Hilary Term

[2016] UKSC 3

On appeal from: [2013] EWCA Civ 1302

JUDGMENT

Youssef (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)

before

Lord Neuberger, President

Lord Mance

Lord Wilson

Lord Sumption

Lord Carnwath

JUDGMENT GIVEN ON

27 January 2016

Heard on 18 and 19 November 2015

Appellant	Respondent
Timothy Otty QC	Jonathan Swift QC
Dan Squires	Andrew O'Connor QC
	Louise Jones
(Instructed by Birnberg Peirce & Partners)	(Instructed by The Government Legal Department)

LORD CARNWATH: (with whom Lord Neuberger, Lord Mance, Lord Wilson and Lord Sumption agree)

Introductory summary

1.
The appellant (Mr Youssef), an Egyptian national, has been living in this country since 1994. He challenges a decision made by the respondent Secretary of State on 14 September 2005, in his capacity as a member of the committee of the United Nations Security Council, known as the Resolution 1267 Committee or Sanctions Committee. The committee is responsible for maintaining a

list of persons and entities subject to the asset freeze imposed on persons “associated with Al-Qaida” under Chapter VII of the United Nations Charter. The committee acts by “consensus”: all members must agree to a nomination for inclusion on the list, or to de-listing. The United Nations sanctions regime, and the constitution of the committee, are described in more detail in the judgment under appeal of Laws LJ in the Court of Appeal, as is the drastic effect of listing on the individuals concerned: [2013] EWCA Civ 1302; [2014] QB 728, paras 3-12.

2.
The decision under challenge removed the hold which the United Kingdom had previously placed on the appellant’s designation by the committee. It had the consequence that thereafter he became subject to the asset freeze imposed by virtue of the Charter and of implementing European and national legislation. The appellant’s first contention is that, although the Secretary of State made his own decision on untainted evidence, he was aware that information on which other members were proceeding was or might have been obtained by torture; and that accordingly he was under an obligation, enforceable in domestic law, not to lend his aid to a committee decision which might be so tainted.

3.
The appellant’s case, with others, came before this court in earlier judicial review proceedings in Ahmed v HM Treasury [2010] UKSC 2; [2010] 2 AC 534 (to which I will return below). They related to an implementing order in this country made under section 1 of the United Nations Act 1946. The court held that the order was outside the powers conferred by the Act. However, that decision left in place Council Regulation (EC) No 881/2002, which implemented the asset freeze under European law, and had direct effect in the United Kingdom under the European Communities Act 1972. Although this court declined to suspend its order to enable new regulations to be made under that Act ([2010] UKSC 5; [2010] 2 AC at p 689), such provisions, including the related licensing provisions and criminal sanctions, were made soon afterwards, in effect reproducing the controls previously imposed under the 1946 Act (Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 (SI 2010/1197), since superseded by 2011 Regulations (SI 2011/2742) to similar effect).

4.
In evidence in the Ahmed proceedings it was disclosed that, following a review of the information then available, the government had decided that the appellant no longer met the criteria for designation. From June 2009 until late 2012 the Secretary of State actively supported his removal from the Sanctions Committee’s Consolidated List, and attempted to persuade other members to agree, but without success. The appellant complains of the Secretary of State’s failure at that stage to extend his grounds for seeking delisting to include the tainted nature of the evidence apparently relied on by other members.

Findings of the United Nations Ombudsperson

5.
Meanwhile (by Resolution 1904 of 2009) the Security Council had established the new office of “Ombudsperson”, inter alia, to assist the committee in considering and responding to requests for delisting. The appointment of the first Ombudsperson (Judge Kimberly Prost) and her understanding of this new role were described by Laws LJ in the Court of Appeal (para 8). In April 2013 the appellant applied to the Ombudsperson requesting delisting. Her report to the committee, submitted in February 2014, recommended that he be retained on the list. On 30 July 2014 she wrote to the appellant informing him of her recommendation and the reasons for it. Her letter indicated that she

had excluded from her analysis material tainted by torture (p 4). It reviewed a number of public statements attributed to the appellant between 2011 and 2013. It is sufficient to refer, as an example, to the most recent: a sermon given in May 2013, in which he "offered extensive praise of Usama bin Laden", labelled certain Al-Qaida linked groups as "the fruits of this Martyr [Bin Laden] and his good devout brethren", and asserted that "America will crumble thanks to those Mujahids and by virtue of this Martyr". The Ombudsperson commented that such repeated statements "clearly glorify Usama Bin Laden and the Al-Qaida organisation for its various activities in different locations", and could be "categorised as an exhortation to others to join in the continued expansion of the organisation in its aims, which includes the destruction of America" (p 9).

6.
On 10 September 2014 the Secretary of State informed the appellant that he agreed with the Ombudsperson's recommendation and would no longer support delisting.

7.
On 30 October 2014 the committee's narrative summary of reasons for listing was updated to take account of the Ombudsperson's findings. The revised summary includes the following:

"[The appellant] is a known figure within extremist circles. He uses an Internet site, and other media, to support terrorist acts or activities undertaken by Al-Qaida as well as to maintain contact with a number of supporters around the world. He offers praise for Al-Qaida as an organisation and, directly or by inference, encourages individuals to join and support that organisation and its activities on a global basis. As of early 2014, [the appellant] provided Al-Qaida and Al-Nusrah Front for the People of the Levant (QE.A.137.14) with guidance and justification for their operations and tactics."

8.
The court has no evidence from the appellant to counter the allegations on which the 1267 committee now relies. In his only witness statement in these proceedings, dating from 3 December 2010, he simply rejected (without further explanation) the notion that he is "in any way involved in terrorism, or … linked in any way to Al-Qaida or the Taliban". The court was told that he intends to challenge the Secretary of State's recent decision not to support delisting, but not on what grounds. It has been agreed between the parties that further action will await the decision of the court in this appeal, at which point the Secretary of State will reconsider his decision so far as necessary in the light of this court's findings and of any representations made by the appellant.

