Asset Freezing, Social Security, and Human Rights

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ASSET FREEZING, SOCIAL SECURITY, AND HUMAN RIGHTS

R (M) v Her Majesty’s Treasury concerns restrictions placed on the payment of certain social security benefits in accordance with the UN asset freezing regime. Following a decision by the Court of Appeal upholding the approach taken by the UK government,\(^1\) the House of Lords has now taken a very different view, and made a reference to the European Court of Justice.\(^2\) The case is a good example of the new issues that have come before the national and supranational courts in the post-9/11 world, and which require the courts to strike a balance between the implementation of anti-terrorism measures and the upholding of human rights principles.\(^3\)

**Background**

The case involved restrictions placed on the payment of social security benefits to various women who were not themselves ‘suspected terrorists’, but each of whom was ‘married to a man listed under United Nations Security Council Resolution 1390 as a person associated with Usama Bin Laden, Al Qaida or the Taliban’.\(^4\)

Article 2 of UN Resolution 1390, adopted on 16 January 2002, requires states to:

freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons’ benefit, by their nationals or by any persons within their territory.

This Resolution was subsequently amended by Resolution 1452 which allowed a certain number of derogations and exceptions.

These UN Resolutions were given effect in EU law by Regulation (EC) 881/2002.\(^5\) Article 2 provides as follows:

1. All funds and economic resources belonging to, or owned by or held by, a natural or legal person, group or entity designated by the Sanctions Committee … shall be frozen.

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4. M (CA) (n 1) [1].
5. The UK government has implemented these Resolutions in national regulations but nothing much turned on this point in M.
2. No funds shall be made available, directly or indirectly, to, or for the benefit of, [such] a … person, group or entity …

3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, [such] a … person, group or entity … so as to enable that person, group or entity to obtain funds, goods or services.

However, Article 2 is subject to certain limitations set out in Article 2A,6 as follows:

1. Article 2 shall not apply to funds or economic resources where: (a) any of the competent authorities of the Member States … has determined, upon a request made by an interested natural or legal person, that these funds or economic resources are … necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges; … and such determination has been notified to the Sanctions Committee.

2. Any person wishing to benefit from the provisions referred to in paragraph 1 shall address its request to the relevant competent authority of the Member State … . The competent authority … shall promptly notify both the person that made the request, and any other person, body or entity known to be directly concerned, in writing, whether the request has been granted. The competent authority shall also inform other Member States whether the request for such an exception has been granted.

3. Funds released and transferred within the Community in order to meet expenses or recognised by virtue of this Article shall not be subject to further restrictive measures pursuant to Article 2.

In the UK, social security benefits payable to persons listed for involvement in terrorism are suspended, and payments are approved under licence by the Treasury generally only where benefits are necessary to meet basic needs. However, in mid-2006 the UK government decided that:7

given the fact that household income is generally pooled, state benefits paid to individuals sharing the same household with a listed person would be, directly or indirectly, for the listed person’s benefit and should therefore be subject to appropriate restrictions and conditions.

The actual effect of these restrictions on social security benefits were barely discussed by the lower courts in M, although they accepted that they were ‘draconian’.8 The relevant benefits include housing benefit, council tax benefit, income support, child benefit, child tax credit, disability living allowance and carer’s allowance.9 After an initial period during which the payments were ‘suspended’ (from May/June 2006 to 14 July 2006), the benefits have been paid under licence. The licensing arrangements involve:10

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6 Inserted by Regulation (EC) 561/2003 in implementation of UN Resolution 1452.
8 M (Admin) (n 1) [64] (Kenneth Parker QC, sitting as a deputy High Court judge); M (CA) (n 1) [22] (Maurice Kay LJ).
10 Balls (n 7).
the appointment of a third party, who will control the onward disbursement and use of benefit funds to protect against the risk that these funds are diverted to terrorism and ensure that all licensing conditions are enforced and monitored.

