Treasury might be held to be civilly liable for the consequences of acts undertaken in reliance on the Orders, and (iv) no prosecution would be possible for breach of the Orders.

JUDGMENT

The Supreme Court held by a majority of six to one (Lord Hope dissenting) that the order of the Court quashing the TO and Article 3(1)(b) of the AQO should not be suspended. The Court’s order should be given immediate effect (including in respect of HAY).

REASONS FOR THE JUDGMENT

Majority Reasoning

Lord Phillips (with the agreement of Lord Rodger, Lord Walker, Lady Hale, Lord Brown and Lord Mance) accepted that the Supreme Court possesses the power to suspend the effect of any order that it makes [para [4]].

He noted that the effect of the Court's judgment was to declare the TO and Article 3(1)(b) of the AQO void, meaning that they were never of any legal effect [para [4]].

Suspending the effect of the Court's order might tend to give rise to an erroneous impression to the contrary, implying that in the period pending its entry into effect the TO and Article 3(1)(b) of the AQO represent good law with legally binding effect [para [5]].

The Court should not issue an order that would tend to obfuscate the legal effect of its own judgment [para [8]].

Lord Hope, dissenting, agreed that the Supreme Court had the power to suspend the effect of any order it might make [para [16]].

Suspending the effect of the Court's order would have the practical effect of ensuring that funds subject to asset freezing would not be disbursed by financial institutions to suspected terrorists in the short period pending Parliament legislating to introduce alternate asset freezing measures [para [21]-[22]]. Lord Hope was of the view that the potentially serious and irreversible harm which the release of such funds might cause to the national interest and the prospect of the UK being placed in breach of its international obligations would have justified suspension of the Court's order [paras [22] and [24]].

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at:

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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)].

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