Immigration

9.
The appellant's immigration status is not in issue in these proceedings. He claimed asylum on arrival in 1994, but that claim was rejected under article 1F(c) of the Refugee Convention ("serious reasons for considering that … he has been guilty of acts contrary to the purposes and principles of the United Nations"). Since October 1999 he has remained under a series of grants of discretionary leave to remain. An appeal against refusal of asylum under article 1F(c) is currently pending before the Upper Tribunal. Consideration of his application for indefinite leave to remain has been deferred by the Home Office pending a final decision on his asylum application.

European proceedings

10.

Decisions of the European Court of Justice in Kadi v Council of the European Union (Joined Cases C-402/05P and C-415/05P), [2009] AC 1225 (“Kadi I”), and of the General Court in Kadi v Commission of the European Communities (Council of the European Union intervening) (Case T-85/09) [2010] ECR II 5177 (“Kadi II”) established that inclusion of an individual within a list under EC Regulation 881/2002 (“regulation 881”) was subject to judicial review in Europe, inter alia on grounds relating to the accuracy and reliability of the evidence relied on (Kadi II paras 141-143). Regulation 881 was amended by Council Regulation (EU) No 1286/2009 to create a mechanism for review by the Commission (articles 7(a) and 7(c)).

11.
In July 2010 the appellant applied to the General Court of the European Union for removal from the list in regulation 881. In a decision given on 21 March 2014 (Case T-306/10) the court held that the Commission had failed to review his inclusion under the required procedures, but it dismissed his claim that his retention on the list was irrational. On 17 December 2014 the European Commission sent to the appellant an updated statement of reasons for listing under regulation 881 in the same terms as the 1267 committee’s summary. The appellant responded on 26 January 2015 denying those allegations. He has lodged an application for legal aid with the EU General Court to enable him to challenge the decision to continue his listing under the regulation.

The present proceedings and the issues in the appeal

12.
The present claim for judicial review was issued in December 2010. It challenged the legality both of the Secretary of State’s decision in 2005 to lift his hold on designation, and also of his refusal, in a letter of 14 October 2010, to extend his request for delisting to include the ground that the committee’s decision had been based on torture-tainted evidence. The claim was dismissed by the Divisional Court in July 2012, and by the Court of Appeal in October 2013. Permission to appeal to this court was granted on 9 July 2014.

13.
The appeal raises issues about the tests to be applied in judging the legality of the relevant decision, and about their consequences under domestic law. It also raises issues about the remedies if any to which the appellant should be entitled, if otherwise successful, having regard in particular to the developments since the Court of Appeal decision.

14.
Mr Otty QC summarised his submissions on behalf of the appellant under four main heads:

i)
Torture-tainted material The exceptional status accorded to the prohibition against torture, under international and domestic law, required the Secretary of State not merely himself to make no use of torture-tainted evidence, but to forego participation in a decision which might be affected by such evidence.

ii)
Absence of power The intended and inevitable effect of the committee’s decision was a serious interference with the appellant’s right to peaceful enjoyment of his property. That could only be achieved by a clear statutory provision or common law rule, neither of which existed.

iii)

Standard of proof The test of “reasonable grounds to suspect” that the appellant met the criteria for designation as having been “associated with Al-Qaida” through his “participating in the financing, planning, facilitating, preparing or perpetrating of acts or activity in conjunction with, under the name of or on behalf of … Al-Qaida” adopted by the Secretary of State was too low, as shown by the reasoning of this court in Ahmed.

iv)
Standard of review Given the gravity of the context, the courts below were wrong to limit the standard of review to that of Wednesbury unreasonableness or irrationality. Following the more recent guidance of this court in Kennedy v Information Comr (Secretary of State for Justice intervening) [2014] UKSC 20, [2015] AC 455 and Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening) [2015] UKSC 19, [2015] 1 WLR 1591, the appellant was entitled to a “full merits review”, or at least one involving a “proportionality analysis”.

It will be convenient to take them in this order, expanding the account of law and facts so far as necessary under each head.

Torture-tainted material

Background

15.
The factual background to this issue, so far as not already explained, is uncontentious. On 29 March 2005 a “designating state” (now known to have been Egypt) requested the committee to add 20 individuals, including the appellant, to the UN sanctions list. The information submitted in support relied on his conviction in Egypt in absentia for membership of a terrorist group. This information, as the Secretary of State knew, included evidence that had been or may have been obtained by torture. However, the Secretary of State’s decision on 14 September 2005 to agree to his designation was not based on this information but on a separate Security Service assessment. This referred to his previous links with a terrorist group known as Egyptian Islamic Jihad (EIJ), his arrest in 1998 in connection with a planned bomb attack on the US embassy in Tirana, and his views which remained “extreme”. The assessment was that he had had “strong historical links” to EIJ in the mid to late 1990s and that “the potential remains for him to re-engage with EIJ”.

16.
Under the guidelines in effect in 2005 the committee was not required to make a statement of the reasons for its decision. However, under later guidelines (first introduced in June 2008 by SCR 1822), it was required to publish on its website a “narrative summary of reasons for listing”. Such a summary in respect of the appellant was published in September 2010. This referred to him being wanted in Egypt in connection with terrorist crimes committed in that country. The appellant asserts (without specific contradiction by the Secretary of State) that these allegations were the result of torture of his co-accused. As already noted, by this time, the Secretary of State had formed the view on other grounds that the listing was no longer justified. The Security Service assessment on which this was based (May 2009), included the following:

“We assess that were [the appellant] to be removed from the Consolidated List he would be unlikely to re-engage with EIJ. Although [the appellant] continues to maintain his extremist views, he appears very reluctant to be directly involved in terrorist activities.”

