



Neutral Citation Number: [2008] EWCA Civ 1311

Case No: C1/2008/0030

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION ADMIN COURT
THE HON MR JUSTICE COLLINS
CO/9605/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/11/2008

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE WILSON
and
LORD JUSTICE RIMER

Between :

THE QUEEN ON THE APPLICATION OF HASAN	<u>Appellant</u>
- and -	
THE SECRETARY OF STATE FOR TRADE AND INDUSTRY	<u>Respondent</u>
(now BUSINESS, ENTERPRISE AND REGULATORY REFORM)	

**Mr Michael Fordham QC and Miss Naina Patel (instructed by Public Interest Lawyers) for
the Appellant**

**Mr James Eadie QC and Mr Samuel Wordsworth (instructed by Treasury Solicitors) for
the Respondent**

Hearing dates : 21st & 22nd October 2008

Approved Judgment

The President of the Queen's Bench Division:

Introduction

1. To succeed in this claim for judicial review, the claimant needs to persuade the court to extend the circumstances in which public authorities may be under a public law duty to publish reasons for administrative decisions made under statutory power. In my judgment, Collins J correctly concluded, in his judgment of 19th November 2007, that the claim must fail. I would uphold his decision substantially for the reasons which he gave and dismiss this appeal. I reach this conclusion in short because I am not persuaded that the duty for which it is necessary for the claimant to contend is a duty which the law should impose; and because, more narrowly, the facts of the case do not, in my view, sustain a duty to give reasons such as is contended for.
2. The judge's judgment may be found at [2007] EWHC 2630 (Admin). It contains a sufficient account of the facts and statutory material, which I shall not repeat other than in short outline. The judgment may be referred to for greater detail than this judgment need contain.

Facts

3. The claimant is a Palestinian living in a village near Bethlehem. In April 2005, Israeli forces destroyed his olive and almond trees and appropriated his land. His original claim in these proceedings contended that licences granted by the Secretary of State under the Export Control Act 2002 between April and September 2006 for the export of military equipment to Israel were unlawful. It was contended that the licences were contrary to the Consolidated Criteria of 26th October 2000, which, by section 9(8) of the 2002 Act, are to be treated as guidance to which a person exercising a licensing power is obliged to have regard. It was said that there was a real risk that the licensed articles would be used against Palestinians for internal repression.

The amended claim

4. The original claim was, however, amended so as to reduce its scope, when the schedule to the Secretary of State's Summary Grounds of Defence was accepted as demonstrating that the lawfulness of the grant of the relevant 27 licences granted in April to June 2006 could not properly be challenged. That schedule listed each of the 27 items; noted whether they were to be incorporated into equipment in Israel for onward supply to a third state (in which event they would not be used for internal repression in Israel); gave a brief description of the goods; and then gave a brief comment relevant to the application of the Consolidated Criteria constituting the reasons why the grant of the licences would not offend the Criteria. For example, the goods described in the fourth item of the schedule were "Naval vessel components – cable", for which the reason given in the final column was "Israel has a legitimate right to patrol its waters". Mr Fordham QC, for the claimant, accepts and indeed contends that reasons of this kind, volunteered in the final column of the schedule for the 27 items, would fulfil the public law duty to give reasons for which he contends. The claimant's attenuated case is that there is a public law duty to publish reasons of this kind in the case of export licences for military equipment to Israel and to 19 other countries classified in the Foreign and Commonwealth Office 2006 Human Rights Report as Major Countries of Concern.

