



6 July 2016

PRESS SUMMARY

R (on the application of Ismail) (Respondent) v Secretary of State for the Home Department (Appellant) [2016] UKSC 37
On appeal from [2013] EWHC 663 (Admin)

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Sumption, Lord Hughes, Lord Toulson

BACKGROUND TO THE APPEAL

Mr Mamdouh Ismail, the Respondent, is an Egyptian national who was chairman of the board of the El-Salam Maritime Transportation Company. On 3 February 2006, a ferry operated by the company sank in the Red Sea and more than 1000 people lost their lives. Mr Ismail and his son, who was a director and vice-chairman of the company, were charged with manslaughter. A trial took place at which neither defendant was present, though they were legally represented. Both were acquitted. The prosecution appealed and, again, Mr Ismail and his son were not present but were legally represented. The son's acquittal was affirmed but, on 11 March 2009, Mr Ismail was found guilty and was sentenced to the maximum sentence of seven years with hard labour.

Mr Ismail had entered the United Kingdom on 26 April 2006, and has remained here ever since. On 11 October 2010, the Egyptian authorities requested that the Secretary of State serve the judgment of the Appeal Court in Mr Ismail. On 3 August 2011, the Secretary of State informed Mr Ismail that she intended to do so. In a letter before claim dated 18 August 2011, Mr Ismail's solicitors submitted that the Secretary of State would be acting unlawfully if she served the judgment.

Further representations were made on Mr Ismail's behalf between August 2011 and January 2012. In response to these, the Secretary of State made inquiries with Egyptian authorities as to the effect that service of the judgment would have on Mr Ismail. She was informed that the Appeal Court judgment could be appealed by means of an objection made by a lawyer acting on Mr Ismail's behalf within 10 days of service of the judgment; otherwise, the judgment would become final but could still be appealed to the Court of Cassation if Mr Ismail appeared in person.

On 23 May 2012, the Secretary of State informed Mr Ismail's solicitors that she intended to serve the judgment on him. On 20 June 2012 a claim for permission to apply for judicial review of that decision was made in the English courts. Following a hearing on 12 February 2013, permission was granted and, by a judgment of 26 March 2013 the High Court granted Mr Ismail's application for judicial review. It certified two points of law of general public importance, which are pursued on this appeal:

"1. What is the extent of the Secretary of State's discretion when serving a foreign judgment under section 1 of the Crime (International Cooperation) Act 2003?
2. May a person's ECHR article 6 rights be engaged on service by the Secretary of State of a foreign judgment under section 1 of the Crime (International Co-operation) Act 2003?"

JUDGMENT

The Supreme Court unanimously allows the Secretary of State's appeal and dismisses the application for judicial review of the Secretary of State's decision. Lord Kerr gives the only judgment.

REASONS FOR THE JUDGMENT

The Secretary of State contended that service of a foreign judgment could not engage article 6 because (1) it does not have the direct consequence of exposing the individual to a breach of any fair trial guarantee and (2) the consequences of service are not of a type or nature to warrant the engagement of article 6 rights [13]. Further, the Secretary of State submitted that it was not incumbent on her to investigate the fairness of proceedings in a foreign state when she was asked to serve a judgment: that would run counter to the purpose of the 2003 Act which was to provide speedy and effective procedural assistance to other sovereign states [15]. For Mr Ismail, it was submitted that there is a clear discretion in the 2003 Act; that the Secretary of State is required to carefully assess the respondent's representations on article 6 when plausible evidence of unfairness in the Egyptian trial was provided to her; and that service is more than a merely administrative act [18, 20].

From a purely textual perspective, the wording of the statute suggests an administrative procedure that does not routinely require examination of the proceedings which prompted the request for service [23]. On the other hand, the Act provides a power and not an obligation to effect service of foreign process and it was therefore contemplated that there would be circumstances in which service would not be appropriate [26].

It is well settled that a person physically present in a country which has acceded to the ECHR is entitled to its protection, even in circumstances where the actions of a member state would expose them to consequences in a non-contracting foreign state which would amount to a violation of Convention rights [32]. That, however, is not the context of this case because the decision of the Secretary of State to serve the judgment on Mr Ismail did not expose him to a risk of violation of his Convention rights [36]. Service of the judgment would have undoubtedly placed Mr Ismail in a dilemma – whether to return to Egypt to appeal the judgment, or suffer the consequences of the judgment becoming final – but having to face that dilemma does not amount to a possible violation of his article 6 rights [36]. Service of the Egyptian judgment does not have a direct consequence of exposing Mr Ismail to “proscribed ill-treatment”. It reduces his options but does not carry the inevitable outcome of exposure to a violation of his rights. He could avoid that exposure by remaining in the UK [38].

Service of a judgment is not the same as enforcement of it because it does not give legal force to the judgment or ratify it [41]. Service does not, therefore, alter the legal position of the person on whom it is served. It may narrow the legal options available to him but his essential legal position remains unchanged [42]. Service of the judgment would not involve an exercise of the UK's sovereignty nor would it engage Mr Ismail's fundamental rights. Indeed, in the particular circumstances of this case, it would have no material impact on Mr Ismail at all [48]. The Secretary of State was under no obligation to investigate further the consequences that would accrue to Mr Ismail on service of the judgment [52].

That being said, there may be cases in which service of a judgment *would* engage article 6 or would call for further investigation of the basis on which the judgment had been obtained. That might occur, for instance, where service would lead more directly to enforcement or have other material consequences on the individual. In certain cases service of a foreign judgment might engage article 6. This is not such a case [53].

References in square brackets are to paragraphs in the judgment

NOTE

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

<http://supremecourt.uk/decided-cases/index.html>