Hilary Term
[2011] UKSC 9
On appeal from: EWCA Crim 2437

JUDGMENT

R *v* Forsyth (Appellant)

R *v* Mabey (Appellant)

before

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

JUDGMENT GIVEN ON

23 February 2011

Heard on 6 December 2010

Appellant (F)
John Kelsey-Fry QC
Jonathan Barnard

(Instructed by BCL Burton Copeland)

Respondent
Philip Mott QC
Peter Blair QC
Peter Finnigan QC
(Instructed by Serious Fraud Office)

Appellant (M)
Nicholas Purnell QC
Clare Sibson

(Instructed by Kingsley Napley)

Respondent
Philip Mott QC
Peter Blair QC
Peter Finnigan QC
(Instructed by Serious Fraud Office)

LORD BROWN, delivering the judgment of the court

1. The appellants await trial in the Crown Court at Southwark on three counts of an indictment. Count two charges them with "making funds available to Iraq, contrary to articles 3(a) and 11(4) of the Iraq (United Nations Sanctions) Order 2000 and section 1 of the United Nations Act 1946". The particulars of offence allege that the appellants "being directors of Mabey & Johnson Ltd, between 1 May 2001 and 1 November 2002, consented to, or connived in, the making of €422,264 available to the government of the Republic of Iraq, or a person resident in the Republic of Iraq, by Mabey & Johnson, without the authority of a licence granted by the Treasury."

2. Mabey & Johnson Ltd were in the business of exporting pre-fabricated bridges to developing countries and the essential allegation against the appellants is that they consented to the company's entering into an arrangement which facilitated the Iraqi Government's avoidance of international sanctions by allowing it indirectly to access funds held in a United Nations controlled account. The appellants have pleaded not guilty both to that count and to the other two counts, each of false accounting.

3. The appellants have sought to have count two quashed on the basis that the Iraq (United Nations Sanctions) Order 2000 (SI 2000/3241) was ultra vires section 1 of the United Nations Act 1946. In essence they say that such an Order cannot be made under the 1946 Act unless made "at or about the same time" as the Security Council Resolution which it is implementing is itself made. This Order was made 10 years after the relevant Resolution. The argument failed before Judge Rivlin QC, the Recorder of Westminster, at a preparatory hearing at Southwark on 18 June 2010 (conducted pursuant to section 7 of the Criminal Justice Act 1987). It failed again on an interlocutory appeal (brought by leave of the Recorder pursuant to section 9(11) of the 1987 Act) to the Court of Appeal (Criminal Division), (Hooper LJ, Owen and Roderick Evans JJ) on 22 October 2010: [2010] EWCA Crim 2437. The Court of Appeal refused leave to appeal but certified two points of law of general public importance:

> "(i) May the power to create criminal offences granted to Her Majesty in Council by section 1 of the United Nations Act 1946 only lawfully be exercised at or about the time of the relevant Security Council Resolution?

(ii) If yes, are articles 3(a) and 11(4) of the Iraq (United Nations Sanctions) Order 2000 to the extent to which they create a criminal offence, *ultra vires* section 1 of the United Nations Act 1946 given that the relevant Security Council Resolution was adopted in 1990?"

The matter came before this court on 6 December 2010 when, at the outset of the hearing, the appellants were granted permission to appeal; at the conclusion of the hearing the appeal was dismissed for reasons to be given later. These reasons now follow.

4. It is convenient at once to set out the most material parts of the three instruments here calling for particular consideration, beginning with the Security Council Resolution ("SCR") referred to in the two certified questions.

(1) SCR 661 (1990) ("SCR 661") was adopted by the Security Council under Chapter VII of the UN Charter on 6 August 1990 (four days after Iraq invaded Kuwait, an invasion condemned that same day by SCR 660 (1990)). The Council reaffirmed SCR 660; by article 2 they decided to take measures to secure Iraq's compliance with it; by article 3 they imposed an embargo on trade with Iraq and Kuwait; and by article 4 the Council:

> "*decides* that all states shall not make available to the government of Iraq, or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs".

(2) The United Nations Act 1946 (the 1946 Act) provides by section 1(1):

> "If, under article 41 [in Chapter VII] of the Charter of the United Nations . . . (being the article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures

> to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order."