The public law duty contended for

5. There are, in my view, serious conceptual difficulties with the formulation of an underlying public law duty which would sustain this necessarily particular application of it. Mr Fordham speaks of a duty to promulgate reasons in the public domain where that is required in the public interest; a public law concept of transparency; the character and nature of the subject matter; public confidence and accountability; and proportionality. These lack definition and are hard to tie down. Mr Fordham wrote that English law has now developed to the stage where it should be recognised that there is a common law duty to give reasons for public authority decision making, subject to (a) exceptions in situations where the absence of reasons can be justified, and (b) a standard of adequacy of reasons which is not unduly burdensome. He at one stage in his oral submissions contended for a duty to articulate reasons at the time the decision was made, but later retreated from this position. He said that, if sufficient reasons were given to the Select Committee to which I refer later in this judgment, and through that Committee to the public, that would satisfy the public interest. But he says that, if it is right that reasons should be given publicly, the fact that the Government is accountable to the Select Committee does not by itself fulfil the legal duty to publish reasons.
6. Mr Eadie QC, for the Secretary of State, rightly submits that a duty of this uncontained width and imprecision would be a massive and unwarranted leap for the court to make. Mr Fordham, at the court's request but somewhat reluctantly, eventually formulated the duty for which he contended in terms that public authorities are obliged at common law to publish reasons for administrative decisions whenever in all the circumstances the court is satisfied that the public interest so requires having regard to the ill-defined and hard to tie down concepts or "principles" to which I have referred. His reluctance to be drawn in this direction was because he maintained that there could be a duty to give reasons in a particular context having regard to such concepts and principles. I fear that he strayed too close to an unpredictable lack of principle, whereby the court would be invited to require the publication of reasons whenever an individual judge was persuaded that it was a good idea.
7. Mr Fordham stressed that one factor to be taken into account was whether the administrative decision affected an individual or a defined class of individuals. This faces up to the fact that there is no authority which comes close to supporting a public law duty of the kind and width required for this amended claim to succeed. There are of course many instances where a public authority is obliged to give reasons for decisions which affect individuals. Courts and Tribunals acting judicially are generally required to give reasons for their decisions, and further normally required to publish them for the proper public administration of justice so as to comply with Article 6 of the European Convention on Human Rights. Administrative decisions affecting individuals often require reasons to be given so that the individual may know why the decision has been made, and so that he may exercise rights of review or appeal or rights to make representations. Examples of authorities to this effect are *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (prisoners serving mandatory life sentences); *R v Secretary of State for Education, ex parte G.* [1995] ELR 58 (direction in a case of special educational needs); *R v London Borough of Islington, ex parte Hinds* (1995) 27 HLR 65 (unintentional homelessness under Part III of the Housing Act 1985, where Sir Louis Blom-Cooper QC, sitting as a

deputy judge of the High Court, said at page 75 that public confidence in the decision making process is enhanced by knowledge that supportable reasons are given and that giving reasons is a self-disciplining exercise); *R v City of London Corporation, ex parte Matson* [1997] 1 WLR 765 (confirmation of election of Aldermen); *Stefan v General Medical Council* [1999] 1 WLR 1293 (decision by Health Committee of the General Medical Council about a doctor's fitness to practise); *R (Wooder) v Feggetter* [2003] QB 219 (decision, involving personal liberty, to administer medical treatment to a non-consenting adult); *R v Aylesbury Vale District Council ex parte Chaplin* [1997] 3 PLR 55 (no need to give reasons for the grant of planning permission) reversed by the amendment by SI 2003 No 2047 to article 22(1) of Town and Country Planning (General Development Procedure) Order 1995 SI 1995 No 419; *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 (determination of asylum claim with reference to Income Support Regulations). Mr Fordham was able to point to references in some of these cases to fairness, public confidence and the self-discipline of giving reasons (*Hinds* at page 75); a trend of the law towards an increased recognition of a duty upon decision-makers of many kinds to give reasons, and increased openness in matters of government and administration (*Stefan* at 1300G in the passage cited by the judge in paragraph 20 of his judgment); ensuring that decisions are sound and manifestly just and in the interests of the City (*Matson* at page 777D). These and other individual references are no more in the present context than contributory elements to the decisions in the particular cases, which concern a duty to give reasons to and for the benefit of a person or persons affected.

