Neutral Citation Number: [2025] EWHC 241 (Admin)

Case No: AC-2024-LON-003985

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2025

Before :

LORD JUSTICE SINGH
and
MR JUSTICE CHAMBERLAIN

- -

Between :

THE KING (on the application of FTDI HOLDING LIMITED)	**Claimant**
- v -	
CHANCELLOR OF THE DUCHY OF LANCASTER	**Defendant**
- and –	
FUTURE TECHNOLOGY DEVICES INTERNATIONAL LIMITED	**Interested Party**

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James McClelland KC and Yaaser Vanderman (instructed by **Katten Muchin Rosenman UK LLP**) for the **Claimant**
Richard O'Brien KC and Karl Laird (instructed by the **Treasury Solicitor**) for the **Defendant**
Stephen Cragg KC and David Lemer (instructed by the **Special Advocates Support Office**) appeared as **Special Advocates**

Hearing date: 16 January 2025

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Approved Open Judgment

This judgment was handed down remotely at 10 a.m. on 7 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh and Mr Justice Chamberlain:

INTRODUCTION

1. This judgment contains the reasons for our decision, announced in OPEN on 17 January 2025 after OPEN and CLOSED hearings on the previous day, to refuse an application for interim relief by FTDI Holding Ltd (the claimant). The application was made in a claim for judicial review of a decision by the Chancellor of the Duchy of Lancaster (the defendant) to order the claimant to divest itself of its 80.2% share in Future Technology Devices International Limited (the interested party).

2. It is common ground that the Chancellor was exercising, and was entitled to exercise, the powers of the Secretary of State under the National Security and Investment Act 2021 ("the 2021 Act").

LEGAL FRAMEWORK

3. Section 1(1)(a) of the 2021 Act empowers the Secretary of State to give a "call-in notice" if he or she reasonably suspects that a "trigger event" has taken place in relation to a qualifying entity or asset and the event has given rise or may give rise to a risk to national security. Section 2(2) provides that a call-in notice may not be given after (a) the end of the period of 6 months beginning with the day on which the Secretary of State became aware of the trigger event or (b) the end of the period of 5 years beginning with the day on which the trigger event took place. By s. 5(1), a "trigger event" takes place when (a) a person gains control of a qualifying entity or (b) a person gains control of a qualifying asset. Section 7 makes further provision about qualifying events and qualifying assets. Section 8 makes further provision about what counts as "gaining control". One scenario which counts is where a person acquires a right or interest in a qualifying entity and as a result his shareholding increases from less than 75% to more than 75%.

4. Once a call-in notice has been given, the "assessment period" begins: s. 23(1) and (2). Before the end of the assessment period, the Secretary of State must (a) make a final order or (b) give each person to whom the call-in notice was given a final notification that no further action is to be taken: s. 26(1). Insofar as material to the present case, a power to make a final order arises if, during the assessment period, the Secretary of State: (a) is satisfied, on the balance of probabilities, that (i) a trigger event has taken place and (ii) a risk to national security has arisen from the trigger event; and (b) reasonably considers that the provisions of the order are necessary and proportionate for the purpose of preventing, remedying or mitigating the risk. The final order can include, among other things, provision requiring a person to do or not do particular things and provision for the appointment of a person to conduct or supervise the conduct of activities on such terms and with such powers as may be specified or described: s. 26(5).

FACTUAL AND PROCEDURAL BACKGROUND

5. The Claimant is a holding company beneficially owned by five limited partnerships based in China. The general partner is the Beijing Jianguang Asset Management Co. Ltd ("JAC"), which owns a minority interest in the other partnerships. 51% of the equity interests in JAC are owned by China Jiayin Investment Ltd, a state-owned investment company.

6. On 7 December 2021, the claimant acquired an 80.2% share in FTDI, a semiconductor devices company specialising in USB technology.

7. On 22 November 2023, the defendant sent a call-in notice to the claimant.

8. On 5 November 2024, the defendant made a final order ("the Final Order"). This requires the claimant to take various prescribed steps with a view to disposing of its share in FTDI in full. The order was made on the basis that the trigger event had given rise to national security risks. These risks related to:

   (a) the transfer of UK-developed semiconductor technology and IP to China; and

   (b) the potential for FTDI's ownership to be used to disrupt critical national infrastructure.

9. Paragraph 9 of the Final Order required the claimant to produce a draft disposal plan within thirty days.

10. On 3 December 2024, the claimant filed a claim for judicial review of the Final Order. It also applied for an interim injunction or stay suspending the effect of the Final Order pending the determination of that claim.

