



Neutral Citation Number: [2023] EWHC 1440 (Admin)

Case No: CO/2049/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/23

Before:

MR JUSTICE JAY

Between:

THE KING
on the application of
AMANAT ULLAH

Claimant

- and -

NATIONAL CRIME AGENCY

Defendant

-and -

(1) SECRETARY OF STATE FOR
DEFENCE
(2) SECRETARY OF STATE FOR FOREIGN,
COMMONWEALTH AND DEVELOPMENT
AFFAIRS

Interested
Parties

Dan Squires KC and Rosalind Comyn

(instructed by ITN Solicitors) for the Claimant

Sarah Hannett KC (instructed by the Government Legal Department for the Defendant

Ben Watson KC and James Stansfeld (instructed by **the Government Legal Department**)
for the
Interested Parties
Angus McCullough KC and Rachel Toney (instructed by **SASO**) appeared as **Special**
Advocates

Hearing dates: 24th and 25th May 2023

OPEN JUDGMENT

This judgment was handed down remotely at 10:30am on Wednesday 14th June 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

MR JUSTICE JAY:

INTRODUCTION

1. Chamberlain J made an order for the determination of two preliminary issues in these proceedings for judicial review. The first issue is the application of *AF (No 3) v SSHD* [2010] 2 AC 269 to these proceedings. The second issue is the Defendant's application to withhold CLOSED material from disclosure.
2. It became clear during the course of argument that the first preliminary issue subdivides into three questions, viz.:
 - (1) Whether these proceedings involve a dispute over a civil right which is directly decisive of the right in question.
 - (2) Whether as a matter of principle *AF (No 3)* disclosure is required in cases of this type.
 - (3) If, but only if, the first two questions are resolved in the Claimant's favour, the particular further disclosure, if any, that should be provided to him in order to fulfil the pre-requisites of *AF (No 3)*.
3. It may be understood that the first two questions may be resolved wholly in OPEN. The third question entails both an OPEN and a CLOSED element inasmuch as, assuming that *AF (No 3)* does apply, it will be necessary for me to examine in OPEN the relevant principles governing the nature of the disclosure that is required in principle, and then to apply those principles in CLOSED to the matters in dispute.
4. It also became clear during the course of argument that the first two questions overlap to some considerable extent. Indeed, the submissions advanced by Mr Ben Watson KC on behalf of the Interested Parties rather elided the two.
5. The second preliminary issue would fall to be addressed wholly in CLOSED but has been resolved by agreement.

AN OUTLINE OF THE FACTS

6. The basic facts are that the Claimant, a national of Pakistan, was captured in Baghdad by those whom he says were British forces on 28th February 2004 before being transferred to US custody. He was transferred to Bagram airbase in Afghanistan where he was held without charge or trial until his release in September 2014, whereupon he was returned to Pakistan.
7. In 2015 the Claimant issued proceedings against the Interested Parties claiming damages for ill-treatment and torture, in the first instance at the hands of British forces before his transfer to the Americans. Thereafter, he claimed that the British were complicit in human rights violations perpetrated by the Americans. Any close analysis of the Claimant's causes of action is not warranted at this stage.
8. The claim for damages was settled in a substantial sum without admission as to liability, and a consent order was drawn up on 13th December 2019. The monies were then paid into the Claimant's solicitors' client account five days later. ITN Solicitors, who throughout these events have behaved with impeccable propriety, had become aware that in July 2018 the US Treasury's Office of Foreign Assets Control ("OFAC") added the name of Mr al-Dakhil to its Global Terrorism Sanctions Regulations. It included the Claimant's name as an alias for Mr al-Dakhil. In order to avoid any possibility of criminal prosecution, on 5th February 2020 ITN Solicitors applied to the Defendant for the latter's consent to transfer the entirety of the settlement monies to the Claimant. Consent was formally refused on 5th March (that it would be refused was, I think, indicated earlier), and these judicial review proceedings were begun on 6th June. The initial refusal of consent was upheld following a review on 30th September 2020. On my understanding, both decisions are the subject of this challenge although it may well be that greater attention will be given at the substantive hearing to the latter.
9. The Interested Parties must have been aware before the settlement terms were agreed that there was material to suggest that the Claimant and Mr al-Dakhil were one and the same. I have seen nothing to indicate that this information was imparted to those representing the Claimant. On the other hand, the Claimant's legal team must have realised that the reason he was captured and detained was that someone thought, rightly or wrongly, that he was not the benign rice trader he claimed to be. These considerations aside, and international terrorist or not, his torture, if it occurred, cannot be excused. On the other hand, transferring monies which a person has reasonable cause to suspect may be used, at least in part, for the purposes of terrorism is a criminal offence, even if the owner of those monies has every right to them. The only solution, in the absence of successful judicial proceedings (see further below), is to strike an accord with the Defendant which will ensure to its satisfaction that the monies thus transferred will not be put to that use. As I suggested in oral argument, it might just be possible to achieve that.

