

ENGLISH HIGH COURT MAKES PRELIMINARY REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION IN WESTERN SAHARA DISPUTE

R (Western Sahara Campaign UK) v (1) Revenue and Customs Commissioners; (2) Secretary of State for the Environment and Rural Affairs [2015] EWHC 2898 (Admin)

Introduction

In a judgment handed down on 19 October 2015 in *R (Western Sahara Campaign UK) v (1) Revenue and Customs Commissioners; (2) Secretary of State for the Environment and Rural Affairs* [2015] EWHC 2898 (Admin), the English High Court made a reference to the Court of Justice of the European Union (“CJEU”) for a preliminary ruling concerning whether the European Union’s actions in entering into agreements with Morocco had been legal. The allegations of illegality focused on the alleged failure to distinguish between goods arising in Moroccan territory and those arising in Western Sahara.

Background

Western Sahara is a disputed territory on the Atlantic coastline of North Africa – bordered by Morocco, Algeria and Mauritania. Western Sahara was occupied by Spain during the 19th century. Following Spain’s relinquishment of control to a joint Moroccan-Mauritanian administration, Morocco secured control of the majority of the territory through armed conflict notwithstanding that, by an Advisory Opinion dated 16 October 1975, the International Court of Justice had confirmed that Western Sahara was a non-self-governing territory - the people of which (the Saharawi people) had a right to self-determination.

The underlying agreements included: (a) an EU-Morocco Association Agreement allowing for products originating in Morocco to be imported free from tariffs into the EU; and (b) an EU-Morocco Fisheries Partnership Agreement enabling EU fishing vessels to operate in Moroccan fishing zones. The claimant (an independent voluntary organisation) argued that the agreements were unlawful/invalid, contending that the EU had entered into the agreements acting on a mistaken understanding of international law.

Whilst Morocco had expressed a general intention to pass on benefits from the agreements to the local population, the claimant argued that this was insufficient justification and protection for the Saharawi people in light of the fact that Morocco had never confirmed or acknowledged that it was an administering power with a resulting obligation under the Charter of the United Nations 1945 to promote self-determination. Furthermore, the intention was unsubstantiated as Morocco had not consulted the Saharawi people regarding exploitation of natural resources and the Saharawi people had not given their consent to such exploitation.

Resisting the application for a preliminary reference to the CJEU, the defendants relied upon a legal opinion from counsel to the UN Secretary-General in support of their argument that the EU had not made a manifest error of law. That opinion had concluded that the export of

goods from an occupied territory was lawful where the occupying power complied with its obligations towards the indigenous population to promote their welfare.

Decision

The Administrative Court (Blake J) allowed the application for a preliminary reference, holding that “there is an arguable case of a manifest error by the [European] Commission in understanding and applying international law relevant to these agreements”.

The Judge held that, where an application presented a prima facie credible and arguable challenge to an EU measure’s legality and validity, it was desirable for the national courts to make a preliminary reference promptly.

In the instant case, the defendants failed to show that the arguments of the claimant were bound to fail. The legal opinion relied upon had expressly not had sufficient scope to cover all the issues material to the instant case. It had not addressed, for example, the status and effect of relevant international law material such as the Document on the Responsibility of States for Internationally Wrongful Acts published by the International Law Commission in 2001 and the UN Convention on the Law of the Sea. Moreover, the author of the opinion had (as a private citizen) expressed surprise that his opinion had been used in support for the validity of the agreements.

Furthermore, the question of whether the financial benefits derived from sales of natural resource-based products were to be directed only to the indigenous population of Western Sahara had not been addressed in the legal opinion. This was significant because, if the benefits were reserved for the indigenous population, then Article 73 of the Charter of the United Nations would have the effect of prohibiting agreements with Morocco where political practicalities obstructed the passing on of financial benefits.

It would be reasonable for the CJEU to take the view that it would not be appropriate for the EU to enter into contracts with occupying powers even where there was the possibility of general benefits for the wider region concerned. The controversial nature of these agreements was sufficient to make it necessary for the views of the CJEU to be ascertained.

Concluding Remarks

The judgment underscores the applicability of rules of public international law in the determinations of the national courts, including fundamental principles of self-determination and aspects of state responsibility.

17 November 2015