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Part Three. Judicial decisions on questions relating the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

United Kingdom

1. England and Wales High Court (Commercial Court), London

Entico Corporation Limited, Claimant, against the Secretary of State for Foreign and Commonwealth Affairs, Intervener, and the United Nations Educational, Scientific and Cultural Organization (UNESCO), Defendant
Decision of 28 March 2008

Immunity of an international organization—Convention on the Privileges and Immunities of the Specialized Agencies—Compatibility of the Specialized Agencies of the United Nations (Immunities and Privileges) Order with the right of access to fair and public judicial process under article 6 (1) of the European Convention on Human Rights (ECHR)—Article 6 (1) ECHR does not extend rights beyond existing jurisdiction—Grant of immunity under United Kingdom's legislation pursues a legitimate aim and is proportionate—Availability of an alternative forum

Mr. Justice Tomlinson:

(a) Introduction

1. The Claimant to which I shall refer as "Entico" is an English company carrying on business as a publisher. The Defendant, to which I will refer by its well known acronym UNESCO, is an international organisation which is one of the specialised agencies of the United Nations, hereinafter the UN. It was created in November 1945. The United Kingdom, as one of the founding members of the United Nations, has been a member of UNESCO since its establishment, with the exception of a period between 31 December 1985, when it withdrew from membership, and 1 July 1997, when it rejoined. As of October 2007 UNESCO had 193 Member States and six Associate Members. Under international law, international organisations are granted immunities and privileges before the courts of their member States to enable them effectively to pursue their functions and to operate free from control by any individual Member State (see M. Shaw, *International Law* (5th Edition, 2003), p. 1207 and *Mendaro* v. *World Bank*, 99 ILR 92 at 97–99 (US Court of Appeals, DC Circuit, 1983).

2. This case concerns a challenge to UNESCO's immunity from legal process, bestowed upon it by United Kingdom legislation pursuant to the UK's obligation undertaken by accession to the Convention on the Privileges and Immunities of the Special-

ised Agencies,* 1947, "the 1947 Convention", which has 115 parties, including the UK, which became a party on 16 August 1949. Article III, section 4 of the Convention provides that—

> "The specialised agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

In addition, article III, section 5, provides that—

> "The premises of the specialised agencies shall be inviolable. The property and assets of the specialised agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

These provisions apply to UNESCO under Annex IV of the 1947 Convention, to which the United Kingdom has notified its acceptance as a member of UNESCO, in accordance with article XI, Section 43 of the 1947 Convention.

3. Entico alleges that in October 2005 it concluded with UNESCO a contract pursuant to which Entico was to produce for UNESCO a calendar for 2006. Entico further alleges that in due course UNESCO failed and refused to perform the contract in consequence of which Entico has suffered loss and damage in the shape of costs and wasted expenditure. Entico quantifies its loss as £86,484. In this action Entico claims that amount from UNESCO.

4. The headquarters of UNESCO are in Paris. The relevant French authorities declined to effect service of these proceedings upon UNESCO, observing that UNESCO enjoys diplomatic immunity in that country. Colman J permitted service to be effected by an alternative method, *i.e.,* first class post, which was done but UNESCO has not acknowledged service. Entico by this application seeks judgment in default of acknowledgement of service. Since however as stated above UNESCO enjoys in this jurisdiction as elsewhere immunity from suit and legal process, Entico must first persuade the court to set aside that immunity. To that end it is asserted that UNESCO's immunity violates Entico's rights under article 6 (1) of the European Convention on Human Rights, hereinafter the ECHR, which may broadly be summarised as access to fair and public judicial processes. That challenge to the relevant UK legislation having been intimated, the Secretary of State for Foreign and Commonwealth Affairs intervenes pursuant to CPR 19.4A and submits that there is no incompatibility. The Secretary of State takes no position regarding the underlying dispute between Entico and UNESCO. UNESCO has taken no part in the proceedings although it has on three occasions written to the court to explain its position. It denies that a contract was ever concluded between Entico and UNESCO.

(b) The underlying dispute

5. Entico's case as to the manner in which a contract was concluded is succinctly set out in its Particulars of Claim. After describing the parties and explaining that at all material times Entico's Managing Director, Mr. James Ramsey, acted on its behalf and

* United Nations, *Treaty Series,* vol. 33, p. 261.

that Ms. Michiko Tanaka, Chief of UNESCO Publishing, acted on UNESCO's behalf, the Statement of Case continues:

"3. By a contract, whose initial/draft terms were set out by Entico in writing (as set out in paragraph 4 below) and which terms were accepted by the subsequent conduct of UNESCO (as set out in paragraphs 6–7 below), made in or around late September-early October 2005 ('the Contract'), Entico and UNESCO agreed that Entico would provide a calendar for the year 2006 for UNESCO and in this context, and in particular to assist Entico in raising funds sufficient to pay the estimated £150,000-£180,000 cost to Entico of the production and distribution of the calendar, UNESCO gave permission to Entico to use the 'UNESCO' name and logo in the said calendar. These were the core terms of the relationship between the parties. The contract was made as follows:

"3.1 By an email dated 20 September 2005 Mr. Ramsey wrote to Ms. Tanaka stating, 'Thank you for making it possible for us to put together a calendar for UNESCO. Attached is the contract agreed between Entico and UN/ISDR [UN International Strategy for Disaster reduction]. It could form the basis of a contract between our organisations as well. I am keen to begin finding sponsors as soon as possible and as soon as we agree the contract I will send you a PDF of the proposal we send to sponsors for our approval.'

"3.2 Ms. Tanaka replied later the same day, stating 'The terms of the agreement seem to us correct. UNESCO will make small modifications to the terms in order to fit out [*sic*] own legal standards (please note that it is basically a matter of wording and not contents). Our legal service will prepare a draft which will be forwarded to you within this week.'

Copies of the emails and the Entico/ISDR Contract ('the Draft Contract') are attached as annexure 1 hereto.*

"4. The following were, among others, express terms of the Contract, as set out in the Draft Contract (substituting 'UNESCO' in the place of 'ISDR/ISDR Secretariat', '2006' in the place of '2005' and '£150,000-£180,000' in the place of '£200,000'):

"The 2005 Calendar . . .

"1. In accordance with the terms and conditions of this Licensing Agreement, the Parties shall produce the 2005 Calendar. The 2005 Calendar comprised [sic] of the following elements (the '2005 Calendar'), are information products aimed at raising public awareness.

License

"2. The ISDR Secretariat permits ENRICO [*sic*] the limited right to use its name and logo solely in connection with the production and distribution of the 2005 Calendar.

"3. Pursuant to the license granted by the ISDR Secretariat as set forth in paragraph 2 above, ENTICO is permitted to use the ISDR Secretariat name and logo to raise funds sufficient to pay the estimated GBP£200,000 cost to ENTICO for the production and distribution of the 2005 Calendar.

. . .

* Not reproduced herein.

Settlement of Disputes

[6]. Any matter for which no provision is made in this Licensing Agreement or any controversy between the ISDR Secretariat and ENTICO shall be settled by negotiation between the parties. Any controversy or claim arising out of or in connection with this Licensing Agreement shall, if attempts at settlement by negotiation have failed, be submitted to one single arbitrator agreed upon by both parties in accordance with the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Rules) arbitration in Geneva by the single arbitrator agreed upon by all parties. The decision rendered in the arbitration. Including [*sic*] any division or allocation of costs, shall constitute the final adjudication of the dispute.

Non-waiver of immunity

7. Nothing in this agreement shall signify, express or imply a waiver of the immunity and privileges enjoyed by the United Nations pursuant to the 1946 Convention on Privileges and Immunities of the UN.*

Entry into force, modifications and termination

8. This Licensing Agreement shall enter into force upon signature by authorized officials representing the ISDR Secretariat and ENTICO, and shall continue in full force and effect until the expiration of all rights and obligations arising hereunder or its termination in accordance with the terms hereof.'

5. After 20 September 2005, Entico and UNESCO began the practical implementation of the Contract terms. Thus,

5.1 On 5 October Mr. Ramsey sent Ms. Tanaka a draft of the promotional letter that Entico wished to send out to potential sponsors of the calendar. Ms. Tanaka replied on 7 October.

5.2 Thereafter, at a point in time shortly after 10 October 2005, Mr. Ramsey spoke to Ms. Tanaka, by telephone. In this conversation Ms. Tanaka agreed that Entico could start work on the calendar.

5.3 Entico started work in earnest on the calendar on or around 10 October 2005.

6. UNESCO did not, as was mentioned in Ms. Tanaka's email of 20 September 2005, avail itself of the opportunity to revert to Entico with a re-drafted contract. In the premises, it is to be inferred from UNESCO's conduct, as particularised above in paragraph 5, that it (a) unilaterally waived the possibility of re-drafting the Draft Contract and (b) was satisfied to proceed on the basis of the Draft Contract as emailed by Mr. Ramsey to Ms. Tanaka (and with the substitutions set out above in paragraph 4).

7. Entico and UNESCO did not sign the Contract. It is to be inferred from the parties' conduct, as particularised above in paragraph 5, that they mutually waived that part of Clause 8 which required the parties' signature before the Contract could enter into force."

6. Performance of the contract and the nature of UNESCO's obligations is described at paragraphs 9 and 10 of the Particulars of Claim as follows:

* United Nations, *Treaty Series* , vol. 1, p. 15, and vol. 90, p. 327.

"9. Pursuant to the Contract/Agreement, and from 10 October 2005 onwards, Entico carried out the work required to design, produce and distribute the calendar, including researching and contacting potential sponsors, negotiating terms with them, undertaking graphic design work, researching photographs, compiling a database for the mailing/distribution and organising and booking the printing.

"10. In the premises, and pursuant to the Contract/Agreement, UNESCO was obliged to permit Entico to use the 'UNESCO' name and logo to raise funds sufficient to pay the cost to ENTICO for the production and distribution of the 2006 Calendar. UNESCO has failed and/or refused to do so (see paragraph 18 below)."

7. Entico alleges that on 2 November 2005 Ms. Tanaka telephoned Mr. Ramsey and asked him to put the project on hold since a potential sponsor, contacted by Entico, had complained to UNESCO about the request for sponsorship. On the next day Mr. Ramsey sent Ms Tanaka an e-mail which began "I would ask you to reconsider your decision to cancel this project . . .". There followed several weeks of discussions at the culmination of which, Entico alleges, it became clear that UNESCO did not wish to proceed with the calendar. Finally, by letter dated 19 December 2005 UNESCO asked Entico "to halt immediately the use of the UNESCO logos and of the Organisation's name".

8. By letter dated 21 April 2006 Entico's solicitors invoked the arbitration clause and invited UNESCO's agreement to proceed to arbitration under UNCITRAL Rules.

9. UNESCO replied on 22 May 2006. UNESCO again denied that any contract had been concluded. It said that invocation of the arbitration clause "must fail because that clause is part of a draft contract that did not enter into force".