The House of Lords outlined the measures taken as follows:¹¹

In order to police this restriction, the licence requires Mrs M to have her benefits paid into a bank account from which she can draw only up to £10 in cash for each member of her household. All other payments from the account must be made by debit card. She must send a monthly account to the Treasury, which details all her expenditure in the previous month, enclosing receipts for goods purchased and a copy of her monthly bank statement. Someone in the Treasury presumably goes through her supermarket receipts to check that the purchases from which Mr M may derive a benefit do not exceed ‘basic expenses’. Finally, the licence warns Mrs M that it is a criminal offence to give cash, financial assets or economic resources to her husband.

The Lower Courts

The restrictions were challenged initially before Kenneth Parker QC, sitting as a deputy High Court judge, and subsequently before the Court of Appeal. The appellate court endorsed the trial judge’s approach and both courts adopted a broadly similar approach. The claimants accepted that ‘funds’ (within the meaning of the Regulation) were made available to them, but argued that no funds or economic resources were made available through them to, or for the benefit of, any listed person in breach of Article 2.2 of the EU Regulation.

The claimants accepted that if the state made funds available to a listed person’s spouse, knowing or believing that she would, or might, pass these funds to a listed person, then the state would have indirectly made funds available to the listed person. However, they argued that there was no reasonable basis to believe that the claimants would, or might, pass any funds to any listed person, because the claimants were themselves prohibited from doing this by Article 2 of the Regulation. More particularly, the claimants also argued for a narrow construction of the restrictions under which they would not apply in cases where the state made funds available to a spouse, knowing or believing that she will, or might, use the funds in a way that is likely to benefit a listed person by, for example, the provision of accommodation, food and other essential living items, but in a way that does not enable the spouse herself to obtain funds, goods or services. This argument was rejected by the lower courts on the basis that the payment of social security benefits fell within the plain language of Article 2 of Regulation 881/2002,¹² and that the narrower interpretation argued for would ‘not give full and proper effect to the United

¹¹ M (HL) (n 2) [11].
¹² M (Admin) (n 1) [63]; M (CA) (n 1) [16].
Nations Resolutions or to the prohibitions that have been enacted to implement them.\textsuperscript{13}
(As we will see, the House of Lords took a very different view on this point.)

The claimants had argued that the broad interpretation of the Regulation adopted by the UK government would create anomalies, but this was summarily rejected.\textsuperscript{14} The suggestion that regard should be had to the right of a person to deal freely with her property recognised by the English common law and by Article 8 and Article 1 of the First Protocol of the European Convention on Human Rights (ECHR) was also quickly dismissed. The trial judge said that he could see no ambiguity, as regards language or intention, in Article 2 of the Regulation. Therefore, the common law principle of interpretation offered ‘no real assistance’.\textsuperscript{15} However, he went further, saying that he would ‘seriously doubt whether the common law principle (or the provisions of the ECHR) could have any application at all in the present context’. He noted that the EU Court of First Instance in \textit{Yusuf} had refused to apply general principles of Community law in assessing the validity of the Regulation, holding that the Regulation implemented binding international law so that its validity could only be tested against fundamental peremptory provisions of international law (or \textit{ius cogens}).\textsuperscript{16} Hence he took the view that the High Court could not properly apply any common law principle for the purpose of interpreting the Regulation. While, as determined by the European court in \textit{Yusuf},\textsuperscript{17} peremptory provisions of international law include Article 17(2) of the Universal Declaration of Human Rights, under which ‘no one shall be arbitrarily deprived of his property’, the judge took the view that the restrictions challenged did not involve any arbitrary deprivation of property, and that the interpretation adopted was necessary in order to give proper effect to a public policy goal of the highest importance.\textsuperscript{18}

\textbf{The House of Lords}

On appeal, their Lordships decided to refer this question to the European Court of Justice:\textsuperscript{19}

whether the words ‘for the benefit of’ in Article 2.2 [of Regulation 881/2002] have a wide meaning which covers any application of money from which a listed person derives some benefit, or whether they apply only to cases in which funds, financial assets or economic

