Neutral Citation Number: [2006] EWCA Civ 1141

Case No: T1/2006/9502

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
IN THE MATTER OF THE PREVENTION OF TERRORISM ACT 2005
MR JUSTICE SULLIVAN
[2006] EWHC 1623 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 August 2006

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE MASTER OF THE ROLLS
and
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

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Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
JJ; KK; GG; HH; NN; & LL	**Respondent**

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MR PHILIP SALES, MR TIM EICKE & ANDREW O'CONNOR (instructed by **Treasury Solicitors**) for the **Appellant**
MR KEIR STARMER QC & MR RONAN TOAL (instructed by **Messrs Tyndallwoods**) for the **Respondent HH**
MR KEIR STARMER QC & MS STEPHANIE HARRISON (instructed by **Messrs Tyndallwoods**) appeared on behalf of the **Respondent NN**
MR RAZA HUSAIN and MR DANNY FRIEDMAN (instructed by **Messrs Gladstones**) appeared on behalf of the **Respondents GG & KK**
MR MANJIT GILL QC & MR BARNABAS LAMS (instructed by **Messrs Lawrence & Co**) appeared on behalf of the **Respondent JJ**
MR IAN MACDONALD QC AND MELANIE PLIMMER (instructed by **Greater Manchester Immigration Unit**) appeared on behalf of the **Respondent LL**
MISS JUDITH FARBEY (instructed by the **Special Advocates Support Office**) appeared as **Special Advocate**

Hearing date: 26 July 2006

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Judgment

LORD PHILLIPS, CJ :

This is the judgment of the court.

Introduction

1. This appeal relates to six control orders made by the Secretary of State under the Prevention of Terrorism Act 2005 ('PTA'). They purport to be non-derogating control orders made under section 2 of the Act. On 28 June 2006 Sullivan J ruled that the obligations imposed by those orders were so severe that they amounted to deprivation of liberty contrary to Article 5 of the European Convention on Human Rights ('the Convention'). A control order that has this effect cannot be made by the Secretary of State. It can be made by the court under section 4 of the PTA provided that the specified conditions are satisfied. One of the conditions is that a designated derogation from the whole or a part of Article 5 has been made. No such derogation has been made. Accordingly Sullivan J ruled that the Secretary of State had had no power to make the orders and quashed them. He stayed the effect of his order for seven days and this court extended that stay, pending the outcome of this appeal. This made it particularly desirable to give our judgment swiftly, and for that reason this judgment will be short.

2. Sullivan J's judgment has neutral citation reference [2006] EWHC 1623 (Admin) and reference should be made to that judgment for the facts of this case, the relevant statutory provisions and the judge's reasoning. A short summary follows.

3. Each of the respondents is a single man. Five are Iraqi nationals who have claimed asylum. They were arrested under the Terrorism Act 2000, released without charge, and then re-detained under immigration powers on notice of intention to deport on national security grounds. There is a dispute as to the identity of the sixth, LL, and as to whether he is an Iranian or an Iraqi national. He too was detained pending deportation on national security grounds. All deportation proceedings were discontinued on the making of the control orders.

4. The obligations imposed by the control orders are set out in Annex 1 to Sullivan J's judgment. They are essentially identical. Each respondent is required to remain within his 'residence' at all times, save for a period of 6 hours between 10 am and 4 pm. In the case of GG the specified residence is a one bedroom flat provided by the local authority in which he lived before his detention. In the case of the other five applicants the specified residences are one bedroom flats provided by NASS. During the curfew period the respondents are confined in their small flats and are not even allowed into the common parts of the buildings in which these flats are situated. Visitors must be authorised by the Home Office, to which name, address, date of birth and photographic identity must be supplied. The residences are subject to spot searches by the police. During the six hours when they are permitted to leave their residences, the respondents are confined to restricted urban areas, the largest of which is 72 square kilometres. These deliberately do not extend, save in the case of GG, to any area in which they lived before. Each area contains a mosque, a hospital, primary health care facilities, shops and entertainment and sporting facilities. The respondents are prohibited from meeting anyone by pre-arrangement who has not been given the same Home Office clearance as a visitor to the residence.