10. Entico alleges at paragraph 24 of its Particulars of Claim that UNESCO thereby repudiated the arbitration clause, that that repudiation has been accepted by Entico and that the arbitration clause is in consequence inoperative.

11. At the hearing I expressed doubt whether this analysis is correct and doubt whether it was in any event in Entico's best interests to pursue it. Entico's arguments on incompatibility with article 6 and in particular on proportionality depend in part upon the assertion that there is available to Entico no alternative reasonable means of redress. It seemed to me that the court might on this ground be reluctant to strike down UK legislation giving effect to obligations owed under international law at the suit of a party which had voluntarily divested itself of an opportunity to pursue relief by way of arbitration. Upon reflection Ms. Fatima, for Entico, whilst denying that arbitration here represented a reasonable means of redress, nonetheless for the purposes of this application dropped her insistence upon the argument that Entico had accepted UNESCO's repudiation of the arbitration clause. She maintained her argument that UNESCO had indeed repudiated that agreement. I do not need to decide whether that point is correct, although I would require some persuasion that it is. The letter relied upon did no more than to deny the existence of an agreement to arbitrate in consequence of there never having been an agreement of which such a provision could form part. UNESCO denied that it had reached agreement with Entico on anything. The letter of 22 May 2006 needs also to be read in the light of the correspondence which preceded it. Ms. Fatima relied upon the decision of the Court of Appeal in *Downing* v. *Al Tameer Establishment* [2002] 2 All E.R. (Comm) 545, [2002] EWCA Civ 721. As the Court of Appeal there stressed however, that case turned upon an analysis of its own facts which included both denial by the defendant that a signed

agreement bound it and assertions that, if there was a contract, the claimant was himself in breach of it. Subsequently the principle of separability of an arbitration agreement enshrined in section 7 of the Arbitration Act 1996 has been the subject of consideration by the House of Lords in *Fiona Trust and Holding Corporation* v. *Privalov* [2007] UKHL 40; [2007] Bus LR 1719. That case was of course concerned with a different problem which arises where there is a challenge to the validity of an apparent agreement, rather than a denial that there was ever agreement to anything, including consequentially a denial that there was an agreement to arbitrate. Nonetheless in the light of that discussion the court is in my view likely to be slow to characterise denial of the existence of a contract as necessarily repudiatory of an agreement to arbitrate which, if the main contract was agreed, is included within it. At any rate for the purposes of the present application it is sufficient for me to record that in extensive correspondence UNESCO has never suggested that, if a contract *was* concluded with Entico, it did not include an arbitration clause in the form proposed by Mr. Ramsey in his e-mail of 20 September 2005 and as set out in the attached contract between Entico and UN/ISDR.

12. Although Entico is reluctant to use it, the UNCITRAL Rules, unsurprisingly, provide a mechanism to deal with the situation where the parties are unable, for whatever reason, to decide upon the identity of a sole arbitrator. Article 6 (2) provides:

> "If within 30 days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority."

13. Once constituted, the tribunal has by reason of article 21 of the UNCITRAL Rules and the principle of *Competence de la competence* [*sic*] or, as it is more often rendered in German, *Kompetenz/Kompetenz,* a power itself to determine whether an agreement was concluded. Article 21 of the UNCITRAL Rules provides:

> "1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
>
> "2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of [this article], an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

14. Entico submits that an arbitration in which UNESCO does not participate will be a meaningless process. I cannot accept that submission. Arbitrations regularly proceed without the active participation of one party or alleged party thereto. The UNCITRAL Rules make express provision for just such a case. Entico itself proposed the incorporation of that machinery and, if it concluded a contract with UNESCO, its contract by definition envisaged the possibility that arbitration of a dispute arising therefrom might proceed without the co-operation of one party. The point has not yet been put to the test since Entico has so far declined to invoke the default procedure. It alleges that it is unreasonable

to expect it to resort to "unilateral arbitration". However it is by no means certain that UNESCO would not in fact participate, albeit under protest, in an UNCITRAL arbitration were a tribunal to be constituted. UNESCO's stance in correspondence has so far been that Entico's reluctance to initiate arbitration is itself indicative of an absence in Entico of a belief that a contract was in fact concluded. However in its letter to the court of 27 June 2007, copied to Entico's solicitors, UNESCO "reserve[d] its right, should such arbitration proceedings be initiated, to raise the issue of the non-existence of a contract between the parties". The inference is obvious that the forum in which such issue might be raised is the arbitration itself, as is in fact borne out by the manner in which UNESCO expressed themselves in a subsequent letter of 11 July 2007:

> "Consequently, if Entico truly believes that it has a valid contract with UNESCO, then Entico could unilaterally invoke the UNCITRAL procedure to have an arbitrator appointed.
>
> "UNESCO has no objection to Entico doing so, but UNESCO reserves it right to raise in that context its strongly-held view that there is no contractual relationship between Entico and UNESCO."

UNESCO has in fact on more than one occasion since Entico issued these proceedings stated that it "has no objection" if Entico wishes to have recourse to arbitration under the UNCITRAL Rules. It could of course have no such objection. Finally and perhaps more relevantly UNESCO has also confirmed, by letter of 8 October 2007 to Entico's solicitors, "that should an arbitral tribunal (scilicet, constituted pursuant to the UNCITRAL Rules) make[s] an award against UNESCO, the latter would always respect and comply with such an award, whatever may be the case concerned." I must naturally proceed upon the basis that this organisation, of which the UK is a member, will act in good faith and indeed comply with the terms of an award ordering the payment of damages or compensation to Entico. If UNESCO participated in an arbitration under protest, it would be likely to comply with any direction of the tribunal as to documentary disclosure. If it did not so participate it may be an open question to what extent it would comply with such a direction made prior to determination that a contract, including an agreement to arbitrate, was indeed concluded. It is also an open question to what extent Entico could obtain assistance from the supervisory court of the forum, *i.e.,* the Swiss Court. This and other issues are discussed in an article by Professors Emmanuel Gaillard and Isabelle Pingel-Lenuzza at [2002] 51 ICLQ pages 1–15, in which the learned authors bemoan the conservative approach of the European Court of Human Rights, hereinafter ECt.HR, and criticise a regime which accords to international organisations an immunity which goes beyond that habitually accorded to States.

15. Entico submits that resort to arbitration must nonetheless not be regarded as a reasonable option because the tribunal would lack the competence conclusively to determine, if it be the case, that whereas a contract was indeed concluded between Entico and UNESCO, it did not include as a term thereof an agreement to arbitrate. Whilst it is not for me finally to determine whether a contract was concluded, I have to say that I regard the prospect of a finding along the lines suggested as vanishingly small. Whilst this is a possibility that Entico has raised from the outset of the dispute, it is not currently part of its pleaded case in this action. In order to render it so Entico seeks leave to introduce into the Particulars of Claim a new paragraph 8 as follows:

> "Alternatively, insofar as the Contract was not agreed between the parties as pleaded above, the Claimant avers that an agreement ('the Agreement') was reached between the parties with the core terms being those pleaded above at paragraph 3. The Agreement was concluded partly orally, partly in writing and partly by the conduct of the parties: as is evident from the facts pleaded herein."

Although UNESCO stated that it did not object to this amendment, there is a case for disallowing it on the grounds that it is inconceivable that there could be spelled out of the e-mail exchanges, oral exchanges and conduct pleaded an agreement as alleged. I must record my view that I do indeed regard such an outcome as inconceivable. It seems to me that, on the basis of the case as pleaded, either there was a contract which included the "Settlement of Disputes" clause or there was no contract at all. That is the form of contract which Entico proposed. That proposal would have been understood by UNESCO as made with an eye to the immunity enjoyed by it and comparable organisations. Indeed I would think it right to impute to both parties, if they so conducted themselves as evincing to the other an intention to be bound, an intention to do so on terms which included the Settlement of Disputes provision. It is both reasonable and necessary to impute such an intention since without it the parties must necessarily have been intending to conclude an arrangement which they either knew or ought to have known would be unenforceable. Because of UNESCO's immunity, in order to be enforceable an agreement had to include the arbitration provision. For all these reasons a conclusion that the parties reached an enforceable agreement which did not include the proffered arbitration clause does not seem to me possible.

16. The possibility of such a conclusion being reached is a slender basis upon which to embark upon a consideration whether UK legislation should be struck down. Nonetheless I shall allow the amendment since, the article 6 point having been fully argued, both Entico and the Secretary of State are anxious that I should decide it. Without the amendment I do not consider that the point strictly arises. If, contrary to my expectation, an arbitral tribunal were to come to the conclusion which I regard as inconceivable, it would be most unfortunate if there remained the possibility of yet further expensive resort to this court to determine an argument which can be resolved now.

UNESCO's immunity

17. At the outset it should be stressed that the immunity given to UNESCO in this jurisdiction has been given solely in order to comply with the UK's obligations under public international law. I have already set out the source of this obligation at paragraph 2 above, the 1947 Convention. It is an obligation owed to virtually the entire international community. I have already set out sections 4 and 5 of article III which is headed "PROPERTY, FUNDS AND ASSETS". It should be noted that Section 4 makes no provision for any waiver whatsoever so far as concerns the immunity from execution, article IX, headed "SETTLEMENT OF DISPUTES" includes Section 31 which provides:

> "Each specialised agency shall make provision for appropriate modes of settlement of:
>
> (a) Disputes arising out of contracts or other disputes of private character to which the specialised agency is a party;

(b) Disputes involving any official of a specialised agency who by reason of his official position enjoys immunity, if immunity has not been waived in accordance with the provisions of section 22."

It necessarily follows that an "appropriate" mode of settlement does not include within it submission to the process of execution. A specialised agency cannot waive its immunity in that regard. There is nothing in the Convention to make enjoyment of the privileges and immunities conferred by sections 4 and 5 dependent upon compliance with section 31. Section 31 itself offers no criteria pursuant to which the appropriateness of a mode of settlement is to be judged. Importantly, section 31 does not say that the mode of settlement for which provision is made must be effective. It would be wholly inimical to the international scheme envisaged if individual States party arrogated to themselves the power to determine whether the provision made by each specialised agency for the settlement of disputes is adequate, whether considered generally or by reference to the facts of a particular case.

18. The 1947 Convention must be interpreted in accordance with the principles codified in articles 31–33 of the Vienna Convention on the Law of Treaties*, 1969, which require that a treaty be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose. Sections 4 and 5 of the 1947 Convention are clear, unequivocal and unconditional. They plainly require the parties to recognise and to give effect to a broad jurisdictional immunity possessed by each specialised agency. There is in my judgment no room for "reading down" the provisions of the 1947 Convention in order to take account of the provisions of the subsequent ECHR, a treaty which is binding upon only a minority of the parties to the 1947 Convention.