\textsuperscript{13} \textit{M (Admin) (n 1) [64]; M (CA) (n 1) [17].}
\textsuperscript{14} \textit{M (Admin) (n 1) [68]–[69]; M (CA) (n 1) [20]–[21].}
\textsuperscript{15} \textit{M (Admin) (n 1) [71].}
\textsuperscript{17} \textit{Yusuf (n 17) [292]–[293].}
\textsuperscript{18} \textit{M (Admin) (n 1) [72].}
\textsuperscript{19} \textit{M (HL) (n 2) [12].}
resources are, to use the language of the United Nations Resolution and Article 2.2, 'made available' for his benefit, so that he is in a position to choose how to use them.

At the same time, however, the appellate committee very clearly stated its own view that the 'intrusive regime' adopted by the Treasury was not required by Article 2.2. Their Lordships set out four reasons for this. First, the approach was not necessary to give effect to the purpose of the UN Security Council's Resolution which was to prevent funds from being used for terrorist activities. Their Lordships found it 'hard to see how the expenditure of money on domestic expenses, such as buying household food, from which Mr M derives a benefit in kind, can create any risk that he may divert funds to terrorism'. Second, in order to avoid an 'anomalous discrepancy' between the meaning of Articles 2.2 and 2.3 it would be logical, their Lordships argued, to imply the restriction contained in Article 2.3—which prohibits making economic resources available to a listed person only where it enables that person 'to obtain funds, goods or services'—in Article 2.2. Third, they suggested that the term 'made available' in Article 2.2 should be read as referring to a benefit made available to the listed person 'which he could use for terrorist purposes'. Finally, the appellate committee took the view that the Treasury interpretation of the Regulation produced 'a disproportionate and oppressive result'.

Discussion

The approach adopted by the House of Lords is to be welcomed and the rationale provided is convincing, albeit somewhat brief and without citation of authority. Indeed, there are a number of additional arguments that can be advanced in support of the interpretation adopted, both in relation to the construction of the specific provisions and, more broadly, from a human rights perspective.

Given the plain wording of the UN Resolution (and the implementing EU Regulation) and the lack of any narrowly defined objective expressed in either document, it would seem correct that, in principle, social security benefits payable to a spouse might constitute 'funds, financial assets or economic resources' which are not to be 'made available, directly or indirectly, for such persons' benefit'. However, the relevant benefits in this case included a number of payments, including child benefit, which are payable without any regard to the needs of means of the

20 Ibid.
21 Ibid. [15].
22 Ibid. [14].
23 Ibid. [15].
24 Indeed the House of Lords' approach is so clear that one might wonder whether the decision to refer was necessary.
25 UN Resolution 1390, Art 2(a). Although, as we have seen, the Law Lords have argued that the term 'made available' should be confined to a benefit which could be used for terrorist purposes.
husband/father. Such payments are not intended to be for the father’s benefit. It is not clear why there should be any assumption that the claimant mother would make available such payments for the benefit of the husband.\textsuperscript{26} Second, assuming that some of the other benefits—such as housing benefit—might be made available, directly or indirectly, for the husband’s benefit, the UN Resolution specifically excludes financial assets or economic resources that have been determined by the relevant State to be ‘necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges.’\textsuperscript{27} This then requires us to consider what exactly UK social security benefits are supposed to cover. At first instance in \textit{M}, the judge suggested that it might reasonably be expected that the claimant spouses would use the funds to confer significant economic benefits on their husbands such as payment of rent, utility charges and other normal household expenses for which the latter would otherwise be responsible, at least in part.\textsuperscript{28} However, all of these items would appear to be covered by the specific exclusion (in Article 2a of Regulation 881/2002). The UK government has, as we have seen, interpreted the UN Resolution as requiring that payments that are ‘necessary for basic expenses including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges’ be paid under a licence approved by a competent authority.\textsuperscript{29} However, it is difficult to see how this is required by the wording of the UN Resolution or the EU Regulations, which would appear to allow a more general waiver of restrictions (subject to the conditions quoted above).

