Neutral citation [2008] CAT 21

IN THE COMPETITION APPEAL TRIBUNAL	Case Number: 1102/3/3/08 1103/3/3/08
Victoria House Bloomsbury Place London WC1A 2EB	3 September 2008

Before:
VIVIEN ROSE
(Chairman)
DR ARTHUR PRYOR CB
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

T-MOBILE (UK) LIMITED

Appellant

- supported by -

HUTCHISON 3G UK LIMITED

Intervener

-v-

OFFICE OF COMMUNICATIONS

Respondent

TELEFÓNICA O2 UK LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

RULING ON REQUESTS FOR PERMISSION TO APPEAL

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1. The Tribunal has before it two requests for permission to appeal against the judgment handed down by the Tribunal on 10 July 2008 on a preliminary issue in the appeals brought by T-Mobile (UK) Limited ("T-Mobile") and Telefónica O2 UK Limited ("O2") ([2008] CAT 15) ("the Judgment"). The appeals sought to challenge the way in which OFCOM has decided to conduct the auction of two bands of spectrum that can be used for providing telecommunications services. In the Judgment the Tribunal was unanimous in finding that it did not have jurisdiction under section 192(1)(a) of the Communications Act 2003 ("the CA 2003") to hear the appeals. The full background to these appeals was set out in the Judgment and terms defined in that Judgment have the same meaning in this ruling.

2. By an Order dated 16 July 2008, the Chairman ordered that the time for filing requests for permission to appeal from the Judgment under rule 58(1)(b) of the Competition Appeal Tribunal Rules 2003, S.I. 2003 No. 1372 ("the Tribunal Rules") be abridged to 14 days from the handing down of the Judgment. On 25 July 2008, both T-Mobile and O2 requested permission to appeal against the Judgment.

3. The proceedings before the Tribunal were brought under section 192(2) of the CA 2003. Subsequent appeals from the Tribunal's decisions are governed by section 196 of the CA 2003, which provides so far as relevant:

> **"196 Appeals from the Tribunal**
>
> (1) A decision of the Tribunal on an appeal under section 192(2) may itself be appealed.
>
> (2) An appeal under this section—
>
> (a) lies to the Court of Appeal ….; and
>
> (b) must relate only to a point of law arising from the decision of the Tribunal.
>
> (3) An appeal under this section may be brought by—
>
> (a) a party to the proceedings before the Tribunal; or
>
> (b) any other person who has a sufficient interest in the matter.

> (4) An appeal under this section requires the permission of the Tribunal or of the court to which it is to be made.
>
> …"

4. Requests for permission to appeal from decisions of the Tribunal are considered in accordance with rules 58 and 59 of the Tribunal Rules. Rule 59(2) provides that where a request for permission is made in writing, the Tribunal shall decide whether to grant such permission on consideration of the party's request and, unless it considers that special circumstances render a hearing desirable, in the absence of the parties. The Tribunal wrote to the other parties on 29 July 2008 inviting them to comment on T-Mobile's and O2's requests for permission to appeal and received written observations from OFCOM opposing the requests. OFCOM submits that the Appellants do not have a reasonable prospect of success in any appeal and that it should be left to the Court of Appeal to decide whether to hear the appeal. None of the parties requested an oral hearing of the permission applications and in the circumstances of this case the Tribunal does not consider that an oral hearing is necessary or desirable.

5. The Tribunal has a discretion whether to grant permission to appeal. Part 52 of the Civil Procedure Rules ("CPR") applies to appeals from the Tribunal to the Court of Appeal. Rule 52.3(6) of the CPR states:

> "Permission to appeal may be given only where–
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason why the appeal should be heard."

6. T-Mobile's request for permission to appeal contains two main grounds of appeal. The first ground is that the Tribunal erred in concluding that a right to bring judicial review proceedings is capable of being fully compliant with the appellants' directly effective rights under Article 4(1) of the Framework Directive. The second ground is that the Tribunal erred in concluding that the decision was given effect to by regulations made under section 14 of the WTA 2006 (within the meaning of paragraph 40 of Schedule 8 to the CA 2003) and hence was excluded from the jurisdiction of the Tribunal.

