



8 May 2014

PRESS SUMMARY

A (Respondent) v British Broadcasting Corporation (Appellant)
On appeal from the Inner House of the Court of Session, [2013] CSIH 43
[2014] UKSC 25

JUSTICES: Lady Hale (Deputy President), Lord Wilson, Lord Reed, Lord Hughes and Lord Hodge.

BACKGROUND TO THE APPEAL

A, a foreign national, arrived in the UK in 1991. He was later granted indefinite leave to remain, but in 1996 was sentenced to four years' imprisonment for sexual offences against a child. In 1998, he was served by the Home Secretary with a notice to make a deportation order [4].

A appealed against the decision and protracted proceedings followed in which A cited risks due to his status as a known sex offender of death or ill-treatment (contrary to articles 2 and 3 of the European Convention on Human Rights (ECHR)) should he be deported. A's identity was withheld in the proceedings from 2001 onwards [5]-[9]. In dismissing A's appeal against the Home Secretary's refusal to revoke the deportation order, the First-tier tribunal noted that the proceedings were anonymised, thus reducing the risk of A's identification.

In September 2012 A applied to the Court of Session for judicial review of the Upper Tribunal's refusal of permission to appeal. The Secretary of State gave notice that she intended to remove A from the UK before the date fixed for the hearing of the judicial review application. On 7 November 2012 Lord Boyd heard A's application for interim suspension of the removal decision and allowed him to amend his application for judicial review by substituting initials for his name and address. Lord Boyd also gave directions under section 11 of the Contempt of Court Act 1981 prohibiting the publication of A's name or other identifying details and directing that no picture of him should be published or broadcast [2]; [10]-[13]. He refused the application for interim suspension, concluding that A had not established a prima facie case for setting aside the Upper Tribunal's decision [14]. The Inner House refused A's appeal against that decision [16].

Media organisations had not been notified of and were not represented at the hearing before Lord Boyd. The BBC became aware of the section 11 order and applied for it to be set aside. In refusing the application, Lord Glennie noted that it was accepted that if the fact that A was being deported became known in his country of origin there would be a real risk of his article 3 rights being infringed. That was why an anonymity order had been made by the tribunal. It was necessary to withhold A's identity to safeguard his article 3 rights and to preserve the integrity of the court proceedings, since publication of the information would give A grounds for a fresh application to the Home Secretary and frustrate the proceedings [17-18]. A was deported on 14 December 2012 [20].

The BBC's appeal against Lord Glennie's decision was refused in May 2013. The Inner House considered that the material before the tribunal justified the conclusion that anonymity would be a significant protection of A's article 3 rights and that setting aside the section 11 order would subvert the understanding on which A's deportation had been authorised [21].

The appeal raises three issues [3]: (i) Whether the court possesses any common law power to protect the anonymity of a party where rights under the ECHR (given effect by the Human Rights Act 1998 (HRA)) are engaged; (ii) Whether the court acted compatibly with the BBC's rights under article 10 ECHR

(which protects freedom of expression), both in terms of the substance of its decision and the procedure followed; and (iii) Whether the section 11 order fell within the scope of section 12 HRA, so that the BBC ought to have been notified and given an opportunity to make representations before it was made.

JUDGMENT

In a unanimous judgment delivered by Lord Reed, the court dismisses the BBC's appeal.

REASONS FOR THE JUDGMENT

Lord Reed explains the importance of the general constitutional principle of open justice. Society depends on the courts to act as guardians of the rule of law, and this in turn necessitates the openness of the courts to public scrutiny. The principle has important consequences for the publishing of reports of court proceedings: open justice is inextricably linked to the freedom of the media to report on court proceedings [23]-[26].

But there are exceptions. The courts have an inherent jurisdiction to determine how the principle of open justice should be applied [27]-[37] and can permit the identity of a party or witness to be withheld from public disclosure where necessary in the interests of justice [38-41]. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in advancing that purpose, and any risk of harm that its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others [41].

The principle of open justice is protected and qualified by the ECHR as it is in domestic law [42]-[54]. But the common law principle remains in vigour even where Convention rights also apply [55-57].

The purpose of section 11 is to support the exercise of the court's power to allow a name or other matter to be withheld in court proceedings, by conferring a statutory power to give ancillary directions prohibiting publication of the relevant information. The use of section 11 is not limited to protecting the public interest in the administration of justice [60], or to cases where members of the public are present in court [61].

Section 12 HRA does not apply to section 11 applications as they are not applications for relief made against any person [62-66]. Fairness nevertheless requires the media to have an opportunity to be heard, but both this and the media's right to an effective remedy are secured by enabling any person affected to seek recall of the order promptly at a hearing *inter partes* [67]-[68].

Whilst article 10 ECHR was engaged in the present case, the arguments in favour of making the order were overwhelming. The tribunal had made a decision, the effect of which was to authorise A's deportation, on the basis that anonymity would be a significant protection of his article 3 rights. The court's failure to make the order would have meant that the deportation might create all the risks that the tribunal's directions as to anonymity had been intended to prevent. The order was justifiable under article 10, since it was both prescribed by law and necessary in a democratic society in order to protect the integrity of the legal proceedings and A's article 3 rights [69]-[76].

The order allowing A to withhold his identity was in accordance with the court's common law powers. The section 11 order was made in accordance with the power conferred by that provision. It was not incompatible with the BBC's Convention rights [75-76]. The BBC was able to apply promptly for recall of the order, and its application came before the court two days after the order was made [77].

References in square brackets are to paragraphs in the judgment

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.uk/decided-cases/index.html