The issues

5. Two issues arise on this appeal. Was Sullivan J correct to hold that the obligations imposed by the control orders amount to deprivation of liberty contrary to Article 5? If so, was it appropriate to quash the orders rather than to quash or modify the obligations?

Do the orders amount to deprivation of liberty?

6. There is a degree of common ground between the parties:

   i) The concept of 'deprivation of liberty' is autonomous.

   ii) The best guidance in relation to the nature of 'deprivation of liberty' is provided by the decision of the Strasbourg Court in *Guzzardi v Italy* (1980) 3 EHRR 333.

   iii) The difference between deprivation of liberty, contrary to Article 5, and restrictions upon liberty of movement, contrary to Article 2 to Protocol No 4, is one of degree or intensity.

7. Mr Sales for the Secretary of State submitted that the approach of the judge displayed five errors of principle:

   i) The judge identified liberty with freedom to do as one wishes. The concept is much narrower than that.

   ii) The judge erroneously had regard to the extent to which the obligations interfered with 'normal life'.

   iii) The judge had regard to restrictions on other human rights.

   iv) The judge extended the meaning of liberty beyond that identified in *Guzzardi.*

   v) The judge concentrated excessively on the individual features of the idiosyncratic cases.

8. There is no merit in these attacks of principle. They reflect, we believe, the difficulties facing the Secretary of State in attempting to demonstrate that Sullivan J's judgment is unsound.

9. In paragraph 92 of *Guzzardi* the ECtHR said:

> "The Court recalls that in proclaiming the 'right to liberty' paragraph 1 of Article 5 is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are covered by Article 2 of Protocol No 4… In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must

> be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question."

10. The factors which Mr Sales submitted had been wrongly, or excessively, taken into consideration by Sullivan J were peripheral to his determination that the control orders amounted to a deprivation of liberty. In accordance with *Guzzardi* Sullivan J placed the 'concrete situation' at the heart of his deliberation on the 'deprivation of physical liberty'. He said at paragraph 77:

> "In accordance with the principles established in *Guzzardi* I have considered the cumulative impact of the obligations and therefore the extent to which they restrict the respondents' liberty in the six hours when they are allowed out of their residences, as well as the effect of the 18 hour curfew and the obligations imposed on the respondents whilst they have to remain within their residences during that period. If I had to assess the impact of the obligations individually, I would consider that house arrest for 18 hours each day, even if it was the only obligation (apart from obligations such as reporting and tagging to ensure that it was strictly observed) would be more realistically described as deprivation of liberty, and not as a restriction on liberty, if it prevented the individual from pursuing a normal "in at home/out at work" life cycle."

11. Clearly, and correctly, Sullivan J took as his starting point the physical restriction that confined each respondent to a small flat for eighteen hours a day. Such a restriction makes most serious inroads on liberty, even giving that word its most narrow meaning. But *Guzzardi* also required Sullivan J to weigh in the balance other material factors. We turn to consider whether, as Mr Sales suggested, the other factors that he weighed in the balance were not material.

12. Mr Sales criticised Sullivan J for equating 'liberty' with the freedom to do as one wishes. He also criticised the judge for considering the extent to which the restrictions interfered with 'normal life'. Both these criticisms related to paragraph 54 of the judgment:

> "The extent to which he is subject to supervision, the extent to which he can make social contacts, the extent to which he has access to public facilities, and whether he is free to make telephone calls or otherwise to communicate with whomsoever he wishes, are all aspects of the broader question: to what extent is the individual subject to the obligations able to lead a life of his choice, which for convenience may be described as a "normal" life?, If one asks the question "deprived of liberty to do what?" the answer must be: deprived of the freedom to lead one's life as one chooses (within the law). That freedom is the antithesis of a life which is subject to the kinds of control to which a prisoner, whose "liberty to do anything is governed by the prison regime" is subject…"

13. If applied without starting with the 'concrete situation' of physical confinement, we can see that this passage might not be consistent with the Strasbourg concept of deprivation of liberty, but the judge did not so apply it. If one starts with that "concrete" situation, however, as the judge did, we do not consider that this passage of his judgment is at odds with the direction in *Guzzardi* to take account of "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question".

