

PUBLIC & ADMINISTRATIVE LAW

UNINCORPORATED PUBLIC INTERNATIONAL LAW AND JUDICIAL REVIEW: CANCELLING AN ASSIGNMENT OF RADIO FREQUENCIES

R (ICO SATELLITES LTD) v OFFICE OF COMMUNICATIONS [2010]
EWHC (ADMIN)

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In a case concerning the ability of the Office of Communications ('Ofcom') to cancel an assignment of a particular radio frequency to a satellite operator, the High Court considered the wider question of whether a public body's decision can be judicially reviewed where it was based upon its understanding of treaty obligations that have not been incorporated into English law. The case applied the obiter dicta of Lords Bingham and Brown in R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 756, which have previously been applied by the High Court in R (Badger Trust) v Welsh Ministers [2009] EWHC 768 (Admin)¹, but were here given a more detailed consideration. The High Court ultimately concluded that Ofcom's decision had been based on purely domestic provisions, laid down in its Guidance on Procedures for the Management of Satellite Filings ('the Guidance'). Lloyd Jones J's analysis is, however, indicative of what future litigants may expect in cases where such arguments are run.

The International Telecommunications Union

Radio spectra, and orbital positions for satellites to occupy, are a finite resource. The rapid development of mobile and broadband technologies has led to an increase in demand for

¹. Also a judgment of Lloyd Jones J; at [122] et seq. Overturned on other grounds in *Badger Trust v Welsh Ministers* [2010] EWCA Civ 807

both in recent years, and to a corresponding increase in their value.

The allocation of radio spectrum frequencies is governed by an internationally agreed regime, administered by the International Telecommunications Union ('the ITU'). Under this regime, the ITU maintains register (called the 'Master International Frequency Register' or 'MIFR') of all the frequencies that have been assigned to different operators throughout the world. When a satellite operator wishes to apply for an assignment, it applies to one of the national administrations of the Member States, which will review whether the application would be compatible with existing assignments if granted and notify other ITU Member States for them to review it too (a process called 'co-ordination'). If it is compatible, then the national administration will notify the ITU that the frequency has been assigned (known as a 'filing'). The procedure is laid down in the Radio Regulations issued by the ITU.

One of the requirements that a satellite operator must comply with is to bring the filing into operation, in accordance with its notified characteristics, within a specified regulatory period from the start of the co-ordination process (Article 11.44 Radio Regulations). This is to ensure that the resource is not reserved by operators who are not using it; national administrations are under a duty to ensure that frequency bands are used efficiently (Article 44.2 Constitution of the ITU). As a correlative of this obligation:

- (a) National administrations are required to impose due diligence requirements on operators who apply for a frequency assignment, including information relating to the contractual status of the satellite and launch vehicles (Resolution 49 of the World Radiocommunication Conference);
- (b) There is a procedure by which the ITU will automatically cancel a filing, in circumstances where an assignment notified to it has not been brought into operation in accordance with the notified characteristics (Article 13.6(b) Radio Regulations).

The Dispute

ICO Satellites Ltd ('ICO') applied in the UK for an assignment in 1994. Its application was notified to the rest of the ITU Member States in February 1995 and the co-ordination

² The nine year period applied to Advance Publication Information received by the ITU before 22 November 1997. Publications received thereafter must be brought into use within seven years.

R (ICO SATELLITES LTD) v OFFICE OF COMMUNICATIONS

process was completed by 2004. The frequency had to be brought into use within nine years² of the date of notification, i.e. by February 2004, or would be automatically cancelled by the ITU. In January 2004 Ofcom (the national administration for the UK) notified the ITU that the frequency had been brought into use, as one of the twelve planned satellites had already been launched.

Three days after Ofcom sent its notification to the ITU, ICO terminated the contracts it had with Boeing for the construction and launch of its satellites. It did not inform Ofcom, which learned of the problem only through the media. In May 2004 Ofcom wrote to ICO requesting evidence that ICO had sufficient financial resources to complete the construction and launch of the remaining satellites, that it had contracts in place to complete the construction and launch of the remaining satellites, and a timescale for doing so. Following an exchange of correspondence, Ofcom decided in February 2009 that it would write to the ITU requesting that the assignment to ICO be cancelled. ICO sought a judicial review of that decision.

LLOYD JONES J'S JUDGMENT

Duty under the ITU regime to cancel the assignment/expectation of the ITU that Ofcom would seek cancellation

Lloyd Jones J rejected ICO's arguments that Ofcom had regarded itself as being under duty under the ITU regime to cancel the assignment, or that it had regarded the ITU as expecting it to cancel it.

He noted, in particular, that nothing in the ITU regime prohibits national administrations from imposing requirements additional to those in the ITU regime itself. In this case, Ofcom had imposed additional requirements that went beyond Resolution 49, in particular the requirement to prove that the operator has sufficient financial resources to bring the satellite into operation (Guidance at section 5.3), and to report yearly on progress made to bring into operation a frequency entered on the MIFR (Guidance at section 5.9).

