PROSCRIBED ORGANISATIONS APPEAL COMMISSION

Appeal No: PC/04/2019
Hearing Date: 29th & 31st July 2020
Date of Judgment: 18th February 2021

Before

THE RIGHT HONOURABLE LADY JUSTICE ELISABETH LAING
MR RICHARD WHITTAM QC
MR PHILIP NELSON CMG

Between

ARUMUGAM & OTHERS

Appellants

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

JUDGMENT ON RELIEF

MS M. LESTER (QC) and MR M. BIRDLING (instructed by **Bindmans LLP**) appeared on behalf of the Appellant.

SIR J. EADIE (QC), Mr B WATSON and MS E WILSDON (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State.

MR A. Mr McCULLOUGH (QC) and MS R. TONEY (instructed by **Special Advocates' Support Office**) appeared as Special Advocates.

1. At the end of the substantive hearing in this case, the parties agreed that the Commission should deal with the question of relief once it had handed down its judgment. In due course the parties agreed the terms of a draft order which provided for written submissions to be exchanged. The parties agreed that, if the Commission thought it necessary, there could be a further oral hearing on this issue. That agreement was reflected in an order made by the Commission on 26 October 2020.
2. We thank the parties for their further submissions, which were initially made in two stages. We have read those. We apologise for our delay in circulating this judgment in draft. This was caused by a request by the Special Advocates for disclosure to the OPEN representatives of part of the CLOSED submissions made by Secretary of State ('the SoS') on relief. This request meant that we had to consider further CLOSED written submissions, and to prepare a further CLOSED judgment on disclosure. The SoS then served a gist of her CLOSED submissions on the OPEN representatives on 18 December 2020, and we gave them an opportunity to make further written submissions if they wished to. We have read their solicitor's email of 23 December. He said, understandably, that the OPEN representatives could not meaningfully comment on any CLOSED material on which the SoS sought to rely on the question of relief.
3. In the light of the parties' full written arguments, we do not consider that a further hearing is required.

Does the Commission have a duty, or a power, to make an order under section 5(4) of the 2000 Act?

4. We described some of the relevant statutory provisions in paragraphs 12-16 and 20-21 of our OPEN judgment. In short, the Commission must allow an appeal if the test in section 5(3) is met, but the Commission's only express power, if it allows an appeal, is to make an order under section 5(4).

The submissions

5. The As note the difference between, for example, section 2D(4) of the 1997 Act and section 5(3) of the 2000 Act. Section 2D(4) spells out that the Commission may decide that a decision should be set aside; there is no equivalent provision in section 5 of the 2000 Act. The As submit that the section 5(4) order is the only remedy provided by the 2000 Act. The Commission has no express power to order de-proscription, or to remit the case to the SoS. If a section 5(4) order is made, Parliament, rather than the SoS, is

the ultimate decision maker. The As accept that the Commission has a discretion not to make an order under section 5(4). The As submit that the discretion should be exercised in a similar way to the way in which a court exercises its discretion about relief when it allows an application for judicial review, and in particular, its discretion about whether or not to quash a decision which it has held to be unlawful. It should only refuse to 'quash' (in this context, to make an order under section 5(4)) in exceptional cases. This case is not such a case.

6. The As further submit that their interpretation of section 5(4) is supported by statements made in Parliament by the then SoS during the Committee stage of the Terrorism Bill. There was an exchange about what would happen if an appeal succeeded and Parliament took a different view from the SoS and from the Commission. The SoS replied that Parliament was sovereign. The As contend that, under the 2000 Act, the role of the legislature is central. It would only be appropriate for the Commission not to make an order under section 5(4) if that would be pointless.
7. The As refer to the SoS's guidance to appellants which says, 'If you win your case, the organisation will be removed from the list of proscribed organisations'. That gives the As, and others, a 'clear expectation' that other than in an exceptional case, the section 5(4) remedy follows a successful appeal.
8. The As submit that if the Commission were to decide that it does have jurisdiction to remit the case to the SoS, such an outcome would be unfair. It would create the potential for successive appeals, should the SoS make the same decision again, which given the SoS's 'rolling' approach to evidence, could become an 'endless loop'. The As would be denied an opportunity for the issue to be considered by Parliament, which was the very remedy which they sought on this appeal. That, they argue, would not be an effective remedy, and it would be incompatible with the rule of law.
9. They contend that this unfairness is compounded by the fact that the SoS did not put the question of remedy in issue until five days before the hearing. It was for the SoS to put material before the Commission which was relevant to the continued proscription of the LTTE, because the As challenged its compatibility with their Convention rights; evidence of matters since the decision was clearly relevant to that. The SoS, having chosen not to do that, cannot deprive the As of an effective remedy by making that choice, and because she would like another opportunity to rely on that, or other, evidence. That would be an abuse of the Commission's process. In any event, the SoS did submit some material relating to matters after the decision. This was clearly not