7. O2's appeal focuses on the Tribunal's conclusions as regards the scope of the rights conferred by Article 4 and whether judicial review is an adequate implementation of those rights.

(a) Article 4 of the Framework Directive

8. Both parties argue that Article 4(1) requires a full appeal on the merits where a challenge is brought by a person affected by a decision and that judicial review is not capable of satisfying that requirement. They assert that the Tribunal failed to take into account the real difference that still exists under English law between judicial review and a full merits appeal and that the Tribunal erred in law in finding that judicial review could satisfy the requirements of Article 4.

9. The Judgment makes clear that the Tribunal arrived at its conclusion that judicial review was capable of satisfying the requirements of Article 4 even if the appellants were right in their contention that there would be a material difference between the way the Administrative Court and the Tribunal would approach a substantive hearing of these appeals: see paragraph [76] of the Judgment. Article 4 clearly does require that some consideration of the merits by an independent body must be available to an appellant. But the judicial review jurisdiction is not limited to questions of procedural fairness or *vires*. It does involve the Administrative Court in some consideration of the merits of the decision under challenge to the extent described in the many judicial pronouncements handed down on the subject of the judicial review standard.

10. The question for the Tribunal was therefore whether, having regard to the degree to which the Administrative Court can consider the merits of the Sequencing Decision in the course of a judicial review challenge, such proceedings satisfy the United Kingdom's obligation under Article 4 to ensure that the appellants can challenge OFCOM's decision in a forum in which the merits of that decision "are duly taken into account" and to provide an effective appeal mechanism.

11. The Tribunal concluded that this was the case in respect of a decision of the kind under challenge in this case. By limiting its conclusion to the kind of decision in

question, the Tribunal was acknowledging the point set out at paragraph [75] of the Judgment, namely that OFCOM did not assert that judicial review would be adequate implementation for challenges to *all* the various kinds of decisions that fall within the ambit of Article 4.

12. T-Mobile argues that the Tribunal did not address the paragraph in the *Termination Rate Disputes* appeals judgment, [2008] CAT 12, which states at paragraph [81]: "The Tribunal notes that its jurisdiction to consider these appeals on the merits is conferred by the statute in order to implement the requirement imposed on the United Kingdom by article 4 of the Framework Directive that there should be an effective appeal mechanism against decisions by OFCOM." However, the Tribunal there did not intend to say that an appeal before it is the only way that the requirements of Article 4 could be satisfied, but merely that that was the route adopted by the legislature for appeals against dispute resolution determinations.

13. Both appellants assert that the Tribunal failed to give adequate weight to the difference in the wording of sub-paragraphs 1 and 2 of Article 4. O2 submits that the Tribunal failed properly to distinguish between Article 4(1), which refers to a "right of appeal", and Article 4(2), which refers to "review by a court or tribunal". The distinction, it says, is not one of domestic law but rather a Community law distinction. The Tribunal carefully examined all three elements of the language of the Directive on which the appellants relied in construing Article 4. The Tribunal explained, at paragraph [71], why the distinction O2 and T-Mobile attempt to draw between the wording of Article 4(1) and 4(2) cannot bear the weight they seek to place on it. The judgment of the European Court of Justice in Case C-438/04 *Mobistar SA v IBPT* [2006] ECR I-6675, referred to in paragraph 12 of O2's request, was concerned with whether or not the regulator must disclose, in the appeal proceedings, confidential information on which it had based the challenged decision. It does not support the proposition that a full merits appeal must be available for all decisions falling within Article 4. The Tribunal does not consider that the examination of the *travaux préparatoires* set out in O2's request for permission assists it further. The wording that had been adopted by the European Parliament at the first reading and which was proposed by the Parliament's

Committee on Industry, External Trade, Research and Energy was not, in the end, the wording adopted in the Framework Directive.

14. Similarly the reference to the fact that the other official language versions of the Framework Directive also use different words in sub-paragraphs (1) and (2) of Article 4 (paragraph 36(2) of O2's request for permission) does not take the matter further, since the question to be decided is not whether there can or should be a difference between the roles of the two bodies referred to, but rather what is the test that the primary body must apply.