19. Article 31.3 (c) of the Vienna Convention provides:

"There shall be taken into account, together with the context:

(c) any relevant rules of international law applicable in the relations between the parties."

As was pointed out by the ECt.HR in *Bankovic* v. *Belgium* 123 ILR 94 at paragraph 57 of the judgment, the ECHR is itself an instrument which must be construed in the light of this article. Moreover article 30.4 (b) of the Vienna Convention has the effect that the need to comply with the requirements of the ECHR does not excuse compliance with an earlier convention to which more states are party than are party to the ECHR. As Mr. Greenwood QC, for the Secretary of State, submitted, it is in the highest degree implausible that when the states party drafted and acceded to the ECHR they intended thereby to place themselves in violation of their existing international obligations. Their existing international obligations, owed to many more states than were or are party to the ECHR, required them to recognise and to give effect to a broad and unqualified jurisdictional immunity enjoyed by each specialised agency. It would therefore be surprising if article 6 of the ECHR was intended to render this regime non-compliant, thereby plunging all states party to both the ECHR and the 1947 Convention into a position in which their obligations conflicted.

20. Since 1968 the immunity of international organisations in English law has been governed by the provisions of the International Organisations Act 1968. Section 1 of the Act provides, in relevant part:

* United Nations, *Treaty Series,* vol. 1155, p. 331.

"(1) This section shall apply to any organisation declared by Order in Council to be an organisation of which—

"(a) the United Kingdom, or Her Majesty's Government in the United Kingdom, and

"(b) any other sovereign Power or the Government of any other sovereign Power are members.

"(2) Subject to subsection (6) of this section, Her Majesty may by Order in Council made under this subsection specify an organisation to which this section applies and make any one or more of the following provisions in respect of the organisation so specified (in the following provisions of this section referred to as 'the organisation'), that is to say-

"(a) confer on the organisation the capacities of a body corporate;

"(b) provide that the organisation shall, to such extent as may be specified in the Order, have the privileges and immunities set out in Part I of Schedule 1 to this Act;"

Part I, section 1 of schedule 1 includes "immunity from suit and legal process" among the privileges and immunities which may be accorded by Order in Council. Section 1 (6) of the Act provides that:

"Any Order in Council made under subsection (2) or subsection (5) of this section shall be so framed as to secure—

(a) that the privileges and immunities conferred by the Order are not greater in extent than those which, at the time when the Order takes effect, are required to be conferred in accordance with any agreement to which the United Kingdom or Her Majesty's Government in the United Kingdom is then a party (whether made with any other sovereign Power or Government or made with one or more organisations such as are mentioned in subsection (1) of this section);

. . ."

21. The Specialised Agencies of the United Nations (Immunities and Privileges) Order, SI 1974/1260, was adopted under the 1968 Act. Section 6 provides that:

"Except in so far as in any particular case it has expressly waived its immunity, the Organisation shall have immunity from suit and legal process. No waiver of immunity shall be deemed to extend to any measure of execution."

The Specialised Agencies of the United Nations (Immunities and Privileges of UNESCO) Order, SI 2001/2560, states that "UNESCO is an organisation of which the United Kingdom and other sovereign powers are members" (section 2) and that "the Specialised Agencies of the United Nations (Immunities and Privileges) Order 1974 shall apply to UNESCO . . . in accordance with its terms" (section 3).

22. Ms. Fatima has suggested that in compliance with its interpretative obligation imposed by section 3 of the Human Rights Act 1998 the court should read section 6 of the 1974 Order in relation to UNESCO as containing a proviso to the effect that UNESCO shall have immunity from suit and legal process "provided article IX, section 31 of the [1947] Convention is satisfied" and that it should then go on to declare that as regards this claim UNESCO has failed to satisfy the requirements of article IX, section 31 and is not as regards this claim immune from suit and legal process. I have already given my reasons for regarding it as impossible to read the 1947 Convention as securing the result that the enjoyment of immunity is conditional or qualified in this way, and for thinking it impos-

sible and unprincipled for this court to adjudicate upon whether there has been compliance with Section 31. However as Mr. Greenwood points out the logical conclusion to be drawn from Ms. Fatima's argument is that the 1974 Order is in any event *ultra vires* without need to resort to the ECHR because contrary to section 1 (6) of the 1968 Act it confers privileges and immunities greater in extent than those required by the 1947 Convention.

23. It is unnecessary for me to decide whether article 6 of the ECHR is in these circumstances in fact engaged at all. In the context of State immunity Lord Millett in *Holland* v. *Lampen-Wolfe* [2000] 1 WLR 1573 at 1588 pointed out that while article 6 "forbids a contracting state from denying individuals the benefit of its powers of adjudication it does not extend those powers". In *Jones* v. *Saudi Arabia* [2007] *1 AC 270* both Lord Bingham at paragraph 14 and Lord Hoffmann at paragraph 64 expressed their agreement with Lord Millett's approach, As Lord Hoffmann put it, "there is not even a *prima facie* breach of article 6 if a State fails to make available a jurisdiction which it does not possess." When the UK became party to the ECHR it possessed no jurisdiction over UNESCO unless UNESCO chose to waive its immunity.

24. Since recognition of the immunity of an international organisation is equally required by international law, there can be no reason for regarding this approach as not equally applicable to recognition of organisational immunity as it is to recognition of State immunity. Certainly when considering whether the grant of immunity to an international organisation pursues a legitimate aim, the ECt.HR has drawn no distinction—see *Waite and Kennedy* v. *Germany* [1999] 30 EHRR 261 at paragraph 63. In that case however Germany conceded that article 6 was engaged and the court proceeded on the basis that it was applicable. That case was moreover concerned with the European Space Agency (the ESA), an international organisation created by a small group of European States all of which were parties to the ECHR and had been so for some years before the establishment of the ESA.

25. In the present case it makes no difference to the outcome of this application whether article 6 is regarded as engaged or not. I turn therefore to consider whether, on the assumption that article 6 is engaged, the grant of immunity to UNESCO pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

26. In relation to the first question, it was as I understood it the submission of Ms. Fatima that the court is concerned with the question whether the grant of immunity to UNESCO and similar organisations is itself a legitimate aim in the sense of being necessary to its or their proper functioning. In my judgment jurisprudence of which I must take account demonstrates that this is not the appropriate question. In its separate judgments in the trilogy of cases *Al-Adsani* v. *United Kingdom* (2001) 34 EHRR 273, *Fogarty* v. *United Kingdom (2001) 34 EHRR 302,* and *McElhinney* v. *Ireland* (2001) *34 EHRR 323,* the Grand Chamber of the ECt.HR included, in identical terms, the following passage:

> "The Court must first examine whether the limitation pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium,* by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

> The Court must next assess whether the restriction was proportionate to the aim pursued. It recalls that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties, and that article 31 (3) (c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties.' The Convention, including article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.
>
> It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in article 6 section 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity."

It follows in my judgment that compliance with obligations owed in international law is of itself pursuit of a legitimate aim. Furthermore, insofar as the 1974 Order reflects generally recognised rules of public international law on organisational immunity, which in my judgment it does, it cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in article 6 (1).

27. It is true that in the earlier case of *Waite and Kennedy,* which was concerned with organisational rather than State immunity, the ECt.HR did not express itself in quite such stark terms. However as I have also already pointed out, there can in fact be no principled basis upon which the approach can in the two situations be different. The Commission was in that case almost equally divided, a bare majority, 17—15, finding that Germany had not exceeded its margin of appreciation in limiting the applicants' rights of access to the national courts in relation to an employment dispute with the ESA. The dissentients pointed out that the Commission was there concerned only with the immunities of international organisations created after the coming into force of the ECHR—see page 281. It is true that in considering proportionality the Court said that it regarded as a material factor whether the applicants had available to them means of redress which were a reasonable alternative to access to the German national courts—see paragraph 68 at page 287. At paragraph 73 of the judgment the Court said that it took into account in particular the alternative means of legal process available to the applicants, which involved an internal tribunal. However I note that the Court did not approach the matter upon the basis that it is a pre-requisite to the compatibility with article 6 of organisational immunity that the organisation provide an alternative forum for dispute resolution. Furthermore the conceded applicability of article 6 in that case to disputes involving the ESA created no possibility of conflict of international obligations. The Court was concerned only with the obligations of an ECHR State owed to other ECHR States and to an organisation created by such States long after they had acceded to the ECHR. In the light of the approach of the ECt.HR in the subsequent trilogy of State immunity cases it is not in my judgment safe to assume that the ECt.HR would in a case involving the immunity of a global organisation created prior to the ECHR adopt reasoning similar to that to be found in *Waite and Kennedy.* Indeed it is worth setting out in full what the Court did on that occasion say about the immunity of

international organisations in the context of legitimate aim. At paragraph 63, a passage to which I have already drawn attention above, the Court said this:

> "Like the Commission, the Court points out that the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.
>
> The immunity from jurisdiction commonly accorded by States to international organisations under the organisations' constituent instruments or supplementary agreements is a long-standing practice established in the interest of the good working of these organisations. The importance of this practice is enhanced by a trend towards extending and strengthening international co-operation in all domains of modern society.
>
> Against this background, the Court finds that the rule of immunity from jurisdiction, which the German courts applied to ESA in the present case, has a legitimate objective."

One can understand why in that case there was an argument for the applicability of article 6, which was of course conceded. By contrast I can find no justification for reading a convention concluded some years before the ECHR, the majority of whose parties are not bound by that later Convention, in the light of the later principles espoused by only a small sub-set of the parties to the earlier convention.

28. If however, contrary to my view, it is relevant to take into account the availability of an alternative forum, it is clear that there is in the present case an available mode of dispute resolution, *i.e.,* arbitration under UNCITRAL Rules. For the reasons already stated I find it inappropriate to assess its adequacy and likely efficacy, although I should record that it has certainly not been established that it is an inadequate remedy. It is the remedy which Entico itself put forward for acceptance. The immunity from execution of UNESCO is not incompatible with article 6—see *Kalogeropolou* v. *Greece* 129 ILR 537, and is in any event irrelevant, UNESCO having stated that it will comply with any award. As Mr. Greenwood pointed out the ability of either party to compel the attendance of the now retired Ms. Tanaka in any forum must be open to question, particularly if she has returned to her native country. Her absence would be likely to inconvenience UNESCO more than Entico. I accept that it may be open to question whether Entico will obtain documentary disclosure from UNESCO. However voluntary disclosure of documents other than those upon which a party wishes to rely is not a feature of litigation or arbitration in jurisdictions which do not follow the common law tradition.

