26 March 2015

PRESS SUMMARY

R (on the application of Evans) and another (Respondents) v Attorney General (Appellant) [2015] UKSC 21

On appeal from [2014] EWCA Civ 254

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Kerr, Lord Wilson, Lord Reed, Lord Hughes

BACKGROUND TO THE APPEAL

The Freedom of Information Act 2000 ("**FOIA 2000**") enables members of the public to see documents held by many public bodies, subject to certain exemptions; the Environmental Information Regulations 2004 ("**EIR 2004**") enables members of the public to see documents containing "environmental information", again subject to certain exemptions. In April 2005, Mr Evans, a journalist who works for the Guardian newspaper, requested disclosure of communications passing between various government departments and HRH the Prince of Wales ("**the letters**"). The requests were made under both FOIA 2000 and EIR 2004. The Departments refused to disclose the letters on the ground that they considered the letters were exempt. Mr Evans complained to the Information Commissioner, who upheld the Departments' refusal. Mr Evans then appealed to the Information Tribunal, and the matter was transferred to the Upper Tribunal. The Upper Tribunal conducted a full hearing with six days of evidence and argument. In its determination issued 18 September 2012, the Upper Tribunal decided that many of the letters (referred to as "advocacy correspondence") should be disclosed. The Departments did not appeal this decision, but on 16 October 2012 the Attorney General issued a certificate under section 53(2) FOIA 2000 and regulation 18(6) EIR 2004 stating that he had, on "reasonable grounds", formed the opinion that the Departments had been entitled to refuse disclosure of the letters, and set out his reasoning. If this Certificate is valid, its effect would be to override a decision of the Upper Tribunal, a judicial body which has the same status as the High Court.

Mr Evans issued proceedings to quash the Certificate on the grounds (1) that the reasons given by the Attorney General were not capable of constituting "reasonable grounds" and/or (2) in so far as the advocacy correspondence was concerned with environmental issues, the Certificate was incompatible with Council Directive 2003/4/EC ("**the 2003 Directive**"). The Divisional Court dismissed his claim. However, the Court of Appeal allowed his appeal on both grounds. The Attorney General appealed to the Supreme Court. The issue before the Supreme Court was therefore whether the Certificate is valid, and in particular (i) whether the Attorney General was entitled to issue a certificate under section 53 FOIA 2000 that he had "on reasonable grounds" formed the opinion that the Departments had been entitled to refuse disclosure; (ii)(a) whether, in any event, regulation 18(6) EIR 2004 complies with the relevant provisions of EU law; and (b) if it does not, whether the Certificate can stand even in relation to the non-environmental information.

It should be noted that the Supreme Court has not seen the advocacy correspondence, and did not need to do so in order to determine the points of law set out above.

JUDGMENT

The Supreme Court dismisses the Attorney General's appeal. By a majority of 5:2 the Court considers that the Attorney General was not entitled to issue a certificate under section 53 FOIA 2000 in the manner that he did and therefore that the Certificate was invalid. By a majority of 6:1 the Court holds that reg.18(6) is incompatible with the 2003 Directive and must be treated as invalid, and therefore that

the Certificate would in any event have been invalid insofar as it related to environmental information.

REASONS FOR THE JUDGMENT

The appeal based on FOIA 2000

Lord Neuberger (with whom Lord Kerr and Lord Reed agree) concludes that section 53 FOIA 2000 does not permit the Attorney General to override a decision of a judicial tribunal or court by issuing a certificate merely because he, a member of the executive, considering the same facts and arguments, takes a different view from that taken by the tribunal or court. This would be unique in the laws of the United Kingdom and would cut across two constitutional principles which are fundamental components of the rule of law, namely that a decision of a court is binding between the parties and cannot be set aside, and that decisions and actions of the executive are reviewable by the courts, and not vice versa **[52]**. Clear words must be used if the statute is to have that effect, and section 53 is a very long way from being clear enough **[58-59]**.

Lord Mance (with whom Lady Hale agrees) considers that it would be open to the Attorney General to issue a certificate under section 53 if he disagrees with the decision of the Upper Tribunal. However, disagreement with findings of fact or rulings of law in a fully reasoned decision would require the clearest possible justification (and may only be possible in the circumstances suggested by Lord Neuberger at **[71-79]**), while disagreement as to the weight to be attached to competing public interests would require properly explained and solid reasons **[130-131]**. In this case the Attorney General impermissibly undertook his own redetermination of the relevant factual background, including certain constitutional conventions on which the Upper Tribunal had heard detailed evidence, which he was not entitled to do. The Attorney General's certificate does not engage with the closely reasoned analysis of the Upper Tribunal **[142]**. The Certificate proceeded on the basis of findings which differed radically from those made by the Upper Tribunal without real or adequate explanation, and cannot be regarded as satisfying the test for issue of a certificate **[145]**.

Lord Wilson and Lord Hughes each give judgments dissenting on this issue. They each consider that the Attorney General was entitled to issue the certificate under section 53 on the ground that he did.

Environmental information under the 2003 Directive

Lord Neuberger and Lord Mance (with whom Lady Hale, Lord Kerr, Lord Reed and Lord Hughes agree) point out that article 6.1 requires that, following a refusal by a public authority of a request for environmental information, the refusal must "be reconsidered … or reviewed administratively", article 6.2 requires that thereafter the applicant has "access to a review procedure before a court of law or [similar] body] … whose decisions may become final", and article 6.3 requires that "[f]inal decisions under paragraph 2 shall be binding on the public authority holding the information" **[100]**. In light of these provisions, they consider that it would be impermissible for the executive to have another attempt at preventing disclosure, and therefore regulation 18(6) EAIA 2004 is incompatible with article 6 of the 2003 Directive **[103].** However, this conclusion would only apply to the environmental information **[111].**

Lord Wilson dissenting on this point, would have held that the issue of a section 53 certificate in respect of environmental information whose disclosure was ordered by a court or judicial tribunal was not incompatible with the provisions of the 2003 Directive.

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