Legal principles and the courts below

17.
For the legal principles governing the use of evidence obtained by torture we need look no further than the opinions given in the House of Lords in A v Secretary of State for the Home Department (No 2) [2005] UKHL 71; [2006] 2 AC 221, notably that of Lord Bingham which contains an extensive review of the international materials (paras 30ff). Having quoted from the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, he noted as common ground that the international prohibition of the use of torture "enjoys the enhanced status of a jus cogens or peremptory norm of general international law". He quoted at length from the authoritative exposition by the International Criminal Tribunal for the Former Yugoslavia in Prosecutor v Furundzija (1998) 38 ILM 317 (10 December 1998), including this statement of the obligations of states, both individually and collectively:

"151. Furthermore, the prohibition of torture imposes upon states obligations erga omnes, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued."

18.
Lord Bingham interpreted these extracts as indicating the requirement on states both to "eschew the practice of torture" and "to cooperate to bring to an end through lawful means any serious breach of an obligation under a peremptory norm of general international law". The same principles required states "save perhaps in limited and exceptional circumstances" to reject "the fruits of torture" (para 34). Similarly article 15 of the Torture Convention prohibited the use of "any statement which is established to have been made as a result of torture" (para 35), a principle recognised also in the European Convention on Human Rights and in the common law (para 52).

19.
The Court of Appeal held that the Secretary of State was responsible for the lawfulness of his own reasons, but not in effect for policing the reasoning of other member states. Laws LJ (paras 54-55) accepted that "the court cannot ignore an established rule of international law, far less one which has the force of ius cogens erga omnes", and declined therefore to base his decision on the proposition that "the Government's conduct of foreign relations enjoys something close to an immunity from judicial review". He continued:

"The true answer to Mr Otty's argument on ground 2 rests in my judgment on the facts of the case. In R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs [2008] QB 289 I said, at para 102:

'[T]he status of ius cogens erga omnes empowers but does not oblige a state to intervene with another sovereign state to insist on respect for the prohibition of torture (para 151 of Prosecutor v Furundzija) ...'

But Mr Otty's submission entails an obligation on the Secretary of State so to intervene. Given that the Foreign Secretary's own reasons for lifting the hold were not tainted by torture evidence, there is nothing in Mr Otty's case save an insistence that the United Kingdom should, in effect, have stymied the designation because other states were not so pure. The law did not require him to do so."

Submissions

20.
In this court Mr Otty challenges both the reasoning of the decision in Al Rawi on which Laws LJ relied, and its applicability to this case. The Court of Appeal in Al Rawi had been wrong to interpret the passage cited from Furundzija as support for an entitlement rather than an obligation to act. In any event, unlike Al Rawi in which the Secretary of State had had no control over the treatment of inmates in Guantanamo Bay, in this case he had the power to determine whether or not designation would proceed. Further, the courts below erred in holding that the Secretary of State could disassociate himself from the reasoning of the committee of which he was a member. Although the committee's reasons were not published (nor required to be published) until some years later, the narrative summary must be treated as representing the views of the committee as a body, and so attributable also to its members individually.

21.
For the Secretary of State, Mr Swift QC accepted that the decision is reviewable, but subject to defined limits. As he put it in his printed case:

"It is common ground that the decision taken by the Foreign Secretary as a member of the 1267 committee as to whether or not the appellant met the designation criteria is justiciable as a matter of domestic law, applying standard public law principles. It is equally clear, however, that neither similar decisions taken by other members of the committee, nor decisions of the committee itself, are justiciable as a matter of UK domestic law."

In his submission, the Secretary of State in removing the hold on designation was agreeing to the fact of designation and no more. Provided his own reasons were valid, the law did not make him responsible for the decisions of others. He had no means of knowing what evidence might be relied on by them, nor any duty to make inquiries. At the time, under the current UN guidance there was no expectation that the committee would form a single collective view or adopt collective reasons.

Discussion

22.
In choosing between these competing submissions, it is important to define the scope of the court's powers. Mr Swift's concession that the decision of the Secretary of State is subject to judicial review begs a potentially important question as to the legal basis of the concession and its proper limits. Judicial review does not operate in the abstract. The "standard public law principles" to which Mr Swift refers cannot be divorced from the legal context, statutory or common law, in which the particular executive action is taken or decision made. The legal context in which the 2005 decision was made was that of a body operating under international law, not subject to the domestic courts. If the Secretary of State alone is to be subject to review, there must be some legal principle by which under domestic law his vote can be distinguished from those of other members.

23.
The point can be illustrated by reference to the committee's narrative summary of reasons published in 2010. I agree with Mr Swift that there is no valid basis for attributing that statement retrospectively to the decision made in 2005, at a time when there was no requirement for a collective statement of any kind. But I would reach the same view looking at the matter in 2010. Although I see force in Mr Otty's submission that the Secretary of State, as a voting member of the committee, cannot divorce himself from its collective statement, this would lead me to the opposite conclusion from that drawn by him. It does not mean that the Secretary of State's vote, infected by the committee's reasons, acquires a separate status for the purpose of domestic law. They remain the

reasons of the international body, challengeable if at all only under international law (or by virtue of their specific adoption under the European regulation).

24.
The object of the present challenge therefore has to be the logically prior decision of the Secretary of State in 2005 to remove his hold on the proposal for designation. The source of his powers under domestic law lay not in any statute but in the exercise of prerogative powers for the conduct of foreign relations. That did not make it immune from judicial review, but it is an area in which the courts proceed with caution, as is apparent from the authorities reviewed by the Court of Appeal in R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598; [2003] UKHRR 76 (cited with approval in this court in R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] UKSC 44; [2014] 1 WLR 2697, paras 49ff). In Abbasi the issue was whether the Secretary of State could be required by the court to intervene with the American government on behalf of a British prisoner held in Guantanamo Bay. Following Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (GCHQ), it was accepted as settled law that the issue of justiciability depends, not on general principle, but "on subject matter and suitability in the particular case" (para 85).