There is also a broader human rights argument (under both EU law and the European Convention on Human Rights) which, of course, also speaks to the interpretation of the Regulation.\textsuperscript{30}

\textit{EU Law}

In answering the question referred to it, the Court of Justice will, one assumes, be asked to have regard to the requirements flowing from the protection of fundamental rights within the Community legal order. It is true, as noted by the High Court, that the EU Court of First Instance had decided that sanctions adopted in accordance with UN

\textsuperscript{26} The same argument would apply to the disability living allowance that appears to have been payable to one of the children.

\textsuperscript{27} UN Resolution 1545, Art 1.

\textsuperscript{28} \textit{M (Admin)} (n 1) [63].

\textsuperscript{29} Balls (n 7).

\textsuperscript{30} Although the House of Lords does not specifically refer to human rights issues in its reference, this is implicit in its narrow reading of the wording of the Regulation in line with the objective of the UN Security Council and in its emphasis on the disproportionate and oppressive effect of the ‘Treasury’s approach.’

\textsuperscript{31} See especially \textit{Yusuf} and the other decisions cited in n 16.
Resolutions were not subject to review in accordance with general principles of human rights. However, the approach taken by the court has been heavily criticised, and, in more recent decisions, both the Court of First Instance (CFI) and the Court of Justice have taken quite a different approach. In a number of recent cases (several decided before the decision of the Court of Appeal) involving persons listed by the EU itself (rather than the UN) the CFI has emphasised the importance of human rights and has, in fact, quashed the listing of a number of persons and organisations. Subsequently, in a case which primarily involved procedural points as to whether the applicants had standing to bring a case, the European Court of Justice also took the opportunity to emphasise the importance of human rights. And in a recent case involving an alleged breach of property rights, the Court held that ‘in accordance with settled case-law’ the requirements flowing from the protection of fundamental rights within the Community legal order are binding on Member States when they implement Community rules (including Regulation 881/2002), and that consequently they are bound, as far as possible, to apply the rules in accordance with those requirements.


34 PKK and KNK v Council Case C-229/03P [2007] ECR I-439 [76]–[77] and [109]–[110].

35 Möllendorf Case C-117/06 [2008] 1 CMLR 11 [78]. Most recently at the time of writing, Advocate General Maduro has argued that the Court of First Instance ‘erred in law in holding that it had no jurisdiction to review the contested regulation in the light of fundamental rights that are part of the general principles of Community law’ and that, because infringes the right to be heard, the right to judicial review and the right to property, the Court should annul, in so far as it concerns the appellants, Regulation 881/2002: Kadi v Council Case C-402/05P [40] and Al Barakaut International Foundation v Council Case C-415/03P [40].
Arguments may also be advanced as to the protection of rights under the ECHR. The social security benefits in question are clearly possessions for the purposes of the European Convention on Human Rights.36 The measures adopted by the UK government obviously involve some interference with the peaceful enjoyment of those possessions (and, arguably, with the respect for family life due under Article 8 of the Convention). In order to be justified, this interference must be in accordance with the public interest and subject to conditions provided by law.

However, assuming human rights principles do apply to the implementation of UN Resolutions,37 it is somewhat difficult to predict how the European Court of Human Rights might approach such an issue. To date the Court has yet to give detailed consideration to such issues.38 However, in the context of earlier ‘anti-terrorist’ legislation, the ECHR institutions tended to allow a wide margin of discretion. An example is the Adams case,39 in which the UK government attempted to counteract Adams’ arguments that Northern Ireland should be independent from the remainder of the UK by excluding him from Great Britain. The European Commission on Human Rights held that while the ECHR case-law emphasises the importance of freedom of expression as one of the essential foundations of a democratic society and that as a matter of principle the necessity for any restriction must be convincingly established, it was:

in the first place for the national authorities to assess whether there is a pressing social need for a restriction and in making their assessment they enjoy a certain margin of appreciation.