On that basis he held that Ofcom's decision was based on ICO's failure to comply with the conditions that Ofcom itself had stipulated – its failure to demonstrate it had contracts in place, and sufficient financial resources, for the construction and launch of the remaining satellites - rather than on a failure to comply with any aspect of the ITU regime. It could not

be said that Ofcom regarded itself as being under a duty under the ITU regime to request cancellation of the assignment in these circumstances (paragraph 48), or that it regarded the ITU administration as expecting it to request cancellation in these circumstances (paragraph 80).

Relevance of public international law

As to both parties' arguments concerning the proper interpretation of the Radio Regulations, and various communications from ITU officials, the Judge considered this case "*a compelling example of the difficulties and the undesirability of a domestic court expressing a concluded view on a disputed point as to the meaning and effect of non-implemented instruments governing a regime established by an international organisation.*" (paragraph 94). He declined to express a concluded view on the correct interpretation of the Radio Regulations, given that they have not been incorporated into English law, but rather he found only that Ofcom's interpretation was "tenable" (following the approach indicated by their Lordships in *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756, in particular by Lord Brown at [68]) (paragraph 95). He expressed "concerns" about whether the ITU officials' communications, on which ICO relied, could be said to be "*authoritative statements of the institutional view of the ITU*" and indicated that he found them "difficult to reconcile" with Article 13.6(b) Radio Regulations (paragraph 86). One must assume that he meant that he found them difficult to reconcile with Ofcom's interpretation of Article 13.6(b), which he did not consider to be untenable.

Failure to take into account relevant considerations

Lloyd Jones J rejected ICO's arguments that Ofcom should have taken into consideration the absence of any prejudice to third parties if the filing was not cancelled, and the adverse impact of cancellation on ICO. He held that there was no basis in the ITU regime, or in Ofcom's Guidance, for considering either factor to be relevant (paragraphs 105 and 112 respectively). He held that, to the contrary, the ITU regime contemplates automatic cancellation of unused frequencies, irrespective of whether third parties are waiting to use that frequency or whether the current operator will lose its existing investment.

He also held that Ofcom was entitled to reach the view that ICO would not be able to bring its dispute with Boeing to a successful conclusion (paragraph 119). ICO had accepted that no other company was capable of completing the manufacture of the remaining satellites, and although it had succeeded in its claim against Boeing for damages (filed in the

R (ICO SATELLITES LTD) v OFFICE OF COMMUNICATIONS

US courts) it had lost its claim for specific performance of the contract. ICO's suggestion that it might still be able to reach a settlement which saw Boeing perform its original obligations was "no more than a possibility".

Disproportionality

Finally, Lloyd Jones J rejected ICO's argument that Ofcom's decision was disproportionate. He considered Ofcom had "*been generous in extending time [by some five years] so as to allow ICO to provide evidence that the position can be remedied*" (paragraph 135). He also accepted Ofcom's argument that although Article 13.6(b) Radio Regulations contemplates a range of possible responses to a failure to bring a frequency into use, the other responses contemplated were appropriate in cases where, for example, a satellite encountered a problem that could be rectified in a short time, or where an operator was not using the full frequency assigned to it (so that it might be appropriate to modify the filing). In a situation where the filing was "*not being used in any real sense*" Ofcom's decision to cancel could not be considered disproportionate (paragraph 136).

COMMENTS

The case indicates that public authorities tasked with administering the UK's obligations under unincorporated international treaties would be well advised to issue guidance on how they understand those obligations. It is clear that for Lloyd Jones J the Guidance was determinative: he rejected ICO's invitation to overlay it with public law requirements, such as proportionality and not taking into account irrelevant considerations, and held simply that the procedures which Ofcom had outlined in the Guidance had been followed. The dispute was therefore treated as being one of purely domestic law. It seems that provided a regulator provides fair and transparent guidance on how it will administer treaty obligations that guidance will insulate it from challenges based on public international law. The only basis on which it could be challenged would be if the interpretation adopted in its guidance were "untenable".

The case also illustrates the practical importance of the approach outlined by their Lordships in *Comer House*. The court is placed in an invidious position if it is asked to weigh the Government's interpretation of its treaty obligations against a contrary interpretation from international officials. The undesirability of international organisations, with no mandate from Parliament, trying to offer unofficial amicus briefs to the courts or to engage in an unofficial procedure akin to the CJEU's preliminary reference procedure is self-evident. Yet the case

illustrates that parties are readily tempted to draw on international officials if the court is being asked to determine the correct interpretation of international treaties, as opposed to simply reviewing the 'tenability' of the Government's interpretation.

ICO are currently seeking permission to appeal from the Court of Appeal. The Court is to hear their application shortly.

Christopher Vajda QC and Ben Rayment appeared for OFCOM.