25.
The court cited R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Everett [1989] QB 811, relating to the issue of a passport, in which Taylor LJ summarised the effect of GCHQ:

"The majority of their Lordships indicated that whether judicial review of the exercise of prerogative power is open depends upon the subject matter and in particular upon whether it is justiciable. At the top of the scale of executive functions under the prerogative are matters of high policy, of which examples were given by their Lordships; making treaties, making war, dissolving Parliament, mobilising the Armed Forces. Clearly those matters and no doubt a number of others, are not justiciable. But the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases." (p 820)

In Abbasi the court held that the exercise of the Secretary of State's powers to protect British citizens abroad was in principle subject to judicial review, although the court could not enter "the forbidden areas, including decisions affecting foreign policy"; but it declined to intervene on the facts of that case (paras 106-107).

26.
The present case falls somewhere between the two ends of the spectrum indicated by Taylor LJ. The conduct of foreign policy through the United Nations, and in particular the Security Council, is clearly not amenable to review in the domestic courts so far as it concerns relations between sovereign states. The distinguishing factor in the present context is that the Security Council's action, through the 1267 committee, is directed at the rights of specific individuals, and in this case of an individual living in the United Kingdom. Furthermore, at the time the decision was taken, the Security Council procedures provided no other means for the individual to challenge their decision. It is no doubt such considerations that led to Mr Swift's concession. I am content (without deciding the point) to proceed on the basis that it is correct.

27.
That said, the decision under challenge in the domestic proceedings is that of the Secretary of State not of the committee, and it is by reference to his reasons that it must be judged. There is no legal

basis for attributing to him reasons which he did not have. Since his own reasons were untainted, Mr Otty has to show that he was in breach of a distinct duty to inquire into the reasons of the other members, and to withhold his support if they appeared tainted in any way.

28.
For the existence of such a duty he relies on the obligation of states to "reject the fruits of torture", and places particular weight on the following passages from Furundzija (in addition to those cited above):

"148. … given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence ….

149. … in the case of torture the requirement that states expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, states must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring."

He also relies on Lord Bingham's reference in this context (A (No 2), para 34) to the obligations held by the International Court of Justice to arise from its ruling on the illegality of the wall in occupied Palestinian territory: see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion (unreported) 9 July 2004 (General List No 131) para 159). That placed other states under an obligation "not to recognise the illegal situation resulting from the construction of the wall" and "not to render aid or assistance in maintaining the situation created by such construction".

29.
These passages leave no doubt as to the importance of the rules against torture and the use of torture-tainted evidence, and the duty of states to take the necessary measures "within their municipal legal systems" to give full effect to those rules. However, taken at their highest, they do not suggest or imply any duty on states to inquire into the possible reliance on such evidence by other states, whether on their own or as parts of an international organisation such as the 1267 committee. The obligations held to arise out of the International Court's decision on the Palestinian wall are nothing in point. They followed a definitive finding of illegality. There was no suggestion that, absent such a finding, mere suspicion of illegality could give rise to an equivalent obligation on other states.

30.
In agreement with the courts below I would reject this ground of appeal.

Absence of power

31.
Mr Otty's submission under this head starts from the principle, established by authorities dating back at least to Entick v Carrington (1765) 19 State Tr 1029, that interference by the state with individual property rights cannot be justified by the exercise of prerogative powers, unsupported by specific statutory authority. The Secretary of State's decision to remove his hold on designation, which led inexorably and designedly to the freezing of the appellant's assets, fell within that principle, even if the actual interference was authorised (see R (M) v Hackney London Borough Council [2011] EWCA

Civ 4; [2011] 1 WLR 2873, in which a local authority was held liable for procuring the detention of the claimant by the hospital trust, albeit that the latter was acting under statutory powers).

32.
The Court of Appeal accepted the relevance of the Entick principle ("a constitutional principle of the first importance") but held that the necessary authority was provided by the European regulation. Laws LJ said:

"I accept that if the Foreign Secretary's release of the hold on the claimant's designation rested solely on the Prerogative power, then it would appear to have been done without legal authority. But that is not the position. As a matter of domestic law the Foreign Secretary was obliged to apply the Consolidated List regime to its proper subjects by force of article 2(1), (3) of and Annex I to Regulation 881/2002. There might be an argument on the question whether the general words of the European Communities Act 1972, by virtue of which the Regulation has the force of law in the United Kingdom, are sufficient to authorise the EU legislature to empower or require the Secretary of State to deprive an individual of access to any economic resources (with or without proper proof of what was said against him); but no such argument has been run in this or any case, and it would plainly not be appropriate to canvass it now." (para 26)

33.
In this court Mr Swift puts his case rather differently. He declined to support the Court of Appeal's reliance on regulation 881 as providing statutory authority for the Secretary of State to approve the designation. That power rested on the exercise of the prerogative, which was however sufficient for its purpose. It was not that decision which resulted in interference with the appellant's rights, but rather the decision of the European Commission, giving effect in turn to the decision of the 1267 committee. The fact that the Secretary of State's decision was "a step along the path" to those later decisions was insufficient to engage the Entick principle.