11. On 6 December 2024, there was an initial hearing before Chamberlain J of the application for interim relief. By the time of that hearing, there had not been time for the defendant to apply for a closed material declaration under s. 6 of the Justice and Security Act 2013 ("JSA 2013"). The defendant therefore gave an undertaking to vary paragraph 9 of the Final Order under s. 27 of the 2021 Act, so that the time for filing a draft disposal plan was extended until 17 January 2025 and the interim relief hearing was listed before the Divisional Court on 16 January 2025. In the meantime, special advocates were instructed, a declaration under s. 6 JSA 2013 was made, and agreement was reached between the defendant and the special advocate that some of the initially CLOSED material could be disclosed into OPEN.

12. This meant that, at the hearing on 16 January 2025, we were able to hold OPEN and CLOSED hearings. During the course of the hearing we indicated that we had decided to order a rolled-up hearing on an expedited basis. At the conclusion of the OPEN and CLOSED hearings, we indicated that we would consider our decision overnight. We explained in OPEN on the morning of 17 January 2025 that we had decided to refuse the application for interim relief and would provide written reasons later, which we now do.

THE TEST FOR INTERIM RELIEF

13. The parties agreed in principle that the framework for consideration of the application for interim relief (whether in the form of an interim injunction or a stay) was the familiar one laid down in *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396. In most circumstances, that requires the applicant to surmount a relatively low merits threshold, namely that there is a "serious question to be tried". The court then goes on to consider whether damages would be an adequate remedy for the claimant or (in a case where an undertaking in damages is given) for the defendant. If not, the court considers the balance of convenience.

14. Richard O'Brien KC for the defendant submitted that, in public law cases, the claimant must show a "strong prima facie case", which imposed a merits threshold higher than that required for permission to apply for judicial review. The claimant submitted that there is no such requirement.

15. We do not consider that the appellate authorities support the proposition that a uniform, higher merits threshold applies in every public law case. Even in *R v Secretary of State for Transport ex p. Factortame (No. 2)* [1991] 1 AC 603, a case about the potential disapplication of primary legislation, Lord Goff of Chieveley was careful to say, at 674A, that "the discretion conferred upon the court cannot be fettered by a rule". Rather, the importance of the public law context came in at the balance of convenience stage, when the court would accord great weight to the public interest in the enforcement of an apparently valid law and a claimant seeking to enjoin such enforcement would have to show that his challenge was "prima facie so firmly based as to justify so exceptional a course being taken".

16. This seems to us to be consistent with what was said by Lord Walker of Gestingthorpe in the Privy Council in *Belize Alliance v Department of the Environment of Belize* [2003] 1 WLR 2839, at [39]: "(because the range of public law cases is so wide) the court has a discretion to take the course which seems most likely to produce a just result". Similarly, in *R (Governing Body of X) v Office of Standards in Education, Children's Services and Skills* [2020] EWCA Civ 594, [2020] EMLR 22, Lindblom LJ (with whom Sir Geoffrey Vos MR and Henderson LJ agreed) held at [66] that there was no separate "threshold" or "gateway" in public law cases. Rather, "the underlying strength of the substantive challenge is likely to be a significant factor in the balance of considerations weighing for or against the granting of an injunction".

17. In our judgment, this is an accurate and sufficient statement of the law as regards interim relief in public law cases. The special feature of such cases is that, other things being equal, it is likely to be in the public interest to allow a defendant public authority to enforce the law (as it understands it), or exercise powers in what it considers to be a lawful matter. The weight to be accorded to this public interest will vary from context to context, but may be considerable. In many cases, the claimant would need to point to something very compelling to outweigh it. In deciding whether a claimant has done so, the court will consider both the prima facie strength of the claim and the gravity of the consequences that would follow if interim relief were not granted. It is not possible, and would not be desirable, to lay down anything more prescriptive than that.

THE MERITS OF THE CLAIM

Ground 1A – Timing

18. Under ground 1A, the Claimant argues that the Final Order was *ultra vires* because:

(a) the Call-in Notice was not served within the six-month time limit. The Claimant argues that the SoS's officials were aware of the trigger event "*by 7 September 2022 at the latest*", meaning that the 23 November Call-in Notice was out of time by one day;

(b) the requirements for service set out in the National Security and Investment Act 2021 (Procedure for Service) Regulations 2021 ("the 2021 Regulations") do not permit reliance on reg. 4(3) of the 2021 Regulations without any prior attempt to obtain the email address of the acquirer under reg. 4(1) or 4(2). Therefore, the Call-in Notice was not "given to… the acquirer" as required by the 2021 Regulations.