10. The grounds on which the Claimant was designated by the US were as follows:

“Abdul Rehman al-Dakhil is a long-time member of the US designated Foreign Terrorist Organisation (FTO) and SDGT Lashkar e-Tayyiba (LeT) and was an operational leader for LeT’s attacks in India between 1997 and 2001. In 2004, Dakhil was captured in Iraq by UK forces, then held in US custody in Iraq and Afghanistan until his transfer to Pakistan in 2014. After his release from Pakistani custody, Dakhil returned to work for LeT. In 2016, Dakhil was the LeT divisional commander for the Jammu region in the state of Jammu and Kashmir. As of early 2018, Dakhil remained a senior commander in LeT.”

11. The skeleton argument of the Interested Parties reflects the substance of this designation although seeks to break it down into nine points. There is, if I may say so, a degree of unnecessary repetition. In short, the designation constitutes the OPEN case against the Claimant. The latter denies that he is al-Dakhil and asserts that this is a case of mistaken identity.

THE LEGAL FRAMEWORK

12. Section 17 of the Terrorism Act 2000 provides:

“Funding Arrangements

A person commits an offence if—

- (a) he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is made available to another; and*
- (b) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.”*

13. Section 21ZA provides, in material part:

“Arrangements with prior consent

- (1) A person does not commit an offence under any of sections 15 to 18 by involvement in a transaction or an arrangement relating to*

money or other property if, before becoming involved, the person

—

(a) discloses to an authorised officer the person’s suspicion or belief that the money or other property is terrorist property and the information on which the suspicion or belief is based, and

(b) has the authorised officer’s [Defendant’s] consent to becoming involved in the transaction or arrangement.

(2) A person is treated as having an authorised officer’s consent if before the end of the notice period [7 working days] the person does not receive notice from an authorised officer that consent is refused.

...

(6) The reference in this section to a transaction or arrangement relating to money or other property includes a reference to use or possession.”

14. The target of this judicial review application is the Defendant’s decision to refuse consent under section 21ZA. Given that the settlement monies are held by the solicitors to their client’s order, it cannot seriously be denied that the Claimant is, to use the vernacular, front and centre of this application. It is because he is suspected to be a terrorist that consent was both required and refused.
15. The effect of the Defendant’s refusal of consent is evident. Should ITN Solicitors *qua* the “person” for the purposes of section 17 now decide in the face of the Defendant’s objection to transfer any part of the settlement monies to the Claimant, who would then have use and possession for the purposes of section 21ZA(6), it is difficult to see what defence there would be to criminal proceedings.
16. Thus, the monies will remain where they are unless and until:
 - (1) The Claimant should succeed in these judicial review proceedings and consent is not thereafter withheld (in the event that the fresh decision is adverse to the interests of the Claimant, the same analysis applies to any subsequent judicial review proceedings); or
 - (2) The parties agree the terms of an arrangement which would secure the release of part of the fund to the Claimant for a non-terrorist purpose. (It seems highly unlikely that the Defendant would agree that the whole of the fund could be released on terms: if, *ex hypothesi*, the Claimant is an international

terrorist, the only reasonable inference is that at least part of the settlement monies risk being used for a terrorist purpose.)

DOES ARTICLE 6 APPLY AT ALL?

17. The parties are agreed that Article 6(1) applies where there is a dispute over a right which can be said, at least on arguable grounds, to be recognised in domestic law. The dispute must be genuine and serious; it may relate not merely to the actual existence of the right but also to its scope and manner of exercise; and the result of the proceedings must be directly decisive for the right in question.
18. Mr Watson advanced a range of submissions all directed to the final stage of the foregoing analysis, namely whether the result of the proceedings is directly decisive for the right in question.
19. His submissions may be summarised as follows.
20. First, given that these are judicial review proceedings, it cannot be said that there will be a positive determination or disposition of the civil right in issue, being the Claimant's undoubted right to access to his money.
21. Secondly, there has been no deliberate targeting of the Claimant and no determination that he should not receive the monies.
22. Thirdly, the Claimant's lack of access to his money should be regarded as no more than temporary. After all, there remains a possibility that the Claimant and the Defendant will come to an accord that leads to the release of all or part of the settlement fund to the former.
23. It is not necessary for me to summarise Mr Watson's written arguments which were succinct and helpful. His oral arguments were very attractively presented. However, I cannot accept the Interested Parties' submissions.
24. It has been held on various occasions that Article 6 may be in play notwithstanding that the forum for the resolution of the issue is judicial review.

Perhaps the most authoritative statement of principle may be found in the opinion of Lord Slynn in *R (Alconbury Developments Ltd) v SSETR* [2003] 2 AC 295, at para 27, citing the ECtHR decision in *Ringeisen v Austria (No 1)* [1971] EHRR 455, at para 94.