34.
In my view, there is a short answer to this ground. The respective submissions, and indeed the reasoning of the Court of Appeal, pay insufficient regard to the legal means by which the listing took effect in this country. It is here that the interference with the appellant's rights, like the intrusion on Mr Entick's property, took place. It was directly and specifically authorised by regulation 881, which was given legislative effect in this country by the European Communities Act 1972. No issue has been raised as to the effectiveness of the Act for that purpose. The regulation is subject to challenge, but in the European rather than the domestic courts. In my view the regulation, taken with the 1972 Act, provides ample statutory authority to satisfy the Entick principle. That is not affected by the causative role played by the 1267 committee, nor by the Secretary of State as a member of that committee. That was a lawful exercise of his prerogative powers (unlike the actions of the local authority in the Hackney case, which had no lawful basis). For the purpose of domestic law regulation 881, given effect by a United Kingdom statute, stands on its own feet. Laws LJ was right to place reliance on the regulation. He was wrong with respect to read it as implying statutory authority for the prior decision of the Secretary of State as a member of the 1267 committee, but wrong also to think that statutory authority was required at that stage. As Mr Swift rightly submits, the exercise of the prerogative power for that purpose involved no breach of any common law principle.

Standard of proof

The arguments

35.
It is common ground that the standard applied by the Secretary of State in 2005 when considering whether the appellant was “associated with Al-Qaida” was that of “reasonable grounds for suspicion”. This appears not from any formal statement but from the evidence of the responsible officer in the Foreign Office who says:

“When deciding whether to support another member state’s designation proposal, the Secretary of State considers whether or not there are reasonable grounds for suspecting that the individual concerned meets the criteria for designation; ie whether or not the individual is ‘associated with’ Al-Qaida. Although it is not specifically stated in the submission of 12 September 2005, I understand that this is the standard of proof that the then Secretary of State (Jack Straw MP) would have applied when he considered whether or not to lift his hold on another member state’s proposal to designate the claimant. I say this because I understand that this was the standard which was applied at the time and which continues to be applied today.” (Adrian Scott, third witness statement, para 5)

He adds that, had the evidence then available been assessed on the basis of a balance of probabilities, he would have expected the same conclusion.

36.
Mr Otty submits that the standard applied by the Secretary of State in making his decision in 2005 was too low, having regard to the serious consequences for the appellant’s rights. He relies strongly on the reasoning of members of the Supreme Court in Ahmed, where the application of such a test led to the quashing of the order made under the relevant United Kingdom statute. He argues further that the test is not supported by the wording of the relevant Security Council resolution (1617) which refers to “participating in” or “supporting” the offending activities, not merely being suspected of doing so. Finally he relies on the doctrine of proportionality under the common law (as discussed in recent cases in the Supreme Court), which he says embraces concepts of necessity and suitability similar in substance to the tests of “necessity and expedience” prescribed by the statute in issue in Ahmed.

37.
The Court of Appeal rejected those submissions. Laws LJ, like Toulson LJ in the Divisional Court ([2012] EWHC 2091 (Admin); [2013] QB 906), took as his starting point the recognition that, in lifting the hold, the Secretary of State was exercising a power derived not from an Act of Parliament but in the exercise of prerogative powers acting on behalf of the Government as a member of an international body. The basis of judicial review must lie, therefore, not in the actual or presumed intention of Parliament in passing empowering legislation; but “must found entirely on standards which are the product of the common law [of which] reason and fairness are the cornerstones” (para 23). He continued:

“In this case the application of these standards requires in my judgment that the court be satisfied that the Foreign Secretary reached his decision conformably with the Consolidated List regime. His decision was as a participant in that regime. Reason and fairness - having effect, perhaps, as a species of legitimate expectation (but I do not mean to involve that expression’s panoply of conceptual footnotes) – surely demand that he should act according to the grain of the scheme and not across it.” (para 24)

38.
Having distinguished Ahmed (for reasons to which I will return) he found support for the Secretary of State’s approach in the preamble to resolution 1617, which emphasised the “preventive” purpose of

the regime. That aim, he said, is “more effectively promoted by the adoption of a reasonable suspicion test” (para 32). He noted also that paragraph 7 of the same resolution urges the implementation of recommendations of the Financial Action Task Force (FATF) relating to money-laundering and terrorist financing. The interpretative notes to Special Recommendation III (para 2) referred to the objective of freezing terrorist-related assets “based on reasonable grounds, or a reasonable basis, to suspect or believe” that the assets could be used to finance terrorist activity. A similar test was later adopted by the Ombudsperson in her report to the Security Council in January 2011 (quoted at para 8 of his judgment), in which she proposed the test “whether there is sufficient information to provide a reasonable and credible basis for the listing”.

39.
Mr Swift in substance adopts the reasoning of the Court of Appeal. He adds that the test proposed by the Ombudsperson in 2011 has not in the ensuing four years been questioned by the 1267 committee. In 2013 it was reaffirmed by her, following exchanges with Ben Emmerson QC who as UN Special Rapporteur had proposed a more stringent “balance of probability” test. Furthermore in 2012 the Security Council by resolution 2083 (para 44), when urging member states to take note of “best practices for effective implementation of targeted financial sanctions”, referred to “the need … to apply an evidentiary standard of proof of ‘reasonable grounds’ or ‘reasonable basis’…”.

Ahmed

40.
In view of the reliance understandably placed by Mr Otty on the reasoning of this court in Ahmed it is necessary to refer to the judgments in a little more detail. As Mr Otty explains, the court had to consider the legality of two regimes introduced by Orders in Council under the United Nations Act 1946: the first designed to give effect to the resolution 1267 which is in issue in this case (referred to as “AQO 2006”); the other, the Terrorism (United Nations Measures) Order 2006 (or “TO 2006”) relating to a different Security Council resolution (1373). That was directed at persons who “commit or attempt to commit terrorist acts”, but left their selection to member states. Both Orders were enacted under section 1(1) of the 1946 Act, which permitted the making by order of such “provision as appears … necessary or expedient for enabling [Security Council] resolutions to be effectively applied”. Both Orders were quashed by this court.

