Case note: *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3

Mr Youssef challenged, through judicial review proceedings, a decision of the Secretary of State made in his capacity as a member of the UN Security Council Sanctions Committee. That committee is responsible for maintaining a list of persons and entities subject to the asset freeze imposed on persons 'associated with Al-Qaida' under Chapter VII of the UN Charter.

Initially the UK placed a hold on the designation of Mr Youssef by the committee, but in September 2005, the UK removed that hold, which had the consequence that the appellant became subject to an asset freeze.

There are two key respects in which this judgment may be of interest to judicial review practitioners: (1) in relation to the use of a proportionality test in judicial review in the common law context; and (2) in relation to remedy.

(1) Proportionality

One of the grounds of appeal advanced on Mr Youssef's behalf related to the standard of review. It was contended that a rationality review was inappropriate, and, *inter alia*, that in the context of a case which concerned interference with fundamental rights, the common law review conducted by the court should not be restricted to a *Wednesbury* rationality test. This submission drew upon *Kennedy v Information Commissioner* [2015] UKSC 20 and *Pham v SSHD* [2015]. *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 had been handed down by the Supreme Court since the hearing in *Youssef*. Louise Jones's review of these cases can be found at:
http://www.guildhallchambers.co.uk/uploadedFiles/WednesburyarticleJan2016.pdf

In *Youssef*, Lord Carnwath (with whom all members of the panel agreed) reviewed the authorities, and pointed to the measure of support to be found for the use of proportionality as a test in relation to interference with "fundamental" rights. He observed at §55 that, "it is to be hoped that an opportunity can be found in the near future for an authoritative review in this court of the judicial and academic learning on the issue, including relevant comparative material from other common law jurisdictions. Such a review might aim for rather more structured guidance for the lower courts than such imprecise concepts as "anxious scrutiny" and " sliding scales"."

The Supreme Court proceeded on the basis of the application of a proportionality test, but found it made no difference to the outcome and there was no aspect of the reasoning of the lower courts (which had rejected Mr Youssef's challenge, through the application of a rationality test) which was open to challenge, even applying a proportionality test.

(2) Remedy

Even if Mr Youssef had succeeded in demonstrating an error of reasoning when a proportionality approach was applied, Lord Carnwath held that the court should be

very slow to grant a substantive remedy. He said at §61, “The court is not required to ignore the appellant’s own conduct, or to the extent to which he is the author of his own misfortunes.” There was unchallenged evidence before the court showing that the appellant is at least a strong vocal supporter of Al-Qaida and its objectives, and Lord Carnwath continued, “even if the appellant were otherwise entitled to some relief, I would be very hesitant about granting it so long as these allegations stand unrefuted.”

Louise Jones appeared as junior counsel for the Secretary of State in the appeal to the Supreme Court.

Louise Jones
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