(3) The Iraq (United Nations Sanctions) Order 2000, made on 13 December 2000 and coming into force on 14 December 2000 ("the 2000 Order"), recites:

> "Whereas under article 41 of the Charter of the United Nations the Security Council of the United Nations have, by a resolution adopted on 6 August 1990, called upon Her Majesty's Government in the United Kingdom and all other states to apply certain measures to give effect to a decision of that Council in relation to Iraq:
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> Now, therefore, Her Majesty, in exercise of the powers conferred on Her by section 1 of the United Nations Act 1946, is pleased, by and with the advice of Her Privy Council to order, and it is hereby ordered, as follows."

Articles 3 and 11 (the two articles referred to in count 2 and in the second certified question) provide:

> "3. Any person who, except under the authority of a licence granted by the Treasury under article 5 –
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> (a) makes any funds available to the Government of the Republic of Iraq or any person who is resident in the Republic of Iraq, or,
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> (b) otherwise remits or removes any funds from the United Kingdom to a destination in the Republic of Iraq,
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> is guilty of an offence.
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> 11. (1) Any person guilty of an offence under article 3 . . . shall be liable –
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> > (a) on conviction on indictment to imprisonment for a term not exceeding seven years, or a fine, or both . . .

> (4) Where a body corporate is guilty of an offence under this Order, and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

5. Essentially the appellants' argument comes to this. The 1946 Act was enacted, and the government was thereby permitted to introduce by executive order highly restrictive measures including new criminal offences and sanctions without a parliamentary majority or even parliamentary scrutiny, specifically so as to enable urgent (prompt, hasty, speedy and immediate were other words used by the appellants in the course of argument) action to be taken to implement article 41 UN Resolutions. Urgency alone justifies such wide executive power and the bypassing of the ordinary parliamentary processes and safeguards. The power, therefore, must be construed as subject to there being a need for its immediate exercise and limited, therefore, to its being exercised within a very short time-scale. If not exercised "at or about the same time" as the Resolution being implemented, runs the argument, the power is lost by the effluxion of time. The appellants candidly acknowledge that they can find no example of any other power once given expiring by the effluxion of time (absent, obviously, legislation containing express sunset clauses). They submit, however, that, novel as their argument may be, there is support for it to be found in a number of the speeches made during the parliamentary debates leading to the passage of the 1946 Act and some support too in the judgments of this court in *A v HM Treasury* [2010] 2 AC 534.

6. Principal amongst the passages from Hansard relied upon are these:

> (i) "Subsection (4) provides that Orders in Council shall be laid forthwith before Parliament, but it excludes the application of a provision in the Rules Publication Act requiring the publication in the 'London Gazette' of notice of the proposal to make the Order in Council for 40 days before the Order is made, it being obvious that the urgency with which decisions of the Security Council must be carried out renders any such notice quite impracticable." (Lord Jowitt LC, introducing the Bill at its second reading in the House of Lords: Hansard (HL Debates), 12 February 1946, col 376.

> (ii) "[The Lord Chancellor] is fortunate in being able to bring forward a Bill to enable this Government to do things by Order in

> Council which will, I believe, have the complete, unanimous, and enthusiastic support of everybody in this House. If this organisation fails, all fails. If it is to succeed, it must be able to take effective action, and that action must be prompt and immediate. All the world must know that when it takes a decision, all the member states will be prompt and loyal in giving effect to such a decision. For the reasons the noble and learned Lord Chancellor has given, this method of Orders in Council is the only effective way by which we can do that." (Viscount Swinton, supporting the Bill at its second reading: Hansard (HL Debates), 12 February 1946, col 377.
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> (iii) "Subsection (4) provides that Orders in Council shall be forthwith laid before Parliament, but it excludes the application of a provision in the Rules Publication Act requiring publication in the 'London Gazette' of notice of the proposal to make the Order in Council for 40 days before the Order is made. It is evident that that must be so, because, if we are to take action at all in pursuance of a decision by the Security Council, it must be taken with the least possible delay. Therefore, any such notice of 40 days would be really out of the question." (Mr Philip Noel-Baker, Minister of State, introducing the Bill's second reading before the House of Commons: Hansard (HC Debates, 5 April 1946, col 1516.
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> (iv) "The procedure by way of Order in Council under this Bill when it becomes an Act possesses the necessary combination of speed and authority to enable instant effect to be given to these international obligations to which we are pledged." (Mr W S Morrison, supporting the Bill's second reading in the House of Commons. Hansard (HC Debates, 5 April 1946, col 1517).