41.
Although only the first was applicable to the appellant, Mr Otty finds more assistance in the reasoning of this court in respect of the second. He relies in particular on the definition of the issue by Lord Phillips (para 131):

“The wording of the TO tracks the wording of the Resolution, save that those who can be made subject to the Order are not only those described in the Resolution but those whom the Treasury have reasonable grounds for suspecting fall or may fall within that description. The issue is whether it can properly be said to be ‘necessary or expedient’ to apply this test of reasonable suspicion in order to ensure that the measures in the Resolution are effectively applied to those described in the Resolution.”

Lord Phillips answered that question in the negative. He said that by applying a test of reasonable suspicion the Order

“… goes beyond what is necessary or expedient to comply with the relevant requirements of Resolution 1373 and thus beyond the scope of section 1 of the 1946 Act.” (para 143)

42.
Although those passages were not dealing directly with resolution 1617, Mr Otty finds parallels in the reasoning in respect of the AQO made to give effect to that resolution, particularly that of Lord Phillips (paras 139-143). He had looked at "the parallel series of resolutions" adopted by the Security Council under article 41 (including resolution 1617) for guidance on the intended scope of resolution 1373, but had found "nothing to indicate that the Security Council has decided that freezing orders should be imposed on a basis of mere suspicion" (para 139).

43.
Mr Otty submits that Lord Phillips' reasoning was sufficiently reflected in other judgments to give it majority support. I am doubtful whether that is so. The clearest support comes from Lord Mance who relied strongly on the differences of language between the resolution and the Order:

"The relevant wording of Security Council Resolution 1373 paragraph 1(c)(d) is directed at the prevention and suppression and the criminalisation and prosecution of actual terrorist acts; … This wording does not suggest that the Security Council had in mind 'reasonable suspicion' as a sufficient basis for an indefinite freeze …" (para 225).

"In my opinion, there is an objective limit to the extent to which section 1(1) permits the executive by Order in Council to enact any measure that appears to it expedient to enable the effective application of the core prohibition mandated by Resolution 1373. … A measure cannot be regarded as effectively applying that core prohibition, if it substitutes another, essentially different prohibition freezing the assets of a different and much wider group of persons on an indefinite basis …" (para 230).

44.
However, in the leading judgment Lord Hope (with whom Lord Walker and Lady Hale agreed) saw the issue as turning more on principles of domestic law as applied to section 1 of the 1946 Act:

"SCR 1373 (2001) is not phrased in terms of reasonable suspicion. It refers instead to persons 'who commit, or attempt to commit, terrorist acts'. The Preamble refers to 'acts of terrorism'. The standard of proof is not addressed. The question how persons falling within the ambit of the decision are to be identified is left to the member states. Transposition of the direction into domestic law under section 1 of the 1946 Act raises questions of judgment as to what is 'necessary' on the one hand and what is 'expedient' on the other. It was not necessary to introduce the reasonable suspicion test in order to reproduce what the SCR requires. It may well have been expedient to do so, to ease the process of identifying those who should be restricted in their access to funds or economic resources. But widening the scope of the Order in this way was not just a drafting exercise. It was bound to have a very real impact on the people that were exposed to the restrictions as a result of it. … Is it acceptable that the exercise of judgment in matters of this kind should be left exclusively, without any form of Parliamentary scrutiny, to the executive?" (para 58 emphasis added)

He held that, by introducing the reasonable suspicion test as a means of giving effect to SCR 1373, the Treasury had exceeded its powers under section 1(1):

"This is a clear example of an attempt to adversely affect the basic rights of the citizen without the clear authority of Parliament. … As Lord Hoffmann said in R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115, 131, fundamental rights cannot be overridden by general or ambiguous words …" (para 61).

45.

Similarly, Lord Rodger noted that resolution 1373 itself provided no “express guidance” as to the test, but simply prescribed the result to be achieved: “it does not indicate how states are to identify the people in question” (para 168). He observed, however, that the reasonable suspicion test meant that “sooner or later, someone will be designated who has not actually been committing or facilitating terrorist acts”. He agreed with Lord Hope that the making of an Order, which, in effect, amounts to “permanent legislation conferring powers to affect, directly, very basic domestic law rights of citizens and others lawfully present in the United Kingdom” went well beyond the general power conferred by section 1(1) of the 1946 Act (para 174).

46.
Lord Brown (dissenting in part) also referred to what he called the Simms principle or “principle of legality”, concluding:

“Where, as here, those to be designated under the proposed measure will suffer very considerable restrictions under the regime, I would hold that it can only properly be introduced by executive Order in Council if the measure is in all important respects clearly and categorically mandated by the UN resolution which it is purporting to implement. If the implementing measure is to go beyond this, then, consistently with the Simms principle, it can only properly be introduced by primary legislation.” (para 196)

47.
Laws LJ dealt with Mr Otty’s arguments under Ahmed relatively briefly. He said that, on a reading of the whole case, “the reach of the court’s concern” was no wider than the question whether the reasonable suspicion test in the regulation was authorised by section 1 of the 1946 Act. He noted Lord Hope’s comment that:

“The standard of proof is not addressed. The question how persons falling within the ambit of the decision are to be identified is left to the member states.”

and Lord Rodger’s comment to similar effect (both quoted above). He continued:

“It is in my judgment clear that if the imposition of sanctions is in principle authorised by [regulation 881], the general law does not impose a further requirement to the effect that the sanction may only bite if the material facts are proved on the balance of probability. By force of article 2(1), (3) of and Annex I to [regulation 881] the procedures of the material Security Council resolutions - the Consolidated List regime - are effectively incorporated into the [regulation]. There is no doubt but that the imposition of sanctions is in principle authorised by [regulation]. The question then is whether the Foreign Secretary has lawfully deployed the Prerogative power to invoke that authority by lifting the hold on the claimant’s designation. That in turn depends on the correct resolution of the issue I stated earlier: did the Foreign Secretary reach his decision conformably with the Consolidated List regime?” (paras 27-28)

As already noted, he answered that question in favour of the Secretary of State.

