

Landsbanki Freezing Order 2008

Advice of Sir Michael Wood, K.C.M.G.

(24 December 2008)

1. I have been asked for urgent initial advice on possible legal challenges by the Government of Iceland (GoI) against the Landsbanki Freezing Order 2008 of 8 October 2008 (SI 2008/2668) (hereafter 'FO'). Under the FO, the UK Government (HMG) froze Landsbanki assets in the UK, action which had severe consequences for Iceland. Advice is sought on the possibility of judicial review in the English courts (JR) and, in particular, on the possibility of proceedings in Strasbourg before the European Court of Human Rights (ECtHR).
2. I have seen only a limited selection of papers on this matter, including a 'Timeline of Events Concerning the State of Icelandic Banks in the UK', dated 22 December 2008, prepared by the Embassy in London, with appendices. For more considered advice I would need more information, especially to assess such issues as the necessity for, and the proportionality of, HMG's action.
3. Other possibilities, such as action under the EEA Treaty, are not discussed in this advice. I have, however, included some initial thoughts on the possibility of bringing proceedings at the International Court of Justice (ICJ).

Judicial review in the English courts

4. I am aware that the GoI has received advice on JR from Lovells LLP, at meetings in Reykjavik over the last couple of days. I have not heard how those meetings ended. The GoI may by now have already taken a decision on whether to proceed with JR.

5. I have seen two *Draft* Outlines prepared by Lovells for a Ministerial Meeting on 22 December. In my opinion, based on these *Draft* Outlines, the advice Lovells are giving is (as one would expect) sound and balanced. As they explain, the three-month time-limit for commencing JR proceedings expires on 7 January 2009, and - while permission for a hearing could well be given - the chances of eventual success are slim. This is so because the legislation under which the FO was made leaves a wide discretion to HMG. In all the circumstances the courts will be most unlikely to wish to interfere with HMG's exercise of that discretion. As for arguments based on the Convention right set out in ECHR Article 1 of Protocol 1 ('A1P1') under the UK's Human Rights Act 1998, HMG would be likely to succeed in convincing the English courts that its actions were justified within the terms of that provision. The reasons given by HMG, for example in the further guidance set forth in the Financial Sanctions Notice issued by HM Treasury and dated 17 October 2008¹, seem

¹ See, in particular, para. 4 of the Notice: 'This action was deemed necessary because the emergency nationalisation law passed by Iceland on 7 October 2008 meant that UK creditors' rights could be prejudiced compared with other creditors. The Icelandic government had been unable to clarify the

clearly to be within A1P1. For the GoI to show a lack of necessity or proportionality would require compelling evidence, which I have not seen. The courts are likely to take the view that the need for such urgent action was clear.

6. Under these circumstances, the GoI needs to consider the effect of commencing proceedings on the crucial ongoing negotiations with HMG. I do not, of course, have direct knowledge of the state of the negotiations between the GoI and HMG, and I hesitate therefore to express a view. But, from the outside, it seems to me that the effect of commencing JR proceedings would be likely to be very negative. Action against HMG in the courts would not, in my view, encourage HMG to reach what the GoI would regard as a fair solution in the negotiations. HMG would no doubt be advised by its lawyers that the action was unlikely to succeed, so such action would not be effective as pressure. On the contrary, it would be likely to antagonise Ministers and officials, making them less willing to reach an equitable result in the negotiations. At the least, they would be distracted by the litigation (having to spend time on it that could be better spent on preparing for the negotiations), and they might fear that offers made in the negotiations would weaken their position in court. In short, I see nothing to be gained in to seeking a JR and much potentially to be lost.

position of UK creditors in the administration process and there was therefore a threat to UK economic interests.’

Action before the European Court of Human Rights

Inter-State case or individual application?