19. The defendant argues that the call-in notice was given to the claimant in accordance with s. 1(4)(a) of the 2021 Act. It was not in dispute that the claimant's email address had not been provided or published when the defendant sent the call-in notice, so the defendant was permitted by reg.4(3) of the 2021 Regulations to send the call-in notice to any person through whom he rationally believed it would come to the attention of the acquirer or its representative.

Ground 1B – Awareness

20. Under ground 1B, the claimant argues that the "Secretary of State" becomes aware of the "trigger event" for the purposes of s. 2(4)(b)(i) of the 2021 Act when the officials dealing with the matter on his behalf (in this case, the officials in the Investment Security Unit ("ISU")) become so aware. Those officials first became aware of the Trigger Event by 7 September 2022 at the latest, so there was no power to serve the call-in notice more than 6 months after that date.

21. The defendant argues that the reference to the "Secretary of State" in s. 2(4)(b)(i) of the 2021 Act is a reference to the Secretary of State (or the Minister exercising his functions) personally. In this case, the defendant only became personally aware of the trigger event on 20 November 2023, two days before the call-in notice was issued. Reliance is placed on *Revenue and Customs Commissioners v Tooth* [2021] UKSC 17; [2021] 1 WLR 2811, at [70].

22. The defendant argues in the alternative that, if knowledge of officials is dipositive, the date on which they became aware of the relevant trigger event was 23 May 2023, meaning the call-in notice on 22 November 2023 was issued within the six-month time limit.

23. We note at this point that, in the claim as originally drafted, the only target of challenge was the Final Order. However, by an application notice dated 10 January 2025, and in response to the way the defence to this ground was pleaded, the claimant applied to challenge the call-in notice on the same grounds. We considered that that amendment would cause no prejudice, provided that the defendant could still take the point that the

amendment was out of time. We therefore granted permission to amend, making clear that the question whether any extension of time required should be granted can be considered at the rolled-up hearing.

Ground 2 – Procedural Fairness

24. The claimant alleges that it was deprived of the minimum information necessary to understand the case it had to meet, in breach of its rights under Article 6 ECHR and at common law. On the claimant's case, this was a case in which disclosure complying with the standard in *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28, [2010] 2 AC 269 was required *before* the decision was made.

25. The defendant submits that there was no requirement to give disclosure before the decision was made and that, in any case, *AF No. 3* disclosure is reserved for what the Court of Appeal has referred to as "objectively high level rights": *R (AZ) v Secretary of State for the Home Department* [2017] EWCA Civ 35. Even if disclosure was required, sufficient information was given to the claimant for it to give effective instructions.

Ground 3 – Failure to give reasons

26. The claimant argues that no or inadequate reasons were given in the Final Order and that it was therefore made *ultra vires*.

27. The defendant relies on its right under s. 28(5)(b) of the 2021 Act to withhold disclosure that would undermine national security and submits that it is to be expected that aspects of the decision-making process could not be disclosed.

Ground 4 – A1P1

28. The claimant argues that the Final Order (i) engages Article 1 of Protocol 1 to the European Convention on Human Rights ("A1P1") as it amounts to an expropriation of the Claimant's property, (ii) is not in accordance with domestic law for the reasons given under the other grounds, and (iii) is disproportionate to the national security aim pursued.

29. The defendant submits that the Final Order constituted a lawful and proportionate interference with the Claimant's rights under A1P1. He argues that national security could not be equally well protected by measures less intrusive than divestment.

Ground 5 - Irrationality

30. The claimant submits that the Final Order was irrational and incapable of reasonable justification.

31. The defendant submits that the threshold for irrationality is not met.

Discussion

32. We have already indicated our decision that there should be an expedited, rolled-up hearing considering permission and the substance together. This decision was taken on the basis that there is a realistic prospect that permission would be granted on one or more grounds. In those circumstances, it was likely that a rolled-up hearing would lead to a final authoritative determination of the issues in the claim more quickly than a separate permission stage (with the potential for appeals if permission were refused in any respect). In those circumstances, we do not consider that anything would be gained by our commenting on the strength of the individual grounds, unless our decision on interim relief turned on that. For reasons we shall explain, it does not.

ADEQUACY OF DAMAGES

33. The claimant submits that, if its claim succeeds but interim relief is not granted, damages would be an inadequate remedy, because of (i) the claimant's constitutional right to the free enjoyment of its possessions, (ii) the difficulty involved in quantifying its losses, and (iii) the unique character of FTDI.