14. Mr Sales criticised the judge's concept of interference with "normal life" on the grounds that this was at odds with giving 'liberty' an autonomous meaning. The effect of his objection was that, on the judge's approach, whether measures amounted to a 'deprivation of liberty' might depend upon whether they were aimed at a hermit or a long distance runner. We do not consider that the judge was suggesting this. The judge was considering the extent to which restrictions would prevent an individual from pursuing the life of his choice, whatever that choice might be.

15. These criticisms of the judgment overlap with Mr Sales' fifth criticism – that the judge concentrated excessively on idiosyncratic features of individual cases. For instance, he had regard to the fact that the respondents lived alone, without social contacts, in flats which were not of their own choosing. We do not consider that this criticism is valid. The Strasbourg Court does not turn its back on the impact of restrictions on the individual. In considering the significance of confinement it can be very relevant whether the individual is confined in his own home, or confined in quarters where he would not wish to live. In this case this did not prove a critical factor and the judge correctly observed that the fact that all except GG had to live in new accommodation was of less significance than if they had had to move out of long established homes.

16. The agreed facts showed that the respondents had little social contact, for there were few requests for approval of visitors or for authorised meetings outside the residences. This, however, could as well have reflected the consequences of the obligations as individual idiosyncrasies. As Mr Starmer QC observed, the requirement to obtain personal particulars and a photograph from any visitor, involving no doubt an explanation of why these were needed, was a serious inhibition on social life.

17. Mr Sales submitted that restrictions that took effect within the residence were of some, although limited relevance, but restrictions outside the residence were of no relevance. It does not seem to us that this accords with *Guzzardi.* The ECtHR gave wider consideration to the 'type, duration, effects and manner of implementation of the measure in question'. For instance it commented that Guzzardi needed the consent of the authorities for trips to Sardinia which were 'understandably made under the strict supervision of the *carabinieri'.* We consider that Sullivan J was correct to consider the effect of the physical restraints on the respondents during 18 hours of the day in the context of the restrictions that applied to them when they were permitted to leave their residences.

18. We turn to Mr Sales' third criticism. He said that the judge should not have had regard to restrictions which engaged other Articles of the Convention, such as Articles 8 and 9. Those made provision for qualified rights, interference with which could be justified. It was wrong, he suggested, for Sullivan J to have had regard to:

a) the availability of one's home and/or intimacy of family life;

b) the ability to admit or refuse visitors to one's home;

c) restrictions on the ability to communicate by mobile telephone and/or the internet;

d) the ability to meet any person of one's choosing;

e) the freedom to attend whatever church, temple, mosque or synagogue one chooses.

19. These were all matters referred to by the judge, but they were not the principal factors that led him to conclude that the orders produced deprivation of liberty. We do not agree that he should have disregarded these matters merely because they could have been made the subject of complaint under other Articles of the Convention. The different Convention rights overlap, and it would be contrary to the approach of the Strasbourg court to consider them in watertight compartments. We need only point, by way of example, to the "particular importance" that the Commission attached in *Guzzardi* to "the possibilities of social contacts" – see the Report of the Commission adopted on 7 December 1978 at paragraph 94. The ECtHR also had regard to the "opportunities for social contact" – paragraph 95. These matters do not, of themselves, constitute deprivation of liberty. Where, however, they are features of a regime at the heart of which is physical confinement, they are relevant in considering whether the restrictions cross the boundary between restriction on the freedom of movement and deprivation of liberty.

20. Finally, we turn to Mr Sales' fourth criticism. He submitted that the facts in *Guzzardi* had been held by the ECtHR to be on the borderline between restriction of freedom of movement and deprivation of liberty. The judge's decision on the facts of this case extended the definition of deprivation of liberty beyond the Strasbourg jurisprudence in a manner which was impermissible –see Lord Bingham in *Ullah v Secretary of State for the Home Department* [2004] 2 AC 323 at paragraph 20:

> "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

21. The judge gave careful consideration to the Strasbourg authorities on Article 5. He correctly concluded that these left a gap between "24 hour house arrest seven days per week (equals deprivation of liberty) and a curfew/house arrest of up to 12 hours per day on weekdays and for the whole of the weekend (equals restriction on movement)" – see paragraph 33. He concluded, rightly, that while *Guzzardi* gave no direct guidance on how to fill this gap, it was necessary to apply the principles to be derived from that decision. We have rejected Mr Sales' attack on the way that the judge applied those principles.