15. O2 submits the Tribunal failed to take into account the fact that Article 4(1) requires that the appellate body have "the appropriate expertise available to it". As the Tribunal made clear in paragraphs [78] and [79] of the Judgment, the High Court undoubtedly has the means to have the appropriate expertise made available to it to deal with the facts at issue in these proceedings. That, in our judgment, is sufficient to answer O2's allegation.

16. In the Tribunal's judgment, therefore, there is no real prospect of the appellants establishing that, on its true construction, Article 4 confers on them a right to a full appeal on the merits before the Tribunal in their challenge to the Sequencing Decision. Permission to appeal on these grounds is therefore refused.

17. O2 also raises in its request two points argued before the Tribunal which did not need to be decided because they arose only if the Tribunal concluded that section 192 of the CA 2003 does not adequately implement Article 4 of the Framework Directive. These are the points concerning the duty of the Tribunal to disapply the limits on its jurisdiction set out in section 192 and the use of the *Marleasing* principles of statutory construction to resolve any conflict between the domestic legislative provisions and the appellants' directly effective rights.

18. While not raised as an independent ground of appeal *per se* by T-Mobile, in its application it submits that these points will require consideration by the Court of Appeal. In a letter to the Tribunal following filing of its request for permission to

appeal, T-Mobile submitted that the difference in approach between O2 and T-Mobile in this regard was not a material one.

19. Since, in the Tribunal's judgment, the appellants do not have a real prospect of establishing that the proper construction of section 192 is inconsistent with their Article 4 rights, the Tribunal concludes that permission to appeal should not be granted on these grounds.

(b) The construction of the domestic legislative provisions

20. T-Mobile's request for permission to appeal raises the following argument related to the statutory framework considered in the Judgment:

> "27. Parliament's true intention was that all decisions falling within Article 4 should be subject to a right of appeal to the Tribunal […].
>
> "28. But in any event, even if Parliament intended to exclude certain decisions falling within Article 4 from the scope of a right to appeal to the Tribunal, it did not intend to exclude decisions in the nature of the Sequencing Decision or Award Decision…"

21. It is not clear from its request for permission whether O2 also challenges the Tribunal's conclusions on the question of domestic construction of section 192. This is not mentioned separately in its principal grounds of appeal, although paragraph 52 of the request for permission to appeal states that it remains O2's position that there is a good argument as a matter of domestic construction that O2 is entitled to appeal OFCOM's decision under section 192. For present purposes, we treat O2's request for permission to appeal as covering the domestic construction point as well as the points arising from the direct effect of Article 4.

22. Both appellants refer in their requests for permission to the analysis of the Explanatory Notes. The Tribunal reiterates what was said at paragraphs [32] and [38] to [42] of the Judgment, namely that it is important to avoid either focussing on the wording of the Explanatory Notes rather than the wording of the statutory provisions or attributing the views of the Government as expressed in the Notes to Parliament, which promulgates the legislation. Neither appellant addresses the point made in paragraph [39] of the Judgment that there are other provisions in Schedule 8 which are clearly intended to implement provisions of the Common Regulatory

Framework (and hence are decisions within Article 4), but which are equally clearly excluded from the ambit of the Tribunal's jurisdiction. The Tribunal regards the assertion that Parliament intended all decisions falling within Article 4 to be subject to a full merits appeal to the Tribunal as devoid of merit.

23. T-Mobile argues that the alleged failure by OFCOM to take the Refarming decision is appealable to this Tribunal by virtue of section 192(7) of the CA 2003 and that the Tribunal erred in rejecting this point. The Tribunal accepts that the Refarming Failure alleged by the appellants is "at the very core" of their case since it is the nexus between the timing of the proposed award of the new spectrum and the timing of the Refarming decision which give rise to the proceedings before this Tribunal and the Administrative Court. But that does not mean that the Tribunal should have considered whether the Refarming Failure *of itself* was an appealable decision under sections 8 to 10 of the WTA 2006 or any other section. Those provisions of the WTA concern, amongst other things, OFCOM's powers to revoke and vary licences and Schedule 1 to that Act sets out the procedure which OFCOM must follow before taking such a step. OFCOM has not commenced any such procedure in relation to the appellants' holdings of Existing Spectrum and is unlikely to do so (if at all) until after it has decided on its policy in relation to refarming of that spectrum. The Tribunal did not hear argument as to whether it is right to regard a decision on the policy of refarming Existing Spectrum as a decision adopted under the powers in those provisions or, if so, how section 192(8) CA 2003 would apply if OFCOM announced its intention to initiate the procedures in Schedule 1.