29. In my judgment therefore if article 6 is engaged there is no violation of Entico's article 6 rights. It has of course already been held by the Court of Appeal in *Stretford* v. *The Football Association* [2007] 2 Lloyds Rep 31, that voluntarily entering into an arbitration agreement amounts to a waiver of rights under article 6. However my principal conclusion is that the 1974 Order is not incompatible with article 6. In those circumstances it is unnecessary for me to consider the various heads of relief pursued by Entico. I grant leave to Entico to amend its Particulars of Claim in terms of the draft placed before the court, so that those various heads of relief set out in the latest amendment may be regarded as having been open to and sought by Entico on this application. It follows however that it is inappropriate to grant to Entico any further relief and in particular I dismiss its application that judgment be entered in its favour against UNESCO in default of acknowledgement of service.

2. Court of Appeal (Civil Division), London

*A, K, M, Q & G, Applicants/Respondents, against the H.M. Treasury, Respondent/Appellant**
Decision of 30 October 2008

DOMESTIC IMPLEMENTATION OF UNITED NATIONS SANCTIONS—SECTION 1 OF THE UNITED NATIONS ACT 1946—THE TERRORISM ORDER 2006 (TO)—THE AL-QAIDA AND TALIBAN ORDER 2006 (AQO)—QUESTION OF WHETHER THE TO AND THE AQO WERE "*ULTRA VIRES* THE UNITED NATIONS ACT 1946" AND THUS UNLAWFUL IN WHOLE OR IN PART—EFFECT OF THE LACK OF PROCEDURAL SAFEGUARDS IN THE TO—THE PRINCIPLES OF PROPORTIONALITY AND LEGAL CERTAINTY—RIGHT TO A MERITS BASED REVIEW UNDER THE AQO FOLLOWING DESIGNATION BY THE UNITED NATIONS SANCTIONS COMMITTEE

Summary

In the case *A, K, M, Q & G* v. *H.M. Treasury,* the Court of Appeal (Civil Division) was confronted with questions regarding the lawfulness of the Terrorism Order 2006 (TO) and the Al-Qaida and Taliban Order 2006 (AQO). The case before the Court was an appeal by H.M. Treasury (HMT) against two orders made by Collins J of the High Court of Justice, Queen's Bench Division. By the first order delivered, where G was the Applicant, Collins J quashed both the TO and the AQO. By the second order, where A, K, M and Q were the Applicants, the TO was quashed again. Both Orders were quashed on the ground of being "*ultra vires* the United Nations Act 1946" and thus unlawful. The central issue in this appeal was whether the Judge was correct so to hold and, if he was, whether the whole Order should have been quashed in each case.

The Orders were made under section 1 of the United Nations Act to give effect to Security Council resolutions. The TO was laid down to apply the measures outlined in resolutions 1373 (2001) and 1452 (2002). The former, adopted following the attacks in New York on 11 September 2001, was concerned with prevention and criminalization of the financing of terrorist acts. The latter allowed each State to determine certain funds that should not be frozen. The AQO derived from resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1452 (2002) and 1526 (2004). Resolutions 1267 and 1333 required the freezing of economic resources, controlled by the Taliban and Usama bin Laden, respectively.

All Applicants had been designated by direction of the HMT under article 4 (2) (a) of the TO. G was, in addition, to be considered as a designated person under the AQO, subject to designation by the United Nations Sanctions Committee, article 3 (1) (b) AQO.

The central question regarding the TO was whether the Crown exceeded its legislative power by concluding that the Order was necessary or expedient for the effective application of the mentioned resolutions. While the Applicants submitted that it had, HMT argued that, given the purpose of the resolutions, the Order should be construed broadly.

* Due to the length of the judgement, only selected extracts are reproduced herein. However, in order to ease the comprehension of this judgement, a summary has been prepared by the United Nations Secretariat. The complete text is available on the internet at http://www.judiciary.gov.uk/docs/judgments_guidance/a_k_m_q_g.pdf.

Since resolution 1373 did not state the standard of proof for ascertaining whether a particular person committed or attempted to commit terrorist acts before the State had to freeze his assets, Sir Anthony Clarke concluded that "the reasonable grounds for suspecting" test in article 4 (2) TO was lawful, on the condition that there was a right to challenge it. The terms of the TO in this respect were therefore found to lie within the Crown's statutory powers under section 1 of the United Nations Act and were not contrary to the European Convention of Human Rights. However, since the Order was not to go further than to apply the provisions of resolution 1373, the addition of "or may be" to the wording of article 4 (2) was not expedient and thus unlawful.

Thus the Judge did not quash the TO, but ruled that the words "or may be" should be excised from article 4 (2). Since the directions against all the Applicants were made by reference to "or may be", such directions were quashed.

As to the lack of express procedural safeguards in the TO, apart from that contained in article 5 (4), Sir Anthony Clarke pointed out that, while there is no statutory power to appoint a special advocate in proceedings arising out of the TO, the court would be able to authorize or request the use of one in an appropriate case. Regarding the lack of provisions to admit intercept material in legal proceedings, the Judge underlined that the courts must either guarantee sufficient procedural safeguards for the Applicants under article 5 (4) or set aside the direction in question. Under these circumstances, the TO was found to be "expedient".

The Applicants submitted that articles 7 (3) and 8 (2) of the TO were unlawful because they interfered with article 8 (1) of the European Convention on Human Rights with regard to the right to respect for one's private and family life and article 1 of the First Protocol thereto regarding the right to peaceful enjoyment of one's possessions, were disproportionate and did not satisfy the test of legal certainty. Regarding article 7 (3), Sir Anthony Clarke found neither the terms "economics resources" or "deal with", nor the defence provided for in article 7 (4), to be uncertain. Article 8 was also considered to be sufficiently clear, to have a legitimate purpose and to provide for a defence. Both articles satisfied the European Convention on Human Rights and were proportionate, given that HMT operated the license scheme, provided for in article 11, in the way indicated.

While Sir Anthony Clarke answered the question of the lawfulness of the AQO affirmatively, he held that the court could consider an application for judicial review by a person to whom the AQO applied as a result of designation by the United Nations Sanctions Committee and, under such an application, consider the basis of the listing.

Lord Justice Sedley delivered a dissenting Judgment. While agreeing with Sir Anthony Clarke in respect of procedures to ensure procedural safeguards and on the severance of the words "may be" from the TO, he concluded that the TO did not satisfy the test of legal certainty. The TO was therefore neither necessary nor expedient and was as such "*ultra vires* section 1 of the United Nations Act 1946". With regard to the AQO, Lord Sedley allowed the appeal on the same grounds as Sir Anthony Clarke.

Lord Justice Wilson agreed with Sir Anthony Clarke.

Extracts*

Sir Anthony Clarke, Master of the Rolls

. . .

The legal framework

The United Nations Act 1946

3. I take the description of the Orders and their *vires* largely from the Judgment. Both Orders were made under powers conferred by section 1 of the United Nations Act 1946 . . . , which provides, so far as material:

> "(1) If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty five (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty's Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order . . .
>
> (4) Every Order in Council made under this section shall forthwith after it is made be laid . . . before Parliament."

The Judge noted in [3] that, although every Order must be laid before Parliament, there is no procedure which enables Parliament to scrutinise or to amend it, although no doubt an individual Member could seek to initiate a debate if he or she felt that an Order was unsatisfactory. The AQO and the TO were each laid before Parliament on the day after each was made and came into force on the following day. . . .

. . .

The TO

12. The preamble of the TO is in these terms:

> "Under Article 41 of the Charter of the United Nations, the Security Council of the United Nations has, by resolution 1373 (2001), adopted on 28th September 2001 and resolution 1452 (2002) adopted on 20th December 2002, called upon Her Majesty's Government in the United Kingdom and all other States to give effect to decisions of that Council in relation to terrorism."

By article 3 (1) of the TO, a designated person is one who is identified in Council Decision 2006/379/EC as provided for in article 2.3 of Regulation (EC) No 2580/2001 or one identified in a direction made under article 4 of the TO. Neither the Council Decision nor the Regulation is relevant here because the Applicants have all been designated by direction under article 4, which provides:

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* The selected extracts have been slightly edited by the United Nations Secretariat according to the United Nations editorial style.

"(1) Where any condition in paragraph (2) is satisfied, the Treasury may give a direction that a person identified in the direction is designated for the purpose of this Order.

(2) The conditions are that the Treasury have reasonable grounds for suspecting that the person is or may be–

(a) a person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism;"

. . .

As the Judge observed in [9], the relevant sub-paragraph in these cases is (*a*).

13. Article 7, which is quoted in full below, *inter alia* prohibits any person from dealing with funds or economic resources belonging to or held by a designated person. Article 7 (6) defines "deal with" to mean:

"(*a*) in respect of funds–

(i) use, alter, move, allow access to or transfer;

(ii) deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or

(iii) make any other change that would enable use, including portfolio management; and

(*b*) in respect of economic resources, use to obtain funds, goods or services in any way, including (but not limited to) by selling, hiring or mortgaging the resources."

"Economic resources" are defined in article 2 (1) to mean:

"assets of every kind, whether tangible or intangible, moveable or immoveable, which are not funds but can be used to obtain funds, goods or services."

Article 8, which is also quoted in full below, by paragraph (1) prohibits anyone from making "funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a designated person", otherwise than under the authority of a licence granted by HMT under article 11. By articles 7(3) and 8(2) it is a criminal offence to contravene any of the prohibitions in them and, by article 13 (1), the offence carries a maximum of 7 years imprisonment on indictment or 12 months on summary conviction. The only defence available requires the defendant to show that he "did not know and had no reasonable cause to suspect" that he was dealing with funds or economic resources belonging to a person referred to in article 7 (2) or making funds available to or for the benefit of such a person otherwise than under licence. In these circumstances the Judge was right to say in [10] that the offence is one of strict liability and that the potential penalty is severe.

The AQO

14. In [11] the Judge described the AQO as even more draconian. It provides by article 3:

"(1) For the purposes of this Order–

(a) Usama bin Laden,

(b) any person designated by the Sanctions Committee, and

(c) any person identified in a direction, is a designated person.

(2) In this Part, "direction" (other than in articles 4(2) (d) and 5(3) (c)) means a direction given by the Treasury under article 4 (1)."

Article 4 (1) permits designation, where, pursuant to article 4 (2), HMT has reasonable grounds for suspecting that the person is or may be–

"(*a*) Usama bin Laden;

(*b*) a person designated by the Sanctions Committee;

(*c*) a person owned or controlled, directly or indirectly, by a designated person; or

(*d*) a person acting on behalf of or at the direction of a designated person."

15. The distinction between articles 3(1) (a) and (b) and 4(2) (a) and (b) is that the latter applies if there is some issue whether the individual in question is listed. If he is listed and there is no doubt that he is indeed that person, he is automatically designated under article 3(1). G is listed and so is caught by article 3 (1). This is of some importance because by article 5 (4) an application to the High Court can only be made to set aside a direction given by HMT, whereas article 3 (1) (b) does not involve a direction. It follows that G has no express right to apply to the High Court in respect of the freezing of assets or, in any case, the criminal offences imposed under articles 7 and 8, which are almost identical to articles 7 and 8 of the TO.

