



9 December 2009

PRESS SUMMARY

R (on the application of A) (Appellant) v B (Respondent) [2009] UKSC 12

On appeal from the Court of Appeal (Civil Division) [2008] EWCA Civ 24

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Brown, Lord Mance, Lord Clarke

BACKGROUND TO THE APPEAL

A is a former member of the Security Service, B its Director of Establishments. A wants to publish a book about his work in the Security Service. A duty of confidentiality binds A and he cannot publish material relating to the Security Service without B's consent. B refused A's application for consent to publish. As a result, A began proceedings in the High Court to challenge B's decision. He claimed, amongst other things, that his right to freedom of expression under article 10 of the European Convention on Human Rights had been breached. B argued that section 65(2)(a) of the Regulation of Investigatory Powers Act 2000 ("RIPA") provided that the Investigatory Powers Tribunal ("the IPT") was "the only appropriate tribunal" in relation to proceedings under section 7(1)(a) of the Human Rights Act 1998 brought against the intelligence services, such that the High Court did not have jurisdiction to entertain A's article 10 claim.

The High Court held that it had jurisdiction to hear A's challenge. The Court of Appeal, by a majority, reversed the High Court's decision, holding that exclusive jurisdiction did lie with the IPT. A appealed to the Supreme Court. Justice (an all-party law reform and human rights organisation) intervened in the appeal in support of A's submissions.

JUDGMENT

The Supreme Court unanimously dismissed A's appeal. Lord Brown, with whom all the members of the Court agreed, gave the leading judgment. Lord Hope gave a concurring opinion.

REASONS FOR THE JUDGMENT

Two alternative arguments were advanced by A:

- Section 65(2)(a) excludes the section 7(1)(a) jurisdiction of any other tribunal but not that of the courts.
- Even if section 65(2)(a) is to be construed as conferring exclusive section 7(1)(a) jurisdiction on the IPT, it does so only in respect of proceedings against the intelligence services arising out of the exercise of one of the investigatory powers regulated by RIPA.

As to the first argument, Lord Brown noted that the language of section 7(2) of the 1998 Act and the use of the word “only” before “appropriate tribunal” in section 65(2)(a) indicated that it was unlikely that Parliament was intending to leave it to a complainant to choose for himself whether to bring proceedings in court or before the IPT (**Para 13**). Whilst the IPT rules made under RIPA were restrictive (e.g. in relation to the limited disclosure of information to a complainant), there were various provisions in RIPA and the IPT rules which were designed to ensure that, even in the most sensitive cases, disputes could be properly determined. None of these provisions would be available in the courts (**Para 14**). A further telling consideration against A’s construction was that there were in fact no other tribunals with section 7(1)(a) jurisdiction over the categories of claim listed in section 65(3) of RIPA (**Para 15**).

As to the second argument, Lord Brown considered that A’s submission would involve reading into section 65(3)(a) (which contains the phrase “proceedings against any of the intelligence services”) words which were simply not there. There were, in addition, other provisions in RIPA which were more obviously directed to complaints of abuse of the intelligence services’ regulatory power which made it impossible to adopt A’s construction (**Para 18**). It also did not seem right to regard proceedings of the kind intended here as immune from the same requirement for non-disclosure of information as other proceedings against the intelligence services (**Para 19**).

Lord Brown then went on to consider whether there were sufficiently strong arguments available to A which would require the Court to construe section 65 in a way which was contrary to Lord Brown’s initial conclusions as to its construction. For the reasons set out below, Lord Brown concluded that there were no such arguments available to A.

Lord Brown rejected A’s argument to the effect that to construe section 65 as conferring exclusive jurisdiction on the IPT would constitute an ouster of the jurisdiction of the courts that would be constitutionally objectionable (**Para 21**). RIPA, the 1998 Act and the Civil Procedure Rules all came into force at the same time as part of a single legislative scheme and it could not be said that section 65(2)(a) was ousting some pre-existing right (**Paras 21-22**). Parliament had not ousted judicial scrutiny of the acts of the intelligence services, but had simply allocated that scrutiny (as to section 7(1)(a) proceedings) to the IPT (**Para 23-24**).

Lord Brown also rejected the argument that forcing A’s article 10 challenge into the IPT would result in breaches of article 6 of the Convention. Claims against intelligence services inevitably raise special problems that cannot be dealt with in the same way as other claims and this was recognised both domestically and by the European Court of Human Rights (**Para 26**). The Court would be going further than the Strasbourg jurisprudence if it were to hold that the IPT procedures are necessarily incompatible with article 6(1) and it would decline to do so here (**Para 30**). Even if the IPT’s rules are in any way incompatible with article 6, the remedy would be to modify them, instead of adopting some artificially limited construction of the IPT’s jurisdiction (**Para 31**).

The anomalies which A alleged would arise if the Court of Appeal’s construction were to be adopted also did not cast doubt on the correctness of the Court of Appeal’s decision (**Paras 32-37**).

NOTE

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