limited to material which the duty of candour required her to disclose. It included an addendum report from JTAC. This is inconsistent with a submission that the SoS deliberately did not put post-decision evidence before the Commission.

10. The SoS submits that we should not make an order under section 5(4) for four reasons.
    i. We allowed the appeal because we found that there were procedural/administrative failings in the way the case was put to the SoS.
    ii. The Commission did not reach a concluded view on the merits of the As' three grounds of appeal, and expressed a provisional view that if the test for proscription were met, it was hard to see how continued proscription could be a disproportionate interference with the As' rights.
    iii. The Commission rejected a series of challenges to the merits of the decision.
    iv. The Commission while holding that the decision would not 'inevitably have been the same' without the November 2018 incident could not say that the decision would have been different without it.
11. In sum, the SoS submits that there is nothing in our decision which suggests that she could not properly have concluded that the LTTE was concerned in terrorism when she decided to proscribe the LTTE. To make a section 5(4) order would subvert the statutory scheme by requiring the SoS to lay an order in Parliament deproscribing the LTTE with no considered assessment of the merits of that course. Finally, much time has passed since the making of the decision which was challenged. The SoS should be allowed to consider whether there is any more recent evidence which is relevant to the issues.
12. The SoS submits that the effect of allowing the appeal is that the original decision is quashed, and that the necessary consequence of that is that the SoS, as the primary decision maker under the statutory scheme, should reconsider the application for deproscription. She undertakes to do so within 90 days of the date of the Commission's order.

Discussion

13. The scope of the Commission's powers on an appeal is a question of statutory construction. We do not accede to the As' invitation to take statements made in Parliament by the former SoS into account when deciding that question. Statements in

Parliament not only do not help us to understand the scope of the section 5(4) power, they are not admissible as aids to construction (see *Pepper v Hart* [1993] AC 593, and *R (Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] AC 349, which SoS drew to our attention). We do not consider that the SoS's guidance is admissible either; but even if it were, it only tells what the SoS thought the words might mean. The primary guide to Parliament's intention is the words of the enactment.

14. Before we consider section 5(4) in more detail, it is convenient to ask what the consequence of a decision to allow an appeal might be. The express terms of the 2000 Act do not make exhaustive provision about this. They impose a duty to allow an appeal if the Commission finds that a decision is flawed and then confer a discretion to make an order under section 5(4) (see further, below). We acknowledge that the 1997 Act expressly confers a power to set aside a decision, and that the 2000 Act does not. We have to consider whether, nevertheless, it is necessarily implicit in this scheme that the effect of allowing an appeal is that the decision which has been challenged is set aside. If that were not the position, Parliament would have created a position in which the Commission was obliged to allow an appeal, not obliged to give a section 5(4) remedy, but the successful appeal would have no effect. This would create an implausible gap. It would mean that the appeal had been allowed, but the allowing of the appeal achieved nothing for the successful appellant. We do not consider that such an intention can be attributed to Parliament. It seems to us that it is necessarily implicit in this scheme that if the Commission allows an appeal, the decision challenged is quashed. That point is supported, we consider, by the terms of section 5(4), which assume, without saying so expressly, that the challenged decision has been set aside.

15. The first question about section 5(4) is whether it confers a discretion. It is clear to us, as a matter of ordinary language, that the Commission has a discretion whether or not to make an order under section 5(4). The contrast between section 5(3) 'must allow an appeal' and section 5(4) 'may make an order' could not be clearer. The As were right to make that concession. So the starting point is that both sides agree, and we consider, that section 5(4) confers a discretion.

