

# A major first

## Ahmed: Khawar Qureshi QC reports on the Supreme Court's landmark decision

### IN BRIEF

- The UN Terrorist Finance Sanctions regime which enables a person to be placed on a list potentially indefinitely must provide for effective legal challenge.
- Delegated legislation seeking to give effect to UN Sanctions Resolutions must be clear and not go beyond the scope of the Resolutions.

The first case to be heard by the Supreme Court, concerned two Orders in Council (the Terrorism Order 2006 (TO) and the Al-Qaeda Order 2006 (AQO) (the SIs)), which sought to give effect to UN Security Council Sanctions Resolutions (the UNSCRs) targeted at terrorist funds and economic resources (*HM Treasury v Ahmed and others* [2010] UKSC 2 (Ahmed No 1, [2010] All ER (D) 179 (Jan)) and *HM Treasury v Ahmed and others* [2010] UKSC 5 (Ahmed No 2, [2010] All ER (D) 40 (Feb)).

Four individuals who were made the subject of the SIs from around late 2006/ August 2007 (and thus had access to any economic resources denied absent a licence from HM Treasury) sought to challenge the legal basis for the SIs.

The UNSCRs were promulgated pursuant to Ch VII (Art 41) of the UN Charter, and created a binding obligation on all member states to accept and carry them out (Art 25 UN Charter). Under English Law, international law obligations created by Treaty or UNSCR's must be "transposed" into domestic law. This is ordinarily done through primary legislation or delegated legislation.

It is a fundamental principle of English constitutional law that the greater the infringement upon individual rights through legislation, the greater will be the requirement for Parliamentary scrutiny/ legislative clarity. This is on the basis that Parliament will not be presumed to curtail freedoms in the absence of clear statutory language, and it must be manifest that Parliament intended legislation to have the effect being argued for (see the speech of Lord Browne Wilkinson in the case of *R v Secretary of State for the Home Department*

*Exp Pierson* [1998] AC 539 (HL), [1997] 3 All ER 577, and the speech of Lord Hoffmann in the case of *R v Secretary of State for the Home Department Exp. Simms* [2000] 2 AC 115 (HL), [1999] 3 All ER 400.

The UN Sanctions terrorist finance regime (which was mainly developed in response to the threats posed by Al-Qaeda/ Taliban and those allegedly connected to them) has recently been considered a source of potential for conflict between obligations arising out of UNSCRs, and the need for legal certainty. Of their nature, UNSCRs tend to be broad in their ambit and use language which is the result of political compromise.

The Supreme Court was required to consider these questions, in what is likely to be seen as a highly significant decision, both in terms of English Constitutional Law and the need for the UN Security Council to appreciate that its "legislative acts" (the UNSCRs) should comply with fundamental requirements such as the principle of legality, and provide scope for effective review (when individuals are directly affected). While the Supreme Court does not, of course, have any direct "Judicial Review" jurisdiction vis-à-vis the Security Council, one anticipates that the Supreme Court's decision will be carefully studied and considered by members of the UN Security Council.

A panel of seven judges delivered an 89-page judgment and found that both the TO and AQO were ultra-vires (Lord Brown dissenting vis-à-vis the AQO).

### The Issues

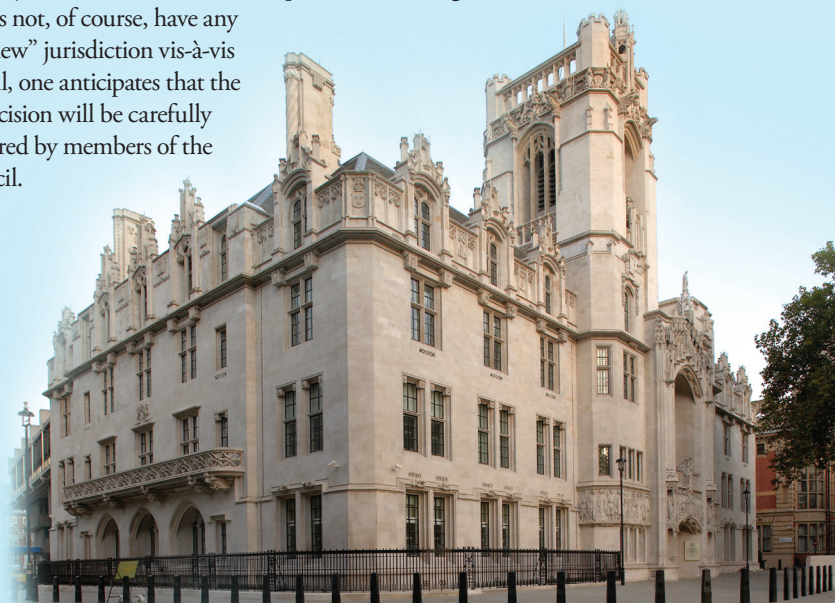
The court, *inter alia*, considered the context for the UNSCRs, and heard very detailed argument to the effect that the SIs were ultra-vires the United Nations Act 1946 (UNA 1946). Section 1 UNA 1946 enables SIs to be made by the executive without any kind of Parliamentary scrutiny "as appears... necessary or expedient for enabling [Ch VII Art 41 UNSCR Resolution] to be effectively applied".

Lord Hope (paras 5, 52 and 53 of his speech) contrasted the position *viz* the scheme for freezing assets pursuant to the Anti-Terrorism, Crime and Security Act 2001 (ACSA 2001). While the SIs are unlimited in time and not subject to Parliamentary scrutiny, the SIs promulgated under ACSA 2001 must be kept under review by HM Treasury, are time limited and must be approved by both Houses of Parliament.

Lord Hope observed that the case raised "fundamental questions about the relationship between Parliament and the executive and about judicial control over the power of the executive".