. . .

The appeal

24. In this appeal HMT says that the judge should not have struck down the TO and the AQO either in whole or in part. It says that, even if the Orders where in part *ultra vires,* there was no sensible basis upon which the judge should have struck them down in their entirety. A number of particular issues arise in this appeal as follows:

i) Is the TO *ultra vires* the UN ACT?

ii) If so, must the TO be quashed?

iii) What is the effect of the lack of procedural safeguards?

iv) Criminal offences: are the principles of legal certainty and proportionality satisfied?

v) Is the AQO unlawful?

vi) The challenge to the TO in the Respondent's Notice?

i) Is the TO *ultra vires* the United Nations Act?

. . .

33. Given the terms of section 1 quoted above, it is not and could not be in dispute that the Security Council had called upon the Government to apply the measures set out in Security Council resolutions 1373 and 1452. The question is therefore a narrow one, namely whether it was open to the Crown to conclude that it was necessary or expedient to introduce the terms of the TO in order to enable the provisions of those Security Council resolutions to be effectively applied.

. . .

37. . . . The difference is that the obligations in those paragraphs [paragraph 1 (c) and (d) Security Council resolution 1373] are limited to dealing with "persons who commit or attempt to commit terrorist acts" and the like, whereas under the TO the category of designated person is extended (a) to any person whom it is suspected on reasonable grounds is such a person and (b) to those who *may be* such a person.

38. The Applicants say that, in making the TO, the Crown has exceeded the power conferred on the United Kingdom by the conjunction of the Untied Nations Act and Security Council resolution 1373 in two respects. The first is that the conditions in the TO arise where HMT has reasonable grounds for suspecting that the person is a terrorist, which it is said are not present in the resolution, and the second is the addition of the words *may be*. I take them in turn.

"Reasonable grounds for suspecting"

39. . . . The question is whether the provision, including those words, "appears . . . necessary or expedient for enabling those measures to be effectively applied" are wide enough to support the TO as drafted. . . . For my part, I would accept the submission that the words "necessary or expedient" are disjunctive and that the Crown is indeed given a wide discretion. Moreover, I would further accept his submission that the court should not lightly declare a provision made pursuant to such a wide power to be *ultra vires*.

. . .

42. I would accept the submissions of HMT on this point. Security Council resolution 1373 is silent on the standard of proof to be satisfied on the question whether a particular person "commits, or attempts to commit, terrorist acts . . ." before a State must freeze his assets within paragraph 1 (c) or prohibit certain activities within paragraph 1 (d). In my opinion a State could properly conclude that it was expedient to provide that reasonable grounds for suspicion was an appropriate test. As indicated above such a test has been accepted by the ECtHR in relation to a similar problem arising out of the risk of terrorism. In these circumstances I would accept such a test as lawful provided that the person concerned has a proper opportunity to challenge the decision made against him. I return to this point below.

43. In reaching that conclusion I have had full regard to the principles stated by the Judge in [21–25] of his Judgment. He first referred, at [21], to the earlier cases of *R* v. *Halliday* [1917] AC 287 and *Chester* v. *Bateson* [1920] 1 KB 829. Then at [22] he quoted this statement by Lord Browne-Wilkinson in *R* v. *Secretary of State ex p Pierson* [1998] AC 539 at 575D:

> "From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

44. At [22] the Judge referred to a later statement on the same page by Lord Browne-Wilkinson that it was not open to a court to quash an Order on the ground that it was harsh. Like the Judge, I agree that that is so, provided that the principle identified above is satisfied. More recently, the same point has been put by Lord Hoffmann in a well-known passage (quoted by the Judge at [24]) in *R* v. *Home Secretary ex p Simms* [2000] 2 AC 115 at 131E:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of the unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

45. The Judge noted in [25] that general words have been allowed to override fundamental human rights. It is true that there have been such examples. All depends upon the true construction of the particular statute, which must of course be considered in its context and having regard to its statutory purpose. In this respect I agree with the Judge's conclusion at the end of [25], after referring to *Bishopgate* v. *Maxwell* [1992] BCLC 475 and *R* v. *Lord Chancellor ex p Lightfoot* [2000] QB 597:

> "All that can, I think, be derived from those authorities is that it is proper to look to see whether the context in which the relevant legislation is made provides a clear indication that, even in the absence of express words, fundamental rights are overridden."

The general principle remains.

46. The conclusion that the "reasonable grounds for suspecting" test is within the ambit of the general power expressed in the United Nations Act does not, in my opinion, fall foul of any of these general principles, provided (as I stated earlier) that the relevant person's right to challenge it is preserved: see below.

"May be"

. . .

48. . . . I can see that the widest possible power might be desirable from the Government's point of view. I can also see that the public might take the same view. However, the principles which I have just stated are of fundamental importance. The Judge said at [39] that, in his view, if Parliament was not to be involved, it was necessary for the Order in Council to go no further than to apply what the Security Council resolution required. I agree. In the case of "reasonable grounds for suspicion" it did not, in my opinion go further than Security Council resolution 1373 required, whereas, by adding "may be", it did.

49. There is no warrant in the language of the Security Council resolution for the addition of "may be" in the TO. There is scope for argument as to how much difference this will make but I would accept the argument advanced on behalf of the Applicants that it makes the test very wide indeed. In response to the submission that it was "expedient" within the meaning of section 1 of the United Nations act to express the test in such wide terms, the Judge expressed his conclusion thus at [40]:

> "Mr. Crow submits that it is expedient, which has a wider meaning. In *R(Gillan)* v. *Commissioner of Metropolitan Police* [2006] 2 AC 307, the distinction between necessary and

> expedient was considered in the context of powers of random search conferred by s.44 of the Terrorism Act 2000. Lord Bingham at paragraph 14 said that Parliament had used the word deliberately recognising that the powers were desirable in the interest of combating terrorism. But Lord Bingham drew attention to the close regulation of the exercise of the statutory power. There is no such regulation here and I do not accept that the extension to those who are suspected of possible involvement is properly within the scope of what is authorised by s.1 of the 1946 Act."

I agree.

50. For these reasons I would dismiss the appeal against this part of the Judge's Judgment.

ii) Must the TO be quashed?

51. The Judge quashed the whole TO. The question arises at this point whether the effect of the conclusion set out above, namely that the TO is *ultra vires* because of the inclusion of the words "or may be", is that the whole TO must be quashed. In my opinion it is not. Such a conclusion would to my mind be contrary to common sense. The obvious solution seems to me to order that the words "or may be" be excised from article 4 (2) of the TO.

52. Such an approach would be consistent with authority. The problem was considered in detail by the House of Lords in *DPP* v. *Hutchinson* [1990] 2 AC 783, where the principal speech was given by Lord Bridge, with whom the other members of the appellate committee agreed. It was there held that the general test was that of severability, which Lord Bridge said at page 804D was often referred to inelegantly as the blue pencil test. He described the test (or tests) at page 804E to G. He first referred to separate clauses, one of which exceeded the law-maker's power. He added that the test was in truth a double test, namely a test of textual severability and a test of substantial severability, which he described in this way:

> "A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect."

53. . . . Removal of the words "or may be" satisfies the textual severability test because what remains is still grammatical and coherent. It satisfies the substantial severability test because what remains after severance is essentially unchanged in its legislative purpose, operation and effect. I would therefore excise the words "or may be" from article 4 (2) of the TO.

54. The question remains what relief the Applicants are entitled to as a result. As stated above, all the directions made against them by HMT included the same statement, namely that HMT "has reasonable grounds for suspecting that you are, or may be, a person who facilitates the commission of acts of terrorism . . .". In these circumstances, since HMT made the directions expressly by reference to "or may be" I would quash the directions as made.

iii) What is the effect of the lack of procedural safeguards in the TO?

55. The only express procedural safeguard in the TO is that contained in article 5 (4), which provides:

"The High Court . . . may set aside a direction on the application of-

(*a*) the person identified in the direction, or

(*b*) any other person affected by the direction."

56. The Judge held in [41] and [47] of his Judgment that that safeguard was not sufficient to protect the legitimate interests of the Applicants. In essence the Judge's view was that, in the absence of provision to admit intercept material and of express rules providing for the use of special advocates on applications under article 5 (4) of the TO, it was not open to the Crown to conclude that the Order was an "expedient" provision to give effect to the measures adopted by the Security Council in Security Council resolution 1373.

. . .

58. There is so far no statutory power to appoint a special advocate in proceedings arising out of a TO. However, as I see it, there is no reason in principle why a special advocate should not be appointed in a particular case. The authorities show that in an appropriate case the court would have power to authorise or request the use of a special advocate: see in particular the decision of the House of Lords in *R (Roberts)* v. *Parole Board* [2005] UKHL 45, [2005] 2 AC 738, where it was held that the court had power to do so even where it was not sanctioned by Parliament. Whether it should do so or not would depend on the particular circumstances of the case. It has very recently been held by the Divisional Court in *Malik* v. *Manchester Crown Court* [2008] EWCA Admin 1362 that the court has power to ask the Attorney General to appoint a special advocate, but that it should only do so in an exceptional case and as a last resort: per Dyson LJ, giving the Judgment of the court at [93–102], especially at [99]. In these circumstances the court would have power to procure the appointment of a special advocate through the Attorney General.

. . .

60. . . .

While . . . I certainly agree that it would have been very much better to make appropriate statutory provision in the first place, I do not think that that is a sufficient basis upon which to hold that the TO was unlawful. The court has power to order a special advocate. In most cases, such an advocate should be able to ensure that the individual will receive a fair hearing and in other cases the direction would have to be discharged: see the reasoning of the majority in the House of Lords in *MB and AF.* In either such case, the interests of the individual will be protected. Subject to the problems to which I now turn, I would not therefore hold that the TO was unlawful on this ground.

61. Mr. Owen further relies upon the problems thrown up by the Regulation of Investigatory Powers Act 2000 ('RIPA'). The problem arises or potentially arises because, where there has been an intercept warrant issued by the Secretary of State authorising a relevant intercept, section 17 of RIPA contains a number of critical provisions as follows:

"(1) Subject to section 18, no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings . . . which (in any manner)–

(*a*) discloses, in circumstances from which its origin in anything falling within subsection (2) may be inferred, any of the contents of an intercepted communication or any related communications data; or

(*b*) tends (apart from any such disclosure) to suggest that anything falling within subsection (2) has or may have occurred or be going to occur.

(2) The following fall within this subsection–

. . .

(*c*) the issue of an interception warrant or of a warrant under the Interception of Communications Act 1985;

(*d*) the making of an application by any person for an interception warrant or for a warrant under that Act;"

62. Section 18 sets out the exceptions to section 17. It provides that section 17 (1) shall not apply to a number of different types of proceedings including, by paragraphs (da), (e) and (f), control order proceedings, proceedings before the Special Immigration Appeals Commission ('SIAC'), proceedings before the Proscribed Organisations Appeals Commission ('POAC') and, in each case, proceedings arising out of such proceedings. . . .

