Status: Positive or Neutral Judicial Treatment

Secretary of State for the Foreign Office and Commonwealth Affairs v E Maftah and A Khaled

Case No: C1/2010/2522

Court of Appeal (Civil Division)

13 April 2011

[2011] EWCA Civ 350

2011 WL 1150924

Before: The Lord Chief Justice of England and Wales Lord Justice Sedley and Lady Justice Smith

Date: 13/04/2011

On Appeal from the High Court of Justice Queen's Bench Division Administrative Court

Mr Justice Keith

[2010] EWHC 1868 (Admin)

Hearing date: Wednesday 23 February 2011

Representation

Mr Jonathan Swift QC (instructed by Treasury Solicitors) for the Appellant.

Mr Rabinder Singh QC and Mr Dan Squires (instructed by Public Law Solicitors) for the Respondent.

Judgment

Lord Justice Sedley:

1 This is an appeal by the Secretary of State against the decision of Keith J, sitting as a judge of the Administrative Court, [2010] EWHC 1868 (Admin), that the claimants' respective applications for judicial review potentially involved the determination of rights governed by article 6 of the European Convention on Human Rights .

2 Article 6(1) provides:

> In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

3 The question was whether the two claims for judicial review involved, or might involve, the determination of the claimants' civil rights within the meaning of article 6 . By order of Mitting J it was taken as a preliminary point, though it was not capable of being dispositive of the claims in whichever sense it was answered.

4 Both claimants are Libyans who have lived in exile here for many years. Each was placed, at the instigation of the government of the United Kingdom, on a list maintained by the Sanctions Committee of the United Nations Security Council of persons believed to be associated with Al Qaida, Usama Bin Laden or the Taliban. Neither had any notice of the proposal nor any

opportunity before or after being listed to challenge it.

5 The purpose and effect of listing are to freeze all the individuals' assets, to place the release of any funds entirely in the discretion of the executive and thereby to make them what in *A and others v HM Treasury [2008] EWCA Civ 1187* , §125, I called a prisoner of the state. Until the Order in Council providing for this regime was struck down as unlawful by the Supreme Court ([2010] UKSC 2) it was pursuant to it that the listing of the claimants was implemented. But both up to and since that time the listing has also been pursuant to a similar regime created by EU Regulation 881/2002 .

6 It has now been accepted by the United Kingdom that the organisation (the Libyan Islamic Fighting Group) with which the two claimants had allegedly been associated is not, or at least is no longer, linked to Al-Qaida. Mr Maftah, at the United Kingdom's request, has now been de-listed. Despite a similar request, Mr Khaled has so far not been. But the claimants wish to be cleared of the suggestion that either of them at any time had terrorist connections.

7 One means to this end is to establish that the sole evidence against them – assuming that it amounted to evidence – was of association with the LIFG; if it was, to refute it; and, if it was not, to have the opportunity to deal with any other evidence deployed against them. Mr Maftah is concerned in particular that the Libyan regime may have taken advantage of a recent rapprochement with the United Kingdom to supply false information about opponents who are beyond its physical reach.

8 It is considered by the Secretary of State that the fair hearing vouchsafed by article 6 is or may be more generous in the disclosure it affords than the common law which, as is accepted on all hands, will otherwise govern the conduct of these proceedings. The assumption has not been argued out; but this makes it more, not less, necessary to express concern, which I believe the other members of the court share, at any assumption that the standard of fairness set by the common law for the judicial determination of civil issues is in any respect, disclosure included, weaker than that set by article 6 of the Convention.

9 Since, however, it falls to us, irrespective of whether it has any practical consequences, to decide whether Keith J was right or wrong about the issue, I turn to the arguments.

10 All six of the impugned acts were either decisions of the Foreign and Commonwealth Office (FCO) to take steps which resulted in the listing of the claimants or omissions of the FCO to take steps in relation to their delisting. They are justiciable as forms of allegedly unlawful conduct on the part of the state in which the claimants have a sufficient interest to seek judicial review. But each act or omission necessarily and designedly impinges on the claimants' private life (and therefore on an interest protected by article 8) and on the enjoyment of their property (and thus on an interest protected by article 1 of the First Protocol). Both claims would stand up in public law whether or not this was so; but it is on the inexorable invasion of Convention rights that the present argument that the claims involve civil rights turns.

