



26 March 2014

PRESS SUMMARY

Kennedy (Appellant) v The Charity Commission (Respondent) [2014] UKSC 20

On appeal from [2011] EWCA Civ 367; [2012] EWCA Civ 317

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Wilson, Lord Sumption, Lord Carnwath and Lord Toulson

BACKGROUND TO THE APPEALS

The appellant, Mr Kennedy, is a journalist with *The Times*. On 8 June 2007 he made a request to the Charity Commission under the Freedom of Information Act 2000 (the “FOIA”) for disclosure of information concerning three inquiries conducted by the Charity Commission between 2003 and 2005 into the ‘Mariam Appeal’, which was launched by Mr George Galloway in connection with the sanctions imposed on Iraq following the first Gulf War.

The Charity Commission refused Mr Kennedy’s request on the ground that the information was subject to an absolute exemption from disclosure contained in section 32(2) of the FOIA. The Court of Appeal, overturning the decision of the Information Tribunal, held that the absolute exemption applied and dismissed Mr Kennedy’s request.

The issues before the Supreme Court on Mr Kennedy’s appeal are: (a) whether section 32(2) of the FOIA contains, as a matter of ordinary statutory construction, an absolute exemption which continues after the end of an inquiry; and (b) if it does contain such an absolute exemption, whether that is compatible with Mr Kennedy’s rights under article 10 of the European Convention on Human Rights (the “Convention”). If section 32(2) were not so compatible, the following further issues would arise: (c) in the light of the duty in section 3 of the Human Rights Act 1998 to interpret primary legislation “*so far as it is possible to do so ... in a way which is compatible with the Convention rights*”, should section 32 be read down so that either: (i) the absolute exemption ceases with the end of the relevant inquiry; or (ii) it contains only a qualified exemption (requiring a general balancing of the competing public interests) rather than an absolute exemption; and (d) if it is not possible to interpret section 32(2) in a manner that is compatible with the Convention, whether the Supreme Court should make a declaration of incompatibility. [9]

JUDGMENT

Lord Mance and Lord Toulson give the leading judgments with which a majority of the court agrees. Lord Sumption gives a concurring judgment. Lord Wilson and Lord Carnwath give dissenting judgments.

As a matter of ordinary statutory construction, section 32(2) of the FOIA imposes an absolute exemption from disclosure that lasts until the relevant information is destroyed or for up to 30 (or in future 20) years under the Public Records Act 1958 (Lord Mance at [24-34], Lord Toulson at [102-104]). Mr Kennedy is not assisted by his reliance on the Convention as, in respect of his ability to obtain information, the Charities Act 1993 and the common law put Mr Kennedy in no less favourable position than he would be in if article 10 of the Convention were engaged (Lord Mance at [35-41], Lord Toulson at [105-132]). In any event, article 10 does not impose a freestanding positive duty of disclosure on public authorities (Lord Mance at [57-100]).

REASONS FOR THE JUDGMENT

Ordinary statutory construction

The more natural interpretation of section 32(2) is that the absolute exemption continues after the end of the relevant inquiry. The words “for the purposes of the inquiry or arbitration” qualify the immediately preceding words in 32(2)(a) and (32)(2)(b) and refer to the original purpose for which the relevant documents were placed in the custody of, or were created by, a person conducting an inquiry. They do not refer to the purpose for

which a public authority holds the documents at the time of a request for information. (Lord Mance at [24-28], Lord Toulson at [102-103])

The more natural interpretation is also a better fit with the scheme of the FOIA. Under section 62(1), a record becomes a “historical record” at the end of 30 years. Under section 63(1), information contained in a historical record cannot be exempt information by virtue of section 32. The natural inference is that information falling within section 32 would continue to be exempt for 30 years rather than cease to be exempt at the conclusion of an inquiry. (Lord Mance at [29-30], Lord Toulson at [104])

The relevance of Article 10 of the Convention

The effect of section 32 is to take information falling within the absolute exemption outside the scope of the FOIA disclosure regime. The FOIA was never intended to determine whether or not such information should be disclosed. Instead, any question as to its disclosure will be governed by other rules of statute and common law. If the law otherwise entitles Mr Kennedy to disclosure or puts him in a position no less favourable regarding disclosure than that which could be provided under article 10, then there can be no basis for reading down section 32 or concluding it is inconsistent with article 10. (Lord Mance at [6-8, 35-42], Lord Toulson at [106])

Disclosure outside the FOIA

In Lord Mance’s opinion, the Charity Commission has the power to disclose information to the public concerning inquiries on which it has published reports, both in pursuit of its statutory objective under the Charities Act 1993 (since replaced with the Charities Act 2011) of increasing public trust in, and the accountability of, charities, and under general common law duties of openness and transparency on public authorities. The exercise of that power will be subject to judicial review. Given the importance of the principles of openness and transparency, courts will apply a very high standard of review to any decision not to disclose information in answer to questions of real public interest raised by a journalist in relation to inquiries on which the Charity Commission has published reports, and would take into account similar factors and provide a no less favourable standard of protection for a person seeking information, as any review under article 10 of the Convention. [43-56]

In Lord Toulson’s opinion, open justice is a fundamental principle of common law. Judicial processes should be open to public scrutiny, unless and to the extent, that there are good reasons for secrecy. Letting in the light, is the best way of keeping those exercising the judicial power of the state, up to the mark and for maintaining public confidence. These underlying considerations apply also to any quasi-judicial inquiries and hearings, such as an inquiry conducted by the Charity Commission, though the application of such principles will vary according to context. In conducting any judicial review of a decision not to disclose information, the High Court should exercise its own judgment on whether the open justice principle requires disclosure. [109-132]

The scope of the right to receive information under article 10

Had it been necessary for the resolution of the appeal, the Supreme Court would have concluded that article 10 did not contain a freestanding right to receive information from public authorities. The recent developments in the case law of the European Court of Human Rights relied on by Mr Kennedy were not sufficient to justify a departure from the principle clearly established in a series of Grand Chamber decisions on article 10. (Lord Mance at [57-100])

Dissenting judgments

Lord Wilson [160-201] and Lord Carnwath [202-248] would have allowed the appeal on the basis that Mr Kennedy had a right to receive the requested information under article 10 of the Convention. Lord Wilson and Lord Carnwath would read down s 32(2) such that the absolute exemption expired at the end of the relevant inquiry. This would preserve the FOIA as the mechanism for obtaining information, which they considered would offer a number of advantages to a person seeking information compared with a judicial review procedure.

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:

<http://www.supremecourt.uk/decided-cases/index.shtml>