63. One might have thought that proceedings challenging a direction under article 4 of the TO would have been included in the exceptions in section 18 of RIPA in order to bring them into line with control order, SIAC and POAC proceedings. We were told that it has indeed been the Government's intention to introduce legislation to that effect since the introduction of the TO. . . .

69. Mr. Owen submits that in these circumstances the Judge was justified in reaching the conclusion he did in [41] as follows:

"There is another cogent reason for saying that it is not expedient. It is rightly accepted by Mr. Crow that the TO in terms and the AQO through judicial review allows consideration of whether the person affected is on the facts properly within the test to be applied. This means that all material must be available to the court, whether closed or open. I have some experience both as an ex-chairman of SIAC and in considering Control Orders cases of the evidence upon which reliance is placed by the Security Services and so available to the Treasury. This will usually—in my experience invariably—include intercept material. Section 17 of the Regulation of Investigatory Powers Act 2000 (RIPA) excludes such evidence from any legal proceedings. Exceptions to this exclusionary rule are contained in s.18, but they do not extend to applications or judicial review claims against orders made under the TO or the AQO. Thus the court is disabled from considering such material. This means that a fair and just consideration of the question whether the individual Applicant is one who should be subjected to an order is likely to be impossible in most cases. Fairness works for the Crown as it does for the Applicant. Thus the Treasury will be unable to rely on inculpatory intercept material just as the Applicant will be unable to rely on exculpatory intercept material. This cannot be in the interests of justice or indeed of ensuring that the right people are made subject to these orders. Thus it is in my view impossible to say that the use of an Order in Council is expedient unless it can provide an exception to s.17 of RIP A. It cannot nor does it purport to do so."

. . .

72. . . . Mr. Swift submits that it is not possible to say that the TO is unlawful and must be quashed. He says that this follows from the fact that a significant number of direc-

tions are based on open material. I would accept that submission. It seems to me that, if the TO is flawed on the basis that, where closed source material is relied upon, the rights of the individual are not protected, the appropriate course is to set aside the particular direction and not to quash the TO as a whole.

73. One possibility would be to set aside all directions which are based on closed source material on the ground that it is not possible to know whether it is based on intercept material within the prohibition in section 17 of RIPA, which I will call 'section 17 material'. I have however reached the conclusion that it would not be appropriate to take that course but that each case should be considered on its merits. . . . For my part, I would divide the cases into four: first, where there is only open source material; second, where there is closed source material of whatever kind but no section 17 material; third, where there is section 17 material which is wholly inculpatory; and fourth, where there is section 17 material some or all of which is exculpatory.

. . .

76. The fourth class of case is where there is some exculpatory material. If the individual is to be treated fairly, there must be a procedure which ensures that the exculpatory material is made available to the Judge or the allegation to which the exculpatory material relates is abandoned. . . .

77. Mr. Swift . . . submits that there is scope in a case of this kind for use to be made of section 18 (7) (b) of RIPA. In this regard I would accept the submission that there is scope for a Judge, perhaps on the application of a special advocate or of an individual, to order that disclosure be made to him alone. It is plain from section 18 (7) (c) that section 18 (7) is not limited to criminal cases. I would therefore reject Mr. Owen's submission to the contrary. I see no reason why a "relevant judge" in section 18(7)(*b*) should not include a judge hearing an application under article 5 (4) of the TO. Although it is true that section 18 (8) limits the power under section 18 (7) (b) to cases where the judge is satisfied that the exceptional circumstances of the case make the disclosure essential in the interests of justice, it appears to me that, where he learns that there may be section 17 material, a judge is likely to be readily so satisfied in order to satisfy himself that there is no exculpatory material.

78. The precise steps required will depend upon the facts of the particular case. Whether it will be possible (or indeed permissible) to disclose the gist of section 17 material and what, if any, other precautions can be taken to protect the interests of the individual cannot, as I see it, be decided in advance. However, I am not persuaded that those interests cannot be suitably protected by procedures to be worked out on a case by case basis. In these circumstances, while I fully understand his concerns, I have reached the conclusion that the Judge has gone too far in [41] of his Judgment. My answer to the question "what is the effect of the lack of procedural safeguards?" is that the courts must be relied upon to ensure that there are sufficient procedural safeguards to protect Applicants under article 5 (4), that it should be possible to do so and that, if it proves impossible in a particular case, the direction must be set aside. In these circumstances, it would be wrong to hold that it was not open to HMT to conclude that it was expedient to make the order and it would be wrong to quash the TO itself. The problems must be resolved, not by taking that dramatic step, but on a case by case basis.

iv) Criminal offences: are the principles of legal certainty and proportionality satisfied?

79. As I said in [13] above, articles 7 and 8 create criminal offences. At [38] the Judge said that, since the TO interfered with the Applicants' fundamental rights, it must involve the least possible interference with such rights. Between [42] and [46] the Judge considered the submission that the criminal offences created by articles 7 and 8 went far beyond what was reasonably required and offended against the principle of legal certainty. It was also submitted that they were disproportionate.

80. In considering that submission the Judge directed himself as to the relevant principles at [43] and [44]. He noted that in *Norris* v. *USA* [2008] UKHL 16, the House of Lords has recently considered the principle of legal certainty in the context of criminal offences. He quoted this extract from the composite report of the appellate committee, which seems to me to be of some relevance in this case:

> "53. In *R* v. *Rimmington* [2006] 1 AC 459, para 33 Lord Bingham of Cornhill said that there were two "guiding principles" relevant in that case, namely:
>
> > "no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done."
>
> As he went on to say in the next paragraph, those principles are "entirely consistent with article 7 (1) of the European Convention". At paragraph 35 he discussed a number of decisions of the Strasbourg Court on the topic, which established that, while "absolute certainty is unattainable, and might entail excessive rigidity", and "some degree of vagueness is inevitable" particularly in common law systems, "the law-making function of the courts must remain within reasonable limits".
>
> 54. In *R* v. *Jones (Margaret)* [2007] 1 AC 136, Lord Bingham took the matter a little further when he identified, at paragraph 29
>
> "what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle."
>
> Lord Hoffmann said much the same at paragraph 60."

I agree with the Judge that those observations are pertinent in considering whether the offences created under the TO offend against the principle of legal certainty.

. . .

85. . . . I turn therefore to articles 7 and 8, which I set out in full as follows:

> "Freezing funds and economic resources of designated persons
>
> 7(1) A person (including the designated person) must not deal with funds or economic resources belonging to, owned or held by a person referred to in paragraph (2) unless he does so under the authority of a licence granted under article 11.
>
> (2) The prohibition in paragraph (1) applies in respect of-

(*a*) any person who commits, attempts to commit, participates in or facilitates the commission of acts of terrorism;

(*b*) any designated person;

(*c*) any person owned or controlled, directly or indirectly, by a person referred to in sub-paragraph (a) or (b); and

(*d*) any person acting on behalf or at the direction of a person referred to in sub-paragraph (a) or (b).

(3) A person who contravenes the prohibition in paragraph (1) is guilty of an offence.

(4) In proceedings for an offence under this article, it is a defence for a person to show that he did not know and had no reasonable cause to suspect that he was dealing with funds or economic resources belonging to, owned or held by a person referred to in paragraph (2).

(5) This article is subject to article 5 (2).

(6) In this article, "deal with" means–

(*a*) in respect of funds–

(i) use, alter, move, allow access to or transfer;

(ii) deal with in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination; or

(iii) make any other change that would enable use, including portfolio management; and

(*b*) in respect of economic resources, use to obtain funds, goods or services in any way, including (but not limited to) by selling, hiring or mortgaging the resources.

MAKING FUNDS, ECONOMIC RESOURCES OR FINANCIAL SERVICES AVAILABLE TO DESIGNATED PERSONS, ETC.

8(1) A person must not make funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a person referred to in article 7 (2) unless he does so under the authority of a licence granted under article 11.

(2) A person who contravenes the prohibition in paragraph (1) is guilty of an offence.

(3) In proceedings for an offence under this article, it is a defence for a person to show that he did not know and had no reasonable cause to suspect that he was making funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a person referred to in article 7 (2).

(4) This article is subject to articles 4 (3) and 5 (2)."

It is convenient to consider article 7 first because it seems to me that somewhat considerations may apply to the two articles.

Article 7

86. The first question is whether the offence created by article 7 (3) satisfies the test of certainty identified above. I should note at once that it was agreed during the oral argument that the heading to article 7 is not correct because, as article 7 (1) makes clear, the prohibition applies to all the people identified by article 7 (2) and thus, in particular to people who commit, etc. acts of terrorism even though they are not designated. Mr. Owen

submits that article 7 does not satisfy the test of certainty. In essence he submits that, both read alone and in conjunction with article 8, article 7 imposes on persons in respect of whom the prohibition applies (*i.e.,* those referred to in paragraph (2)) and their families a series of provisions which impinge on almost every aspect of their daily lives in circumstances in which it is entirely unclear what they can and cannot lawfully do.

87. While it is necessary to have regard to the provisions of article 7 as a whole, it is also necessary to consider the language in which the prohibition is framed. I consider first the person in respect of whom the prohibition applies. I would not accept the submission that the definition of "economic resources" in article 2 is too vague or uncertain for that person to understand what is prohibited. It will be recalled that "economic resources" are defined as:

> "assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services."

In short "economic resources" are all assets which can be used to obtain funds, goods or services, which seems to me to cover either everything or almost everything, other than a fund, which could be regarded as an asset.

. . .

89. As in the case of a freezing injunction, the purpose of article 7 is to freeze all the person's assets, including both funds and other assets. In my opinion, at any rate as far as concerns the person in respect of whom the prohibition applies, there is no lack of certainty in the prohibition in article 7 (1). He of course knows that he has been designated (article 7 (2) (b)) or is committing, etc. acts of terrorism (article 7 (2) (a)) and he knows what he must not do, namely deal with his assets.

90. The next question is whether the definition of "deal with" in article 7 (6) is sufficiently certain. Mr. Owen submits that it is not and a number of examples were discussed in argument. However, in my opinion the definition is sufficiently certain. I see no significant ambiguity in either sub-paragraph (a) or (b) of paragraph (6). The concept of "dealing with" or "deal with" is familiar in the context of freezing injunctions. No significant problem has been found with it. Although this does not of course mean that there may not be cases in which there is some scope for argument, I would not regard the example of the person's wife borrowing his car to go down to the shops as dealing with the car. If the Judge held that sub-paragraphs (a) and (b) of paragraph 6 are insufficiently certain to enable a person to know or the court to determine what amounts to "dealing with", I respectfully disagree.

91. The only remaining question is whether the defence provided for in article 7 (4) is sufficiently certain. The person in respect of whom the prohibition applies could not of course have such a defence if he was alleged to be dealing with his own assets.