8. Certainly the categories of cases in which reasons are required are not closed. But it remains that there is no general duty to give reasons for an administrative decision – see *R v Royal Borough of Kensington and Chelsea ex parte Grillo* (1995) 28 HLR 94 at 105, and *Stefan* at page 1300 in the passage quoted by the judge. Lord Clyde there contemplated the future possibility that, upon the direct application of the Human Rights Act 1998, it might become appropriate to have a wide-ranging review of the position at common law. The present appeal does not, in my view, call for such a review, if only because the present claimant now has at most only an indirect interest in the subject matter and outcome of the appeal. The judge held in paragraphs 5 to 8 of his judgment that the claimant had sufficient standing to bring the claim, and neither party has questioned that part of the judge's decision. But he may be seen as a nominal representative of the public interest upon which Mr Fordham seeks to rely with reference to human rights considerations, not as an individual whose personal human rights are likely to be affected by a decision to grant a licence to export military equipment to any one of 20 countries.

The legislation

9. The judge referred to the most relevant parts of the 2002 Act, the Export of Goods, Transfer of Technology and Provision of Technical Assistance (Control) Order 2003 (SI 2003, No 2764) and to the Consolidated Criteria in paragraphs 9 to 13 of his judgment. These, taken together, empower the Secretary of State to grant licences for the export of military equipment and any goods whose exportation or use is capable of breaching international law and human rights, subject to conditions and having regard to the Consolidated Criteria. The Criteria say that an export licence will not be issued where the arguments for doing so are outweighed by concerns which include that the

goods might be used for internal repression or international aggression. The claimant relies on all eight of the Criteria, but mainly Criterion Two, by which the Government will not issue an export licence if there is a clear risk that the proposed export might be used for internal repression having regard to the recipient country's attitude towards relevant principles established by human rights principles. Section 10 of the Act requires the Secretary of State to lay before Parliament an annual report on its operation. Article 15 of the Order requires the Secretary of State to give an applicant for a licence written reasons if the licence is refused, suspended or revoked, so that the applicant may appeal. Article 22 provides for the controlled and proportionate use by the Secretary of State or the Commissioners for Her Majesty's Revenue and Customs of information in connection with the operation of controls imposed by the Order.

10. Mr Fordham says that the statutory requirement to give reasons to an applicant whose application has been refused should be balanced by a duty to give reasons to the public where an application has been granted – this to show that the statutory criteria have been complied with in this highly sensitive human rights context. Mr Eadie says that a statutory structure which provides for reasons to be given when an application is refused, for the controlled dissemination of information and for an annual report to Parliament, strongly implies that Parliament did not intend that wider reasons should be published, especially on a topic where questions of national security, commercial confidence, relations with foreign states and the advice given to ministers are likely to arise.
11. In addition to the annual reports to Parliament required by section 10 of the 2002 Act, the Government has issued quarterly reports entitled “Strategic Export Controls” on its export licensing decisions. The reports are examined by a House of Commons Select Committee, formerly known as the Quadripartite Committee and now known as the Committees on Arms Export Controls, comprising representatives of four separate committees, namely Defence, Foreign Affairs, International Development and Business and Enterprise.
12. Mr Fordham showed us that the quarterly reports for April to June and July to September 2006 published details of each of the items for which licences were granted in that period, and that information of the kind given in the schedule to the Summary Grounds of Defence was contained in the reports, with the exception of the summary reasons explaining why the granting of the licences complied with the Consolidated Criteria. He dismissed the Secretary of State's contention that publishing reasons would be unduly time-consuming and expensive. He said that most of the rest of the information was gathered and published anyway. Providing reasons could not add much to that process. If reasons were formulated at the time the licence was granted, it would be little or no labour to publish them. If there were no recorded reasons at the time, there should be. Mr Doddrell's evidence was that compiling the schedule to the Summary Grounds of Defence was laborious. I see no reason to doubt that. Nor does that, to my mind, carry any implication that reasons were not formulated at the time of the original decision, since formulating reasons on a subject such as this in a form which could be published is likely to require careful consideration.
13. The annual reports, quarterly reports and reports of the Select Committee are very bulky. They constitute the public dissemination by the Government, directly or

indirectly, of a large amount of information about its decisions on export licences for military equipment. The annual report for 2006 was accompanied by a CD Rom containing 1138 pages of information on licensing decisions for 198 states. Mr Eadie relies on these reports as indicating that the court should not require the Secretary of State to publish yet more information than is published already.