Discussion

48.
I have found this issue more troubling than (seemingly) did the courts below, particularly having regard to the strength of views expressed by this court in Ahmed. From the victim’s point of view it may seem strange that a process which, as applied under domestic legislation, was found to involve an unacceptable interference with his property rights, should be capable of automatic and immediate

reinstatement by the indirect route of a European regulation. Indeed, it is unclear from the substantive judgments in Ahmed to what extent the court was made aware of the limited practical effects of its decision. (Some reference was made by Lord Hope to that regulation in his dissenting judgment following a later hearing on the issue of suspension: Ahmed v HM Treasury (No 2) [2010] UKSC 5; [2010] 2 AC 634, 692, 693, at paras 12, 15.)

49.
However, as I have said, the majority judgments turned principally on the interpretation of a 1946 statute designed to give effect to United Nations resolutions but expressed in relatively general terms. Particular care was needed in applying it to a novel form of UN measure, directly targeted at the rights of individuals, as under the present resolution. The same considerations do not apply to an EU regulation designed specifically to give effect to the current UN regime, and itself subject to judicial review in the European courts. I note also that Lord Phillips was influenced by his inability to find anything in UN practice to support a reasonable suspicion test. (It seems that the FATF guidelines were referred to in argument, under the name “UN International Task Force guidelines”: see for example per Lord Hope para 59.) We have the advantage of the more recent evidence, on which Mr Swift is now able to rely as to the current practice of the UN committee, supported by the Ombudsperson. Although this later evidence was not available at the time of the decisions under review, there is no indication that it represented a material change of practice or loosening of the tests previously applied by the committee. Had this been available to the court in Ahmed, it might well have influenced some aspects of the reasoning, even if it is unlikely materially to have affected the majority’s view of the interpretation of the 1946 Act.

50.
In substance therefore I agree with reasoning of the Court of Appeal, supported by the more recent evidence relied on by Mr Swift. The position of a decision-maker trying to assess risk in advance is very different from that of a decision-maker trying to determine whether someone has actually done something wrong. Risk cannot simply be assessed on a balance of probabilities. It involves a question of degree. The Court of Appeal were right to attach weight to the notes to the FATF Special Recommendation which referred to the “preventative” purpose of designation, and the requirement to freeze terrorist-related funds based on “reasonable grounds, or a reasonable basis, to suspect or believe” that they could be used to finance terrorist activity. This is similar in substance to the language used by the Ombudsperson in her Fifth Report dated 31 January 2013, where she rejected a test based on probability, and proposed the standard “whether there is sufficient information to provide a reasonable and credible basis for the listing”. She saw this as one which recognised “a lower threshold appropriate to preventative measures”, while setting a “sufficient level of protection for the rights of individuals”. As a member of the 1267 committee, the Secretary of State was not only entitled, but would be expected, to apply the same approach as the committee as a whole. On this ground also the appeal must fail.

Standard of review

The issues

51.
In the Divisional Court, under the heading “rationality”, Toulson LJ considered Mr Otty’s submission that there was insufficient evidence to support the Secretary of State’s finding in 2005 of a subsisting association between the appellant and any Al-Qaida organisation, and nothing to show any difference from the position in 2009 when he reached the opposite conclusion. Toulson LJ concluded that the

Secretary of State was entitled to rely on the assessment by the Security Service that the appellant "continued to hold extremist views and presented a continuing risk of participation in the activities of the EIJ". It was well established that the courts should pay "very high respect to ministerial security assessments on competence and constitutional grounds". The fact that four years later the Security Service came to a different assessment did not mean that the view taken in 2005 was "irrational" (paras 82-84).

52.
In the Court of Appeal Laws LJ rejected Mr Otty's submission that a rationality review was inappropriate:

"… there is no question of precedent fact. Nor is there any issue of proportionality: not only because we are outside the territory of the European Convention but also because the Foreign Secretary was not required to exercise a discretionary judgment where there might have been alternative outcomes - fertile ground for a proportionality approach. Here, however, once satisfied that the claimant met the criteria for designation, the Foreign Secretary's duty was to include him in the Consolidated List." (para 42)

53.
Mr Otty challenges this reasoning on three grounds:

i)
the claim did include a challenge brought pursuant to the European Convention which required an assessment of proportionality;

ii)
in the context of the present case concerning interference with fundamental rights, common law review is not restricted to a Wednesbury rationality test;

iii)
the court was wrong to hold that the case involved no discretionary judgment by the Secretary of State, and therefore no basis for assessing its proportionality.

The second submission relies on cases decided in this court since the decision of the Court of Appeal (Kennedy v Information Comr [2015] AC 455, Pham v Secretary of State for the Home Department [2015] 1 WLR 1591, which are said to confirm that a simple Wednesbury test was inappropriate: see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223).

54.
Mr Swift for the Secretary of State accepts that the court is likely to take the approach signalled in Kennedy and Pham as its starting point, and that the facts of the case make it one in which the review to be conducted will be towards "the intense end of the scale", conducted "in accordance with common law principles, incorporating notions of proportionality". He does not, as I understand him, adopt Laws LJ's suggestion that such an approach is inappropriate because the Secretary of State "was not exercising a discretionary judgment where there might have been alternative outcomes". He emphasises, however, that application of the doctrine of proportionality "does not mean that there has been a shift to merits review" (citing, inter alia, R (Daly) v Secretary of State for the Home Department, [2001] UKHL 26; [2001] 2 AC 532 paras 27-28, per Lord Steyn). He submits that the review conducted by the Divisional Court, albeit under the heading "rationality", was entirely consistent with the new approach indicated by Kennedy and Pham. Toulson LJ [2013] QB 906

recognised the “gravity of the consequence of the designation for the claimant” and conducted a review of “commensurate intensity”.

