



27 January 2016

PRESS SUMMARY

Youssef (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)
[2016] UKSC 3

On appeal from [2013] EWCA Civ 1302

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Wilson, Lord Sumption, Lord Carnwath

BACKGROUND TO THE APPEALS

The appellant is an Egyptian national who has lived in the UK since 1994. He is subject to an asset freeze imposed on persons “associated with Al-Qaida” under Chapter VII of the United Nations Charter. The United Nations Security Council Sanctions Committee maintains a list of persons and entities subject to the asset freeze. All members of the committee must agree to a nomination for inclusion on the list, or to de-listing. The sanctions imposed on designated persons have a drastic impact on the individuals and entities concerned, and are of an indeterminate length. The United Kingdom had originally placed a hold on the appellant’s designation by the Sanctions Committee. On 14 September 2005 the respondent, in his capacity as a member of the Sanctions Committee, removed the United Kingdom’s hold on the appellant’s designation. As a consequence, the appellant became subject to the asset freeze. The appellant challenged the respondent’s decision of 14 September 2005 to remove the hold the United Kingdom had placed on the appellant’s designation.

The appellant challenged the respondent’s decision on four grounds: (i) although the respondent’s decision was made on untainted evidence, he was aware that the information on which other members of the Sanctions Committee were proceeding was or might have been obtained by torture, and this placed the respondent under an obligation not to support a tainted committee decision; (ii) 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, which could only be achieved by a clear statutory power or common law rule, neither of which existed; (iii) the standard of proof adopted by the respondent, namely “reasonable grounds to suspect” that the appellant met the criteria for designation, was too low; (iv) the *Wednesbury* standard of review, that of reasonableness or irrationality, was wrong given the gravity of the context, and the appellant was entitled to a full merits review or at least one involving a proportionality analysis. The appellant’s judicial review was dismissed by the Divisional Court and the Court of Appeal. He was subsequently granted permission to appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses Mr Youssef’s appeal. Lord Carnwath gives the only judgment, with which Lord Neuberger, Lord Mance, Lord Wilson and Lord Sumption agree.

REASONS FOR THE JUDGMENT

The court finds that the respondent’s 2005 decision to remove his hold on the proposal for the appellant’s designation by the Sanctions Committee was the exercise of prerogative powers for the conduct of foreign relations. This does not make it immune from judicial review, but the courts should proceed with caution [24].

On the first ground, torture-tainted evidence, the court finds that the respondent's decision must be judged by reference to *his* reasons, which were untainted, and not by the reasons of the committee which were published in 2010 [27]. Whilst there is no doubt as to the importance of the rules against torture and the use of torture-tainted evidence, these rules do not imply a duty on states to inquire into the possible reliance on torture-tainted evidence by other states, acting alone or as part of an international organisation [29].

On the second ground, absence of power, the court finds that there is statutory authority to satisfy the principle in *Entick v Carrington* that interference by the state with individual property rights cannot be justified by the exercise of prerogative powers, unsupported by specific statutory authority. The requisite statutory authority is provided by EU Regulation 881, which was given legislative effect by the European Communities Act 1971. The causative role played by the prior decision of the Sanctions Committee and the respondent as a member of the committee does not affect this conclusion [34].

The appellant's third ground, that the standard of proof of "reasonable grounds for suspicion" is too low, is rejected. The court holds that 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. Designation has a "preventative" purpose [50]. The Financial Action Task Force (FATF) recommendations relating to money-laundering and terrorist financing refer 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 of "whether there is sufficient information to provide a reasonable and credible basis for the listing" was proposed by the Ombudsperson in her report to the Security Council in January 2011 and reaffirmed by her in 2013 [38-9]. The appellant's reliance on the criticisms of a "reasonable suspicion" test by this court in *Ahmed v HM Treasury (No. 2)* [2010] UKSC 5 is rejected on the basis that the majority judgments in *Ahmed* turned principally on the interpretation of the United Nations Act 1946, and that this court has the advantage of more recent evidence as to the current practice of the UN committee court [49].

The fourth ground is the standard of review. The respondent accepted in light of the approach in *Kennedy v Charity Commission* [2014] UKSC 20 and *Pham v Secretary of State for the Home Department* [2015] UKSC 19, that the facts of the case are such that the review to be conducted will be "in accordance with common law principles, incorporating notions of proportionality", but submitted that this does not imply a shift to merits review [54]. The court finds that whilst there is support for the use of proportionality as a test in relation to interference with "fundamental rights", in many cases the application of a proportionality test is unlikely to lead to a different result from traditional grounds of judicial review, particularly in cases involving national security, where a large margin of appreciation is accorded to the executive [56-7]. The court rejects the appellant's submission that a full merits review was required, finding that the UN Security Council has entrusted member states, as members of the Sanction Committee, with determining whether the designation criteria are met. It would be inconsistent with that regime for a national court to substitute its own assessment [58]. The court finds that whilst the Divisional Court was wrong to lay emphasis on an "irrationality" test, the applicant had failed to identify any particular aspect of the reasoning which is open to challenge even applying a proportionality test [59].

The court holds that even if there were a flaw in the respondent's 2005 decision, this of itself would not entitle the appellant to a remedy. Quashing the decision would not have any substantive effect on the appellant's present position, as it would not detract from the continuing effect of the Sanction Committee's listing or its application in the United Kingdom through Regulation 881 [60].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.uk/decided-cases/index.html