14. □□ As to the nature of what can be gleaned from this material, the judge referred to and quoted from it at some length in the long paragraphs 14 and 15 of his judgment, and we were shown those passages and some others which the parties relied on in support of their respective cases. Mr Eadie stressed that the Select Committee – but also individuals and interested organisations through their ability to make representations to the Select Committee – were able to press the Government for information which they regarded as lacking. The Select Committee was able to ask for and receive in closed session sensitive information which could not be made public. Mr Eadie pointed to paragraph 329 of the Committee Report for 2006-2007 where the Committee was able to say that in nearly all cases the Government, upon being asked for additional information, produced a satisfactory answer. Mr Fordham pointed us to passages in which the Government had declared a policy of being as open as was possible; and contrasted this with passages in the Committee Reports in which they complain of evasive answers having no content, failure to give reasons and lack of transparency. Mr Fordham emphasised the passage from the Scott Report quoted by the Committee in paragraph 329 of the same Report – see paragraph 15 of the judge’s judgment.
15. □□ The judge’s own summary observations on this material in paragraph 16 of his judgment was as follows:

“I have set out extracts from the Committee Reports at some length because they demonstrate that careful scrutiny of exports to Israel (and, indeed, elsewhere) of military equipment has been exercised. The Committee can call for any information which may be material and that includes sensitive material which for good reason cannot be made public. It is to be noted that, as the information given in this claim and the reports show, there is no evidence that the criteria are not being properly applied.”

The Freedom of Information Act

16. Mr Eadie relies on the existence and terms of the Freedom of Information Act 2000 as a strong indication that the court should not find a common law duty to give reasons such as is contended for by the claimant. He says that the judge was correct to find in paragraph 19 of his judgment that Parliament has set out the parameters for the disclosure of information, and the law not only need not, but should not, go further.
17. The Freedom of Information Act 2000 had been enacted when the 2002 Act was itself enacted, although the 2000 Act came into force later in 2005. Section 1 of the 2000 Act establishes a general right of access to information held by public authorities. There are exemptions in Part II of the Act. Section 36(2) exempts disclosure of information that would or would be likely to prejudice the effective conduct of public affairs. Section 40 exempts disclosure of personal data. Section 41 exempts evidence

given in confidence. Section 43(2) exempts disclosure that would or would be likely to prejudice the commercial interests of any person. Mr Fordham accepts, I think, that his common law duty would need to have regard to matters such as these. But he says that the enactment of the 2000 Act should not be seen as abrogating a common law duty which can be demonstrated to exist. He also points to a decision of the Information Commissioner of 4th June 2007 (Ref: FS50086622) in which a person seeking information about arms export licences to Indonesia failed under the exemptions in sections 36 and 41 of the Act. This, he says, demonstrates that the Freedom of Information Act route to the information is not effective. Mr Fordham also points to paragraph 13 of the Decision Notice in which the DTI is recorded as recognising that there is a legitimate public interest in its making available information about its decisions to approve or refuse export licensing applications and in the arguments for doing so; and that the public needed to be satisfied that the Government was operating in accordance with its published criteria and that it was using its export licensing powers properly.

18. I agree that the enactment of the Freedom of Information Act would be unlikely to abrogate any previously well recognised common law duty, unless it did so expressly, which the 2000 Act does not. But there is, as I have indicated, no such well recognised common law duty. But I accept Mr Eadie's submission that the 2000 Act may properly be seen as Parliament's considered statutory framework for the disclosure of information held by public authorities, whose enactment militates against the incremental judicial perception of a common law duty to the same or any wider extent. Second, the fact that the complainant failed before the Information Commissioner goes nowhere to suggest that he or others ought to be enabled to succeed by other means. He failed because his application was outside the framework for disclosure enacted by Parliament.