Discussion

55.
In Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2015] 3 WLR 1665 (decided since the hearing in this appeal) this court had occasion to consider arguments, in the light of Kennedy and Pham, that this court should authorise a general move from the traditional judicial review tests to one of proportionality. Lord Neuberger (with the agreement of Lord Hughes) thought that the implications could be wide-ranging and “profound in constitutional terms”, and for that reason would require consideration by an enlarged court. There was no dissent from that view in the other judgments. This is a subject which continues to attract intense academic debate (see, for example, the illuminating collection of essays in The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow ed Wilberg and Elliott, 2015). It is to be hoped that an opportunity can be found in the near future for an authoritative review in this court of the judicial and academic learning on the issue, including relevant comparative material from other common law jurisdictions. Such a review might aim for rather more structured guidance for the lower courts than such imprecise concepts as “anxious scrutiny” and “sliding scales”.

56.
Even in advance of such a comprehensive review of the tests to be applied to administrative decisions generally, there is a measure of support for the use of proportionality as a test in relation to interference with “fundamental” rights (Keyu paras 280-282 per Lord Kerr, para 304 per Lady Hale). Lord Kerr referred to the judgment of Lord Reed in Pham (paras 113, 118-119) where he found support in the authorities for the proposition that:

“… where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality.” (para 119)

See also my own judgment in the same case (para 60), and those of Lord Mance (paras 95-98) and Lord Sumption (paras 105-109), discussing the merits of a more flexible approach in judging executive interference with important individual rights, in that case the right to British citizenship.

57.
On the other hand, in many cases, perhaps most, application of a proportionality test is unlikely to lead to a different result from traditional grounds of judicial review. This is particularly true of cases involving issues of national security. In Bank Mellat v HM Treasury (No 2) [2013] UKSC 39; [2014] AC 700 (which concerned another security council regime, relating to nuclear weapons), there was not only majority and minority agreement as to the steps involved in an assessment of “proportionality” (demanded in that case by the relevant statute), but also, within that context, general recognition that on issues of national security a large margin of judgment was accorded to the executive (paras 20-21 per Lord Sumption, para 98 per Lord Reed). The difference turned on contrasting views as to the allegedly discriminatory nature of the restrictions in that case. Similar considerations apply in the present case.

58.

Mr Otty asks us to go further and to hold that the Divisional Court should have conducted a full "merits review" of the Secretary of State's decision. He finds support in the judgments of the Court of Appeal in Ahmed in which such a submission appeared to find favour with Sir Anthony Clarke MR and Wilson LJ ([2008] EWCA Civ 1187; [2010] 2 AC 534 at pp 578, 587). I agree with the Court of Appeal (para 38) that those observations were made in the context of an Order made under a domestic statute, and were overtaken by the decision of this court that the Order was ultra vires. In my view, they can have no application in the present context, which concerns the Secretary of State's functions as a member of a UN committee. Even accepting that his decision is judicially reviewable, it is to the member states, as members of the committee, that the Security Council has entrusted the task of determining whether the criteria for listing are fulfilled. It would be quite inconsistent with that regime for a national court to substitute its own assessment of those matters.

59.
On the basis that a proportionality review is appropriate, two issues arise: first, whether the application of such a test to the decisions under challenge would have made any difference; secondly, if so, whether or not, having regard in particular to the subsequent changes in the basis of the appellant's designation, the court should refuse any remedy in respect of the earlier decisions. As to the first, I agree with Mr Otty that, in the light of subsequent authority, Toulson LJ was wrong to lay emphasis on a test based on "irrationality". However, apart from the general criticism, he has failed to highlight any particular aspect of the reasoning which is open to challenge even applying a proportionality test. Apart from a general denial of involvement in terrorism, the appellant has not addressed the specific incidents referred to in the 2005 security assessment. Nor in my view has he provided any grounds for questioning the Secretary of State's assessment of future risk, given the wide margin allowed to him on such an issue.

60.
In any event, whatever grounds there may be for criticism of Toulson LJ's reasoning, they have in my view been entirely overtaken by subsequent events. Even if we were to find a legal flaw in the 2005 decision, that would not of itself entitle the appellant to a remedy. Mr Otty has been unable to show how an order quashing the 2005 decision, or a declaration of illegality, would have any substantive effect on his present position. Even in 2010 quashing the Secretary of State's decision would not have detracted from the continuing effect of the committee's listing, or its application in the United Kingdom through regulation 881. So far as it concerns the Secretary of State's own position, he had already decided by 2009 to support the application for de-listing. His subsequent change of mind in 2014 followed the Ombudsperson's report. There is no reason to link it to any flaws that might have been shown in his reasoning in 2005.

61.
More generally, the court should in my view be very slow to grant a substantive remedy in the circumstances now facing the court. Judicial review is a discretionary remedy. The court is not required to ignore the appellant's own conduct, or the extent to which he is the author of his own misfortunes. I appreciate that the material disclosed by the Ombudsperson's report became available after the Court of Appeal's judgment, and indeed after the grant of permission to appeal to this court. It is not formally in issue before us. Further the appeal raised important issues of law which needed a decision. I can understand therefore why it was decided to defer for the moment detailed consideration of any challenge to the latest decision. However, the fact remains that there is before the court unchallenged evidence showing that the appellant is at least a strong vocal supporter of Al-Qaida and its objectives. That stands uneasily with his simple denial in 2010 of any involvement in

terrorism. If those allegations were misplaced, I would have expected him to want to say so publicly at the first opportunity. I raised my concern with Mr Otty at the opening of the appeal, but I heard no convincing answer. Even if the appellant were otherwise entitled to some relief, I would be very hesitant about granting it so long as these allegations stand unrefuted.

Conclusion

62.
For the reasons I have given, I would dismiss this appeal.