11 The FCO's case is that the alleged infringement of Convention rights is at most a side-effect of what is in every material respect a challenge to the legality of the exercise of sovereign powers, and in no more than a marginal sense a vindication of civil rights. The claimants' case is that the litigation is centrally about the violation by deliberate and targeted executive action of rights which have been patriated by the Human Rights Act and are *par excellence* civil rights.

12 The judge's conclusion was that the litigation concerned civil rights within the scope of article 6(1) . His reasons in essence were that the Secretary of State was putting form above substance, and that the substance of the claims concerned decisions taken in Whitehall which it was known would automatically bring about the listing of anyone who was named, destroying their reputations, invading their private lives and paralysing their assets, and thus – subject to imponderables to which the judge drew attention – attacking civil rights recognised by the Convention itself.

13 Since we have had to go through the case-law on the subject, it is no disrespect to Keith J if we turn directly to it without reproducing his careful analysis of it.

14 The only thing which is certain is that civil rights in article 6 have an autonomous meaning. The Strasbourg court has made this clear on more than one occasion. What is neither certain nor clear is what that meaning is.

15 Dr König was a plastic surgeon in private practice whose professional association laid a charge of professional misconduct against him before a medical tribunal which was a satellite of the local administrative court. The charge was found proved and his appeal to a higher court failed. His Convention claim related to the length of time the proceedings had taken, so that he first had to establish that they had involved a determination of his civil rights. This he succeeded in doing: König v Germany (1978) 2 EHRR 170 . The reason was that the proceedings concerned not his registration – an administrative matter – but his right to earn a living on the basis of it: see §91. The Court, however, did not treat the distinction as definitive: it found in the doctor's favour "without it being necessary in the present case to decide whether the concept of 'civil rights and obligations' [in art. 6(1)] extends beyond those rights which have a private nature".

16 König was an early case in the Court's jurisprudence. It has been succeeded by two cases which make it fairly clear that some forms, at least, of state action fall outside the autonomous concept of civil rights and obligations.

17 In *Pellegrin v France (2001) 31 EHRR 26* a senior civil servant who had been, in effect, removed from office was held by the Grand Chamber not to have a claim under article 6(1) . Although the facts are a long way from the present cases, it is the way the court expressed its reasoning which has relevance to the Secretary of State's case:

> 66. ….. In practice, the Court will ascertain, in each case, whether the applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. In doing so, the Court will have regard, for guidance, to the categories of activities and posts listed by the European Commission in its Communication of 18 March 1988 and by the Court of Justice of the European Communities.
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> 67. Accordingly, no dispute between administrative authorities and employees who occupy posts involving participation in the exercise of powers conferred by public law attract the application of Article 6(1) since the Court intends to establish a functional criterion. ….
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> …..
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> 70. The facts of the case show that the tasks assigned to the applicant gave him considerable responsibilities in the field of the State's public finances, which is, *par excellence* , a sphere in which States exercise sovereign power….

18 There followed shortly afterwards the decision, again of the Grand Chamber, in *Ferrazzini v Italy (2002) 34 EHRR 45* . The case concerned trial delays in Italy, but the subject-matter was the applicant's liability to tax. The Court held that, albeit "private interests are clearly at stake in tax proceedings", taxation was a public law matter and therefore outside the purview of article 6(1) . The decision thus resolved the question left open by König . It also gave some significant indications of what a public law matter was for the purposes of distinguishing it from civil rights and obligations:

> 25. Pecuniary interests are clearly at stake in tax proceedings, but merely showing that a dispute is "pecuniary" in nature is not in itself sufficient to attract the applicability of Article 6(1) under its "civil" head. In particular, according to the traditional case law of the Convention institutions,
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> > There may exist 'pecuniary' obligations vis-à-vis the State or its subordinate authorities which, for the purpose of Article 6(1) , are to be considered as belonging exclusively to the realm of public law and are accordingly not covered by the notion of 'civil rights and obligations. Apart from fines imposed by way of 'criminal sanction', this will be the case, in particular, where an obligation which is pecuniary in nature derives from tax legislation or is otherwise part of normal civic duties in a democratic society.