The judge's decision

19. The passage from the judgment of the Privy Council delivered by Lord Clyde in *Stefan* quoted at length by the judge in paragraph 20 of his judgment examined an argument which in general form proposed that there should be a general obligation on all decision-makers to give reasons for their decisions. Lord Clyde referred to well known advantages in favour of this, and to some dangers and disadvantages. There is a trend towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. But the trend is proceeding on a case by case basis and the law does not at present recognise a general duty to give reasons for administrative decisions. There are exceptions to this for individuals and classes of individuals, and there may be a trend for the exceptions to become the norm and the cases where reasons are not required may appear to be exceptions. But the general rule has not been departed from, and *Stefan* was not an appropriate case to explore such a departure.
20. In the light of this, the judge's conclusion in the present case was in paragraphs 21 and 22 of his judgment as follows:

“An obligation to give reasons is rooted in the common law's concern that there should be fairness or, as the historic approach stated, compliance with the rules of natural justice so that individuals directly affected should not suffer without any

possible remedy or at least knowing why they were suffering. It is always necessary to look at the statutory scheme to ascertain whether an absence of a requirement to give reasons needs to be filled.

Public scrutiny is required by the Act through Parliament. The Quadripartite Committee, as the transcripts of the evidence given before it and its reports show, fulfils that role and ensures compliance with the criteria. It is obvious that there will be sensitive matters arising in some of the licensing decisions and the Committee can obtain all necessary information, even though it cannot be published openly. While no doubt the defendant could routinely give the information which has been given in this case, it would involve a considerable amount of extra work. I have no doubt that the law does not require this exercise to be undertaken. In principle, judicial review is a remedy of last resort and is only needed if appropriate redress cannot be obtained by another route. Parliament has set out the means whereby the lawfulness of licensing decisions such as those with which the claimant is concerned should be monitored. Thus there is in my judgment the necessary transparency and insofar as the defendant fails to comply with it, the Committee will comment and the ultimate judge will be Parliament.”

Discussion

21. In my judgment, as I have indicated, the judge reached the right conclusion for the right reasons. Indeed in my view this claim fails for reasons which are cumulatively more compelling than those in these two paragraphs of the judge’s judgment. The compelling reasons are, I think, as follows:
 - (1) the 2002 Act and the 2003 Order themselves contain provision for giving reasons to an applicant for a licence whose application is refused, a requirement for an annual report to Parliament and a power for proportionate disclosure of information. This structure shows that Parliament considered what information should be given and to whom, and argues against a wide common law obligation.
 - (2) the 2002 Act is in fact administered with the additional voluntary publication of quarterly reports and assiduous scrutiny by the Select Committee. There is in practice a high degree of openness and public accountability which suggests little necessity for a common law duty. The fact that on occasions the Select Committee expressed the view that the information provided by the Government was less than complete does not detract from this.
 - (3) the subject matter is generally sensitive, such that unguarded publication is likely to be on occasions damaging. Parliamentary scrutiny, with a possibility of receiving information in closed session, is thus to be seen as preferable.

- (4) the existence of the Freedom of Information Act argues against the parallel existence of a common law duty for the reasons I have indicated.
- (5) as I have also indicated, the formulation of a sufficiently confined and principled common law duty, which is not simply a cocktail of the particular facts relied on, eluded Mr Fordham.
- (6) the problem of definition is compounded because the claimant, having conceded that the licences of which he initially complained were lawfully issued in accordance with the Consolidated Criteria, now has no more than a nominal interest in the proceedings. This strips the case for finding a common law duty to give reasons of a number of the considerations which otherwise might militate in favour of so finding. Admittedly he conceded the original case when reasons were given. But an obligation to give reasons after the event when, it is accepted, the export in question cannot be stopped, does not enable him or anyone to challenge effectively the decision for which reasons are sought.

22. For these reasons, I would dismiss this appeal.

Wilson LJ: I agree.

Rimer LJ: I also agree.