92. In these circumstances I conclude that there is no lack of certainty in the case of the person in respect of whom the prohibition applies and who might be alleged to be in breach of article 7 (1) and thus to have committed an offence under article 7 (3). What then of other persons, say the person's wife? She will know if she has dealt with any funds or other resources. She will ordinarily know whether the funds or other resources belong to her husband. If he is designated, she is likely to know that fact. If he is not designated but is committing , etc. acts of terrorism, she may or may not know that fact or have reasonable

cause to suspect it. But if, in either case, she does not know that fact and has no reasonable cause to suspect it, she has a defence.

. . .

96. . . . I do share some of the concerns which have been expressed as to the operation of the license system.

97. Article 11 provides by 11 (1) that HMT may grant a licence to exempt acts specified in the licence from the prohibition in article 7 (1) or 8 (1). By article 11 (2) a licence may be (a) general or granted to a category of persons or to a particular person, (b) subject to conditions and (*c*) of indefinite duration or subject to an expiry date. By article 11 (3) and (4), subject to notice provisions, HMT has power to vary or revoke a licence at any time. By article 11 (5) any person who, for the purpose of obtaining a licence, knowingly or recklessly makes any statement or furnishes any document or information which is false in a material particular is guilty of an offence. By article 11 (6) any person who has done any act under the authority of a licence and who fails to comply with any conditions attaching to that licence is guilty of an offence.

98. The license system is plainly intended to be a central part of the scheme. It strikes me that, if the scheme is to be workable, it must be operated by all those concerned, especially HMT, fairly, expeditiously and with good will. In addition HMT must of course act lawfully when considering applications for licences. This involves taking account only of relevant considerations and acting rationally throughout. It seems to me to be critical that families and other third parties affected by TOs, which are in many ways draconian, should be treated fairly. Thus there was much discussion about whether it would be unlawful to sell a fruit cake without a licence to a person known by the seller to be one in respect of whom the prohibition applies. This problem should never arise in practice for two reasons.

99. First there must I think be a level, which might be described as *de minimis,* below which the TO cannot have been intended to bite. Would the designated person need a licence to buy a box of matches? Surely not because *de minimis non curat lex.* Secondly, and more importantly, as I see it, if HMT operate the licence system fairly, expeditiously and with good sense, giving proper reasons for their decisions, most if not all of the theoretical problems discussed in argument will become irrelevant. So too will the concerns expressed by the Judge in [42]. For example, it would surely be irrational for HMT to refuse a licence in respect of expenditure of many every day activities. In this regard it is noteworthy that by article 11 (2) a licence may be general and not addressed either to a particular category of person or to a particular person. Those are problems to be worked out in practice. Provided that the licence scheme is operated in the way I have indicated, I would hold that article 7 is both sufficiently certain, that it is proportionate and that it is not unlawful.

Article 8

100. The problem here is somewhat different. I was at one time attracted by Mr. Owen's submissions. Article 8 (1) does, however, seem to me to be clear. The prohibition is against making funds, economic resources or financial services available to a person referred to in article 7 (2). I have already expressed my view that the meaning of "funds" and "economic resources" is sufficiently clear and certain. As to "financial services", they

are defined in article 2 as "any service of a financial nature". The definition then adds "including but not limited to—(a) insurance-related services consisting of" four specified types of insurance and reinsurance and "b) banking and other financial services consisting of" 11 types of financial activity. I do not think that there should be any difficulty in identifying what is or is not within the expression "financial services".

101. The next question is whether it is sufficiently certain and proportionate to provide that a person must not make, for example, funds "available, directly or indirectly, to or for the benefit of a person referred to in article 7 (2)" without a licence. It is said that the notion of making, say, funds available indirectly for the benefit of such a person is hopelessly vague. For my part, I respectfully disagree. There should be no difficulty in identifying whether funds, other assets or financial services are being made available directly or indirectly to another person. It seems to me to be proportionate to include such a provision. The provision has a legitimate purpose, namely in order to avoid terrorists obtaining sufficient funds—or other financial benefits which render other of their funds available for deployment—for their activities. As I see it, it is proportionate because of the licensing scheme, provided that the licensing scheme is operated properly and expeditiously. As I indicated above, if the scheme is operated as the draftsman of the TO intended, any problems about comparatively small sums can be solved by the granting of an appropriate licence or, perhaps, by an agreement that they are *de minimis*. Indeed, it might be sensible to develop a scheme whereby a licence was routinely granted in the case of small sums, if only to meet the fruit cake example.

102. As I see it, any possible unfairness of the provision is met by the defence provided by article 8 (3). If the person against whom the charge is brought can show that he did not know and had no reasonable cause to suspect that he was making the funds, economic resources or financial services available to a person within article 7 (2) he will have a defence. Thus, while I accept the general submission that the certainty and proportionality of a measure such as the TO cannot be left to the trial of a particular case, it is permissible to have regard to all the relevant circumstances, including the certainty or otherwise of the language, the provision here of a licensing system and the available defences, in deciding whether the relevant provision is unlawful. Having approached the problem in that way, I have reached the conclusion that article 8 is not unlawful or contrary to any provision of the European Convention of Human Rights.

. . .

Conclusion on the lawfulness of the TO

104. For the reasons I have given, I would hold that, subject to the "or may be" point, the TO is not unlawful. I would sever "or may be" from the TO.

105. Finally in this regard I should refer to [46] in the Judgment of the Judge:

> "The purpose of asset freezing is to ensure that funds are not made available for terrorist purposes. Thus any criminal liability which could fall on those who make any assets available to a designated person should depend on whether it was or ought to have been known to the supplier that the asset in question could result in funds being available for terrorist purposes. That at the very least seems to me to be an appropriate limitation on criminal liability. How the requirements of the Sanctions Committee should be put into law is, as it seems to me, having regard to the principles to which I have referred a mat-

ter for Parliamentary consideration. Thus I am satisfied that neither Order in Council represents a necessary or expedient means of giving effect to the obligations imposed by the Committee."

106. While I entirely understand the sentiments behind that paragraph and am pleased that the government has at least (and at last) put a Bill before Parliament, I am unable to agree with the Judge's view (if it is his view) in the above paragraph that it is for the court to identify the appropriate limitation upon criminal liability and that only Parliament could provide otherwise. My conclusion is that, with the exception of "or may be", the terms of the TO are within the statutory power conferred on the Crown, *i.e.,* in effect the Government, by Parliament in section 1 of the United Nations Act and are not otherwise contrary to the European Convention of Human Rights or unlawful at common law.

Is the AQO unlawful?

107. The conclusions which I have reached so far lead to the conclusion that the AQO is also lawful, subject to one further point which is relevant only to the AQO. That point focuses on the nature and scope of the challenge that can be mounted against the AQO.

. . .

109. G does not seek to challenge the legality of the Security Council resolutions (referred to above) that led to the AQO. Nor is it sought to challenge the legality of the use of Article 41 of the United Nations Charter to make named individuals subject to United Nations sanctions. It is correctly accepted that neither the provisions of the Charter nor those of any of the Security Council resolutions have direct effect in English law, unless or until they are enacted as part of domestic law or become part of it pursuant to an EU instrument with direct effect. I have already indicated that HMT does not rely upon any EU Regulation in this case.

110. It follows from the above that, absent the AQO, G could not challenge his inclusion on the Committee's list. On the other hand, absent the AQO, he would not be affected by that inclusion as a matter of English law. As indicated in [14] and [15] above, the only challenge expressly contemplated by the AQO is that contained in article 5 (4), which gives the High Court power to set aside "a direction" on the application of the person identified by the direction or any other person affected by it. G is not such a person because there is no dispute that he is a "person designated by the Sanctions Committee" within the meaning of article 3 (1) (b) and therefore a "designated person" within the meaning of article 3 (1). The AQO gives him no express right to apply to the High Court for any relief.

. . .

113. The question is whether the court is powerless to achieve a solution whereby a person in the position of G can challenge the underlying basis of the case against him. The question is thus whether he can do so through judicial review. If he can do so under the TO, it would to my mind be very strange if he could not do so in the case of the AQO in a case where the evidence against him appears to be the same in both cases. If he cannot, I would be inclined to hold that the AQO was unlawful, by reason of the application of the principles briefly referred to in [43] to [45] above.

114. The argument addressed to the Judge by Mr. Singh on behalf of G was that there must be implied into the AQO a right of access to the court by way of judicial review. That is not in dispute. It is the extent or content of the right that is in dispute. Mr. Singh submitted to the Judge that, since fundamental rights were affected, that review must include a means of challenging the factual basis upon which the Committee's designation of him was made. This appears from the beginning of [16] of the Judgment. The Judge continued:

> "16. . . .This would require the court to have power to set aside the order notwithstanding that G was on the Sanctions Committee list if on consideration of the facts it took the view that he ought not to have been listed because he was not involved in any terrorist activity. This was all the more important because there was no means whereby G could mount an effective challenge to his listing since he did not know nor was there any procedure whereby he could be informed of what material had led the Committee to list him. It is known that he was listed following information given against him by the government. Thus, without the support of the government, his chances of achieving delisting are infinitesimal.
>
> 17. . . .In a document entitled 'Guidelines of the Committee for the Conduct of its Work' [issued by the United Nations in respect of its Sanctions Committee] delisting is dealt with at paragraph 8. The listed person may present a petition which should 'provide justification for the delisting request, offer relevant information and request support for delisting'. The petition can be presented either through the person's state of residence or what is called 'the focal point process'. The relevant governments, including naturally of the state in which the person resides, will be notified and asked to comment and to indicate if they recommend delisting. Any information in support of delisting held by a government should be forwarded to the Committee and any opposition to delisting will also be conveyed to the Committee. After 3 months, a decision will be taken and the person notified of it.
>
> 18. It is I think obvious that this procedure does not begin to achieve fairness for the person who is listed. Governments may have their own reasons to want to ensure that he remains on the list and there is no procedure which enables him to know the case he has to meet so that he can make meaningful representations. Nevertheless, that is what the Security Council has approved and the resolution, which Member States are obliged to put into effect, requires the freezing of the assets of those listed. Article 103 of the Charter makes clear that the obligations under the Charter take precedence over any other international agreements. Thus human rights under the European Convention of Human Rights cannot prevail over the obligations set out in the resolutions.
>
> 19. Mr. Singh has relied on the constitutional right of access to the court, a right which cannot be taken away save by express words in a statute. An Order in Council following the exercise of the Royal Prerogative is itself amenable to judicial review. Accordingly, submits Mr. Singh, albeit no right of challenge is contained in the Order, there must be such a right. . . ."