> 26. The Convention is, however, a living instrument to be interpreted in the light of present-day conditions, and it is incumbent on the Court to review whether, in the light of changed attitudes in society as to the legal protection that falls to be accorded to individuals in their relations with the State, the scope of Article 6(1) should not be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions.
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> 27. Relations between the individual and the State have clearly developed in many spheres during the 50 years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations. This has led the Court to find that procedures classified under national law as being part of “public law” could come within the purview of Article 6 under its “civil” head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages. Moreover, the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as “civil”.
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> 28. However, rights and obligations existing for an individual are not necessarily civil in nature. Thus, political rights and obligations, such as the right to stand for election to the National Assembly, even though in those proceedings the applicant's pecuniary interests were at stake, are not civil in nature, with the consequence that Article 6(1) does not apply. Neither does that provision apply to disputes between administrative authorities and those of their employees who occupy posts involving participation in the exercise of powers conferred by public law. Similarly, the expulsion of aliens does not give rise to disputes over civil rights for the purposes of Article 6(1) of the Convention, which accordingly does not apply.
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> 29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the “civil” sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1 , which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes. Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer.

19 Jonathan Swift QC for the Foreign Secretary points in particular to the use of the phrase “the hard core of public authority prerogatives” as a distinguishing category coextensive, in his submission, with what in Pellegrin the Court called “sovereign power”.

20 Rabinder Singh QC for the two respondents points first to what Pellegrin and Ferrazzini do not exclude from article 6(1) . Where a senior civil servant's employment is excluded, it is equally clear, by parity of reasoning, that a clerical worker's is not. While the obligation to pay tax belonged, according to the Italian government, “exclusively to the realm of public law”, its purpose being “to support national economic policy” (Ferrazzini §21), freezing orders are designed to strike directly and individually at assets, private lives and reputations.

21 At the forefront of his case before us, Mr Singh now puts the decision of the House of Lords in *R (Alconbury Developments) v Secretary of State for the Environment [2001] UKHL 23* – a case not referred to either below or in the skeleton arguments for this court. One reason for this may be that neither Pellegrin nor Ferrazzini was apparently before the House, albeit the former had been decided some time earlier. It is the latter, however, which, in my respectful view, would have made a material difference to the analysis and exegesis of the Strasbourg case-law in the

speech of Lord Hoffmann on which Mr Singh relies.

22 At §79 Lord Hoffmann offered an interesting explanation in terms of comparative law of König , concluding:

> ….. The court has not simply said, as I have suggested one might say in English law, that one can have a “civil right” to a lawful decision by an administrator. Instead, the court has accepted that “civil rights” means only rights in private law and has applied article 6(1) to administrative decisions on the ground that they can determine or affect rights in private law.

23 He went on to illustrate how this doctrine had worked by reference to Ringeisen v Austria (1971) 1 EHRR 455 where the decisive effect of “a classic regulatory power exercisable by an administrative body” on a contract for the sale of land had brought article 6(1) into operation. Neither of these early decisions has been overtly called in doubt by the Court's later jurisprudence.

24 What seems to me to emerge from the present Strasbourg jurisprudence is that, while civil rights within the autonomous meaning of article 6 can be brought into play either by direct challenge or by administrative action, it is the nature and purpose of the administrative action which determines whether its impact on private law rights is such that a legal challenge to it involves a determination of civil rights. Thus, for example, the nature and purpose of taxation are such that, despite its direct impact on property rights, taxation falls outside article 6 ; while the nature and purpose of professional regulation are such that its impact on the right to earn a living may bring it within article 6 .

25 Mr Swift seeks to add an overriding class of exempted acts, namely acts which represent the exercise of the sovereign power of the state. For this he relies on the passages from Pellegrin and Ferrazzini which are cited above. I do not accept this approach. It assumes, first of all, a version of state sovereignty which is unlikely to be common to the member states of the Council of Europe, many of which have written constitutions that keep executive power within the limits not only of domestic law but of the state's treaty obligations (of which the Convention will be one). Secondly, it confuses the state with the executive, claiming for the latter an autonomy which only the former possesses and assuming a freedom of executive action under the United Kingdom's common law constitution which, if it was ever the case, is now history. What I said of Orders in Council in *Secretary of State for Foreign and Commonwealth Affairs v R (Bancoult) [2007] EWCA Civ 498* (a decision overset, by a majority, on its facts: [2008] UKHL 61), §35–6, is true of executive acts generally:

> 35. … [A]n Order in Council is an act of the executive and as such is amenable to any appropriate form of judicial review, whether anticipatory or retrospective. What determines the constitutional status of a measure – a statute, a judgment or an order — is not its formal authority, which is always that of the Crown, but its source in the interlocking but unequal limbs of the state. One aspect of this structure, determined by the historic compromise reached in the course of the 17th century, is that both the courts and the executive will treat the authority of Parliament, duly exercised, as absolute. Another aspect, upon which both democratic governance and the rule of law depend, is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is (*M v Home Office [1992] QB 270* , 314, per Nolan LJ, cited in Bradley and Ewing, *Constitutional and Administrative Law* , 14th ed, 2007, p.90).
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> 36. This case, correspondingly, concerns not a sovereign act of the Crown but a potentially justiciable act of executive government. Were we to hold otherwise we would be creating an area of ministerial action free both of Parliamentary control and of judicial oversight, defined moreover not by subject-matter but simply by the mode of enactment. The implications of such a situation for both democracy and the rule of law do not need to be spelt out.

26 In my judgment the critical question is therefore the one spelt out in §24 above, uncoloured by the rhetoric of state sovereignty. I confess that I find the categorisation of freezing orders in this

context extremely difficult, because the nature and purpose of freezing orders can themselves be legitimately described both as a step in the international struggle to contain terrorism and as a targeted assault by the state on an individual's privacy, reputation and property. The heart of Keith J's decision was that the orders were in form the first but in substance the second of these things; but I am not convinced that the Strasbourg jurisprudence looks to this distinction. It seems to look, rather, to the nature of the power itself. So seen, the making or procuring of a freezing order is, I think, a discharge of public functions, albeit with a dramatic impact on the civil rights of individuals. It is challengeable in public law, but the challenge is to the procuring and continuance of the order, not to its effects.

27 Mr Singh's alternative way of putting his case in this situation is that the claims themselves raise and assert civil rights. For this he relies on what Lord Nicholls said in *Re S (Minors) [2002] UKHL 10* , §71:

> Although a right guaranteed by article 8 is not *in itself* a civil right within the meaning of article 6(1) , the Human Rights Act has now transformed the position in this country. By virtue of the Human Rights Actarticle 8 rights are now part of the civil rights of parents and children for the purposes of article 6(1) . This is because now, under section 6 of the Act, it is unlawful for a public authority to act inconsistently with article 8 .

28 I follow the logic of this proposition, but I am unable to see that it has a bearing on the issue before us. As Mr Swift submitted, the issue before us is not whether Convention rights are now civil or private law rights in domestic law – they clearly are – nor whether they are capable of ranking as civil rights for the particular purposes of article 6 – which again they without doubt are. It is whether the subject-matter of the two judicial review claims involves the determination of civil rights.

29 A public law challenge in England and Wales does not depend on the existence and invasion of a positive right, though it may well involve these: it depends only on the claimant's having a sufficient interest in an arguable abuse of power. This both claimants clearly have. But while their Convention rights will, if they succeed, be vindicated, the challenge to the state's acts does not turn on this. It turns on the propriety of the acts and omissions which have brought about the interference with their interests and rights. The fallback argument does not therefore differ in reality from the main argument.

30 I would accordingly allow this appeal.

Lady Justice Smith:

31 I agree with Sedley LJ. Whether the issue we have decided will have any real impact on the conduct or outcome of these claims seems to me very doubtful. The Secretary of State wished to have the application of article 6 determined because he is of the view that this will make a difference to the extent to which sensitive material will have to be disclosed to the claimants for use in open court as opposed to disclosure to the claimants' special advocates for use in closed session. I doubt that there will be any difference between the position at common law and under the Convention.

The Lord Chief Justice of England and Wales:

32 I also agree with Sedley LJ. By way of emphasis I should add that I would need a great deal of persuasion to accept that the standard of fairness set by the common law for the determination of issues arising in civil litigation is any less robust than the standards set by article 6 of the Convention.