16. The next question concerns the scope of that discretion. It is useful at this stage to ask how this remedy compares with what would be available on an application for judicial review. The remedy under section 5(4) assumes that the equivalent of a quashing order has been made. It then directs the SoS to take steps to lay an order before Parliament

the effect of which, if Parliament approves it, is to de-proscribe an organisation. In that respect, the section 5(4) order goes further than a quashing order. In many cases, once a quashing order has been made, a court will remit the matter to the original decision maker, for him to take the decision again, in the light of the court's judgment. The cases in which the mere making of a quashing order will dictate the course to be taken by the decision maker in the light of the quashing order are few. By contrast, the section 5(4) order prevents the SoS from reconsidering a flawed decision, and deciding, nonetheless, to take the decision again and to maintain it.

17. It would, we suppose, be open to the SoS, having responded appropriately to a section 5(4) order, to make a wholly fresh decision to proscribe an organisation again. It seems to us, however, that it might be difficult for the SoS to go back to Parliament with a draft proscription order, if Parliament has only recently made a de-proscription order pursuant to section 5(4). That would be so, it seems to us, even if new material had emerged which supported the making of an order. This view in part reflects a point made by the SoS in paragraph 10 of her submissions in reply to the As' submissions. It seems to us that the As' submissions about the effect of section 5(4) tend to equate the effect of a quashing order with the outcome of a section 5(4) order. We do not consider that that is the position, for the reasons we have already given.

18. An order under section 5(4) is a very unusual remedy. The As are right to submit that this 'is not a "classic judicial review" '. The unusual nature of the remedy is, no doubt, in part, a consequence of the structure of the statutory scheme for proscription and de-proscription. Unlike many other decisions governed by public law, Parliament is involved in this decision-making process. The SoS does not merely make a decision to proscribe an organisation. That decision is given effect in an order made by Parliament. It is a decision-making power which in some ways resembles powers to make delegated legislation such as regulations.

19. What the As take from this is that Parliament is the ultimate decision maker under this statutory scheme. That is true, but only in the same way as it is true that Parliament is the ultimate decision maker in any scheme in which a decision maker is given power to make a statutory instrument subject to the affirmative resolution procedure. The only decision maker in this scheme, however, with the ability fully to investigate and evaluate the evidence and the competing considerations, in particular because they are very likely to involve CLOSED material, which would not be debated in Parliament, is the SoS. It seems to us that in constructing this scheme, Parliament will have had those

considerations in mind. Those considerations make it unlikely, we consider, that the statutory scheme has the effect for which the As contend.

20. The next question is what principles should guide the exercise of that power. As we have said, the Commission must allow the appeal if it considers that the decision is flawed 'when considered in the light of the principles applicable on an application for judicial review'. This contextual factor suggests, it seems to us, that the Commission should, when deciding whether or not to exercise the power conferred by section 5(4), also apply the principles which would apply on an application for judicial review. It seems to us that the As accept this approach. But that suggests that the section 5(4) remedy is not the default remedy in this scheme. It is unusual on an application for judicial review for a court not only to quash a flawed decision but also to direct the decision maker how to make the fresh decision.

21. There may be cases, as the SoS's argument recognises, where, applying judicial review principles, the Commission might find flaws in a decision which meant that a section 5(4) order was appropriate, for example, if there was no evidence to support a decision to proscribe an organisation, or where such a decision was *Wednesbury* unreasonable. We consider that the SoS's account of the flaws which we found in the decision is essentially correct. We did not find that there was no evidence to support the decision, or that it was *Wednesbury* unreasonable. This is not, therefore, a case in which we consider that it would appropriate to make an order under section 5(4).

Conclusion

22. For the reasons we have given, we decline to make an order under section 5(4). We accept the SoS's undertaking that, within 90 days of the order which reflects our decision, she will reconsider the As' application to de-proscribe the LTTE.

Is a CLOSED judgment on relief necessary?

23. We have considered whether we should give a CLOSED judgment on relief. We have decided that that is not necessary. There are two reasons. First, the issue of statutory construction is an OPEN issue. Second, as a result of the further disclosure we have described in paragraph 2, above, the OPEN representatives now know that there is nothing in our CLOSED judgment which undermines the conclusions in our OPEN judgment, and that the CLOSED judgment supports an argument, and what is now our decision, that a section 5(4) order would not be appropriate in this case.

24. Finally, the application for disclosure by the Special Advocates which we described in paragraph 2, above, is, in the experience of the members of this Panel, unique. As we have explained, it caused delay. Nevertheless, we consider that we should acknowledge that it is the reason why we have not thought it necessary to produce a CLOSED judgment. It has contributed to greater transparency, on the facts of this case, and we thank the Special Advocates for making it.