The court examined the manner in which the obligations arising under the UNSCRs had been "transposed" into English Law, in the case of the TO (Art 4(2)(a)) by adding a requirement of "reasonable grounds" for suspecting that an individual fell within the scope of the TO.

As for the AQO, it applied in the present context (pursuant to Art 3(1)(b) thereof) if the individual/entity in question was placed upon the UN Sanctions List (Designation). Designation takes place at the instigation of a UN member



state which provides the UN Sanctions Committee with information for this purpose.

The court observed that Designation could not be challenged by legal process, and that removal from the UN Sanctions List was by no means an easy process. The court also referred to the decision of European Court of Justice (ECJ) in the case of *Kadi v Council of the European Union* [2009] AC 1225, [2009] All ER (D) 34 (Sep). The ECJ held that Council Regulation (EC) No 881/2002 (the Regulation) implementing terrorist finance related UNSCRs (and thus providing for asset freezing of individuals/entities made the subject of Designation was incompatible with the need for full review to be available of all Community Acts.

### The decisions

At para 48 of his speech, Lord Hope stated that the wording of the SIs must

VII obligations prevail). The European Court of Human Rights (ECtHR) will be considering *Al-Jedda* shortly, and it remains to be seen whether this “hierarchy of norms” will be nuanced by the ECtHR.

### The vires of UNSCRs

In the speech of Lord Phillips (para 151) an interesting question was raised as to whether UNA 1946 was limited in terms of giving effect to Ch VII UNSCRs which were themselves *intra vires*. Lord Phillips expressed the view that such UNSCRs must be compatible with *ius cogens* norms. In stating this view, Lord Phillips has expressly raised the possibility (perhaps even likelihood) that the English court will be called upon to review the vires of Orders/SIs made under UNA 1946.

While an initial response may be to the effect that Lord Phillips’ observations assume

in the UK’s commitment to the UN Charter (para 206).

Lord Mance agreed with the majority and also observed (at para 249) that a relevant distinction could be made where UNSCRs had identified States and non-State actors (such as Al Qaeda). In the case of the TO, it was left to domestic legal systems to determine the identity of persons active as terrorists on whom sanctions should bite. In the case of the AQO, the determination was undertaken by non-judicial process at the international level, by which member states were bound without more.

### Suspending the effect of the Supreme Court judgment

A postscript concerns whether the effect of decision of the Supreme Court (handed down on 27 January 2010) could be suspended. Lord Hope and the majority agreed that the decision declaring the TO/AQO *ultra-vires* could be suspended for one month (to enable HM Treasury/third parties to consider the position).

However, HM Treasury then sought a six to eight-week suspension. At that point, while Lord Hope agreed with the request, the majority refused to grant any suspension. In very clear terms, in a judgment handed down on 4 February 2010 Lord Phillips (with whom the majority agreed) refused to grant any suspension on the basis that (*Ahmed No 2* at para 8) “the Court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment”. Emergency primary legislation was enacted the next day (Terrorist Asset Freezing (Temporary Provisions) Act 2010), the intended effect of which was to overcome the judgment of the Supreme Court—it remains to be seen what the outcome of any challenge to this measure will be.

### Concluding observations

The Supreme Court has delivered a very clear judgment dealing with issues that are central to the balance between the rights of the individual, protection of the public and the need to give effect to international obligations. Some may view the decision as being underpinned in no small part by the need for our highest court to remind all of us that the rule of law must always prevail. NLJ

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## “It was left to domestic legal systems to determine the identity of persons active as terrorists on whom sanctions should bite”

be tested precisely against the wording used in the UNSCRs. Lord Hope stated that provisions could be included in the SIs which differ from terms used by the UNSCRs or are unavoidably required by them. However, this would not justify interference with the basic rights of the individual any more than is necessary and unavoidable to give effect to the SCR and is consistent with the principle of legality.

Insofar as the TO relied upon the “reasonable suspicion” test, this went beyond the scope of the UNSCRs and the TO was declared to be *ultra vires* UNA 1946.

With regard to the AQO, the issue was the absence of any effective judicial remedy against Designation (given that Designation had been the basis of application of the AQO in one of the cases before the court), Art 3(1)(b) of the AQO was therefore declared to be *ultra vires*.

The court considered but did not rule upon European Convention on Human Rights (ECHR) based arguments. The court noted (per Lord Hope at paras 71-74) that the present state of the law (post *Al-Jedda* (2007) UKHL 56) was that UNSCR obligations took precedence over ECHR-based obligations—as a result of Art 103 of the UN Charter (which would have meant that, apart from a situation in which a peremptory norm is involved, UN Chapter

a jurisdiction on the part of domestic courts to test the vires of UNSCRs which does not as such exist, with respect, a fairer reading would indicate that Lord Phillips clearly had in mind the principle of Parliamentary Supremacy—namely that UNA 1946 enables proper and valid UNSCRs to be given effect to as a matter of domestic law. It is the responsibility of the domestic courts (and the domestic courts alone) to ensure that the thread of legality runs straight through from the UNSCRs to the SIs promulgated in respect thereof (see paras 217 to 218 of the speech of Lord Mance in this regard).

As to a possible way out for the Executive, Lord Rogers expressed the view that the “reasonable suspicion” element of the TO might be sustainable if its life span was limited and it was replaced by primary legislation (para 176).

### Lord Brown’s dissent on the AQO

Lord Brown did not agree with the majority that the impugned provision of the AQO (*vis* Designation) should be struck down. Lord Brown expressed the view that the AQO gave precise effect to the UNSCRs and Designation. As such, Lord Brown did observe (and hoped this would not be the case) that some might take the view that the majority decision reflected a weakening