24. As regards the power exercised by OFCOM in taking the Sequencing Decision, in addition to the various powers identified in its written submissions and at the hearing, T-Mobile asserts in its request for permission to appeal that the Sequencing Decision: "cannot be identified in express terms within any part of the [WTA 2006]; but insofar as it must be identified as being implicit in a single section (rather than being implied into the scheme of sections 8-14 read together […]), the relevant section is section 9, not 14".

25. In the Tribunal's judgment, as set out in paragraph [48] of the Judgment, the Sequencing Decision, together with the decision to reject the Split Auction Alternative, are clearly decisions taken under section 14 WTA 2006, and not under section 9 or any of the other sections identified. There is no real prospect of the appellants establishing that the Sequencing Decision was taken under any power in the CA 2003 or the WTA 2006 other than section 14 of the WTA 2006.

26. Finally, T-Mobile challenges the Tribunal's finding at paragraph [55] of the Judgment:

> "The Tribunal concludes, therefore, that there is no category of decisions antecedent to the making of the regulations which can be described as decisions under section 14 but which are not given effect to by regulations under section 14 WTA 2006."

27. The question whether it is possible for OFCOM to take a decision under section 14 WTA 2006 (rather than under regulations made under section 14) which is *not* a decision "given effect to" by regulations under section 14 for the purpose of paragraph 40 was the issue in the case which the Tribunal found the most difficult and which, in the Tribunal's judgment, constitutes the point of law on which an appeal would have a real prospect of success.

28. The Tribunal set out its reasons for rejecting the existence of such a class of decisions in paragraphs [49] *et seq* of the Judgment. T-Mobile reiterates its arguments in favour of applying a test which asks whether the policy decision can be said to be "embodied" in the regulations in order to determine whether that decision is "given effect to" by the regulations. The Tribunal would be concerned that such a test would be difficult to apply in practice and may lead to a proliferation of disputes about whether a particular decision announced by OFCOM is or is not "embodied" in the way T-Mobile describes. It is also difficult to see how the test can be applied unless or until OFCOM issues draft regulations, but there is nothing in the legislation which indicates that all decisions taken before drafts are promulgated are to be challenged before the Tribunal. But we accept that this is not clear cut and that it is an important point which would benefit from further consideration by a higher Court.

29. We therefore go on to consider whether it is appropriate for the Tribunal to exercise its discretion to grant permission to appeal on this point.

(c) The parallel High Court proceedings

30. As noted in the Judgment, proceedings in relation to the dispute heard before the Tribunal have also been commenced by T-Mobile in the High Court on a precautionary basis, and O2 has intervened in those proceedings in support of T-Mobile. We understand that no hearing date has yet been fixed for the judicial review application, although the proceedings are not formally stayed. The parties have agreed, subject of course to the consent of the Court of Appeal, for there to be a "rolled up" hearing of permission to appeal and the substance of the appellants' appeal against the Judgment.

31. We also understand that OFCOM has suspended the auction timetable contemplated in the Award Decision. That timetable envisaged that applications for the award would be due in July 2008. The process has now been put on hold, pending the developments in the legal proceedings outlined above.

32. In the circumstances, given the interaction between the proceedings before the High Court and before the Court of Appeal, and the potential impact of any decision granting permission to appeal might have on the further progress of the judicial review proceedings, the Tribunal considers that the most appropriate course is for us to refuse permission to appeal and for the parties to seek permission from the Court of Appeal directly. We therefore unanimously refuse T-Mobile's and O2's requests for permission to appeal.

33. If so advised, a further application for permission to appeal may be made to the Court of Appeal within 14 days pursuant to CPR 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling, together with copies of T-Mobile's and O2's applications of 25 July 2008 requesting permission to appeal and OFCOM's letter of 30 July 2008 commenting on the requests, should be placed before the Court of Appeal.

Vivien Rose Adam Scott Arthur Pryor

Charles Dhanowa
Registrar 3 September 2008