115. The Judge then considered between [19] and [25] a number of the well-known authorities, some of which I have referred to above. Then between [26] and [33] he discussed in some detail the position in EU which I touched upon earlier. He was critical of the decision of the CFI in *Kadi* and said at [32] that if the views of Advocate General Maduro were accepted, the AQO would have to be quashed. At [33] he noted Mr. Singh's submissions that fundamental principles of domestic law are not within Article 103 of the United Nations Charter because they are not "obligations under any other international

agreement" but are conferred, not only by article 6 of the European Convention on Human Rights, but by long-standing principles of the common law.

116. As I read the Judgment the Judge did not accept that submission, on the basis that by Article 25 of the United Nations Charter the Members of the United Nations "agree to accept and carry out the decisions of the Security Council". However he relied upon two statements of principle in *R (Al Jeddah)* v. *Defence Secretary* [2008] UKHL 58, [2008] 1 AC 332, where the House of Lords considered whether internment of a British citizen in Iraq pursuant to an Security Council resolution permitting internment if "it was necessary for imperative reasons of security" overrode his rights conferred by article 5 of the European Convention of Human Rights. As the Judge observed in [34], Lord Bingham drew attention in [33] to the facility for the Security Council to adopt resolutions couched in mandatory terms in which case Article 25 of the Charter bound Member States to comply with them. However, Lord Bingham accepted that, while maintenance of international peace and security is a fundamental purpose of the United Nations, so too is the promotion of respect for human rights. In [39] Lord Bingham considered how the power or duty to detain on the express authority of the Security Council and the fundamental human right enshrined in article 5 of the European Convention of Human Rights could be reconciled. He said this:

> "There is in my opinion only one way in which they can be reconciled: by ruling that the U.K. may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by [the relevant resolutions], but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention."

117. To like effect, Lord Carswell said at [136]:

> "I would emphasise . . . that that power [*viz*: to detain] has to be exercised in such a way as to minimise the infringements of the detainees' rights under article 5 (1) . . ."

Mr. Singh notes that in *Al Jeddah* the Applicant thus retained a right to a full merits based review, which was proceeding in the Administrative Court at the date of his release and, Mr. Singh tells us, has now been amended to a private law claim for false imprisonment.

118. The Judge concluded that the reasoning of Lord Bingham and Lord Carswell was clearly applicable to the inevitable breaches of property rights and infringement of article 8 rights resulting from the application of the AQO to G. I agree. The Judge's solution can be seen from this important sentence at the end of [36]:

> "Mr. Crow in the course of argument accepted—or rather, he was not instructed to oppose—the view I expressed that there should be a power in the court to decide whether the basis for listing existed which would then bind the Government to support delisting."

Mr. Crow QC was then appearing for HMT. In my judgment, that concession was correctly made.

119. I would accept the submission that the court has power to consider an application for judicial review by a person to whom the AQO applies as a result of designation by the Committee and, on such an application, to ask the court, so far as it can, to consider what the basis of the listing was. This will not be a challenge to the AQO itself but, if—to take the example of G—it were held that G should not have been listed, I see no reason why HMT (or the relevant Government body) should not, as the Judge put it, be bound to

support delisting. I feel sure that, if it were so held, HMT would wish to have G delisted and take appropriate steps to that end.

. . .

121. In these circumstances, I would not set aside the AQO as the Judge did. Although I would answer the question whether the AQO was unlawful in the negative, I would hold that G is entitled to a merits based review of the kind I have indicated.

. . .

Conclusion

124. For these reasons I would hold that the TO is lawful, provided the words "or may be" are excised from article 4 (2) of the TO. However, given that the directions under the TO were made by reference to the words "or may be", I would quash the directions as made. I would also hold that the AQO is lawful but that G is entitled to a merits based review of the kind I have indicated.

Lord Justice Sedley

. . .

126. The Orders in question were made by the Treasury during 2006 with the purpose of freezing the assets of persons suspected of aiding terrorism. By that date there were already in existence at least two statutory regimes—that is to say regimes introduced by Parliament in primary legislation—which enabled the executive to freeze terrorist assets: Part III of the Terrorism Act 2000, and the Anti-Terrorism, Crime and Security Act 2001, passed in the immediate wake of 9/11 and providing both for Parliamentary scrutiny of freezing orders and for compensation for anyone who wrongly suffers consequent loss. There was also Council Regulation EC 881/2002, which again provides for the freezing of terrorist assets but which has been neither transposed nor treated as having direct effect.

128. The case for the Treasury is that s.1 of the United Nations Act 1946 gives it something as close to absolute power as any department of state could hope for. So long as it relates to the subject-matter of a United Nations resolution not involving the use of armed force, it permits ministers to place before the Monarch for signature (a constitutional formality) a measure, backed by penal sanctions which until 1957 could include the death penalty, which ministers consider to be necessary or expedient (and the "or", I agree, is plainly disjunctive). It follows that the executive is empowered to make Orders which it knows to be unnecessary but considers to be expedient. This is relevant not simply as an illustration of the breadth of the powers ostensibly conferred by s.1 of the 1946 Act but because in the present case the existence of two statutory regimes designed for the same purpose means that neither Order in Council was necessary: both Orders, if they are to be held *intra vires,* must therefore be shown to be expedient.

. . .

131. Setting aside for the moment the questions of necessity and expediency, I do not doubt that it lies within the s.1 power to make provision, including the creation of new criminal offences, for freezing terrorist assets. For the reasons given by the Master of the Rolls I accept that this may legitimately include the assets of persons reasonably suspected of abetting terrorism, albeit this goes beyond the terms of the United Nations resolutions.

But, for the reasons I have given, it would not be open to the Treasury to include in an Order in Council a privative clause denying access to the courts; and the corollary, as it seems to me, is that the courts must be vigilant to ensure that the way in which the order operates does not turn their supervisory role into tokenism.

132. Art. 5 (4) of the Terrorism Order allows the court to set aside a direction. For the reasons given by Collins J and now by the Master of the Rolls, however, this is nowhere near adequate. If the court is to ensure that there is at least a reasonable basis for the Treasury's action, and to supervise designations along with directions, a properly structured and resourced system is needed. . . .

133. I am unable to accept that it is the role of the courts to devise such a system in order to save delegated legislation from invalidity. . . .

. . .

Suspicion of involvement

135. The enlargement of the scope of the Security Council resolution from those who commit or attempt to commit terrorist acts to persons reasonably suspected of doing so is, I agree, capable of coming within the "expedient" limb of s.1—so long as it is accompanied by proper judicial safeguards to ensure that suspicion is truly fact-based and genuinely reasonable. At present there is no such provision, and I do not think it is sufficient for the court to look forward to a time when there will be.

Suspicion of possible involvement

136. The inclusion of those who it is suspected may be involved in funding terrorism is, on any rational view, a bridge too far. There is practically nobody of whom this could not be said. The words are not merely tautologous (I doubt whether the drafter of the Order would thank Mr. Swift for his initial submission that they were). Can they then be severed?

. . .

138. For the reasons given by the Master of the Rolls, I agree that the offending words fall within the blue-pencil test set out by Lord Bridge in *DPP* v. *Hutchinson* [1990] 2 AC 783. But the question remains whether the order taken as a whole exceeds the statutory powers under which it purports to be made.

139. Whatever the answer to that question, it is plain that none of the present freezing orders can stand, since they all adopt the "or may be" formulation. (This, indeed, may be why the Treasury would not accept the possibility of excising the words from the Order in Council.) In agreement with the Master of the Rolls, I would quash them for this reason alone.

Procedural safeguards

140. The Master of the Rolls has set out the disturbing history of non-provision of measures and resources to ensure that individuals subjected to freezing orders get a fair hearing. . . . The Master of the Rolls has described this unhappy situation at [60–64] in terms with which I respectfully agree. I also agree with him that we must take the law as

it is, not as it ought to be. But the law as we now have it is an Order in Council which is markedly deficient in the opportunity which it gives, or which is provided by other means, to ensure that a freezing order cannot be made or confirmed without a fair hearing.

141. The Master of the Rolls has analysed at [69–78] the tranches of issues which may arise in relation to open and closed material. His conclusion is that these can be fairly managed case by case. I do not dissent from this, but once again it does not seem to me to resolve the *vires* question: is it the role of the courts not simply to ensure that what is lawfully enacted is fairly administered but to fill the gaps in enactments in order to make them valid?

Uncertainty

142. The same concern attends the question of vagueness in the criminalisation of acts proscribed by the Terrorism Order. I accept, as the European Court of Human Rights has accepted, that rough edges are unavoidable in the definition of many crimes. In such cases the arbiter has to be a court of criminal jurisdiction. But the degree of imprecision in the phrases "deal with" and "financial services" is considerable, and (in respectful disagreement with the Master of the Rolls) I do not think it sufficient to rely upon an administrative application of the principle *de minimis non curat lex* to keep them within bounds. . . .

. . .

The Terrorism Order

144. I come back therefore to the question whether, since the prior existence of parallel powers in primary legislation makes it unnecessary, the Terrorism Order as it stands can properly be said by government to be expedient. In my judgment it cannot. If its only vice was the inclusion of the words "or may be", it could be cured by severance. But it is far from being the only vice. The Order criminalises a wide and uncertain range of everyday acts. It makes no proper provision (and none is made elsewhere) for according due process to those against whom it is deployed. Even with the objectionable words "or may be" excised, the Order appears to me to be incompatible with the rule of law in its failure to accord legal protection to those it affects and the legal uncertainty of what it forbids. In agreement with Collins J I would hold the Order to be outwith the powers contained in s.1 of the United Nations Act 1946.

145. I would accordingly dismiss the Treasury's appeal. I stress that this would not leave the United Kingdom without means to stop funds reaching terrorist organisations: the Acts of 2000 and 2001 continue to provide such means.

The Al Qaida Order

. . .

147. . . . But, although I am not sanguine about the viability of a merits review in the face of security-sensitive material, I do not dissent from the holding of the Master of the Rolls that such review is in principle available under the Al Qaida Order. I stress the word "under": contrary to the Treasury's submission, it is not necessary for the individual affected to show the material part of the Order to be *ultra vires;* it will be sufficient if he can establish that he should not have been listed.

. . .

150. Upon this narrow footing, which represents at best a partial and potentially a Pyrrhic victory, I would allow the Treasury's appeal in as much of G's case as relates to the Al Qaida Order.

Lord Justice Wilson

151. Where the Judgments of the Master of the Rolls and Sedley LJ are in accordance, I agree with both of them. Where they are not in accordance, I agree with that of the Master of the Rolls. I therefore consider not only that the AQO is valid but that, subject to severance of the words "or may be" ("the three words") from article 4(2), the TO is also valid.

. . .

157. In my view therefore, subject to severance of the three words, the TO is valid. The issue as to the validity of the AQO raises a particular problem to which, in my view, the Master of the Rolls finds a sufficient, creative solution in [113] to [120] above, namely in a merits-based judicial review of the executive's response to a person's application to it that it should request, or support his own request, for delisting by the Sanctions Committee. . . .