



13 July 2011
[2011] UKSC 35

PRESS SUMMARY

Home Office (Appellant) v Tariq (Respondent)

On appeal from the Court of Appeal (Civil Division) [2010] EWCA Civ 462

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lady Hale, Lord Brown, Lord Mance, Lord Kerr, Lord Clarke, Lord Dyson

BACKGROUND TO THE APPEALS

This appeal concerns the permissibility of a procedure whereby a claimant in employment tribunal proceedings may be excluded along with his representatives from certain aspects of those proceedings on grounds of national security. In particular the question arises as to whether such a procedure, known as a “closed material procedure”, is compatible with European Union law and the European Convention on Human Rights.

Mr Tariq was employed as an immigration officer with the Home Office until 2006 when he was suspended and his security clearance withdrawn. The background for these decisions was the arrest of Mr Tariq’s brother and cousin during an investigation into a suspected plot to mount a terrorist attack on transatlantic flights. Mr Tariq’s cousin was convicted in 2008 of various offences in relation to that plot. No information suggested that Mr Tariq had himself been involved in any terrorism plot.

Mr Tariq commenced proceedings in the Employment Tribunal claiming direct and indirect discrimination on grounds of race and religion. He alleged that the Home Office had relied on stereotypical assumptions about him, Muslims and individuals of Pakistani origin such as susceptibility to undue influence and that the Home Office had indirectly discriminatory policies and procedures. The Home Office denied this and stated that its decisions were based on Mr Tariq’s association with individuals suspected of involvement in terrorist activities and the risk of their attempting to exert influence on him to abuse his position.

Section 10(6) of the Employment Tribunals Act 1996 provides that the Secretary of State may make regulations that enable a tribunal to adopt a closed material procedure if it considers this expedient in the interests of national security. Rule 54(2) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (“the Regulations”) provides for the adoption of a closed material procedure if the tribunal so orders. Schedule 2 provides for the use of special advocates, whose role is to represent a claimant’s interests so far as possible in relation to the aspects closed to him and his representatives.

The Employment Tribunal made an order for a closed material procedure, directing that Mr Tariq and his representatives should be excluded from the proceedings when closed evidence or documents were being considered. Mr Tariq appealed the order to the Employment Appeal Tribunal. The appeal was dismissed and a further appeal was dismissed by the Court of Appeal. The Court of Appeal, however, declared that Article 6 of the European Convention on Human Rights required Mr Tariq “to be provided with the allegations being made against him in sufficient detail to enable him to give instructions to his legal team so that those allegations can be challenged effectively”. This requirement is known as “gisting”. The Home Office appealed to the Supreme Court against the declaration and Mr Tariq cross-appealed against the conclusion that a closed material procedure was permissible.

JUDGMENT

The Supreme Court by a majority of 8-1 allows the Home Office’s appeal and sets aside the declaration made by the Court of Appeal requiring the provision of a gist. Lord Kerr dissents.

The Supreme Court unanimously dismisses Mr Tariq's cross-appeal, holding that a closed material procedure is compatible with Article 6 of the European Convention on Human Rights and EU Law.

REASONS FOR THE JUDGMENT

Mr Tariq's Cross-Appeal

The issue in the cross-appeal was whether the provisions in the Regulations providing for a closed material procedure were contrary to EU law or the European Convention on Human Rights. It is a basic principle of EU law that national law should provide effective legal protection of EU law rights. Those rights include the right not to be discriminated against on grounds of race or religion. As to whether the closed material procedure provided effective legal protection, the case-law of the European Court of Justice is clear that EU law will look for guidance on the subject in the case-law of the European Court of Human Rights. That Court has established in a line of cases culminating in *Kennedy v UK* that the demands of national security may necessitate a system for determining complaints under which a claimant is, for reasons of national security, unable to know the secret material by reference to which his complaint is determined. The tests are whether the system is necessary and whether it contains sufficient safeguards. On the facts, both were satisfied. The system was necessary because security vetting is a highly sensitive area in which integrity of sources of information and the means of obtaining it must be protected. The alternatives of the Home Office routinely having to pay unmeritorious claims or the courts refusing to hear claims at all are not possibilities that the law should readily contemplate. The rule of law must, so far as possible, stand for the objective resolution of civil disputes on their merits by a court which has before it material enabling it to do so. The system contained sufficient safeguards in the form of special advocates, who can usefully protect the claimant's interests. For these reasons the use of the closed material procedure in this case was lawful and the cross-appeal must be dismissed.

The Home Office's Appeal

The question in the appeal was whether there is an absolute requirement that a claimant should be able to see the allegations against him in sufficient detail to give instructions to his legal team to enable the allegations to be challenged effectively. Mr Tariq argued that the European Convention on Human Rights contained such a principle. The Supreme Court, however, held that the line of cases culminating in *Kennedy v UK* recognised that there was no absolute requirement. Article 6 of the European Convention on Human Rights provides the right to a fair trial. The European Court of Human Rights has held that where the liberty of the subject is involved, Article 6 requires the provision of a gist as described by the Court of Appeal. In cases such as the present not involving the liberty of the subject, however, the question is whether the use of the closed material procedure will impair the very essence of the right to a fair trial. That cannot be said to be so in this case, as Mr Tariq's claim will be determined by an independent and impartial tribunal and the disadvantages that the procedure gives rise to will as far as possible be minimised. The appeal was therefore allowed.

Lord Kerr dissented. He held, first, that the withholding of information from a claimant which is then deployed to defeat his claim is a breach of his fundamental common law right to a fair trial. The removal of that right can only be achieved by legislation framed in unambiguous language. Secondly, such withholding also constitutes a breach of a claimant's Article 6 right to a fair trial. *Kennedy v UK* was an anomaly. Lord Kerr would therefore have dismissed the appeal.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html