The Commission recalled the sensitive and complex issues arising in the context of Northern Ireland where there had been ongoing efforts to establish a peace process and where the threat of renewed incidents of violence remained real and continuous. In these circumstances, it found that the exclusion order was not disproportionate to the aim of protecting national security and preventing disorder and crime and that it could be regarded as necessary in a democratic society for those purposes.

36 See Stec v United Kingdom, 65731/01 and 65900/01, 6 July 2005, ECHR 2005-X, (2005) 41 EHRR SE 295. The ongoing discussion as to whether the English Court of Appeal should recognise this or exist in some parallel universe bound by its earlier decisions is, perhaps, beginning to lose contact with reality: R (MJ) v Secretary of State for Work and Pensions [2007] EWCA Civ 614, [2007] 1 WLR 3067; R (Cowsone) v Crowley BC [2007] EWCA Civ 1086. (An appeal to the House of Lords in the former case is currently pending.)

37 Advocate General Maduro convincingly refutes the argument that measures that are necessary for the implementation of Security Council resolutions automatically fall outside the ambit of the Convention: Kadi v Council Case C-402/05P [36 n 42] and Al Barakaat International Foundation v Council Case C-415/05P [36 n 42].

38 See SECI v Germany, 6422/02, 23 May 2002. This case was also considered by the EU courts: see C Eckes, ‘How Not being Sanctioned by a Community Instrument Infringes a Person’s Fundamental Rights: The Case of Segi’ (2006) 17 King’s College Law Journal 144.

In addition, the ECHR has, perhaps understandably, been reluctant to become involved in detailed issues of social security law, giving considerable deference to national legislators and courts. However, this places an important responsibility on national courts to ensure that human rights principles are respected—as indeed the House of Lords did in *Limbusa*.40

**Conclusion**

Maurice Kay LJ in the Court of Appeal, perhaps unintentionally, made an important point in support of the narrower approach to the implementation of the Regulation when he stated that 'although the Regulation is draconian, it does not have the result of withholding a single penny of the benefits to which the appellants are entitled'.41 It is not clear whether the learned judge meant that, in fact, the claimants did not receive a penny less or merely that, in principle, the Regulation did not have that effect. However, if the applicants actually did not receive a single penny less, then HM Treasury must be satisfied that the payments were not in breach of the Resolution (perhaps because they fell within the exemptions set out in Resolution 1452). If so, what exactly is the point of the elaborate licensing regime? If, on the other hand, the claimants do, in fact, get fewer benefits than provided by law, then they and their children are being penalised because of their family relationship with a listed person by having their benefits reduced below the level considered to be appropriate by Parliament. As Cole has argued, '[c]utting off material support for terrorist activity is undoubtedly a worthy and appropriate goal. But that can be done without indulging in guilt by association'.42

In a world where torture is being redefined and outsourced, some restrictions on the payment of social security benefits may seem to be a rather minor issue. However, this case is important as it raises the issue of how the courts will respond to the growing challenge of balancing security concerns and human rights. Professor Iain Cameron, in his report to the Council of Europe, stated:43

Without wanting to exaggerate, I would say that, for a lawyer trained in the idea of the Rechtsstaat, blacklisting strikes at such a basic level of his or her understanding of what is law that it calls into question why it should be obeyed. And at a time of an alleged 'clash of civilizations', if European states wish to avoid this, then it is all the more important for them to adhere to their own professed basic values, especially when targeted sanctions can particularly affect people from immigrant groups in their own territories.

41 M (CA) (n 1) [22].
43 Cameron (n 32) 9.
The approach of the House of Lords and the European Court of Justice—in contrast to that of the lower courts—gives some hope that at least these judges have not lost sight of such basic values.

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