25. Not all judicial review disputes come within Article 6. Those which involve the “hard core of public-authority prerogatives” do not: see, for example, *R (Maftah) v SSFCA* [2012] QB 477, at paras 24 and 26 (although I would respectfully concur with the analysis of Collins J in *Mustafa v HMT* [2013] 1 WLR 1621 that the *ratio* of that case should be narrowly interpreted) and *R (oao Reprive) v Prime Minister* [2020] EWHC 1695 (Admin), at para 41 in particular.
26. It is true that the Defendant’s refusal of consent was not as a matter of form at least directed to the Claimant. ITN Solicitors were seeking the Defendant’s consent to the making of an arrangement, and the Claimant may well not have been involved in that process at all. However, it really makes no sense to say that the Claimant does not lie at the heart of the refusal decision. It is because the Defendant suspects, believes or assesses that the Claimant is an international terrorist that consent has been refused, and that refusal bears obviously and directly on the Claimant’s right of access to his money. The arrangement for which ITN Solicitors were seeking consent was to be between them and the Claimant. His fundamental rights are in play; the solicitors, as agents for their principal, have no rights capable of independent vindication.
27. In para 36 of its judgment, the Divisional Court in *Reprive* (upheld by the Court of Appeal) stated:

“In this case, the court will not be concerned with executive action against any individual or with the restriction of any individual’s fundamental rights.”
28. In my judgment, this is a clear case of executive action against the Claimant or, at the very least, of a restriction of the Claimant’s fundamental rights. To say that the Claimant has not been “targeted” has no attraction, not least because the direct and obvious consequences of the refusal of consent cannot be ignored. The correct analysis is that a restriction has been imposed upon the free exercise of the Claimant’s fundamental rights through the mechanism of the refusal of consent. ITN Solicitors’ freedom of action has been impeded only in the sense that they cannot follow their client’s instructions in relation to the transfer of the fund, but their fundamental rights have not been restricted.

29. Furthermore, the result of judicial review proceedings is capable of being directly decisive of the Claimant's civil rights. Were he to lose (I start with this possibility because that after all is the Interested Parties' primary case), he will not have access to his money unless and until a satisfactory arrangement is made with the Defendant. Consent to that may never be forthcoming. Were he to win, whether first time round or after a number of fresh decisions by the Defendant, each successfully challenged to the point that the Defendant gives up, he will then have access to his money. The forum in which this issue is being determined is irrelevant, just as it is in other similar contexts where either judicial review or a similar statutory procedure is available (see, for example, *AF (No 3)* and para 63 of the opinion of Lord Phillips of Worth Matravers).
30. I am also not attracted by the submission that the result of these proceedings may not be decisive because the court should take into account the possibility of consent being given by the Defendant on terms. Mr Dan Squires KC made the forceful submission that this argument is inconsistent with what is said in para 72 of the Defendant's Detailed Grounds of Defence. It is only recently that the Interested Parties have made overtures exploring the possibility of a compromise solution. At the time of writing, I have seen nothing to indicate that any specific proposals are being considered. The possibility that some sort of agreement might be reached in relation to part of the settlement fund is in my view too speculative to be recruited for Mr Watson's purposes; and, in any event, the status quo has "extremely serious and potentially irreversible consequences": see the analysis of Richards LJ in *Bank Mellat v HMT (No 4)* [2016] 1 WLR 1187, at paras 23-25 in particular.
31. Overall, I cannot begin to accept Mr Watson's emollient submission that the refusal of consent amounts to a temporary restriction. The more apposite adjective would be "indefinite".
32. For all these reasons, I have little hesitation in concluding that Article 6(1) applies to these proceedings.

DOES *AF (NO 3)* APPLY?

33. At this stage, the question falls to be addressed as a matter of principle. How *AF (No 3)* applies to the facts of this case, in the light of the disclosure that has been given to date, raises a logically subsequent issue.

34. Mr Watson's arguments under this rubric were not materially different from those he advanced under the first. His basic point was that the Claimant is living freely in Pakistan and is not subject to any coercive measures. His more nuanced submission was that the present case is distinguishable from the asset-freezing and analogous cases which have been held to require *AF (No 3)* disclosure.

35. At para 24 of its judgment in *Reprive*, the Divisional Court said this:

"The courts have been willing to extend the cases in which AF (No 3) disclosure must be given from detention cases to (amongst other things) freezing orders; directions to banks relating to financial restrictions pursuant to the Counter-Terrorism Act 2008; and orders made under the ... TPIM Act 2011 (see the summary of the case law in Bank Mellat (No 4) ... In each case, the challenge related to executive action brought against an individual or organisation. The measures were "highly restrictive ... with very serious effects" (Bank Mellat, para 23). These careful extensions, undertaken on a case by case basis, reflect the importance of both fair trial rights and of the interests of national security. They extend but are consistent with the reasoning of AF (No 3) which was, as we have set out above, rooted in the liberty of the individual and fair trial procedures under article 5(4)."