7. There are two ways of mounting a case in Strasbourg: by way of individual application under Article 34 of the ECHR, and through an inter-State case under Article 33.
8. The vast majority of cases in Strasbourg are by way of individual application (in which the State of nationality of the applicant may intervene – see Article 36). Inter-State cases have been launched only in very exceptional circumstances, normally when the Applicant State or States are complaining of what they see as systemic human rights violations by the Respondent State (*Ireland v UK* in the early 1970s; *Cyprus v Turkey* over northern Cyprus in the early 1980s; *various States v Turkey*; *Georgia v Russia* 2007).
9. In light of this practice under the European Convention on Human Rights, the facts of the present case (challenge to the FO, which affected one private bank), the more natural course, by a long way, would seem to be an individual application. Care would be needed to identify the right Applicant or Applicants, in view of the changes in Landsbanki. While an inter-State case (*Iceland v UK*) is not excluded

(see, for example, the old - 1960 - case of *Austria v Italy*), but it would be highly unusual and probably look very odd, both to the ECtHR itself and more widely.

Merits

10. Whichever route is taken, the substantive difficulty of establishing a breach of Article 1 of Protocol 1 ('A1P1') would be formidable (see paragraph 5 above). While the Court in Strasbourg might be somewhat more sympathetic to arguments based on necessity and proportionality than the English courts, they might on the other hand be even more reluctant to second-guess HMG's actions (applying the 'margin of appreciation'). Unless further information suggests a good factual basis for necessity and proportionality arguments, I do not think the chances of success in Strasbourg are high.

Need to exhaust domestic remedies

11. One difference between an inter-State case, and a case based on an individual application, lies in the admissibility criteria (Article 35). The only two admissibility criteria for inter-State cases are those set out in Article 35, paragraph 1, which reads:

The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of domestic law, and within a period of six months from the date on which the final decision was taken.

12. While the case-law is limited, it seems that the Court will apply the exhaustion of domestic remedies rule in the same way in inter-State cases as in cases brought by individuals. In addition to the clear wording of Article 35, paragraph 1, the Rules of Court require the Applicant State to deal with the exhaustion of domestic remedies in the Application. The case-law suggests that the rule does not apply where the violations stem from administrative practices or legislation (which in the nature of things may especially be the subject of inter-State cases).² The present case does not seem to fall within this exception, in which case the non-exhaustion rule applies.

13. It follows that, although the advice is that the chances of success in JR proceedings in the English courts are slim (see Lovells *Draft Outlines* and above), unless such proceedings are commenced, and pursued at least at first instance (and quite possibly further), there is a high risk that the HMG would succeed in having the case dismissed by the Court in Strasbourg as inadmissible for failure to exhaust domestic remedies.

Proceedings in the International Court of Justice

14. The ICJ only has jurisdiction if the parties to a case have consented. I have been referred in this connection to the Arbitration Convention of 25 October 1905 between Denmark and the United Kingdom, modified in 1937 (as it applies to Iceland). The Convention would

² See van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed., 1998), p 129; K Reid, *A Practitioner's Guide to the European Convention on Human Rights* (3rd ed., 2007), p. 31.

seem to be a potential basis of jurisdiction under the ICJ Statute, though it would be open to the UK to seek to resist on a number of grounds (non-exhaustion of negotiations, 'vital interests', possible need to define the dispute).

15. More problematic would be the need to establish a breach by the UK of an international legal obligation owed to Iceland. This could be a breach of either a treaty obligation or of an obligation under customary international law, but nothing obvious comes to mind. It might be possible to build some sort of a case based on a breach of a general principle of international law, such as the 'duty to co-operate', or the 'duty of non-intervention'. Such an argument would not only be novel, but would ultimately turn on proving the necessary facts. Based on the information I have been given, the chances of success look slender.

16. Any proceedings in the ICJ would be lengthy, almost certainly with both a jurisdictional and a merits phase. If so, I estimate a minimum of 4 to 5 years before there is a decision on the merits.

Conclusion

17. My overall conclusion is that, given the slim chance of success in either the English courts or in Strasbourg, the GoI would be well advised not to commence JR but to concentrate its efforts on persuading HMG to reach an equitable solution through negotiation.

(signed) *Michael C Wood*

Michael C Wood

20 Essex Street

London

WC2R 3AL

24 December 2008