The terms of these debates, submit the appellants, demonstrate Parliament's clear intention that the powers granted under section 1(1) of the 1946 Act must be used with haste after the passing of the relevant United Nations Resolution requiring implementation. It was for that reason alone, they contend, that Parliament consented to the summary procedure for which the Act provides. The power must therefore be exercised speedily or not at all.

7. As for the recent decision of this court in *A v HM Treasury* [2010] 2 AC 534, the appellants fix in particular upon passages in the judgments which recognise – as had earlier judgments in the House of Lords, most notably in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 and *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 – that a power conferred by Parliament in general terms is not to be taken to authorise the

overriding of fundamental human rights or basic legal principles unless unambiguously conferred with that intention. They rely, for example, upon Lord Hope's judgment at p 626, para 47: "I would approach the language of section 1 of the 1946 Act, therefore, on the basis that Parliament did not surrender its legislative powers to the executive any more than must necessarily follow from the words used by it. The words 'necessary' and 'expedient' both call for the exercise of judgment. But this does not mean that its exercise is unlimited."

8. As, however, the appellants rightly recognise, *A* was concerned with a very different aspect of the scope of the power under the 1946 Act than is under consideration here. Whereas *A* was concerned with the proper limits of the *content* of Orders that can be made under the Act, the present appeal seeks to impose limits upon the *time* within which the power is properly exercisable. It is not suggested that an Order precisely in the terms of the 2000 Order could not properly have been made at around the time SCR 661 was adopted on 6 August 1990. What is contended is rather that, by 13 December 2000, the 1946 Act had long since ceased to be an available legislative route by which to implement the 1990 Resolution; the appellants argue that the new offences created by the 2000 Order could at that stage only have been introduced by ordinary parliamentary legislation. By the same token that *A* demonstrates the Order-making power under the 1946 Act not to be unrestricted as to content, so too, the appellants submit, this court should now hold it not to be unrestricted as to the time of implementation either. And certainly, if the urgency of the need to give effect to a United Nations Resolution were indeed a precondition of the right to exercise the power, the strength of the appellants' case would be obvious: ten years elapsed before the 2000 Order gave effect to (part of) the measures required by article 4 of SCR 661.

9. Is, then, the suggested analogy between the situation facing the court in *A* and that arising here a true one? In our judgment it is not. The critical feature of the Orders in Council under consideration in *A* was that they plainly overrode the fundamental rights of those affected. Orders of that kind, the court held, were impermissible: the 1946 Act had neither expressly nor by necessary implication conferred so extreme a power.

10. The essential reason why the court in *A* was prepared, indeed anxious, to examine the parliamentary material surrounding the passage of the 1946 Act was to make sure that there had in fact been nothing said by those introducing the Bill to suggest that the executive power being conferred was intended to permit fundamental human rights to be overridden. In short, Hansard was being examined to confirm the absence of a clear statement of such intention, the argument there being that a power of the width contended for by the Minister needed to have been conferred *un*ambiguously.

11. In the present case, by contrast, we can see no good reason to look behind the enactment of the 1946 Act, and a real risk of breaching parliamentary privilege if one does. As already stated, it is not suggested here that the 2000 Order overrides anyone's fundamental human rights or is otherwise ultra vires the order-making power conferred by the 1946 Act (save as to the delay in the Order being made). Obviously it was envisaged that the order-making power would ordinarily need to be exercised speedily. But that is a far cry from saying that it was Parliament's clear intention to confine it to urgent use. Had that been the intention, one would have expected it to be clearly provided for in the Act. And inevitably, if it had been, some identifiable limit of time would have been formulated: how otherwise is the Minister, or the court in the event of legal challenge, to determine what precisely is the legal limit of the power?

12. So far from anything of this kind being found in the legislation, it is entirely silent on the question, there being no hint of any such restriction in the language of the section. Indeed, it goes somewhat further even than this: section 1(3) of the 1946 Act provides: "Any Order in Council made under this section may be varied or revoked by a subsequent Order in Council." The appellants necessarily, therefore, recognise that some variations may be made to existing Orders by subsequent Orders made perhaps years later. They are thus constrained to argue rather that this power of variation cannot be invoked to create serious criminal offences. Once the initial urgency has passed, they must submit, such offences can only be created through the normal legislative process. Again, however, had Parliament intended to place such limitations upon this power of variation, one would have expected it to say so rather than leave the position entirely uncertain.