22. The facts of this case differ markedly from those of *Guzzardi* and, indeed from those of any other Strasbourg decision. At the end of the day Sullivan J had to make a value judgment as to whether, having regard to 'the type, duration, effects and manner of implementation' of the control orders they effected a deprivation of liberty. So far as

duration was concerned, he proceeded on the basis that the control orders would be likely to be renewed on expiry of the first twelve month period. This conclusion was based, in part, on a misconception that the Secretary of State was not bound to keep under review whether there were reasonable grounds for suspecting that each respondent had been involved in terrorism-related activity – see our decision in *MB* [2006] EWCA Civ 1140. Nonetheless, we consider that the judge's appraisal of the likely duration of these orders was realistic.

23. The judge's conclusion in paragraph 73 was as follows:

> "I do not consider that this is a borderline case. The collective impact of the obligations in Annex 1 could not sensibly be described as mere restrictions upon the respondents' liberty of movement. In terms of the length of the curfew period (18 hours), the extent of the obligations and their intrusive impact on the respondents' ability to lead a normal life, whether inside their residences within the curfew period, or for the six hour period outside it, these control orders go far beyond the restrictions in those cases where the European Court of Human Rights has concluded that there has been a restriction upon but not a deprivation of liberty."

We agree that the facts of this case fall clearly on the wrong side of the dividing line. The orders amounted to a deprivation of liberty contrary to Article 5. For that reason the appeal against the decision of the judge on the first issue is unsuccessful.

The remedy

24. Mr Sales submitted that, on true construction of the relevant provisions of the PTA, namely section 3(10) and 3(12), there was only one situation where the court should quash a non-derogating control order, namely where the Secretary of State's decision that there were grounds for the imposition of such an order was flawed. In other circumstances, the court should not quash an order, but by quashing individual obligations, or directing the Secretary of State to modify them, procure that the order was modified into one that was lawful. He submitted that section 3(12) provided a mechanism for validating a control order in circumstances where this could not be done according to established principles of severance. This gave effect to the underlying purpose of the PTA, namely the protection of the public.

25. Sullivan J accepted that the appropriate remedy was governed by the provisions of section 3(12), but held that these gave him power to quash the orders. He held that it was appropriate to exercise this power because each order was made without jurisdiction and was a nullity. There was an additional reason. LL faced criminal charges for alleged breaches of his order. If the order was quashed, he would have a defence to those charges; if it was simply modified he would not. As the order had been made without jurisdiction, the former course would produce the just result.

26. We think it questionable whether the provisions of section 3(10) and 3(12) were designed to deal with a challenge to a control order on the ground that it is *ultra vires* because it infringes Article 5(1). There is a symmetry between section 3(6) and section 3(10), and section 3(6) certainly cannot accommodate such a challenge.

Section 11(2) opened the door to the respondents to challenge the *vires* of the control orders at the section 3(10) hearing, but it is not clear that Sullivan J's finding that the orders were *ultra vires* fell to be treated as a finding that his decisions were 'flawed'. Whether section 3(12) applies or not, however, we consider that Sullivan J was correct to conclude that he had jurisdiction to quash the orders.

27. We consider that the reasons given by Sullivan J for quashing the orders are compelling. There is a further reason. Paragraph 8 of the Schedule to the PTA gives the Secretary of State power, should he decide, in the absence of a derogation order, to make new control orders under Section 2 to replace those that Sullivan J quashed. If the Secretary of State decides to exercise this power, he will have to devise a new package of obligations imposing controls on the respondents. This is an exercise that the Secretary of State is very much better placed to perform than the court.

28. For these reasons we reject the submission of Mr Sales that we should modify the terms of the orders, or direct the Secretary of State to modify the obligations. The appeals by the Secretary of State will be dismissed.