34. The defendant argues that the claim for damages under s. 8 of the Human Rights Act 1998 undermines the claimant's argument that damages would be an inadequate remedy. He adds that he would not be compensated by a cross-undertaking in damages, as this would extend the alleged national security risk if the interim injunction were granted.

Discussion

35. So far as the claimant is concerned, we do not consider that the mere existence of a claim for damages amounts to a concession that damages would be a wholly adequate remedy. Even if it were possible properly to assess the loss in value caused by a forced sale, it would be difficult for damages to reflect the strategic importance to the claimant's business of its investment in FTDI. We therefore accept that damages would not be a wholly adequate remedy in this case.

36. But it is important not to lose sight of the fact that the decision challenged here affects property interests rather than (for example) personal liberty or privacy interests. Damages would provide at least some measure of protection for those interests. That fact is relevant to the overall balance of convenience.

37. From the perspective of the defendant, however, the interest said to be served by the decision under challenge is UK national security. Any detriment to that interest is plainly not compensable through an undertaking in damages.

BALANCE OF CONVENIENCE

38. The claimant submits that granting a stay or interim relief would cause "the least irremediable prejudice". James McClelland KC for the claimant prays in aid the extent and seriousness of the Final Order's intrusion into the claimant's property interest. He argues that the refusal of interim relief is likely to be determinative because divestment is likely to precede a final determination. Moreover, he submits that there is no indication that the national security considerations are so urgent or imminent as to demand immediate divestment, and points out that interim relief would do no more than hold the ring for a relatively short period. Safeguards would remain in place during that period. Finally, he relies on the strength of the case.

39. Mr O'Brien for the defendant argues that established authority (in particular *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 and *Begum v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765) requires that we apply a public law standard of review when considering (i) whether the asserted risk to national security is made out, and (ii) what weight should be attached to it on rationality grounds. Reliance was placed on *Attorney General v BBC* [2022] EWHC 826 (QB), [2022] 4 WLR 74, at [31]-[33] (Chamberlain J). Mr O'Brien adds that the Claimant has not demonstrated that it will suffer irreversible harm if interim relief is refused. By contrast, the risk to national security will continue for a longer period than it otherwise would if interim relief is granted.

Discussion

40. The proper approach to applications for injunctive relief in national security cases was considered by Chamberlain J in *Attorney General v BBC*, at [29]-[33], in the light of *Rehman* and *Begum*. We did not understand Mr McCelland to dispute the correctness of that approach. We can summarise the approach as follows. It is the court, not the executive, which holds the scales, deciding where the balance falls between the competing public and private interests. However, where one of the interests is national security, the court must show great respect to the judgment of the executive about whether the relevant risk is made out and about the weight to be attached to it. This means that, subject to review on rationality or other public law grounds, both the existence of a risk to national security and the weight to be ascribed to it are matters for the executive. In many cases it may be difficult to find interests sufficiently weighty to outweigh the public interest in national security.

41. In this case, the substance of the asserted risk to national security is explained only in CLOSED. We do not find this surprising. We have, however, scrutinised the CLOSED evidence with care, with the assistance of special advocates. At this interim stage, we are unable to stigmatise as irrational (or otherwise vitiated by public law error) any of the following propositions:

    (a) the trigger event (the acquisition by the claimant of a substantial majority of the shares in FTDI) has given rise to a risk to UK national security;

    (b) the risk is a real and significant one; and

(c) the grant of interim relief would prolong the period of the risk.

42. It is possible that the court's assessment of the cogency of the national security case may be different after consideration of more detailed evidence and submissions at the rolled-up hearing. At this stage, however, we must take the asserted risks to national security and the weight to be attached to it as established. Accordingly, the public interest weighs heavily against the grant of interim relief, even for the few months until a rolled-up hearing can take place.

43. Against that, we have considered the extent of the impact on the claimant's rights. We do not accept that the refusal of interim relief will necessarily be determinative of the claim. We have given directions for an expedited rolled-up hearing. We have indicated that it is unlikely that time for the taking of particular steps will be extended in ways that imperil the directions for expedition, at least absent very good reason. Given that we were told that the requirement to market the asset is not expected to apply until 1-2 months after the date on which the draft disposal plan is accepted, we consider it likely (though not certain) that the claim can be determined before any irrevocable step towards sale is required under the Final Order.

44. In these circumstances, we consider that the balance comes down firmly against the grant of interim relief. The same would be true whether the grounds of challenge disclose simply a "serious question to be tried" or a "strong prima facie case". Either way, the interests of national security must prevail.

45. These reasons, together with those contained in our CLOSED judgment, explain our decision to refuse interim relief.