13. We have considered the issue thus far purely as one of principle and on the barest of facts, by reference simply to the long passage of time between the United Nations Resolution requiring measures to be taken and the Order giving effect to it. The Crown, indeed, have been anxious that we should do so, concerned no doubt lest otherwise anyone wishing to contest the vires of an apparently delayed 1946 Act Order will be able to require an explanation as to how the delay came about. As will now be apparent, moreover, even on this somewhat blinkered approach, it is our clear conclusion that the appellants' argument must fail.

14. We think it right, however, briefly to sketch in something of the broader context in which the 2000 Order in fact came to be made, partly to show that the case is not simply one of inexplicable tardiness on the part of a negligent government (indeed, succession of governments), but in part also to demonstrate that there may be perfectly good reason to act as the government did here – which, of course, assuming that is so, makes it yet more unlikely that Parliament on conferring the power had been intent upon tightly circumscribing the time within which it could lawfully be exercised.

15. As already indicated, SCR 661 was adopted on 6 August 1990, four days after Iraq invaded Kuwait. In the meantime, on 4 August, the Treasury had already given directions in exercise of powers conferred by section 2 of the Emergency Laws (Re-enactments and Repeals) Act 1964 forbidding (save with Treasury permission) the carrying out of orders by the Government of, or any resident in, Iraq requiring any person "to make any payment or to part with any gold or securities" or requiring "any change to be made in the persons to whose credit any sum is to stand or to whose order any gold or securities are to be held". To an extent, therefore, these directions anticipated the requirements of SCR 661.

16. Shortly afterwards, namely two days after SCR 661 and in substantial implementation of the measures required by it, the Government on 8 August made the Iraq and Kuwait (United Nations Sanctions) Order 1990 (SI 1990/1651) pursuant to the 1946 Act power, imposing restrictions (as the Explanatory Note put it) "on the exportation of goods from Iraq and Kuwait and on supply of goods to Iraq and Kuwait as well as certain related activities and dealings, including the carriage of such goods in British ships or aircraft". This Order thus gave effect to the entirety of SCR 661 save just a part of article 4. It was then amended on 29 August to add a new article 4A so as to ban the payment of any bond given in respect of a contract whose performance was prohibited under any other article: article 4 of the Iraq and Kuwait (United Nations Sanctions) (Amendment) Order 1990 (SI 1990/1768).

17. There followed a succession of SCRs dealing with the Iraqi situation as it continued to develop over the next ten years. Putting it very shortly, on 15 August 1991 SCR 706 (1991) authorised the setting up of an oil-for-food programme, a programme, however, which was then rejected by Iraq on the grounds that it interfered with their sovereignty. On 14 April 1995 SCR 986 (1995) again authorised such a programme and this finally began to operate at the end of 1996. Thereafter the programme was extended on a six-monthly basis by further Resolutions, each of which re-affirmed the terms of SCR 661. With the passage of time, however, the scale and complexity of the humanitarian programme grew, and oil prices increased, to the point where there was ever greater scope for the manipulation of the programme by the Iraqi government. By September 2000 there were consistent reports of Iraq demanding a surcharge on all oil sales and on the purchase of all humanitarian goods, to be paid directly or indirectly to the Government of Iraq. In December 2000 the United Nations 661 Committee agreed that the payment of all such surcharges was illegal and in breach of the UN sanctions imposed on Iraq. On 5 December 2000 SCR 1330 (2000) was adopted inter alia "allow[ing] the Council to take further action with regard to the prohibitions referred to in Resolution 661 …". It was in the context of this ever-changing diplomatic and international landscape that on 13 December 2000 the 2000 Order came to be made.

18. If this brief history establishes nothing else, it demonstrates surely that Security Council Resolutions are not simply one-off measures requiring immediate implementation by member states and then receding into history, and that situations can develop in the course of their subsequent enforcement which call for further measures to be taken, sometimes with considerable urgency, to meet emerging problems. It would be not merely inappropriate as a matter of construction but regrettable as a matter of fact were this court now to stultify the power conferred under the 1946 Act by confining its exercise within an artificially restricted time-frame.

19. For the sake of completeness we record that, since the above judgment was written, the appellants have now been convicted on count 2, the sanctions count. We have in the result lifted the anonymity order which was earlier imposed in these proceedings.