36. Once this passage is examined, it may be seen how Mr Watson's second submission quickly collapses into the principal argument he advanced under the rubric of the first. The real question is whether the Defendant brought executive action against the Claimant or, at the very least, action which amounts to a restriction of his fundamental rights.

37. Unless form is elevated over substance to an unacceptable degree, I am clear that the Defendant's executive action, directed as it was to the solicitors who had applied for consent, should be regarded as having been brought against the Claimant in the sense that he was obviously and directly affected by it. The Defendant's action is tantamount to an asset-freezing measure, and is as much if not more a fetter on the Claimant's access to and use of his money as the restrictions under consideration in *Bank Mellat (No 4)*. The instant case is distinguishable from *Tariq v Home Office* [2012] 1 AC 452 where the admittedly fundamental nature of the Claimant's equality rights and a claim for damages for their alleged violation did not constitute any form of executive action *against* him.

38. In oral argument Mr Watson did not refer to *Tariq* but he did submit that the Defendant's actions were reactive and, by necessary implication, did not amount

to executive action against anyone, still less the Claimant. In my judgment, the point about *Tariq* was that he was the claimant in proceedings which he decided to bring alleging discrimination. *AF (No 3)* would not have applied to this Claimant's damages claim against the Interested Parties, but that is in the past. He is the owner of the settlement fund, and in order to prevent that fund, or part of it, being transferred to Pakistan some sort of step would have to be taken by the executive. The failure to impose an asset-freezing measure before consent was applied for by ITN Solicitors does not mean that the Defendant has been reactive in the sense Mr Watson requires for this limb of his argument to succeed.

39. For these reasons, I have concluded that *AF (No 3)* applies.

WHAT DOES *AF (NO 3)* REQUIRE IN THESE PARTICULAR CIRCUMSTANCES?

40. The general principles are not in dispute between the parties. It is the Interested Parties' argument that, even if *AF (No 3)* were to apply, the Claimant has already been given adequate disclosure of the essential elements of the decision to refuse consent.
41. My attention was drawn to *A v United Kingdom* [2009] ECHR 29, in particular paras 218-224. There, the Grand Chamber drew a distinction between allegations of a general nature and those which were more specific, citing particular dates and locations. The ECtHR did not have access to any CLOSED material and its judgment must therefore be regarded as somewhat general in terms of the principles it enunciates.
42. It is unnecessary for me to set out para 59 of the opinion of Lord Phillips and the entirety of paras 86 and 87 of the opinion of Lord Hope of Craighead. I have considered these paragraphs on a number of occasions when sitting in SIAC and bear them well in mind on this occasion. However, my attention was not drawn specifically to paras 115 and 116 of the opinion of Lord Brown of Eaton-under-Heywood, and in my respectful view what he says there is particularly valuable.
43. My approach is that the Claimant must be given sufficient information about the case against him to enable him to give effective instructions to his solicitors (given that the Special Advocates are now in CLOSED, these instructions cannot be given directly to them) to refute that case, assuming for these purposes that it can be refuted. The Claimant is not of course entitled to see any of the underlying material and/or evidence, or the sources from which it comes. A fact-specific

analysis is required, taking into account the information that has been given to date.

44. Para 86 of Lord Hope’s opinion concludes with the following:

“The judge will be in the best position to strike the balance between what is needed to achieve this and what properly can be kept in closed.”

45. To what extent is any sort of balancing exercise required, and what does “balancing” mean in this context? I think that there may be some confusion about this. That confusion may receive its origin in the ECtHR’s use of the term “counterbalanced” in para 218 of its judgment in *A*.
46. In my judgment, there will be a core irreducible minimum of disclosure which must be provided to meet the fair trial requirements of Article 6. As Lord Brown explained in para 116, the individual must *always* be told sufficient of the case against him to give effective instructions. However, that does not mean that there is no evaluative assessment to be conducted by the court. The core irreducible minimum has both an epicentre and a periphery. When one moves slightly away from the nucleus of the metaphorical atom, questions of fact and degree may become relevant. Consideration may have to be given to the value to the Claimant of providing the disclosure at issue as well as the risk to national security, and making a balanced assessment. When the CLOSED material is considered, it is not a question of breaking it down piece by piece but rather making a global assessment of what information the Claimant really must be given to provide effective instructions.
47. For the reasons given in CLOSED, I am satisfied that the disclosure given to the Claimant thus far does not satisfy the pre-requisites of *AF (No 3)*. Given the information that he has been given thus far, he really can do no more than proffer a general denial. In my CLOSED judgment I have set out the terms of the information that should in my view be provided.